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Same-sex marriage

by

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SUMMARY

The purpose of this paper is not to argue the case for or against the recognition of same-sex marriages but, rather, to review recent legal developments in Australia and beyond. As such, it sets out to update relevant sections of Briefing Paper No 9/2006, [Legal Recognition of Same-Sex Relationships](#) by Karina Anthony and Talina Drabsch.

That paper observed that questions regarding the most appropriate avenue for the legal recognition of same-sex relationships focus on the four main systems commonly in use: (a) de facto recognition; (b) registration; (c) civil unions; and (d) marriage. While the debate has moved on since 2006, this basic typology of same-sex legal relationships remains relevant. The present publication starts with a brief comment on de facto recognition, registration and civil unions, before looking in more detail at the issue of same-sex marriage.

De facto recognition - By the *Property (Relationships) Legislation Amendment Act 1999*, NSW became the first Australian jurisdiction to include same-sex couples in the definition of de facto relationships.

Federally, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* provided entitlements for same-sex couples in areas such as joint social security and veterans' entitlements, employment entitlements, superannuation, workers compensation, joint access to the Medicare safety net, hospital visitation, immigration, inheritance rights and the ability to file a joint tax return. [2]

Registration - In place since 2004 is the [City of Sydney Relationships Declaration Program](#) which applies to both same-sex and mixed-sex couples. Since 2010, a similar Statewide register has also operated under the *Relationships Register Act 2010* (NSW). [3]

Civil unions - The term "civil union" seems to have been used first in [legislation](#) passed in Vermont in 2000, in response to the Vermont Supreme Court ruling in [Baker v. Vermont](#), requiring that the State grant same-sex couples the same rights and privileges accorded to married couples under the law. Internationally, other examples of civil union legislation include Britain's [Civil Partnership Act](#), which came into effect in December 2005, and New Zealand's [Civil Union Act 2004](#). Further instances include Denmark (since 1989), France (since 1999), Germany (since 2001) and Brazil (since 2011). [4]

The ACT's [Civil Partnerships Act 2008](#) defines a civil partnership as "a legally recognised relationship that, subject to this Act, may be entered into by any 2 adults, regardless of their sex". It was amended twice in 2009. The [first amendment](#) provided a mechanism for parties to a civil partnership to make a declaration before a civil partnership notary. The [second amendment](#) was in response to a threat from the Commonwealth Government to disallow this first amendment. It required couples entering a civil partnership by declaration before a civil notary to give that notary and the registrar-general prior notice of

their intention to make a declaration, as well as for the declaration to be registered before it becomes effective. [4.1]

Same-sex marriage - Of all the forms by which same-sex relationships may be legally recognised, marriage is by far the most contentious. Worldwide, same-sex marriage is currently legal in Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain and Sweden. First to recognise same-sex marriages was the Netherlands in 2001, followed by Belgium two years later and then Spain in 2005. [5] On the other hand, in June 2011 a Bill to legalise same-sex marriage in France was defeated in the National Assembly [5.4].

One finding of this paper is that different constitutional settings have tended to impact on the way the issues at stake have been considered and acted upon. In some jurisdictions, the decisive role has been played by the legislature, whereas in others, including South Africa and Canada, a critical part has been played by the courts in their interpretation of constitutional rights.

Same-sex marriage in Canada - In [Reference re Same-Sex Marriage](#) the Canadian Supreme Court adopted the "living tree" approach to the Constitution and the Charter of Rights and Freedoms. It was said that the meaning of marriage is not fixed at the time the Canadian Constitution was enacted in 1867. Rather, marriage must be viewed as part of the evolution in Canadian society since that time, including the fact that Canada is a "pluralistic society". Expressly rejected for the purpose of civil marriage was the classic definition of marriage articulated in the 1866 case of *Hyde v Hyde*, where Lord Penzance said: "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". [5.2]

Same-sex marriage in the United States – In the United States, where the picture is most complex, the courts, the legislatures and the people, acting through statutory and constitutional initiative referenda, have all contributed to a heated debate characterised by conflicting moral standpoints.

With the New York legislature voting on 24 June 2011 to legalise same-sex marriage, it is now permitted in six US States, Massachusetts (2003), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010) and New York (2011). Same-sex marriage is also permitted in the District of Columbia. The States of New York, New Mexico and Maryland recognize such marriages from other jurisdictions. As of January 2010, 29 States had constitutional provisions restricting marriage to one man and one woman, while 12 others had laws restricting marriage to one man and one woman. Eighteen States have laws adversely affecting the legal recognition of same-sex unions or domestic partnerships.

Same-sex marriage and European law: The domestic laws of the European states in respect to marriage came under scrutiny in [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010, a case that specifically challenged a provision of the Austrian Civil Code which confined marriage to a union of two persons of opposite sex. The European Court of Human Rights ruled in June 2010 that

...
there was no violation of human rights either under Article 12 (right to marry) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), or Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to private and family life). The Court noted that only six out of a total of 47 member states allow same-sex marriages, whereas (as at June 2010) another 13 states permit same-sex couples to register their relationships. [5.4]

Same-sex marriage in Australia - In Australia, too, the constitutional position is complex. In respect to the Territories, the powers of the Commonwealth Parliament and Executive are clear, as shown by the history of the ACT's *Civil Unions Act 2006*. This Act was disallowed by the Governor General, further to s 35 of the *Australian Capital Territory (Self-Government) Act 1988* which states that "the Governor-General may, by legislative instrument, disallow an enactment within 6 months after it is made". [4.1]

In certain other respects the powers of the federal Parliament in relation to the "marriage" head of power in the Australian Constitution (s 51(xxi)) remain uncertain, as is the potential relationship between the powers of the federal and State Parliaments in this context. [7.2] From a survey of the leading academic commentators, a number of key propositions can be set out:

- (a) It is unclear whether the marriage power in the Australian Constitution provides the federal Parliament with the power to legislate in respect to same-sex marriage, either permitting or prohibiting such marriages.
- (b) If the High Court was to find that the marriage power did not provide the federal Parliament with the power to legislate in respect to same-sex marriage, then the field would be left open to State law.
- (c) On the other hand, if the issue identified in (a) remained undecided and the federal *Marriage Act 1961* remained in its current form, the constitutional validity of a State law providing for same-sex marriage would be in doubt:
 - The basis for a challenge to such a law would be that the law is inconsistent with the federal *Marriage Act* and is therefore invalid under section 109 of the Australian Constitution.
 - In dealing with this issue, the High Court would look at whether the *Marriage Act* was intended to cover the entire field of marriage, or whether it was only intended to cover marriage between persons of different sex. It may be that, because the federal *Marriage Act* expressly defines marriage in heterosexual terms, it limits the operation of the Act, and its intention to cover the field.
 - The High Court may also be asked to consider the issue identified in (a) because if the Federal Parliament does not have the power to legislate in relation to same-sex marriage, then a challenge based on inconsistency must fail.
- (d) It is likely that a State law providing for same-sex (and other) civil unions would be constitutionally valid, even where these civil unions are the functional equivalent of marriage. Commentators argue that such laws would not be inconsistent with the *Marriage Act 1961*. [8]

1. INTRODUCTION TO THE DEBATE

Same sex-marriage is one of those issues which cross many boundaries of discourse, legal, moral, religious, economic and political. As such, it can be viewed as a complex subject, requiring choices to be made between conflicting principles and policy positions, based on an understanding of the many practical and theoretical considerations at stake. From other perspectives, the subject of same-sex marriage is straightforward, obviously wrong for some, for others clearly right or unproblematic. As the Supreme Court of Connecticut observed in 2008 in [Kerrigan v Commissioner of Public Health](#) (SC 17716):

Many people hold deep seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors.

Same-sex marriage has been on the political agenda in NSW and Australia generally for a number of years, as part of the broader debate about the legal recognition of same-sex relationships. Recently [The Sydney Morning Herald](#) reported the views of the Anglican Archbishop of Sydney, Dr Peter Jensen. According to the article, Dr Jensen said the present law did not deny the rights of those in same-sex unions. He is quoted as saying, "This is not unjust - it is not even discrimination in the current sense of the word - but a refusal to call different things by the same name". Dr Jensen continued, "Some of the unwelcome consequences of same-sex marriage would be the undermining of the family unit and a demand for equal treatment in sex education, where 'the normalisation of homosexuality' would be assumed". He is further quoted as saying: "This claim for a right to be married could open the way for other forms, such as polygamous marriages or perhaps even marriage between immediate family members".

On the other side of the argument is Alex Greewich of the lobby group Australian Marriage Equality who is quoted in the same [SMH](#) article, describing Dr Jensen's predictions as "alarmist" and saying that, in a multi-faith society, his views should not be imposed on other religions, "such as Quakers and progressive synagogues, or the civil celebrants who perform 67 per cent of all marriages".¹ In May 2011 [Australian Marriage Equality](#) commissioned a national poll, conducted by [Galaxy Research](#), which found that 75% believe that same-sex marriage reform is "inevitable" (this included 80% of women, 79% of people under 50 and 78% of people with young children); conversely, the survey found that only 19% believe such reform is not inevitable, with 6% undecided. These findings were said to show similar levels of support as: a Newspoll survey in November 2010, where 65% had "no problem" with allowing same-sex marriages; a Westpoll survey from December 2010 showing 62% support in Western Australia; and national Neilson surveys from November 2010 and March 2011 showing 57% for same-sex marriage.²

These surveys were conducted in the wake of the [notice of motion](#) moved by Greens MP, Adam Bandt, in the House of Representatives on 15 November 2010, asking that the House:

(1) notes that there is: (a) a growing list of countries that allow same-sex couples to marry including the Netherlands, Belgium, Norway, Spain, Canada and South Africa; and (b) widespread support for equal marriage in the Australian community; and

(2) calls on all parliamentarians to gauge their constituents' views on the issue of marriage equality.³

On 20 June 2011 the [Australian](#) reported that the Queensland Labor State conference had "overwhelmingly passed a motion for federal Labor to introduce equal rights for 'all adult couples' who wish to formalise their union". The move was backed by Premier Anna Bligh, with Queensland Labor joining counterparts in South Australia, Tasmania and the Northern Territory in voting to demand support for same-sex marriage at the ALP national conference in December. The Western Australian Labor Party can also be added to this list.⁴

According to the [ABS](#):

The number of people living in a same-sex couple relationship has...increased over the past decade. In 1996, 0.2% of all adults said they were living with a same-sex partner. By 2006, this had increased to 0.4% (to around 50,000 people). However, these figures may be an undercount of the true number of people living in same-sex relationships.⁵

The legal recognition of same-sex relationships was the subject of a 2006 NSW Parliamentary Library Research Service [Briefing Paper](#).⁶ That paper observed that questions regarding the most appropriate avenue for legal recognition focus on the four main systems commonly in use: (a) de facto recognition; (b) registration; (c) civil unions; and (d) marriage.

While the debate has moved on since 2006, this basic typology of same-sex legal relationships remains relevant. The present publication, which updates relevant sections of the 2006 Briefing Paper, starts with a brief comment on de facto recognition, registration and civil unions, before looking in more detail at the issue of same-sex marriage. The main purpose of this paper is to provide an overview of recent legal developments in Australia and overseas. It does not present a concerted account of arguments for and against same-sex marriage and nor does it come down on one side or the other of that debate.

2. DE FACTO RECOGNITION

By the *Property (Relationships) Legislation Amendment Act 1999*, NSW became the first Australian jurisdiction to include same-sex couples in the definition of de facto relationships. As discussed in [Briefing Paper 9/2006](#), the *NSW Commonwealth Powers (De Facto Relationships) Act 2003* referred to the Commonwealth certain financial matters, including "financial matters relating to de facto partners arising out of the breakdown (other than by reason of death)

of de facto relationships between persons of the same sex." Based on this referral, the Commonwealth passed the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

In May 2007 the Human Rights and Equal Opportunity Commission published a major report titled [Same Sex: Same Entitlements](#), which identified 58 federal laws that breached the human rights of members of same-sex couples in the area of financial and work related entitlements. The report commented:

Same-sex couples and families get fewer leave entitlements, less workers' compensation, fewer tax concessions, fewer veterans' entitlements, fewer health care subsidies, less superannuation and pay more for residential aged care than opposite-sex couples in the same circumstances.

Same-sex couples are denied these basic financial and work-related entitlements because they are excluded from the definitions describing a couple in ... federal laws.... Federal law after federal law defines a 'partner' or a 'member of a couple' or a 'spouse' or a 'de facto spouse' as a person of the opposite sex.⁷

There followed the introduction in 2008 by the Rudd Government of legislation that allowed same-sex couples the same rights as cohabiting opposite-sex couples enjoy. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* provided entitlements for same-sex couples in areas such as joint social security and veterans' entitlements, employment entitlements, superannuation, workers compensation, joint access to the Medicare safety net, hospital visitation, immigration, inheritance rights and the ability to file a joint tax return.

3. REGISTRATION

In place since 2004 is the [City of Sydney Relationships Declaration Program](#) which applies to both same-sex and mixed-sex couples. Since 2010, a similar Statewide register has also operated under the *Relationships Register Act 2010* (NSW). Entering into a "registered relationship" provides conclusive proof of the existence of the relationship, thereby gaining all of the rights afforded to *de facto* couples under State and federal law without having to prove any further factual evidence of the relationship. The relevant [Agreement in Principle speech](#) explained that the legislation would bring:

New South Wales into line with other jurisdictions that have relationship registers, including the Australian Capital Territory, Victoria and Tasmania. Statutory schemes recognising de facto relationships have been enacted in Canada, New Zealand, the United States of America and parts of Europe.⁸

In Tasmania, the [Relationships Act 2003](#) came into effect in January 2004, while the Victorian [Relationships Act 2008](#) came into effect in December 2008. Both schemes apply equally to same-sex and mixed-sex couples.

4. CIVIL UNIONS

For most, if not all, practical and legal purposes, registration can be equivalent to a civil union, the main difference being that civil unions tend to permit a greater level of formal ceremonial and symbolic recognition.

The term "civil union" seems to have been used first in [legislation](#) passed in Vermont in 2000, in response to the Vermont Supreme Court ruling in [Baker v. Vermont](#), requiring that the State grant same-sex couples the same rights and privileges accorded to married couples under the law.

Internationally, other examples of civil union legislation include Britain's [Civil Partnership Act](#), which came into effect in December 2005, and New Zealand's [Civil Union Act 2004](#). Further instances include Denmark (since 1989), France (since 1999), Germany (since 2001) and Brazil (since 2011).

Developments in NSW include a January 2006 [letter](#) from Clover Moore to then Attorney General Bob Debus requesting that he:

investigate NSW legislation that would provide civil unions that would allow any couple, regardless of gender, to establish a domestic partnership by making a formal declaration before an authorised celebrant/registrar.⁹

The letter continued:

The New Zealand Civil Union Act 2004 provides for two people of the same or different sexes to have their relationship recognised as a civil union. The United Kingdom's *Civil Partnership Act 2004* recognises same sex "civil partnerships", and the USA states of Vermont, Connecticut and Hawaii provide for civil unions. I understand that France, Denmark, Norway, Sweden, Finland, Greenland, Germany, The Netherlands, Belgium, Hungary, Portugal, Croatia, Luxembourg, Liechtenstein, Switzerland, Andorra, Slovenia, Israel, and South Africa all provide a form of civil partnership registration, along with cities or provinces in a number of other jurisdictions.

4.1 Australian Capital Territory

In May 2006, the Australian Capital Territory passed the [Civil Unions Act 2006](#), which allowed two people to enter into a civil partnership by making a declaration to each other in the presence of a celebrant and one other witness. A month later the Howard Commonwealth Government used its powers to instruct the Governor General to disallow the Act. This disallowance was based on s 35 of the *Australian Capital Territory (Self-Government) Act 1988* which states that "the Governor-General may, by legislative instrument, disallow an enactment within 6 months after it is made".

Further, the Rudd Commonwealth Government threatened to use its powers of veto in 2008 after the *Civil Partnerships Bill 2006* had been reintroduced into the ACT Legislative Assembly. This Bill [passed](#), but only after substantial changes had been made to it. According to the [Supplementary Explanatory Statement](#) for the Bill, the amendments removed:

provisions that allow people to solemnise by a ceremony, rather than merely register, their relationship as a couple. The amendments respond to the advice of the Commonwealth Government that it will move to disallow the Bill if it provides for the creation, rather than the recognition and registration of an existing relationship, or if it describes ceremonial confirmation of a couple's civil partnership.¹⁰

The ACT's [Civil Partnerships Act 2008](#) defines a civil partnership as "a legally recognised relationship that, subject to this Act, may be entered into by any 2 adults, regardless of their sex". It was amended twice in 2009. The [first amendment](#) provided a mechanism for parties to a civil partnership to make a declaration before a civil partnership notary. The [second amendment](#) was in response to a threat from the Commonwealth Government to disallow this first amendment. It also reflected an agreed course of action between the two levels of government, one that required couples entering a civil partnership by declaration before a civil notary to give that notary and the registrar-general prior notice of their intention to make a declaration, as well as for the declaration to be registered before it becomes effective.

Note that in September 2010 Greens Leader, Senator Bob Brown, introduced a [Bill](#) to amend the *Australian Capital Territory (Self-Government) Act 1988*, repealing the provision which enables the Governor-General to disallow and recommend amendments to any Act made by the ACT Legislative Assembly. On 1 March 2011 proposed amendments were circulated by Senator Brown, designed to make similar changes to the *Northern Territory (Self-Government) Act 1978* and the *Norfolk Island Act 1979*. The following day the Bill was referred to the [Senate's Legal and Constitutional Affairs Legislation Committee](#), which reported on 4 May 2011 recommending, subject to certain qualifications, that the Senate pass the Bill. Five Liberal Senators wrote a dissenting report.¹¹

5. MARRIAGE – INTERNATIONAL DEVELOPMENTS

Of all the forms by which same-sex relationships may be legally recognised, marriage is by far the most contentious. Worldwide, same-sex marriage is currently legal in Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain and Sweden. First to recognise same-sex marriages was the Netherlands in 2001, followed by Belgium two years later and then Spain in 2005.¹²

5.1 South Africa

In these above jurisdictions, the lead role was played by the legislature, whereas in some others it is the courts which have driven developments. South Africa is one example of this, where in December 2005 the Constitutional Court ruled in [Minister of Home Affairs v Fourie](#) that it was unconstitutional to prevent people of the same gender marrying and gave the Parliament one year to "rework laws allowing same sex unions". The Court's holding was based on s 9 of the [Constitution of South Africa](#), particularly on the guarantee of equal rights and equal protection for all under s 9(1), and in s 9(3) the explicit prohibition on

discrimination, including on the basis of "sexual orientation". By November 2006 the [Civil Union Act](#) was in force.

5.2 Canada

Canada is another instance of where the courts played a leading role, in this case further to the [Canadian Charter of Rights and Freedom](#), s 15(1) of which guarantees the protection of equality rights, stating – "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination". Prior to the 2005 Federal Act (see below), the common law definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others" had been challenged at the provincial level. In 2003, the courts in [British Columbia](#),¹³ [Ontario](#)¹⁴ and [Quebec](#)¹⁵ all held that, contrary to s 15, the opposite-sex requirement for marriage constituted discrimination on the ground of sexual orientation, thereby legalising same-sex marriage in these provinces. The Federal Attorney General had supported the traditional definition of marriage in all three cases and it was only after they had been lost that legislation to give national effect to these rulings was drafted.

As explained in [Briefing Paper 9/2006](#), the Federal Canadian Government referred the constitutionality of same-sex marriage legislation to the Supreme Court of Canada. Under section 91(26) of the Canadian Constitution, the Federal Parliament has "exclusive" power over "Marriage and Divorce"; whereas under section 92(12) the Provincial Legislatures have "exclusive" powers over "The solemnization of Marriage in the Province". As articulated in [Reference re Same-Sex Marriage](#) 2004 SCC 79, section 91(26) confers on the Canadian Federal Parliament "legislative competence in respect of the capacity to marry", while section 92(12) "confers authority on the provinces in respect of the performance of marriage once that capacity has been recognized".¹⁶ A key issue for the advisory opinion was whether, under the federal head of power in section 91(26), the meaning of marriage was constitutionally fixed in time or whether it could be extended to include same-sex couples?

In [Reference re Same-Sex Marriage](#) the Court found in favour of constitutional validity and said that the "living tree" approach to the Constitution and the Charter must be applied here because it "ensures the continued relevance and, indeed, legitimacy" of both.¹⁷ It was said that the meaning of marriage is not fixed at the time the Constitution was enacted in 1867. Rather, marriage must be viewed as part of the evolution in Canadian society since that time, including the fact that Canada is a "pluralistic society". Expressly rejected for the purpose of civil marriage was the classic definition of marriage articulated in the 1866 case of *Hyde v Hyde*, where Lord Penzance said:

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.

Since 2005, under Bill C-38 [*An Act respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes*](#) (the Civil Marriage Act), the definition of civil marriage in Canada includes "the lawful union of two persons to the exclusion of all others". Section 4 provides that, "For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex".

Since then the focus has shifted back to the provincial level, with some marriage commissioners in Saskatchewan and other parts of the country refusing to solemnize same-sex marriages on religious grounds. Further to this, [*In the Matter of Marriage Commissioners Appointed Under the Marriage Act 1995*](#) 2011 SKCA 3 the Court of Appeal for Saskatchewan held that that a marriage commissioner's refusal to solemnize same-sex marriage on the basis of religious beliefs is unlawful. The Court held that two proposed amendments to the Saskatchewan *Marriage Act 1995* would be contrary to s 15(1) of the Canadian Charter of Rights and Freedoms and, if enacted, "would violate the equality rights of gay and lesbian individuals".

The background to the case is that the Saskatchewan Government had sought an advisory opinion from the Court of Appeal on the constitutional validity of two possible amendments to the *Marriage Act 1995*, both of which would have allowed a commissioner to decline to solemnize a civil marriage if performing the ceremony would be contrary to their religious beliefs. While neither of the proposed amendments was expressly directed towards the issue of same-sex marriage, the Court used this as its focus, recognising that it was the central issue behind the proposed reforms.¹⁸ David Creasey explains:

The Court noted that the aim of the amendments was to accommodate the religious beliefs of marriage commissioners rather than to deny the rights of same-sex couples. In this way, the amendments were concerned with managing the intersection of the freedom of religion of marriage commissioners on the one hand and the rights of gay and lesbian individuals on the other.

However, the Court said that the effect of the amendments would 'create situations where a same-sex couple contacting a marriage commissioner ... will be told by the commissioner that he or she will not provide the service requested'. Of this situation, the Court said, 'gay and lesbian individuals will be treated differently than other people who wish to be married ... the differential treatment will be negative and will flow directly from their sexual orientation'. The Court was not persuaded by the suggestion that same-sex couples could simply approach another marriage commissioner. All in all, the Court concluded that the amendments would curtail rights guaranteed by s 15(1) of the Charter.¹⁹

Creasey continued:

Accordingly, the key question became whether that curtailment of s 15(1) rights could be 'justified' as reasonable, in accordance with s 1 of the Charter. Relying on the 'proportionality' test, the Court concluded that the amendments 'would perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome' and 'would have genuinely harmful

impacts'. Crucially, while acknowledging religious freedoms afforded under s 2(a) of the Charter, the Court said that marriage commissioners 'do not act as private citizens when they discharge their official duties ... they serve as agents of the province'. The Court added, 'a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic'. As such, the Court concluded that the positive effects of the amendments did not outweigh their deleterious effects and did not curtail equality rights in a way that was justifiable. The Court concluded, 'freedom of religion is not absolute'.

5.3 United States

5.3.1 Courts, legislatures and citizen initiatives

For the US, an added component to the already complex relationship between courts and legislatures is the influence of direct democracy on the same-sex marriage issue, notably in the form of citizen initiated constitutional amendments. Writing in 2009, Kenneth P Miller commented:

Most recently, citizens have sought to prevent courts from expanding the definition of marriage and granting marriage rights to same-sex couples. The controversy has taken different forms in different states and has demonstrated how a state's rules for constitutional amendment can determine whether the people or the courts will have the last word on a contested issue.²⁰

The controversy dates from the 1990s, in particular the 1993 case of [Baehr and Lewin](#) in which the Hawaii Supreme Court ruled that the State's denial of marriage licences to same-sex couples created a "constitutionally suspect gender classification", contrary to the State constitution's [equal protection clause](#) (Article 1, s 5). Responding to this development, at the federal level the 1996 [Defence of Marriage Act](#) (DOMA) was passed, which defined marriage as a "legal union between one man and one woman as husband and wife". However, DOMA did not prevent State Supreme Courts from declaring same-sex marriage a State constitutional right, which turned the focus back on the States. As Miller writes:

Advocates of same-sex marriage mobilized in state courts to seek judicial expansion of the right to marry, whereas conservatives counter-mobilized to constrain courts through constitutional amendment.²¹

For the opponents of same-sex marriage, the initiative constitutional amendment (ICA) strategy met with considerable success. According to Miller:

In all, between 1998 and 2008, thirty states held statewide elections on state constitutional amendments defining marriage as a union between a man and a woman. Legislatures placed nineteen of these amendments on the ballot for voter approval; citizens initiated twelve amendments. (In Arizona, voters rejected a 2006 ICA on the issue, but approved a 2008 legislative constitutional amendment). Including Arizona, voters approved marriage amendments in all thirty states where they were able to vote on the question, usually by large margins.²²

The results of the relevant popular votes on propositions opposing same-sex marriage, between 1998 and 2008, are set out in the following table.

State ballot propositions in the US, 1998-2008

State	Year	Vote	Source
Alaska	1998	68-32	Legislature
Hawaii	1998	69-31	Legislature
California	2000	61-39	Initiative
Nebraska	2000	70-30	Initiative
Nevada	2000	70-30	Initiative
Nevada	2002	67-33	Initiative
Arkansas	2004	75-25	Initiative
Georgia	2004	77-23	Legislature
Kentucky	2004	75-25	Legislature
Louisiana	2004	78-22	Legislature
Michigan	2004	59-41	Initiative
Mississippi	2004	86-14	Legislature
Missouri	2004	71-29	Legislature
Montana	2004	67-33	Initiative
North Dakota	2004	68-32	Initiative
Ohio	2004	62-38	Initiative
Oklahoma	2004	76-24	Legislature
Oregon	2004	57-43	Initiative
Utah	2004	66-34	Legislature
Kansas	2005	70-30	Legislature
Texas	2005	76-24	Legislature
Alabama	2006	52-48	Legislature
Arizona	2006	48-52	Initiative
Colorado	2006	55-45	Initiative
Idaho	2006	63-37	Legislature
South Carolina	2006	78-22	Legislature
South Dakota	2006	52-48	Legislature
Tennessee	2006	81-19	Legislature
Virginia	2006	57-43	Legislature
Wisconsin	2006	59-41	Legislature
Arizona	2008	56-44	Legislature
California	2008	52-48	Initiative
Florida	2008	62-38	Initiative

Source: [Initiative and Referendum Institute](#)

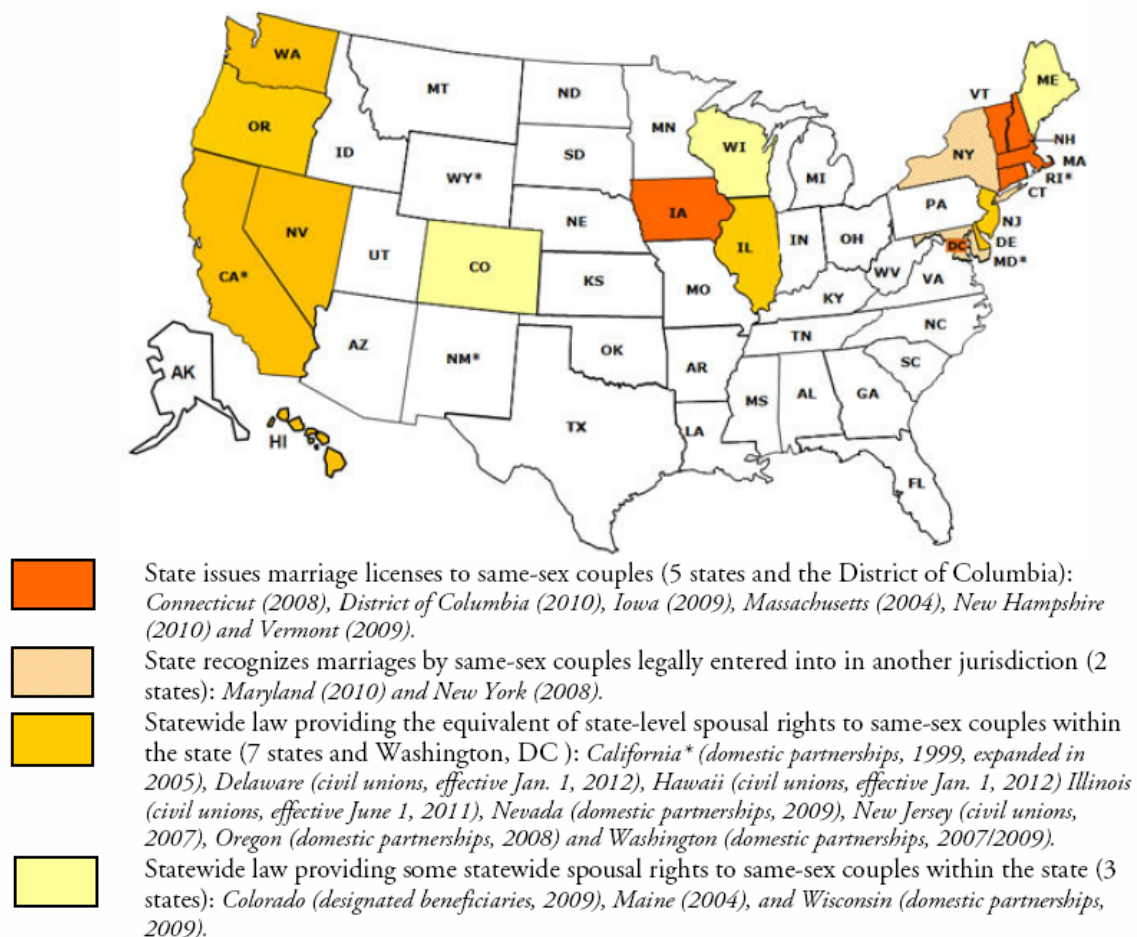
The US *Book of the States* comments:

Regardless of how the court rules, voters have chosen to ban gay marriage in 32 of 33 propositions, an almost unbroken firewall. This shows that the electorate overall is not supportive of gay marriage. On the other hand, the California vote in 2008 was much closer than in 2000, and younger voters appear to be less opposed to gay marriage than older voters, suggesting that time and demographic trends may lead to victories for gay marriage supporters down the line.²³

In 2009, legislation passed in Maine lifting the ban on same-sex marriage was defeated at referendum, by a 53 to 47% margin. With the New York legislature voting on 24 June 2011 to legalise same-sex marriage,²⁴ it is now permitted in six US States, Massachusetts (2003), Connecticut (2008), Iowa (2009),

Vermont (2009), New Hampshire (2010) and New York (2011). Same-sex marriage is also permitted in the District of Columbia.²⁵ The States of New York, New Mexico and Maryland recognize such marriages from other jurisdictions. As of January 2010, 29 States had constitutional provisions restricting marriage to one man and one woman, while 12 others had laws restricting marriage to one man and one woman. Eighteen States have laws adversely affecting the legal recognition of same-sex unions or domestic partnerships.²⁶

US Marriage Equality and other Relationship Recognition Laws



Source: Human Rights Campaign [website](#) (Map updated 21 June 2011, prior to recent developments in New York)

Before turning to the relevant case law, it should be said again that the position in New York changed on 24 June 2011 when the Republican dominated Senate passed, by 33 votes to 29, the Marriage Equality Act. This amends New York's Domestic Relations Law to state that a marriage that is otherwise valid will be valid regardless of whether the parties to the marriage are of the same or different sex. It also ensures that rights, benefits, and protections relating to marriage will not be different based on the parties to the marriage being the same sex or a different sex.²⁷ While this law might possibly be challenged in the courts, it will not be overturned by the process of popular initiative, for the

simple reason that New York has not adopted any form of direct democracy associated with the statute law initiative or the constitutional initiative amendment.

5.3.2 Case law

Following the 1993 case of [Baehr and Lewin](#), for the supporters of same-sex marriage, the next landmark case was the Massachusetts Supreme Court decision in [Goodridge v Department of Public Health](#) 440 Mass 309 (2003), in which the State's marriage laws were struck down and the legislature directed to enact new laws permitting same-sex marriage. The Court defined civil marriage to mean henceforth "the voluntary union of two persons as spouses, to the exclusion of all others". In 2005, petitioners gathered the required signatures for an initiative constitutional amendment (ICA). However, in Massachusetts such an initiative can only be put to the ballot after it is supported by at least 50% of the legislature in two consecutive sessions, a hurdle surmounted in one session but not in the next.

On the other side of the ledger, courts in four States – [New York](#), [Washington](#)²⁸ and [New Jersey](#),²⁹ all in 2006, and [Maryland](#)³⁰ in 2007 – all ruled in favour of the validity of traditional marriage laws in their respective States. The Court in the New York case of [Hernandez and Robles](#) 855 NE 2d 1 (NY 2006) said:

Our conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses, and that any expansion of the traditional definition of marriage should come from the Legislature.

Note that the New York Court of Appeal applied a "rational basis scrutiny" test, and not the more stringent "intermediate scrutiny" or "strict scrutiny" tests that apply to the guarantees of due process and of equal protection (which basically holds that all similarly situated persons should be treated alike). All three tests are part of a hierarchy of standards employed by US courts to weigh an asserted government interest against a constitutional right or principle. The "rational basis" test is the most deferential to the Legislature, requiring only a plausible policy justification and a merely rational relationship between that justification and the suspect statutory classification at issue. Under the "strict scrutiny" test, however, where reasons exist to suspect "prejudice against discreet and insular minorities", certain statutory classifications – for example, those based on race or national origin – are subjected to a heightened level of scrutiny. Classifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest. A middle tier of analysis is referred to as "intermediate scrutiny", which can apply to what are often called "quasi-suspect groups". This level of review can apply to statutory classifications based on gender, for instance. It requires the party seeking to uphold the statute to demonstrate that the challenged classification is substantially related to the achievement of an important governmental objective. To survive this intermediate scrutiny test, the law in question must not only further an important governmental interest and be substantially related to that

interest, but the justification for the classification must be genuine and must not depend on broad generalisations.³¹

In [*Hernandez and Robles*](#) the New York Court of Appeal rejected arguments that the statute in question should be subjected to the level of review associated with intermediate or strict scrutiny. The Court noted the history of "serious injustice in the treatment of homosexuals", but distinguished the traditional definition of marriage from that history, saying that the "idea that same-sex marriage is even possible is a relatively new one". In the Court's view the critical question was whether a rational legislature could decide that the benefits of marriage "should be given to members of opposite-sex couples, but not same-sex couples". While acknowledging arguments to the contrary and emphasising that it was not for it to "say whether same-sex marriage is right or wrong", two relevant grounds were identified by the Court, both "derived from the undisputed assumption that marriage is important to the welfare of children":

First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.

And secondly:

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.³²

In respect to equal protection, the Court observed (references omitted):

Where rational basis scrutiny applies, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"... Plaintiffs argue that a classification distinguishing between opposite-sex couples and same-sex couples cannot pass rational basis scrutiny, because if the relevant state interest is the protection of children, the category of those permitted to marry—opposite-sex couples—is both underinclusive and overinclusive. We disagree.

Plaintiffs argue that the category is underinclusive because, as we recognized above, same-sex couples, as well as opposite-sex couples, may have children. That is indeed a reason why the Legislature might rationally choose to extend marriage or its benefits to same-sex couples; but it could also, for the reasons we have explained, rationally make another choice, based on the different characteristics of opposite-sex and same-sex relationships. Our earlier discussion demonstrates that the definition of marriage to include only opposite-sex couples is not irrationally underinclusive.

In arguing that the definition is overinclusive, plaintiffs point out that many opposite-sex couples cannot have or do not want to have children. How can it be rational, they ask, to permit these couples, but not same-sex couples, to marry? The question is not a difficult one to answer. While same-sex couples and opposite-sex couples are easily distinguished, limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing.³³

Having found in favour of the constitutionality of the New York marriage law, the Court noted that "Rational basis scrutiny is highly indulgent towards the State's classifications".³⁴ Similarly, in [Andersen v King Country](#), 158 Wn 2d 1 (2006) the Washington State Supreme Court observed:

The plaintiffs have not established that they are members of a suspect class or that they have a fundamental right to marriage that includes the right to marry a person of the same sex. Therefore, we apply the highly deferential rational basis standard of review to the legislature's decision that only opposite-sex couples are entitled to civil marriage in this state.

In the New Jersey case of [Lewis v Harris](#), 188 NJ 415 (2006) the majority stated:

A time may come when our society accepts the view that same-sex couples should be allowed to marry. If there were such an evolution in public attitudes, our Legislature presumably would amend the marriage laws to recognize same-sex marriage just as it recognized the increasing public acceptance of same-sex unions by enacting the Domestic Partnership Act. However, absent legislative action, there is no basis for construing the New Jersey Constitution to compel the State to authorize marriages between members of the same sex.

Conversely, in October 2008 in [Kerrigan v Commissioner of Public Health](#) (SC 17716), the Supreme Court of Connecticut, ruled by a narrow majority that the ban on same-sex marriage violated the State's constitution. Applying the intermediate scrutiny test, the Court found that the State law discriminated against gay persons on account of their sexual orientation. It stated:

our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same sex couples cannot be denied the freedom to marry.

5.3.3 Direct democracy and Californian case law

The mechanisms of direct democracy, the initiative referendum and recall, apply unevenly throughout the United States, barely at all in Eastern States and almost universally in the West. The requirements and procedures relating to these mechanisms also vary widely. As discussed, in Massachusetts an initiative constitutional amendment (ICA) can only be put to the ballot after it is supported by at least 50% of the legislature in two consecutive sessions. Such indirect versions of direct democracy tend not to apply in the Western States, including California. There, for an ICA to be put to the ballot, it must attract signatures equalling 8% of the vote for the Governor in the last election; whereas initiatives for ordinary statutes must satisfy a 5% threshold.

It was this last threshold that was achieved in 2000 when Proposition 22 was adopted, by a 61 to 39% margin, as an initiative statute and not as a constitutional amendment. Proposition 22 amended the Family Code to read "Only marriage between a man and a woman is valid or recognised in California". The Legislature is prevented by the State constitution from amending or repealing statutes enacted through the initiative process, with the result that the repeal of Proposition 22 would depend on a new vote by the people.

However, the validity of Proposition 22 could be challenged in the courts, as occurred in what are referred to as the [In re Marriage Cases](#), 43 Cal. 4th 757 (2008). The specific question of law the Court addressed in the case was whether the:

state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a "marriage" whereas the union of a same-sex couple is officially designated a "domestic partnership."

In the event, the Californian Supreme Court, by a majority of 4 to 3, struck down Proposition 22. First, on the basis that it violated the [State constitution's](#) implied "right to marry" (derived in part from the due process and privacy clauses). Secondly, that it violated the State's equal protection clause, finding that all classifications based on sexual orientation are constitutionally suspect and subject to the more stringent test of strict scrutiny.³⁵ As formulated by the Court, under this strict standard "*the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose".³⁶ In respect to this second limb, the Court said:

A number of factors lead us to this conclusion. First, the exclusion of same-sex couples from the designation of marriage clearly is not *necessary* in order to afford full protection to all of the rights and benefits that currently are enjoyed by married opposite-sex couples; permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution of marriage, because same-sex couples who choose to marry will be subject to the same obligations and duties that currently are imposed on married opposite-sex couples. Second, retaining the traditional definition of marriage and affording same-sex couples only a separate and differently named family relationship will, as a realistic matter, impose appreciable harm on same-sex couples and their children, because denying such couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples. Third, because of the widespread disparagement that gay individuals historically have faced, it is all the more probable that excluding same-sex couples from the legal institution of marriage is likely to be viewed as reflecting an official view that their committed relationships are of lesser stature than the

comparable relationships of opposite-sex couples. Finally, retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise — now emphatically rejected by this state — that gay individuals and same-sex couples are in some respects “second-class citizens” who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.

The Court concluded:

Under these circumstances, we cannot find that retention of the traditional definition of marriage constitutes a *compelling* state interest. Accordingly, we conclude that to the extent the current California statutory provisions limit marriage to opposite-sex couples, these statutes are unconstitutional.

Dissenting, Justice Baxter argued that the majority's finding violated the State constitution's guarantee of the separation of powers. In a trenchantly worded judgment, he stated:

History confirms the importance of the judiciary's constitutional role as a check against majoritarian abuse. Still, courts must use caution when exercising the potentially transformative authority to articulate constitutional rights. Otherwise, judges with limited accountability risk infringing upon our society's most basic shared premise — the People's general right, directly or through their chosen legislators, to decide fundamental issues of public policy for themselves. Judicial restraint is particularly appropriate where, as here, the claimed constitutional entitlement is of recent conception and challenges the most fundamental assumption about a basic social institution.

Justice Baxter concluded:

I would apply the normal rational basis test to determine whether, by granting same-sex couples all the substantive rights and benefits of marriage, but reserving the marriage label for opposite-sex unions, California's laws violate the equal protection guarantee of the state Constitution. By that standard, I find ample grounds for the balance currently struck on this issue by both the Legislature and the People.

Under California's version of direct democracy there was still the option of reversing the Court's ruling by means of an ICA – an initiated constitutional amendment. The result was the adoption, by a 52.3 to 47.7% margin, of Proposition 8. This inserted a "Defense of Marriage Amendment" into the Californian Constitution, stating "Only marriage between a man and a woman is valid or recognised in California". During the course of the heated campaign, proponents for and against raised more than \$85 million (\$45 million against, \$40 million in support of Proposition 8), the most ever for an initiative on a social issue.³⁷

A further avenue of litigation was then explored in 2009 in [Strauss v Horton](#) (S 168066), where it was claimed that revoking the right of same-sex couples to marry is a constitutional *revision* rather than an *amendment*. In California, both constitutional *amendments* and *revisions* require that a majority of voters

approve the ballot initiative. However, a *revision*, defined as a "substantial alteration of the entire constitution rather than to a less extensive change in one or more of its provisions", also requires the prior approval of two-thirds of each House of the California State Legislature. In the event, the validity of Proposition 8 was upheld, as an amendment and not revision of the State constitution. The upshot was that Proposition 8 could only be overturned by another popular vote, or else by a ruling that it violated the higher law of the US Constitution.

It was the latter avenue that was pursued in [Perry v Schwarzenegger](#), 704 F. Supp 2nd 921 (N.D. Cal 2010), where Proposition 8 was found to be invalid based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the US Constitution. In that case Chief Judge Walker concluded that California had no rational basis or vested interest in denying marriage licenses to gays and lesbians. He said:

An initiative measure adopted by the voters deserves great respect. The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determinations of the voters. When challenged, however, the voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.³⁸

The decision was handed down on 4 August 2010. Twelve days later the Ninth Circuit Court of Appeals ordered the judgment stayed pending appeal, with the result that the ban on same-sex marriage remained in force. With the named defendants in the case (notably Governor Schwarzenegger and the Californian Attorney General) declining to appeal the decision, complex issues of standing have arisen for those groups seeking to challenge the outcome. The likelihood is that the case will go on appeal to the US Supreme Court and may take several years to resolve.

By way of a [coda](#) to the case, after retiring in 2011 Chief Judge Walker informed the media that he is gay and has been in a relationship with a male doctor for about ten years. The result was that supporters of Proposition 8 filed a motion in the District Court to vacate Walker's decision in *Perry*, arguing that unless he "disavowed any interest in marrying his partner" he had "a direct personal interest in the outcome of the case". On 14 June 2011, in a [decision](#) handed down by Chief Judge James Ware, the motion to vacate the original Proposition 8 judgment was denied.³⁹ It is reported that the ProtectMarriage.com legal team, representing supporters of Proposition 8, are planning to appeal the decision.⁴⁰

5.3.4 Further developments

A further coda is that the federal DOMA has itself been challenged in two related cases - [Gill v. Office of Personnel Management](#) 699 F.Supp.2d 374

(D.Mass, 2010) and [Massachusetts v. United States Department of Health and Human Services](#) 698 F.Supp.2d 234 (D.Mass. 2010). It was found that the denial of federal rights and benefits to lawfully married same-sex couples in Massachusetts is unconstitutional under the Fifth Amendment ("due process" clause) and the Tenth Amendment ("reserving State powers" clause) to the U.S. Constitution. Implementation of the decision was stayed pending appeal. In October 2010 the US Department of Justice entered an appeal, but following a [direction](#) from President Obama subsequently notified the Court that it would "cease to defend" both cases. Then in March 2011, Speaker John Boehner announced he would exercise Congress's right to defend DOMA's by convening a bipartisan legal advisory group. The issue is therefore far from settled, with several other pending DOMA cases in the legal pipeline.⁴¹

Further to the theme of the interaction between the judiciary and direct democracy in the US, it is reported that in November 2010 several judicial retention elections were held (a feature common to "merit based" judicial appointment systems). In Iowa, three (out of seven) of the State's Supreme Court justices, including the Chief Justice, were removed from office, this being the first time voters had taken such action since the system's introduction in 1962. It is reported that:

The judges faced the well funded ire of opponents to a unanimous decision of the Court the previous year finding no sound constitutional justification for excluding same-sex couples from the institution of marriage ([Varnum v Brien, 763 N.W. 2d 862 \(Ia. 2009\)](#)). Their remaining colleagues (none of whom were due to face voters in 2010) have since been called on to resign.⁴²

In *Varnum v Brien* the Supreme Court of Iowa found that the ban on same-sex civil marriages in the Iowa statute "differentiates implicitly on the basis of sexual orientation". Applying the intermediate scrutiny test, the Court further found that "Having examined each proffered governmental objective through the appropriate lens of intermediate scrutiny, we conclude the sexual-orientation-based classification under the marriage statute does not substantially further any of the objectives".⁴³ Among the objectives proffered on behalf of the statute was "support for the 'traditional' institution of marriage, the optimal procreation and rearing of children, and financial considerations".

5.4 France and European law

Same-sex marriage has been debated in France over a number of years, with both the courts and the legislature playing key roles. In 2006, for example, a parliamentary report was released, only a two page [summary](#) of which appears to be available in English. It was reported in this respect that:

In late January, a 30 member parliamentary commission of the French National Assembly published a 453 page Report on the Family and the rights of Children, which rejected same-sex marriage...In the report, the commission says that "the child represents the future of society." The commission asks legislators to make sure that "children, confronted with mutations in family models, be fully taken into account and not suffer from situations imposed upon

them by adults.” It adds: “The interest of the child must take precedence over adults’ exercise of their freedom...including with regards to parents’ lifestyle choices”.⁴⁴

With the question of same-sex marriage remaining a subject of debate, in November 2010 the French Court de Cassation, the highest court of appeal, directed France's Constitutional Council to rule on the constitutionality of the ban on same-sex marriage.⁴⁵ A ruling was delivered in January 2011 when the Constitutional Council ruled that laws banning gay marriage do not violate the French constitution and left the matter for the Parliament to decide.⁴⁶ The [ruling](#) stated (in part):

Considering, on the other hand, that Article 6 of the Declaration of 1789 provides that the law “must be the same for all, whether it protects or punishes”; that the principle of equality does not prevent the legislator from settling different situations in different ways, or from derogating from equality for the general interest, provided that in both cases the difference in treatment that results is either in direct relationship with the subject of the law established thereby; that by maintaining the principle according to which marriage is the union of a man and a woman, the legislator has, in exercising his competence under Article 34 of the Constitution, deemed that the difference of situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding the right to a family; that it is not for the Constitutional Council to substitute its judgment for that of the legislator regarding the consideration of this difference of situation; that consequently the grievance relating to the violation of Article 6 of the Declaration of 1789 must be removed.⁴⁷

Following that decision, in June 2011 an opposition Socialist Party Bill to legalise same-sex marriage in France was defeated in the National Assembly, 293 votes to 222. It is reported that:

Opposition was led by Mr Sarkozy's UMP, while Socialists and other leftists supported the bill, which said "marriage can be contracted by two people of different sexes or of the same sex".⁴⁸

The domestic laws of the European states in respect to marriage came under scrutiny in [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010, a case which specifically challenged a provision of the Austrian Civil Code which confined marriage to a union of two persons of opposite sex. A decision was handed down on 24 June 2010 by the European Court of Human Rights in which it was found that there was no violation of human rights either under Article 12 (right to marry) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), or Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to private and family life). However, the court was divided on the discrimination question, with three of the seven justices dissenting.

Article 12 provides:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

In relation to Article 12, the Court noted that it had not considered same-sex marriage previously but that there were earlier decisions referring to the position of transsexuals in this context. In those cases the Court had concluded that:

Article 12 enshrined the traditional concept of marriage as being between a man and a woman. The Court acknowledged that a number of contracting states had extended marriage to same-sex partners, but went on to say that this reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the fundamental right as laid down by the contracting states in the Convention in 1950.⁴⁹

It was further noted that the text of Article 12 was unusual in that it referred expressly to "*Men and women* of a marriageable age..." (emphasis added). In contrast, the court observed:

all other substantive articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.⁵⁰

On the Article 12 question, the court concluded: "as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State".⁵¹

Article 14 ((prohibition of discrimination) and Article 8 (right to private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provide as follows:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Everyone has the right to respect for his private and family life, his home and his correspondence.

A majority of the Court also dismissed the complaint raised by the applicants on the ground of discrimination in conjunction with the right to private and family life. Among other things, the Court noted that an alternative means of legal recognition of same-sex couples had lately been introduced in Austria and concluded on this point that "States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition".⁵² The majority also stated that, while there was "no European consensus regarding same-sex marriage":

there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.⁵³

It was noted, in fact, that only six out of a total of 47 member states allow same-sex marriages, whereas (as at June 2010) another 13 states permit same-sex couples to register their relationships.⁵⁴ Numbered among the 13 states which permit the registration of same-sex unions is France.

6. MARRIAGE – AUSTRALIAN DEVELOPMENTS

By s 51(xxxi) of the Commonwealth Constitution, the enumeration of the powers of the Commonwealth Parliament includes the power to make laws in respect to "Marriage". As recognised by Quick and Garran, in empowering the national Parliament to pass laws respecting marriage, the Framers of the Constitution were conscious of the desirability of securing uniform marriage laws.⁵⁵ However, the marriage power is not an exclusive federal head of power; rather, like all s 51 powers, it is held concurrently with the States. In fact, uniform federal legislation dealing with the formalities of the creation of a valid marriage was not passed until the *Marriage Act 1961* (Cth). Prior to that, marriage was covered by State laws, just as before Federation it had been covered by the laws of the colonies. The colonial statutes dealing with marriage and divorce were subject to disallowance by the Imperial Parliament, with a view, as Quick and Garran explained, to securing "uniformity of marriage laws among the Christian races of the Empire".

In NSW, the first legislation relating to divorce was assented to in 1873,⁵⁶ whereas marriage between a man and his deceased wife's sister was legalised in 1875 (22 years before an Act to similar effect was passed in the UK).⁵⁷ This 1875 Act was the only substantive extension of marriage to an additional category of persons in colonial times. As for the solemnization of marriage, the forms and procedures used, these laws were consolidated under the *Marriage Act 1899* (NSW). Neither that Act, nor the 1961 Commonwealth *Marriage Act* expressly defined marriage. By the common law, in combination with traditional practice and usage, marriage was of course assumed to relate exclusively to a man and a woman. In the case of the NSW statute, this was indicated by the forms of declaration authorising civil marriages, which referred exclusively to male and female names. Put simply, unlike such matters as polygamy and incestuous relationships, until quite recent times the issue of same-sex marriage would not have occurred to lawmakers, to be prohibited or otherwise.⁵⁸

Federally, s 46 of the [Marriage Act 1961](#) incorporated the substance of the case law definition of marriage found in *Hyde v Hyde* (see above), with celebrants being instructed to explain the nature of the marriage relationship with words that include: "Marriage, according to the law of Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life - or

words to that effect". However, these words were said to be "a description or exhortation rather than a definition".⁵⁹

6.1 Commonwealth

Not until the *Marriage Amendment Act 2004* (Cth) was marriage defined under s 5 of the federal statute, as follows: "*marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". This is in effect the common law definition of marriage, shorn of the reference in *Hyde v Hyde* to "as understood in Christendom". The Howard Government's first Bill dealing with the matter was the [Marriage Legislation Amendment Bill 2004](#). In the [Second Reading speech](#) for the Bill, Attorney General Philip Ruddock said:

The government believes that this is the understanding of marriage held by the vast majority of Australians...Including this definition will remove any lingering concerns people may have that the legal definition of marriage may become eroded by time.⁶⁰

He went on to say:

A related concern held by many people is that there are now some countries that permit same sex couples to marry. It has been reported that there are a few Australian same sex couples who may travel overseas to marry in one of these countries on the basis that their marriage will then be recognised under Australian law on their return. Australian law does, as a matter of general principle, recognise marriages entered into under the laws of another country, with some specific exceptions. It is the government's view that this does not apply to same sex marriages. The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise same sex marriages entered into under the laws of another country, whatever country that may be.⁶¹

In the event, when on 23 June 2004 the Senate referred this first Bill to its Legal and Constitutional Legislation Committee for review, the next day a second Bill - the [Marriage Amendment Bill 2004](#) - was introduced into the House of Representatives, including substantially identical relevant provisions. The Attorney General [explained](#):

These provisions were contained in another bill that passed this House. They were referred to the Senate, and all of the measures have been referred by the Senate to a committee for review. It would be my intention to amend the Marriage Amendment Bill now before the Senate to delete these provisions. If this bill is acceded to today, I want to make it very clear that the reason for this, without breaching any privacy matters, is that some parties have already sought recognition of offshore arrangements approved under the laws of other countries and would be seeking recognition under our law.

Mr Ruddock continued:

It is the government's view that the provisions of the Marriage Act which we are seeking to enact should not be delayed and should not be the subject of Senate

referral. The opposition having indicated its support for these measures should ensure—having restricted it to those matters that relate to a definition of marriage and the recognition of overseas marriages, which they say they support—that they receive a speedy passage.⁶²

Commenting on this process, the [Bills Digest](#) prepared by the Commonwealth Parliamentary Library explained the ALP's position in these terms:

The Marriage Amendment Bill 2004 contains those provisions of the Marriage Legislation Amendment Bill 2004 which the Australian Labor Party stipulated it would support in a press release issued on 1 June 2004. Shadow Attorney-General, Nicola Roxon MP, reiterated during the second reading of the current Bill that the Labor Party would agree to the measures it contains. However, the Party expressed reservations about the process on two grounds. The first, questioned the Government's claims that the issue of gay marriage was of such major community concern that it warranted the need to be dealt with urgently. The second raised the point that the first Bill has already been referred to a Senate committee, the report from which is yet to be released.⁶³

The same [source](#) explained that:

The Greens have labelled both the current and the first Bill discriminatory 'against the gay and lesbian community' and condemned both the Government and the Labor Party for failing to acknowledge the change, within present day society, in the make up of couples. In the House of Representatives, Greens MP, Michael Organ introduced amendments to the current Bill which included provisions that acknowledged gay and lesbian unions within the definition of marriage and also the recognition of such unions as marriages in Australia regardless of whether they were performed in a foreign country. These amendments were not adopted and the current Bill passed the House of Representatives unchanged.

In the Senate the Bill was reintroduced on 13 August 2004, having initially been [defeated](#) on its First Reading.⁶⁴ The *Marriage Amendment Act 2004* (Cth) was subsequently assented to on 16 August 2004. For the Labor Party, Senator Joe Ludwig [said](#): "Labor supports the Marriage Amendment Bill and will be voting for it today. Labor has said from the beginning of this debate that we will not support same-sex marriage".⁶⁵

The issue has of course re-surfaced many times federally. On 15 June 2006, Australian Democrats Senator Stott Despoja introduced the [Same-Sex Marriage Bill 2006](#), which lapsed at the end of the Parliament, to be re-introduced by Senator Bartlett in 2008, only to lapse again in 2010. On 24 June 2009 Greens Senator Hanson-Young introduced the [Marriage Equality Amendment Bill 2009](#), which was defeated by 45 votes to 5 at the [Second Reading](#) stage.⁶⁶ The Bill would have defined marriage to mean "the union of two people, regardless of their sex, sexuality or gender identity, voluntarily entered into for life". The Bill was the subject of inquiry by the [Senate Legal and Constitutional Affairs Legislation Committee](#),⁶⁷ which reported in November 2009. While recommending that the Bill not be passed, the Committee also [recommended](#):

that the Government review (by reference to the Australian Law Reform

Commission, or some other appropriate mechanism) relationship recognition arrangements with the aim of developing a nationally consistent framework to provide official recognition for same sex couples and equal rights under federal and state laws.

Shortly after the minority Gillard Government was formed, on 29 September 2010 Senator Hanson-Young introduced the [Marriage Equality Amendment Bill 2010](#), which is yet to proceed beyond the First Reading stage.

6.2 Tasmania

The [Same-Sex Marriage Bill 2005](#) would have permitted same-sex marriages in Tasmania and granted same-sex married couples the same rights and responsibilities as other married people. The Bill defined *same-sex marriage* to mean "the lawful union of two people of the same sex to the exclusion of all others, voluntarily entered into for life". The [Same-Sex \(Celebrant and Registration\) Bill 2005](#) further provided for registers of same-sex marriages and same-sex marriage celebrants, while the [Same-Sex Marriage \(Dissolution and Annulment\) Bill 2005](#) provided for the dissolution and annulment of such marriages. The Same-Sex Marriage Bill 2005 was introduced into the Tasmanian House of Assembly by the Tasmanian Greens MHA Nick McKim. These cognate Bills did not proceed beyond the [First Reading](#) stage and lapsed with the 2006 Tasmanian election.

There followed the [Same-Sex Marriage Bill 2008](#) and the [Same-Sex Marriage Bill 2010](#), in each case accompanied by their respective Same-Sex (Celebrant and Registration) Bills⁶⁸ and Same-Sex (Dissolution and Annulment) Bills.⁶⁹ All three cognate 2010 Bills were introduced by Nick McKim on 9 November 2010 and are yet to proceed beyond their [First Reading](#) stage.

6.3 New South Wales

On 4 May 2005, NSW Greens MLC Lee Rhiannon gave notice of motion of the [Same-Sex Marriage Bill](#) to provide for marriage between adults of the same-sex. Notice was also given regarding two cognate bills: [Same-Sex Marriage \(Dissolution and Annulment\) Bill 2005](#) and [Same-Sex Marriage \(Celebrant and Registration\) Bill 2005](#). The Bills lapsed on prorogation but were re-introduced on 24 May 2006, only to lapse again on [prorogation](#) on 15 January 2007.

On 30 November 2010 NSW Greens MLC Cate Faehrmann gave [notice of motion](#) in the NSW Upper House in support of same-sex marriage, as follows:

1. That this House notes that:

- (a) there is overwhelming public support for marriage equality in Australia,
- (b) a growing number of jurisdictions overseas have legislated for marriage equality including the Netherlands, Belgium, Norway, Spain, Canada and South Africa,
- (c) constitutional law expert Professor George Williams has advised that

marriage equality laws can be enacted by the states, and

(d) the Australian Greens' Marriage Equality (Amendment) Bill 2010 is currently before the Federal Parliament.

2. That, in the event that the Federal Parliament fails to legislate for marriage equality in 2011, this House calls on the New South Wales Government to legislate to allow marriage between adults in New South Wales regardless of sexual orientation, sex and gender identity.

A [notice of motion](#) in identical terms was given by the same Greens MLC on 4 May 2011. In the lead up to the 2011 NSW State election Ms Faehrmann [said](#) that both Kristina Keneally and Barry O'Farrell had indicated they would allow a conscience vote on the issue.⁷⁰

6.4 South Australia

On [9 February 2011](#) Greens MLC [Tammy Franks](#) (with her co-sponsor Labor's Ian Hunter) introduced the [Marriage Equality Bill 2011](#) into the South Australian Legislative Council. The Bill's purpose is to provide for marriage between adults of the same sex. It defines same-sex marriage to mean "the lawful union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life". The Bill deals broadly with the solemnisation of same-sex marriages, as well as divorce and annulment. By clause 9 of the Bill, Ministers of religion are not bound to solemnise such marriages. One observation made in Ms Franks' [Second Reading](#) speech was that:

Studies in Britain and the US have shown that, where there are alternative forms of relationship recognition—and these are often called things like civil unions, civil partnerships, registered relationships, domestic partnerships—they are no substitute for marriage equality. They do not have the same level of recognition as marriage, are misunderstood and considered the gay option, perhaps, or dismissed as second-best.⁷¹

Ian Hunter, the Bill's co-sponsor, said:

While marriage has traditionally been viewed through the prism of a religious context, marriage is, in fact, a legal construct and legalities are always up for debate and modification. When the Law Council of Australia appeared before the Federal Senate Legal and Constitutional Affairs Committee inquiry into marriage equality it confirmed that: "Legal reform of this nature is not unique; it is the natural progression of rights development as it accords with changes in social practice".⁷²

The [Marriage Equality Bill 2011](#) is yet to proceed beyond its Second Reading stage. Articulating the position of the Liberal Party on the Bill, SG Wade [said](#) on 23 February 2011:

In a recent meeting the parliamentary Liberal Party determined that while the issue of legal recognition of same-sex relationships is a conscience vote for our party, we will not support this bill on the ground of legislative competence.⁷³

Mr Wade explained:

The threshold question with this bill for the Liberal Party is that of the legislative competence of the Parliament of South Australia. My party has come to the view that the answer to that question is sufficiently unclear for us not to support the passage of this bill.

He added:

Even apart from the constitutional issues, I doubt whether most supporters of same-sex marriage would be satisfied with a state-based law. A key element of the push for same-sex marriage is that the same form of marriage should be available for same-sex and different-sex couples. Civil union is seen as a second-class form of recognition to marriage. Similarly, I would have thought that a state law marriage was likely to be seen as a second-class form of recognition to a commonwealth law marriage.

7. KEY CONSTITUTIONAL ISSUES IN AUSTRALIA

Key issues in the current debate include the scope and nature of the federal marriage head of power and the validity or otherwise of any State legislation legalising same-sex marriage.

7.1 Constitutional and statutory provisions

Section 51(xxi) of the Commonwealth Constitution provides that the Federal Parliament has power to make laws with respect to "Marriage".

By s 5 of the Federal [Marriage Act 1961](#) "*marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

Section 6 of the Federal [Marriage Act 1961](#) provides:

This Act shall not be taken to exclude the operation of a law of a State or of a Territory, in so far as that law relates to the registration of marriages, but a marriage solemnised after the commencement of this Act is not invalid by reason of a failure to comply with the requirements of such a law.

On the issue of inconsistency between federal and State laws, s 109 of the Commonwealth Constitution provides:

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.

7.2 Can the Commonwealth Parliament legislate for same-sex marriage?

An issue raised on a number of occasions is whether the federal "marriage" power in s 51(xxii) could support legislation to allow for same-sex marriage (or,

indeed, to allow for the Commonwealth Parliament to prohibit same-sex marriage). With the High Court yet to decide on the matter, there is scope for continued uncertainty, as suggested by the following review of the relevant academic literature.

One question is whether the constitutional meaning of marriage is fixed to its 1900 meaning, or whether it is able to evolve or adapt in line with changed events or attitudes. But then, if in keeping with the normal rules of statutory interpretation the meaning is to be understood by reference to its usage at the time of enactment, what is meant by the meaning of "meaning" in this context?⁷⁴ More technically, when interpreting the meaning of a constitutional term, the High Court has traditionally distinguished between connotation and denotation, that is, between the actual usage relevant to a term in 1900 (denotation), as opposed to a definition of the term which elucidates its essential characteristics (connotation). For example, from a denotation perspective the word "vehicle" in 1900 would not have included "aircraft"; whereas from the perspective of connotation, if "vehicle" is defined as a means of conveying persons and goods then it could include "aircraft", in 1900 and in 2011. Thus, as Zines concludes, "an aircraft although not within the denotation of the term 'vehicle' in 1900 was within its connotation because it is a means of conveyance even though that particular means did not exist in 1900".⁷⁵

Zines and others have pointed out the limitations and problems involved with this denotation/connotation distinction, where genuine ambiguities arise. In relation to the marriage power, Dan Meagher commented in February 2010 that, by reference to denotation/connotation distinction, if the Commonwealth Parliament amended the Marriage Act to include same-sex marriage, the High Court would probably find it to be invalid:

That is, the Court would likely find that the connotation of the constitutional term "marriage" in 1900 was formal, monogamous and heterosexual unions. And if this interpretive technique is something more than a mere linguistic device (which I think it must be) then in my view it is difficult to argue that heterosexuality was not an essential or core element of "marriage" in 1900.⁷⁶

Thus, while the denotation/connotation distinction can be used to apply a more adaptive approach to constitutional interpretation in some cases, Meagher's point is that it is unlikely to do so in respect to a non-heterosexual meaning of the marriage power. But he also suggested an alternative interpretive approach, based on marriage as an evolving legal institution, as follows:

However, constitutional validity *is* a possibility if the High Court were to apply a different – though still orthodox – interpretive technique. It involves recognising that the subject matter of the power is 'marriage' as a *legal* institution, one that before 1900 was the subject of gradual but significant change by the statutes of the United Kingdom and the Australian colonies. In this regard 'marriage' is one of a number of legal terms and institutions that became constitutional provisions in 1900. Importantly, these legal terms of art were products of pre-federation common law and statute and their content - consistent with the common law tradition - was still developing to varying degrees at the time of federation. So considering this history, might it be reasonable to assume that the framers

understood that the legal institution of 'marriage' would likely develop further after federation and provided a constitutional mechanism to accommodate this? In other words, to consider that the essential meaning of constitutional terms such as "marriage" was frozen in 1900 would betray that pre-federation history, the common law tradition and maybe even the intentions of the framers.⁷⁷

The issue has also been considered by Professor Geoffrey Lindell who [said](#):

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 [High] Court to accept that same-sex marriages now come within the meaning of the term "marriage" in s 51(xxi) of the Commonwealth Constitution – a view that has already attracted some judicial support.⁷⁸

Cited in this respect were the views expressed by Brennan J in *Fisher v Fisher* (1986) 161 CLR 376 at 455-456, where it was said:

Although the nature and incidents of a legal institution would ordinarily be susceptible to change by legislation, constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power.

The nature and incidence of the legal institution which the Constitution recognises as 'marriage' ... 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.

Further, in *The Queen v L* (1991) 174 CLR 379 at 392 Brennan J observed:

In *Hyde v. Hyde and Woodmansee*, Lord Penzance defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others" and that definition has been followed in this country and by this Court.

However, Professor Lindell went on to consider an alternative approach, stating:

Although difficult and probably unlikely at the moment, despite the progressive nature of the principles of constitutional interpretation..., it is however by no means impossible, given the inherent flexibility of the relevant principles of constitutional interpretation. The possibility that the term "marriage" may be interpreted as being wide enough to include same-sex marriage is now contemplated by some judges and scholars, some of whom subscribe to the orthodox principles of constitutional interpretation.⁷⁹

Among the judicial authorities cited by Professor Lindell were the views expressed by McHugh J in *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 553, as follows:

The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus in 1901 “marriage” was seen as meaning a voluntary union of 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 of 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.⁸⁰

Underlying the argument in support of a broader interpretation of constitutional terms,⁸¹ is the principle, expressed by O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368, that: "It must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve". To similar effect are the words of, Dixon J in *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81, "it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances".⁸²

The alternative approaches that may apply in the case of the marriage power were summarised by the Gilbert and Tobin Centre in its submission to the [Senate Legal and Constitutional Affairs Legislation Committee](#) inquiry into the [Marriage Equality Amendment Bill 2009](#). According to the [report](#):

The Gilbert and Tobin Centre suggests that the High Court could adopt at least 2 different approaches to defining marriage for the purposes of the Constitution. If the Court were to look to the intentions of the framers of the Constitution, it may be persuaded that the Commonwealth's power is limited to marriages of two different sexes. However, drawing on comments by Justice McHugh in the *Singh* and *Wakim* cases, the Gilbert and Tobin Centre observe that:

...it might be argued that gender is not central to the constitutional definition of 'marriage', which is instead focussed upon the commitment of two people to a voluntary and permanent union. This would be an example of an evolving interpretation in which the Constitution retains its essential meaning while accommodating later understandings as to what may fall within those concepts. The fact that a same-sex union was not within the intended meaning of 'marriage' 1901 need not preclude such an interpretation today.

The submission concluded:

On balance, it cannot be said with any great confidence that the High Court at the present time is likely to find the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxi). Indeed the most likely conclusion is that the meaning which is currently employed by the Marriage Act represents the full extent of the Commonwealth's power.

The Centre goes on to a similar conclusion in respect of the external affairs power (section 51 xxix), but also find that the Commonwealth could safely enact

laws for same-sex marriage were the states to refer their powers to the Commonwealth to do so, concluding that:

The Commonwealth can then use this referred power to make laws for same-sex marriage under section 51(xxxvii). If the Commonwealth and all States were in favour of providing for same-sex unions, this would be the simplest and most certain constitutional method of achieving this.⁸³

In September 2010, Professor Williams came down tentatively on the side of the expansive interpretation, based on the view that "the meaning of the Constitution must evolve with changes in society". He [concluded](#):

There can be no answer to this dilemma until a federal same-sex marriage law is tested in the High Court. My view is that a majority would lean to the latter view, thereby allowing the federal parliament to provide for same-sex marriage.⁸⁴

7.3 Can the States legislate for same-sex marriage?

The question whether the States can legislate to legalise same-sex marriage received scholarly attention in the context of the Tasmanian [Same-Sex Marriage Bill 2005](#). Both George Williams and Geoffrey Lindell provided extensive opinions on the constitutional issues involved, both of which were later published in the October 2006 issue of the journal *Constitutional Law and Policy Review*.

Specifically, Professor Williams was asked to advise on whether the proposed law "is inconsistent with the Marriage Act 1961 (Cth) such that it would be rendered inoperative under s 109 of the Australian Constitution". His advice, which he said was not definitive in nature, was that:

the proposed Same-Sex Marriage Act would not be rendered inoperative under s 109 of the Constitution. It is not inconsistent with the Commonwealth Marriage Act because the two Acts operate in different fields.⁸⁵

After surveying the three types of inconsistency relevant to s 109, Williams concluded that the type most likely to apply in this case is the test of whether the Commonwealth legislation is intended to "cover the field". Direct inconsistency is not the issue here but, rather, whether the Commonwealth Parliament had the legislative intention that its law shall be all the law there is on that topic – "What is inconsistent with the Commonwealth law is the existence of any State law at all on the topic". Two questions must be answered.

First, is the Commonwealth law intended to be exclusive within its field? Second, what field is covered by the Commonwealth law and does the State law operate in that same field?

By reference to s 6 of the federal *Marriage Act* (see above), Williams found that, while express provision is made for the operation of State laws relating to the registration of marriages, in all other respects the Act is most likely intended to be exclusive within its field. But what is that field? In Williams' opinion, the field

covered by the federal Act is the field of different-sex marriage, that is, consistent with the definition of marriage as between "a man and a woman to the exclusion of all others".

The Act is definitive in establishing the boundaries of marriage for the purposes of that Act as being different-sex marriage. It is also significant that the Act only seeks to prevent the recognition of same-sex marriage in respect of certain unions under foreign law. The Act says nothing about such unions if recognised by State law (on the other hand, it is arguable that this is an implication that the Commonwealth law already covers the field of same-sex marriage in Australia so as to make it unnecessary to insert such a provision with respect to State law).

The argument is that, because the federal Marriage Act expressly defines marriage, for the purposes of the Act, in heterosexual terms, it limits the operation of the Act, and its intention to cover the field. There was no inconsistency therefore between the federal marriage law and the proposed Tasmanian law, which did not seek recognition of same-sex marriage under the federal regime, but only under State law. Thus, to the extent that the proposed Tasmanian Act sought only to gain recognition for same-sex marriages under State law, without seeking recognition under the federal Marriage Act, the two statutory regimes could be said to be "two laws that operate in different fields". Further, the proposed Tasmanian Act would not have permitted a person to enter into two marriages, first under the State and then under the federal laws. In such a case, the first same-sex marriage under the State law would be rendered void, thereby avoiding a potential source of s 109 inconsistency.

Revisiting this issue in September 2010, Williams stated:

The only possible impediment to a state same-sex marriage law is that it may be overridden by an inconsistent federal law under section 109 of the constitution. But if it turns out that federal Parliament cannot pass laws for same-sex marriage, it could not override state laws on the topic.

In any event, it seems likely the federal Marriage Act does not prevent a state from legalising same-sex marriage. Amendments to the act in 2004 made it clear that the law applies exclusively to marriage between a man and a woman. This Howard government measure had the unintended effect of reducing the possibility of a conflict and thereby opening up the field of same-sex marriage to the states.

It would be better to have a single national law providing for same-sex marriage. However, such a law may not be legally possible, and in the short term may be politically unachievable. In these circumstances, we should not discount the possibility of a state leading the way.⁸⁶

A contrary view is found in the advice provided by Professor Lindell who was asked in 2005 whether same-sex marriage legislation enacted by a State would be unconstitutional. His answer read (in part):

In my view it is likely that such legislation would be inoperative in its application to the recognition of overseas same-sex marriages and probably also, but less clearly, the same marriages celebrated in Australia.⁸⁷

In a 2008 article Lindell explained:

It is strongly arguable that the amending legislation [the Marriage Amendment Act (2004)(Cth)] has attempted to define exhaustively which relationships may be described as "marriages" so as to confine the use of that description to the kind of traditional marriage referred to in the definition of "marriage" in s 5(1) of the Marriage Act. In the words used in the Minister's second reading speech, the *Marriage Amending Act* was designed "to provide certainty to all Australians about the meaning in the future".

Lindell continued:

It is true that that legislation contains explicit provisions which require *foreign* unions between persons of the same sex not to be recognised as a marriage in Australia but fail to make similar provision in relation to domestic unions of that kind. However, there are dangers in applying the principle of construction embodied in the maxims *expression unius est exclusion alterius* [the express inclusion of certain matters usually implies the exclusion of similar matters that were not included] and *expressum facit cessare tacitum* [when there is express mention of certain things, then anything not mentioned is excluded], and it is possible that the same kind of provisions for those unions may have been thought unnecessary from a technical drafting point of view since such marriages would not be governed by any foreign system of law in any sense. In the final analysis, it would seem highly odd that the *Marriage Amending Act* would treat both kinds of same-sex unions in a different way.⁸⁸

7.4 Can the States legislate to recognise same-sex civil unions?

The answer is almost certainly "yes". Lindell acknowledges that his analysis deals only with the "federal legislative power to prohibit the creation under State law of same-sex unions when those unions are described as marriages". He states:

The *Marriage Act* as it stands cannot be said to cover the field in relation to the law which governs the rights and duties of the partners to a same-sex union, leaving the way open for such matters to be governed by the State - at least...if the union is not described as a "marriage".⁸⁹

Likewise, Dan Meagher argues that in his view:

irrespective of the scope of the marriage power, civil unions – even if the functional equivalent of marriage – are a distinct, secular and modern legal institution that provide an alternative to marriage for same sex (and other) couples. And legislative terminology ought to be important, if not decisive. The functional equivalent of "marriage" is not a "marriage". On this view, civil unions (like de facto relationships) are legally and constitutionally distinct from marriage and so within the residual legislative competence of the States.⁹⁰

8. CONCLUSION

The purpose of this paper is not to argue the case for or against the recognition of same-sex marriages but, rather, to review recent legal and other developments in Australia and beyond. One finding is that different constitutional settings have tended to impact on the way the issues at stake have been considered and acted upon. In some jurisdictions, the decisive role has been played by the legislature, whereas in others, including South Africa and Canada, a critical part has been played by the courts in their interpretation of constitutional rights. In the United States, where the picture is most complex, the courts, the legislatures and the people, acting through statutory or constitutional initiatives, have all contributed to a heated debate characterised by conflicting moral standpoints.

In Australia, too, the constitutional position is complex, with the powers of the federal Parliament remaining uncertain, as is the potential relationship between the powers of the federal and State Parliaments in this context. A number of key propositions can be set out:

- (a) It is unclear whether the marriage power in the Australian Constitution provides the federal Parliament with the power to legislate in respect to same-sex marriage, either permitting or prohibiting such marriages.
- (b) If the High Court was to find that the marriage power did not provide the federal Parliament with the power to legislate in respect to same-sex marriage, then the field would be left open to State law.
- (c) On the other hand, if the issue identified in (a) remained undecided and the federal *Marriage Act 1961* remained in its current form, the constitutional validity of a State law providing for same-sex marriage would be in doubt:
 - The basis for a challenge to such a law would be that the law is inconsistent with the federal *Marriage Act* and is therefore invalid under section 109 of the Australian Constitution.
 - In dealing with this issue, the High Court would look at whether the *Marriage Act* was intended to cover the entire field of marriage, or whether it was only intended to cover marriage between persons of different sex. It may be that, because the federal *Marriage Act* expressly defines marriage in heterosexual terms, it limits the operation of the Act, and its intention to cover the field.
 - The High Court may also be asked to consider the issue identified in (a) because if the Federal Parliament does not have the power to legislate in relation to same-sex marriage, then a challenge based on inconsistency must fail.

(d) It is likely that a State law providing for same-sex (and other) civil unions would be constitutionally valid, even where these civil unions are the functional equivalent of marriage. Commentators argue that such laws would not be inconsistent with the *Marriage Act 1961*.

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- ¹ L McKenny, 'Same-sex marriage will lead to polygamy, says Jensen' [SMH](#), 11-12 June 2011, p 5.
- ² Australian Marriage Equality, [Marriage equality and public opinion](#), Fact Sheet.
- ³ [CPD \(HR\)](#), 15 November 2010, p 2286.
- ⁴ M McKenna and R Barrett, 'Labor tells Julia Gillard: back same-sex marriage' [The Australian](#), 20 June 2011. It was reported on 26 June 2011 that the Western Australian Labor Party had passed a motion supporting same-sex marriage – 'WA Labor backs same-sex marriage', [SMH](#), 26 June 2011. For further comment see – A Patty and E Han, 'Pressure on Gillard to legalise gay marriage', [SMH](#), 29 June 2011.
- ⁵ ABS, [Couples in Australia, 4102.0 – Australian Social Trends](#), March 2009,
- ⁶ K Anthony and T Drabsch, [Legal Recognition of Same-Sex Relationships](#), NSW Parliamentary Library Research Service, Briefing Paper 9/2006.
- ⁷ HREOC, [Same-Sex: Same Entitlements](#), Final Report, 2007, p 1.
- ⁸ [NSWPD](#), 23 April 2010, p 22240.
- ⁹ Clover Moore MP, 'NSW Civil Union Legislation', [Letter to Bob Debus, NSW Attorney General](#), 17 January 2006.
- ¹⁰ For an analysis of the ACT law and the federal Government's reaction to it see - A Zanghellini, 'Marriage and Civil Unions: Legal and Moral Questions' (2007) 35 *Federal Law Review* 265.
- ¹¹ Parliament of Australia, Senate Legal and Constitutional Affairs Legislation Committee [Australian Capital Territory \(Self-Government\) Amendment \(Disallowance and Amendment Power of the Commonwealth\) Bill 2010](#), May 2011, para 3.43. On the specific issue of same-sex marriage, Professor George Williams informed the Committee that: "this bill will not affect the current power of the territory assembly to make laws on the topic of same-sex marriage should they so wish. That is a current power that the assembly has. It is not prevented by section 51 of the Constitution, which provides for concurrent powers with the states and territories. That is a power that could be exercised, of course subject to disallowance or inconsistency or the like, by the territories or the states if they wished to do so. This bill would not alter that".
- ¹² Mexico City was the first city in Latin America to approve same-sex marriage by modifying the relevant provisions of the Civil Code in 2009. Marriage was redefined as "the free union between two people". In response to a challenge launched by the national prosecutor, the Mexican Supreme Court, by an 8 to 2 majority, has upheld the reform: *Public Law*, April 2011, pp 435-436.
- ¹³ [Barbeau v British Columbia \(AG\)](#) (2003) BCCA 251 (an alternative citation is *Egale v Canada* (2003) 225 DLR (4th) 472 (BCCA)).
- ¹⁴ [Halpern](#) (2003) 225 DLR (4th) 429.
- ¹⁵ [Hendricks v Quebec](#) [2002] RJQ 2506 (Quebec SC).
- ¹⁶ [Reference re Same-Sex Marriage](#) 2004 SCC 79, para 18.
- ¹⁷ [Reference re Same-Sex Marriage](#) 2004 SCC 79, paras 21-25.
- ¹⁸ The first amendment would have changed the provincial *Marriage Act* so as to allow a marriage commissioner appointed on or before November 5, 2004 to decline to solemnize a marriage if performing the ceremony would be contrary to his or her religious beliefs. The second amendment (an alternative to the first) would allow every commissioner, regardless of his or her date of appointment, to decline to solemnize a marriage if doing so would be contrary to his or her religious beliefs.
- ¹⁹ [Human Rights Law Centre](#) website, accessed 22 June 2011.
- ²⁰ KP Miller, *Direct Democracy and the Courts*, Cambridge University Press 2009, p 206.
- ²¹ Miller, n 20, p 207.
- ²² Miller, n 20, pp 209-10.
- ²³ *The Book of the States*, n 37, p 341.

- ²⁴ 'New York decision sparks hope for gay marriage', [SMH](#), 28 June 2011.
- ²⁵ The District of Columbia legalised same-sex marriage on December 18, 2009, when mayor Adrian Fenty signed a bill passed by the Council of the District of Columbia on December 15, 2009. A [timeline](#) can be found on Wikipedia.
- ²⁶ Human Rights Campaign, [Statewide Marriage Prohibitions](#), January 2010.
- ²⁷ 'Experts say Marriage Equality Act could answer legal questions', [WAMC New York News](#), 27 June 2011. The Act includes a religious exemption, stating that a refusal by a clergyman or minister to solemnize any marriage shall not create a civil claim or cause of action. In effect, the Act relates specifically to civil marriage and not religious marriage.
- ²⁸ *Andersen v King Country*, 158 Wn 2d 1 (2006).
- ²⁹ *Lewis v Harris*, 188 NJ 415 (2006).
- ³⁰ *Conaway v Deane*, 401 Md 219 (2007).
- ³¹ This summary is based on the judgment of Justice Cady (for the Supreme Court of Iowa) in [Varnum v Brien, 763 N.W. 2d 862 \(Ia. 2009\)](#), pp 19-22. There it was noted that the US Supreme Court had yet to decide which level of scrutiny applies to legislative classifications based on "sexual orientation", which was found to be the relevant statutory classification under the Iowa law (p 32).
- ³² [Hernandez and Robles](#) 855 NE 2nd 1 (NY 2006), para 2.
- ³³ [Hernandez and Robles](#) 855 NE 2nd 1 (NY 2006), paras 9-10.
- ³⁴ [Hernandez and Robles](#) 855 NE 2nd 1 (NY 2006), para 11.
- ³⁵ The Court noted that in enforcing the Californian Constitution's equal protection clause, past Californian cases had not applied an intermediate scrutiny standard of review to classifications involving any suspect (or quasi-suspect) characteristic: "Unlike decisions applying the federal equal protection clause, California cases continue to review, under strict scrutiny rather than intermediate scrutiny, those statutes that impose differential treatment on the basis of sex or gender" - [In re Marriage Cases](#), 43 Cal. 4th 757 (2008), p 100.
- ³⁶ [In re Marriage Cases](#), 43 Cal. 4th 757 (2008), p 84
- ³⁷ *The Book of the States*, 2009 edition, Volume 41, The Council of State Governments, p 339.
- ³⁸ [Perry v Schwarzenegger](#), 704 F. Supp 2nd 921 (N.D. Cal 2010), p 24.
- ³⁹ [Perry v Schwarzenegger](#), 14 June 2011 (N.D. Cal 2011). Justice Ware said in conclusion: "The presumption that Judge Walker, by virtue of being in a same-sex relationship, had a desire to be married that rendered him incapable of making an impartial decision, is as warrantless as the presumption that a female judge is incapable of being impartial in a case in which women seek legal relief. On the contrary: it is reasonable to presume that a female judge or a judge in a same-sex relationship is capable of rising above any personal predisposition and deciding such a case on the merits".
- ⁴⁰ I Lovett, 'Gay judge's ruling on same-sex marriage upheld in California', [SMH](#), 16 June 2011.
- ⁴¹ See for example - J Schwartz, 'A California bankruptcy court rejects US law barring same-sex marriage', [The New York Times](#), 14 June 2011; [In re Balas and Morales](#), 13 June 2011 (US Bankruptcy Court Central District of California).
- ⁴² 'International survey', *Public Law* [April 2011], p 439.
- ⁴³ [Varnum v Brien, 763 N.W. 2d 862 \(Ia. 2009\)](#), p 63.
- ⁴⁴ 'Reasoning behind France's rejection of same sex marriage published in English', [Lifesite News](#), March 2006.
- ⁴⁵ 'France court upholds same-sex marriage ban', [Jurist](#), 28 January 2011.
- ⁴⁶ 'French gay marriage ban upheld by constitutional court', [BBCNews](#), 28 January 2011.
- ⁴⁷ French Constitutional Council, [Decision no 2010-92 of 28 January 2011](#), Mrs Corrine C et al [Prohibition of marriage between persons of the same sex]. The original ruling in French can be found [here](#).
- ⁴⁸ 'France rejects marriage bill', [Herald Sun](#), 15 June 2011, p 12.
- ⁴⁹ [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010, para 53. It may be noted that the United Kingdom intervened on the side of Austria.
- ⁵⁰ [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010., para 55. For an overview of the case see – 'Strasbourg court rules that states are not obliged to allow gay marriage', [Guardian.co.uk](#), 24 June 2011. The article noted that: "Interestingly, the court also looked at the Charter of Fundamental Rights of the European Union (27 members) which includes in its article 9, a

right to marry without a reference to men or women, but with a reference to national law in accordance with which that right should be guaranteed. Thus, article 9 of the Charter, leaves the decision to the states whether or not to recognise same-sex marriages (without obliging them to do so)".

- 51 [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010,, para 61.
- 52 [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010,, para 108.
- 53 [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010,, para 105.
- 54 [Schalk and Kopf v Austria](#) 30141/04 ECHR 2010,, para 28
- 55 J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, pp 608-611.
- 56 *Matrimonial Causes Act 1873* (NSW). For an account of this area of the law see – H Finlay, *To Have But Not to Hold*, The Federation Press, 2005.
- 57 *Marriage with Deceased Wife's Sister Legalizing Act 1875* (NSW). All the Australian colonies passed such legislation in the 1870s.
- 58 But note that suggestions for defining marriage were considered during the debate for the federal Marriage Bill 1961: Commonwealth Parliamentary Library, [Marriage Legislation Amendment Bill 2004](#), Bills Digest No 155, 2003-04, p 2.
- 59 Commonwealth Parliamentary Library, [Marriage Legislation Amendment Bill 2004](#), Bills Digest No 155, 2003-04, p 2.
- 60 *CPD (HR)*, 27 May 2004, p 29356.
- 61 *CPD (HR)*, 27 May 2004, p 29356.
- 62 *CPD (HR)*, 24 June 2004, p 31459.
- 63 Commonwealth Parliamentary Library, [Marriage Amendment Bill 2004](#), Bills Digest No 5, 2003-04.
- 64 [CPD \(Senate\)](#), 25 June 2004, p 25181. Note the Hansard incorporates 24 and 25 June
- 65 [CPD \(Senate\)](#), 13 August 2004, p 26503. Note the Hansard incorporates 12 and 13 August.
- 66 [CPD \(Senate\)](#), 25 February 2009, p 1234.
- 67 Parliament of Australia, [Senate Legal and Constitutional Affairs Legislation Committee, Marriage Equality Amendment Bill 2009](#), 26 November 2009.
- 68 Same-Sex (Celebrant and Registration) Bill [2008](#) and [2010](#).
- 69 Same-Sex (Dissolution and Annulment) Bills [2008](#) and [2010](#).
- 70 B Merhab, 'NSW Greens push for gay marriage', [AAP](#), 18 February 2011.
- 71 [SAPD \(LC\)](#), 9 February 2011, pp 1902-1907.
- 72 [SAPD \(LC\)](#), 9 February 2011, p 1912.
- 73 [SAPD \(LC\)](#), 23 February 2011, p 2048.
- 74 L Zines, *The High Court and the Constitution*, 5th ed, Ferderation Press 2008, p 21.
- 75 Zines, n 74, p 21. Zines quotes Windeyer J as saying (in part), "We must not in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900".
- 76 D Meagher, [The marriage power and same sex unions](#), *Constitutional Law Conference, Sydney*, 19 February 2010.
- 77 For an earlier formulation of this argument see: D Meagher, 'The times they are a'changin? – can the Commonwealth parliament legislate for same-sex marriages?' (2003) 17 *Australian Journal of Family Law* 134-154.
- 78 G Lindell, 'Constitutional issues regarding same-sex marriage: a comparative survey – North America and Australasia' (2008) 30 [Sydney Law Review](#) 27 at 39.
- 79 Lindell, n 78, p 40.
- 80 Similar views were expressed by McHugh J (dissenting) in *Singh v Commonwealth* (2004) 222 CLR 322 at 344 (Fn 73). In that case it was the federal head of power in respect to "aliens" (s 51 (xix)) that was under consideration, in terms of its meaning at the time of Federation and currently. For an analysis of the statement in *Re Wakim* and its implications for same-sex marriage see – A Zanghellini, 'Marriage and Civil Unions: Legal and Moral Questions' (2007) 35 *Federal Law Review* 265, 274-275. The implication seems to be that the core meaning or connotation of the term "marriage" may be more abstract than implied by its denotation as at 1900 "and may include any different-sex requirement at all".
- 81 *Singh v Commonwealth* (2004) 222 CLR 322 at 347-351 where McHugh J discusses the different approaches to constitutional interpretation.

- ⁸² Extending this line of reasoning, Professor Jeffrey Goldsworthy has suggested that a "non-literal, purposive approach to interpretation" might apply, writing: "If, because of developments unanticipated by the founders, the words of the Constitution fail to give effect to their intended purpose, and the words can be expanded or contracted in a simple and obvious way in order to remedy the failure, then a court might be justified in doing so". The example he gives is the expansion of the US Congress' power "To raise and support Armies" and "To provide and maintain a Navy" to include the air force. An analogous case, Goldsworthy suggests, can be made for the Commonwealth parliament's power to pass legislation recognising same-sex marriages. Such marriages were not purposively excluded from the marriage power in 1900. Rather, the possibility was simply not anticipated, any more than the Framers of the US Constitution anticipated the creation of an air force. Further, should the States enact same-sex marriage laws, then marriage would have different meanings within Australia, thereby undermining the intention of establishing uniform national laws. See Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677, at 699-700.
- ⁸³ Parliament of Australia, [Senate Legal and Constitutional Affairs Legislation Committee, Marriage Equality Amendment Bill 2009](#), 26 November 2009, paras 2.13-2.16.
- ⁸⁴ G Williams, 'Could the States legalise same-sex marriage', [SMH](#), 28 September 2010.
- ⁸⁵ G Williams, 'Advice regarding the proposed Same-Sex Marriage Act' (October 2006) 9(2) *Constitutional Law and Policy Review* 21-24.
- ⁸⁶ G Williams, 'Could the States legalise same-sex marriage', [SMH](#), 28 September 2010.
- ⁸⁷ G 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)' (October 2006) 9(2) *Constitutional Law and Policy Review* 25-36.
- ⁸⁸ G Lindell, n 78, at 43-44.
- ⁸⁹ Lindell, n 78, p 44.
- ⁹⁰ Meagher, n 76, p 13.