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THE MARRIAGE AMENDMENT ACT: CAN AUSTRALIA PROHIBIT SAME-SEX MARRIAGE?

Katy A. King[†]

Abstract: Both the United States and Australia have federal legislation, the Defense of Marriage Act¹ and the Marriage Amendment Act 2004,² that defines marriage as a union between a man and a woman. Australia has an express provision in its constitution granting Parliament the authority to pass laws on the subject of marriage. The United States, however, has no such constitutional provision. Consequently, Australia's express constitutional provision may lead the High Court of Australia to rule that the Marriage Amendment Act 2004 is constitutional, which would likely preclude Australia's states and territories from passing local same-sex marriage acts. This is fundamentally different than in the United States, where powers regarding marriage are reserved to the states. Therefore, even if the U.S. Supreme Court upholds the Defense of Marriage Act, laws that authorize same-sex marriage remain valid in states such as Massachusetts.³ Passing a law legalizing same-sex marriage in an Australian state, however, may force the issue before the High Court. A ruling upholding the constitutionality of the law may give Parliament the incentive to use its expressly granted constitutional authority to tighten restrictions on marriage and marriage-like entities even further. Therefore, same-sex proponents in Australia should approach the issue more gingerly than same-sex proponents in the United States. Instead of attempting to pass state same-sex marriage provisions and forcing a decision before the Australian High Court, supporters of commonwealth or state same-sex marriage laws should indirectly pressure Parliament to overturn the Marriage Amendment Act. In addition, they should continue to push for domestic-partnership protections at the state and commonwealth level.

I. INTRODUCTION

February 2004 was an exhilarating month for gay and lesbian couples in both Australia and the United States. On February 12, Mayor Gavin Newsom of San Francisco, California, authorized the city clerk to begin issuing marriage licenses to same-sex couples.⁴ Similarly, on February 15, approximately three hundred gay and lesbian couples tied the knot in Melbourne, Australia, in what organizers claimed was the world's largest same-sex commitment ceremony.⁵ On February 22, two thousand people crammed into San Francisco's Hyatt Regency for a giant wedding reception

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¹ 28 U.S.C. § 1738C, 1 U.S.C. § 7 (2000).

² No. 126, sched. 1 (Austl.).

³ See, e.g., Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457, 466 (1998) (discussing, in part, that DOMA did not intend to change state law).

⁴ *182 Days*, S.F. CHRON., Aug. 13, 2004, at A16.

⁵ *Same-Sex Wedding Fever*, SYDNEY MORNING HERALD, Feb. 16, 2004, available at <http://www.smh.com.au/articles/2004/02/15/1076779837706.html>.

honoring the thousands of same-sex couples that had been married over the past eleven days.⁶

What started as a flurry of hope and an attempt to draw attention to the lack of legal recognition for same-sex couples⁷ ended with disappointment for many. On February 24, President George W. Bush called for an amendment to the U.S. Constitution to ban same-sex marriage.⁸ On May 27, Prime Minister John Howard introduced legislation into Parliament to ban same-sex marriage in Australia.⁹ While on July 15 the U.S. Senate defeated the Bush administration's attempt to ban same-sex marriage, on August 12, the California Supreme Court voided the 3,955 marriages that had taken place in San Francisco during the previous February and March.¹⁰ On August 13, Australia's Commonwealth Parliament approved legislation defining marriage as a union of a man and a woman.¹¹

Both the United States and Australia have federal legislation defining marriage as a union between a man and a woman. In 1996, the Defense of Marriage Act ("DOMA") became law in the United States.¹² DOMA both defines marriage as between only a man and a woman for federal purposes, and asserts that no state shall be required to recognize same-sex marriages from other states.¹³ Similarly, in 2004, the Commonwealth Parliament passed the Marriage Amendment Act 2004 ("Marriage Amendment Act"). The Marriage Amendment Act inserted language into the Marriage Act 1961 defining marriage as a union between a man and a woman.¹⁴ While the plain language of these laws appears similar, the U.S. Constitution differs from the Australian Constitution. President Bush desired a constitutional amendment to ban same-sex marriage at the federal and state levels, whereas Australia's constitution already gives Parliament the express authority to pass binding laws on the topic of marriage. This difference may affect the impact of federal legislation defining marriage.

The actual effects of these two laws are similar in many ways. In Australia, states can allow de facto relationships that grant unmarried couples state benefits equal to those granted married couples; states also

⁶ See *182 Days*, *supra* note 4.

⁷ See *Same-Sex Wedding Fever*, *supra* note 5.

⁸ See *182 Days*, *supra* note 4.

⁹ *Stand Up for Our Rights, PM Plans to Ban Same Sex Marriage*, NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES, available at <http://www.nswccl.org.au/issues/glb.php> (last visited Oct. 9, 2006).

¹⁰ See *182 Days*, *supra* note 4.

¹¹ *Coalition, Labor Pass Same-Sex Marriage Ban*, AUSTRALIA BROADCASTING CORPORATION ONLINE, Aug. 13, 2004, available at <http://www.abc.net.au/news/newsitems/200408/s1176303.htm>.

¹² 28 U.S.C. § 1738C, 1 U.S.C. § 7 (2000).

¹³ *Id.*

¹⁴ No. 126, sched. 1 (Austl.)

potentially can pass civil-union laws.¹⁵ These couples, however, will be excluded from federal laws that cover superannuation,¹⁶ immigration, and taxation.¹⁷ There is debate over whether Australian states, like U.S. states, have the authority to pass same-sex marriage laws.¹⁸ In the United States, states can authorize same-sex marriage, but those couples are denied federal benefits to which other couples are entitled.¹⁹

Due to differences between the two countries' constitutions, however, the strategy that same-sex marriage proponents use to attempt to legalize same-sex marriage should be different. In the United States, a ruling upholding the legality of DOMA from the Supreme Court will continue to limit federal benefits for same-sex couples and the right to have a same-sex marriage recognized in another state. DOMA does not, and cannot, prevent states like Massachusetts from legalizing same-sex marriage; the U.S. Constitution does not expressly authorize Congress to pass laws regarding marriage. On the other hand, because the Australian constitution *does* expressly authorize Parliament to pass laws regarding marriage, it is riskier for proponents of same-sex marriage in Australia to force a decision by the High Court; a judicial determination that the Marriage Amendment Act is

¹⁵ Donna Cooper, *For Richer For Poorer, In Sickness and In Health: Should Australia Embrace Same-Sex Marriage?*, AUSTRALIAN J. FAM. L. Lexis 7, *22 (2005) (discussing Queensland's Discrimination Law Amendment Act (2002) (Austl.) that includes same-sex partners in the definition of de facto partners. *Id.* In addition, Cooper declares that the "2004 amendments to the Marriage Act occurred at a time when there had been strong legislative trends throughout Australia, at both Commonwealth and State and Territory level, to develop to same-sex couples the same rights as married couples in many other areas of the law." *Id.* at *19. In 2006, the Australian Capital Territory ("ACT") attempted to pass a civil-union law. *See, e.g.,* Michael Perry, *Australian Territory to Allow Gay Civil Marriages*, REUTERS, Mar. 29, 2006, available at http://today.reuters.co.uk/news/NewsArticle.aspx?type=worldNews&storyID=2006-03-29T042531Z_01_SYD21282_RTRUKOC_0_UK-AUSTRALIA-HOMOSEXUAL.xml. ACT proposed a civil-union law that would have given same-sex couples the same rights in the territory as married couples. However, the act would not have, affected national laws that govern taxation, superannuation, and health care. *Id.* In June 2006, however, the governor-general struck down ACT's civil-union legislation on the advice of Prime Minister Howard. *No Wedding Bells: John Howard Blocks Canberra's Gay Marriages*, ECONOMIST, June 15, 2006, available at http://www.economist.com/PrinterFriendly.cfm?story_id=7067408. At the time of publication of this comment, it is unclear what will happen next in the conflict between the commonwealth and the states and territories.

¹⁶ Superannuation in Australia is similar to the United States' Social Security program. A mandatory contribution from workers' wages to a superannuation scheme provides for workers upon retirement. It also provides for their dependents upon death. Jenny Millbank & Kathy Sant, *A Bride in her Every-Day Clothes: Same Sex Relationship Recognition in NSW*, 22 SYDNEY L. REV. 181, 213 (2000).

¹⁷ *Id.*

¹⁸ *See, e.g.,* Cooper, *supra* note 15 (discussing state bills in Tasmania and New South Wales that, if passed, purport to legalize same-sex marriage); Rodney Croome, *Marching Under the Banner of Marriage*, GREEN LEFT WEEKLY, May 11, 2005 (arguing that the Marriage Amendment Act clearly indicates that the federal marriage law deals only with different-sex marriage, leaving open the door for states to pass non-contradictory same-sex marriage laws that would operate in a different field).

¹⁹ Andrew Koppelman, *Dumb And Doma: Why the Defense of Marriage Act Is Unconstitutional*, 85 IOWA L. REV. 1, 3-4 (1997).

constitutional would allow Parliament to exercise its express constitutional authority to regulate marriage at both the federal and state levels. This could result in Australian states being precluded from passing laws authorizing equality for same-sex couples.

For same-sex marriage proponents in Australia, a ruling upholding the legality of the Marriage Amendment Act from the High Court would not only eliminate same-sex marriage at the commonwealth level, but also eliminate same-sex marriage at the state level. Section 109 of the Australian Constitution likely prevents individual states and territories from legalizing same-sex marriage, as commonwealth legislation supersedes any conflicting state legislation.²⁰ A ruling upholding the commonwealth's exclusive jurisdiction on marriage could lead to legislation that even further curtails equality of same-sex couples. In December 2005, Prime Minister Howard expressed his views on same-sex partnerships, declaring, "I believe very strongly that marriage is exclusively a union for life of a man and a woman to the exclusion of others. That's the common understanding of marriage in the Judeo-Christian tradition, and I would be opposed to the recognition of civil unions."²¹ The views of highly influential politicians such as the prime minister, in addition to a High Court ruling upholding the prohibition on same-sex marriage, could lead to an even greater push for legislation restricting the rights of same-sex couples.

If the Marriage Amendment Act is challenged, some arguments suggest that the High Court would strike down the act as a violation of the Australian Constitution. Other arguments suggest, however, that the court would uphold the legislation.²² Based on this uncertainty, Australians interested in promoting same-sex marriage should lobby Parliament to amend the marriage definition and continue working to strengthen state and commonwealth domestic-partnership laws. Challenging the Marriage Amendment Act directly through the passage of potentially conflicting state laws might trigger litigation resulting in an unfavorable judicial determination by the High Court.

This comment analyzes different approaches to regulating marriage in the United States and Australia and assesses the similarities and differences of federal legislation and its effect at the state level. Section II lays out the

²⁰ AUSTL. CONST. § 109. "Inconsistency of laws – 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." *Id.*

²¹ *Australians Back Same-Sex Civil Unions*, ANGUS REID GLOBAL SCAN: POLLS AND RESEARCH, February 20, 2006, available at <http://www.angus-reid.com/polls/index.cfm/fuseaction/viewItem/itemID/10947>.

²² See *infra* Part III.

background and history of DOMA in the United States and the Marriage Amendment Act in Australia. Section III analyzes the likelihood the High Court of Australia would uphold the Marriage Amendment Act if the act were attacked on its constitutionality. Section IV argues that if the High Court upholds the legality of the Marriage Amendment Act, then the High Court likely also will rule that the law is binding on the states; state same-sex legislation will be struck down as conflicting with commonwealth legislation. Section V proposes that same-sex marriage proponents in Australia should take a tactically different approach than same-sex marriage proponents in the United States due to the differences in the constitutions and the ramifications of an adverse court decision. Instead of pushing for a state same-sex marriage law that could conflict with the commonwealth law and trigger a restrictive High Court ruling, proponents of same-sex marriage in Australia should continue to advocate for civil unions as well as lobby Parliament and high-powered public officers, such as the prime minister, for a reversal of the Marriage Amendment Act.

II. BACKGROUND: THE SCOPE OF DOMA UNDER THE U.S. CONSTITUTION VERSUS THE POTENTIAL SCOPE OF THE MARRIAGE AMENDMENT ACT UNDER THE AUSTRALIAN CONSTITUTION

The scope of DOMA within the United States differs from the scope of the Marriage Amendment Act in Australia. In the United States, DOMA applies to marriage only for federal purposes; states retain the power to regulate marriage for state purposes. In Australia, however, Parliament has the express constitutional authority to pass laws regulating marriage.²³ As a result, the Marriage Amendment Act may be binding on the states as well as the commonwealth.

A. *The U.S. Congress Likely Does Not Have the Authority to Expand DOMA's Scope to Restrict States' Ability to Pass Same-Sex Marriage Laws*

In 1996, the U.S. Congress passed DOMA, which has two main functions. First, DOMA defines the word *marriage* as a legal union between only a man and a woman for purposes of determining the meaning of any Act of Congress.²⁴ Secondly, DOMA gives authority to all states of the United States to refuse to give effect to any record or proceeding from

²³ AUSTL. CONST. § 51(xxi).

²⁴ 1 U.S.C § 7 (2000).

another state respecting a relationship between persons of the same sex.²⁵ DOMA does not attempt to define marriage as the union between only a man and a woman for nonfederal purposes, i.e., it does not attempt to demand that the states also define marriage as an exclusively heterosexual union. The recognition that regulation of domestic relations belongs exclusively to the states shapes the content and structure of family law in the United States.²⁶ Therefore, in order for the U.S. government to bind states to a certain definition of marriage, there would likely first need to be a constitutional amendment either granting Congress the authority to pass such legislation or, in the alternative, stripping state courts of the power to create or extend legal status and benefits for same-sex partners.²⁷

1. The U.S. Congress Has Limited Power to Pass Laws Regulating Marriage

Although the issue is still debated, the U.S. Congress likely does not have the authority to mandate the definition of marriage for state purposes. The U.S. Supreme Court has recognized that the “whole subject of the domestic relations of a husband and wife, parent and child, belongs to the laws of the states, and not the laws of the United States.”²⁸ On the rare occasions when state family law has conflicted with a federal statute, the Supreme Court has limited review under the Supremacy Clause²⁹ to determine whether Congress has “positively required by direct enactment” that state law be preempted.³⁰ A state family law must do “major damage” to “clear and substantial” federal interests before the Court will invalidate it.³¹

²⁵ 28 U.S.C. § 1738C (2000).

²⁶ See, e.g., *In re Burrus*, 136 U.S. 586, 593-94 (1890); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

²⁷ Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137 (2004).

²⁸ *Burrus*, 136 U.S. at 593-94.

²⁹ U.S. CONST. art. 6, § 2. “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” *Id.*

³⁰ *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1994) (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77).

³¹ *Hisquierdo*, 439 U.S. at 581 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)). *But see* Koppelman, *supra* note 19, at n.25. Koppelman argues that the *Hisquierdo* test has never been described by the Court as a constitutional limitation on Congress, but instead as merely a guide to statutory construction. The “major damage” prong has been toothless and has had little influence on even the interpretation of any federal statute. However, if the law’s purpose is illegitimate, “the law is already invalid.” *Id.*

No express authority exists under the U.S. Constitution for Congress to pass laws regulating marriage.³² The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.³³ For example, in striking down the civil-remedy provision of the Violence Against Women Act,³⁴ the Supreme Court noted that “the Constitution requires a distinction between what is truly national and what is truly local.”³⁵ Reiterating that every law passed by Congress must be based on one or more of its powers enumerated in the Constitution,³⁶ the Supreme Court declared that if the Court accepted the petitioner’s reasoning that Congress had the authority under the Commerce Clause³⁷ to legislate on gender-motivated violence, then that same rationale apply to family law issues such as marriage, divorce, and childrearing.³⁸ In declaring those arenas “areas of traditional state regulation,”³⁹ the Court held that the civil-remedy provision of the Violence Against Women Act exceeded the scope of Congress’ authority to pass legislation.⁴⁰

Nevertheless, the validity of the assertion that states retain plenary governmental authority to regulate family matters is not entirely certain.⁴¹ Federal laws increasingly regulate family relations.⁴² Without a constitutional amendment, however, the Court almost certainly will determine that powers regarding marriage are reserved to the states. Proponents of a federal law defining marriage as a union between only a man and a woman call for a constitutional amendment, rather than mere legislation.⁴³ In 2002, the U.S. House of Representatives introduced the

³² See U.S. CONST. art. 1, § 8.

³³ U.S. CONST. amend. X.

³⁴ 42 U.S.C. §13981 (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

³⁵ *Morrison*, 529 U.S. at 617-18.

³⁶ *Id.* at 607 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written”)).

³⁷ Under the Commerce Clause of the U.S. Constitution, Congress shall have the authority “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. CONST. art. 1, § 8.

³⁸ *Morrison*, 529 U.S. at 615-16.

³⁹ *Id.* at 615.

⁴⁰ *Id.* at 627.

⁴¹ See Wardle, *supra* note 27, at 168-71.

⁴² Examples of the federalization of family law include regulation of child support, abortion, family planning and birth control, foster care and adoption, health insurance for dependents, family violence, family leave policies, and parental rights. Linda Henry Elrod, *Epilogue: Of Families, Federalization, and a Quest for Policy*, 33 FAM. L. Q. 843, 847-48 (1999). See also Norman N. Robbins, *The “Feds” Are Still Coming*, 31 MICH. FAM. L.J. 4 (2002).

⁴³ Wardle, *supra* note 27, at 139. “The choice is clear—either in the next dozen years there will be a constitutional rule protecting the institution of conjugal marriage, or there will be a constitutional rule

Federal Marriage Amendment in an attempt to amend the U.S. Constitution to define marriage as the union between only a man and a woman.⁴⁴ The same bill was introduced into the Senate the following year.⁴⁵ While neither bill has passed, the fact that opponents of same-sex marriage believe they need to amend the U.S. Constitution strongly suggests that there is no existing constitutional authority for Congress to pass laws defining marriage at the state level.

2. *The Scope of DOMA in the United States Does Not Include Mandating That States Define Marriage as Between a Man and a Woman*

Despite the jurisprudence indicating that family arrangements are a “peculiarly state province,”⁴⁶ DOMA was passed by the U.S. Congress in 1996.⁴⁷ DOMA, however, only defines marriage for federal purposes; it does not attempt to require states to define marriage as between only a man and a woman.⁴⁸

DOMA has two parts, “each designed to perform a different function.”⁴⁹ One part, 1 U.S.C. § 7, declares that “in determining the meaning of any Act of Congress . . . the word ‘marriage’ means only a legal union between one man and one woman as husband and wife. . . .”⁵⁰ The second part, 28 U.S.C. § 1738C, asserts that no state “shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State. . . .”⁵¹ This means that marriage is defined as between a man and a woman, only for federal purposes, in the determination of any benefit, privilege, or obligation attributed to marriage through legislation passed by the U.S. Congress.⁵² In

forcing all states to create or to recognize—and effectively leading to domestic approval of—same-sex marriage. The choice is inevitable. There is, and will be, no middle ground.” *Id.* at 198.

⁴⁴ H.R.J. Res. 93, 107th Cong. (2002). The full text of the proposed bill: “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” *Id.*

⁴⁵ S.J. Res. 26, 108th Cong. (2003).

⁴⁶ *United States v. Yazell*, 382 U.S. 341, 353 (1966).

⁴⁷ 28 U.S.C. § 1738C, 1 U.S.C § 7 (2000).

⁴⁸ *Id.*

⁴⁹ Mark P. Strasser, “Defending” Marriage in Light of the Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster After Lawrence, 38 CREIGHTON L. REV. 421, 421 (2005).

⁵⁰ 1 U.S.C. § 7.

⁵¹ 28 U.S.C. § 1738C.

⁵² See Strasser, *supra* note 49, at 421-22, 436-37.

addition, DOMA allows states to refuse to honor same-sex marriages from other states, negating any Full Faith and Credit Clause claim for this issue.⁵³

Since the passage of DOMA, many commentators have argued that the U.S. Supreme Court could (or should) rule that DOMA exceeds Congress's power to legislate,⁵⁴ violates the Due Process Clause of the Constitution, and/or violates the Full Faith and Credit Clause of the Constitution.⁵⁵ Unless the Supreme Court itself declares DOMA unconstitutional, however, lower courts will likely continue to uphold its key provisions.⁵⁶ As of October 2006, arguments regarding the constitutionality of DOMA have not been heard at the Supreme Court level.

However, even a ruling from the U.S. Supreme Court upholding the constitutionality of DOMA would not affect the ability of states to legislate and enforce same-sex marriage laws within that state. In 2003, the Supreme Judicial Court of Massachusetts stated that the U.S. Supreme Court has left open as a matter of federal law whether states have the authority to bar same-sex couples from civil marriage.⁵⁷ Even if the U.S. Constitution would allow a state to prohibit same-sex marriage, the Massachusetts court determined in *Goodridge v. Department of Public Health*⁵⁸ that its own state constitution "is, if anything, more protective of individual liberty and equality than the Federal Constitution . . . [and] may demand broader protection for fundamental rights. . . ."⁵⁹ After careful analysis, the court held that "barring an individual from the protections, benefits, and

⁵³ 28 U.S.C. §1738C (2000); *see generally* Strasser, *supra* note 3.

⁵⁴ *See* Strasser, *supra* note 49, at 439. Strasser argues that DOMA is not merely defining who will receive federal marriage benefits but instead is trying to modify state regulation of family law. Congress is overstepping its authority if it attempts to define marriage to determine who qualifies for federal benefits and allows states to define marriage for state purposes. The scope of a federal right is a federal question, but its content still may be determined by state law. State law is especially important to apply "where a [federal] statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *Id.* (citing *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956)). *But see Koppelman*, *supra* note 19, at 4 n.25. Koppelman asserts that "[o]nly the federal incidents of marriage are withheld as a result of DOMA's definition." *Id.*

⁵⁵ *See* Koppelman, *supra* note 19; Strasser, *supra* note 49; Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507 (2005).

⁵⁶ *See, e.g.,* *Wilson v. Ake*, 354 F.Supp. 2d 1298 (2005). The United States District Court, M.D. Florida, Tampa Division, dismissed plaintiff's argument that the U.S. Supreme Court is "likely to declare that same-sex marriage is a fundamental right that is protected by the Constitution." *Id.* at 1309. The district court stated that it will not create such a fundamental right before the Supreme Court revisits the issue of same-sex marriage and asserted that the higher courts have not acknowledged or established a constitutional right to enter into same-sex marriage. *Id.* The district court also held that its role is to follow precedent of the 11th Circuit Court of Appeals and the U.S. Supreme Court, not to overturn precedent by striking down DOMA. *Id.*

⁵⁷ *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (2003).

⁵⁸ *Id.*

⁵⁹ *Id.* at 313.

obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”⁶⁰

Because Congress currently has no authority to prohibit a state from passing laws affecting same-sex marriage, the federal government cannot pass legislation to stop Massachusetts from granting such marriages without passing a constitutional amendment. DOMA does, however, allow other states to refuse recognition of same-sex marriages from Massachusetts. In 2005, a federal court in Florida upheld the State’s refusal to recognize a Massachusetts marriage license.⁶¹ Even within Massachusetts, however, the impact of DOMA on a same-sex married couple is harsh “since at a stroke it deprives them of all the federal benefits to which other married couples are entitled.”⁶² Under DOMA, same-sex spouses are unable to file federal joint tax returns;⁶³ are excluded from the federal employees’ health-benefits program⁶⁴ and the federal employees’ life-insurance program;⁶⁵ are not entitled as widows or widowers to compensation for the work-related death of a federal employee;⁶⁶ and are unable to receive spousal benefits under the Social Security Act’s old age, survivors, and disability-insurance program.⁶⁷ In 1997, the General Accounting Office found that over one thousand federal laws contained benefits, rights, and privileges contingent on marital status.⁶⁸ DOMA excludes same-sex couples from the protections and benefits of these laws.⁶⁹

On the other hand, same-sex married couples in Massachusetts are eligible for marriage benefits that touch “nearly every aspect of life and death.”⁷⁰ In Massachusetts, marriage benefits include joint state income tax filing;⁷¹ tenancy by the entirety, which provides protections against creditors and allows for the automatic descent of property to the surviving spouse without probate;⁷² automatic rights to inherit the property of a deceased

⁶⁰ *Id.* at 344.

⁶¹ *Wilson*, 354 F.Supp. 2d at 1309. In this case, plaintiffs Nancy Wilson and Paula Schoenwether claimed they were legally married in Massachusetts and possessed a valid marriage license. They allegedly presented their marriage license to a deputy clerk of the circuit court, who refused to recognize it. *Id.* at 1301.

⁶² *Koppelman*, *supra* note 19, at 1.

⁶³ *Koppelman*, *supra* note 19, at 3.

⁶⁴ 5 U.S.C. § 8901(5) (2000); *Koppelman*, *supra* note 19, at 3.

⁶⁵ 5 U.S.C. § 8701(d)(1)(a) (2000); *Koppelman*, *supra* note 19, at 3.

⁶⁶ 5 U.S.C. §§ 8101(6), (11)(2000); *Koppelman*, *supra* note 19, at 3.

⁶⁷ 42 U.S.C. § 416(a)(2004); *Koppelman*, *supra* note 19, at 4.

⁶⁸ Sack, *supra* note 55, at 518 (citing U.S. Gen. Accounting Office, Defense of Marriage Act, Gen. Accounting Office Rep. OCG-97-16, at 1 (1997)).

⁶⁹ Sack, *supra* note 55, at 517.

⁷⁰ *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 955 (2003).

⁷¹ MASS. GEN. LAWS ch. 62c, § 6 (2001); *Goodridge*, 798 N.E.2d at 955.

⁷² MASS. GEN. LAWS ch. 184, § 7 (1996); *Goodridge*, 798 N.E.2d at 955.

spouse that does not leave a will;⁷³ the right to share the medical policy of one's spouse;⁷⁴ the right to bring claims for wrongful death and loss of consortium resulting from tort actions;⁷⁵ preferential options under the state's pension system;⁷⁶ evidentiary rights such as the prohibition against spouses testifying against one another;⁷⁷ and the application of predictable rules of child custody in the event of a divorce.⁷⁸

These rights, however, do not encompass the totality of the benefits of marriage.⁷⁹ In 2004, the Massachusetts Senate sought an advisory opinion from the Supreme Judicial Court of Massachusetts regarding a bill, Senate No. 2175, drafted in response to *Goodridge*.⁸⁰ The proposed law purported to create an institution of civil unions for same-sex couples that would provide all of the same "benefits, protections, rights and responsibilities" granted to spouses in a marriage, yet be separate from it.⁸¹ Even with equal protection of tangible benefits, however, the Supreme Judicial Court stated that the bill maintained "an unconstitutional, inferior, and discriminatory status for same-sex couples. . . ."⁸² While providing equal specific benefits, "[t]he bill would have [had] the effect of maintaining and fostering a stigma of exclusion that the [Massachusetts] Constitution prohibits."⁸³ According to the Supreme Judicial Court, the right to participate in the institution of civil marriage itself, along with its tangible and intangible protections and benefits, exceeds the sum of individual benefits accrued through a civil-union law.⁸⁴

B. Under the Australian Constitution, the Commonwealth Has Broader Authority to Impose the Definition of Marriage upon the States

The Commonwealth of Australia was established in 1901 pursuant to an act of British Parliament.⁸⁵ The Australian Constitution, modeled in some

⁷³ MASS. GEN. LAWS ch. 190, § 1 (1994); *Goodridge*, 798 N.E.2d at 955.

⁷⁴ MASS. GEN. LAWS ch. 175, § 108 (1997); *Goodridge*, 798 N.E.2d at 955-56.

⁷⁵ MASS. GEN. LAWS ch. 229, §§ 1-2 (1986); *Goodridge*, 798 N.E.2d at 956.

⁷⁶ MASS. GEN. LAWS ch. 32, § 12(2) (2001); *Goodridge*, 798 N.E.2d at 956.

⁷⁷ MASS. GEN. LAWS ch. 233, § 20 (2000); *Goodridge*, 798 N.E.2d at 956.

⁷⁸ MASS. GEN. LAWS ch. 208, §§ 19, 20, 28, 30, 31 (2003); *Goodridge*, 798 N.E.2d at 956.

⁷⁹ Opinions of the Justices to the Senate, 802 N.E.2d 565, 571-72 (2004).

⁸⁰ *Id.* at 566; *see also Goodridge*, 798 N.E.2d at 955.

⁸¹ *Justices*, 802 N.E.2d at 568.

⁸² *Id.* at 572.

⁸³ *Id.* at 570.

⁸⁴ *Id.* at 571. For more information on the debate as to whether domestic-partner legislation is equal to same-sex marriage laws, *see, e.g.,* Enrique A. Monagas, *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 HASTINGS WOMEN'S L.J. 39 (2006).

⁸⁵ *Government and Legal Systems*, Martindale-Hubbell International Law Digest (2005).

respects on the U.S. Constitution, vests the High Court of Australia with jurisdiction over the commonwealth's powers.⁸⁶ The Australian Constitution gives Parliament the power to make laws with respect to marriage.⁸⁷

1. Australia's Commonwealth Parliament Has Greater Authority to Pass Laws Regarding Marriage Than Does the U.S. Congress

The Commonwealth Parliament has greater authority than the U.S. Congress to legislate in the area of marriage because the Australian Constitution explicitly gives the Commonwealth Parliament the authority to "make laws for the peace, order, and good government of the commonwealth with respect to: . . . [m]arriage."⁸⁸ In addition, a law at the commonwealth level is binding upon states where state law conflicts with the commonwealth's law. Section 109 of the Australian Constitution states, "[w]hen 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."⁸⁹

2. The Scope of the Marriage Amendment Act in Australia is Broader Than That of DOMA

In August 2004, the Commonwealth Parliament of Australia passed the Marriage Amendment Act, which amended the Marriage Act 1961 in several substantial respects.⁹⁰ In section 5(1), the Marriage Amendment Act inserted the text "[marriage] means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."⁹¹ In addition, at the end of section 88B, the Amendment added "(4) To avoid doubt, in this Part (including section 88E) marriage has the meaning given by subsection 5(1)."⁹² And lastly, after section 88E, the Amendment added "[c]ertain unions are not marriages. A union solemnized in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be [recognized] as a marriage in Australia."⁹³

Australian states that favor equality of benefits for same-sex couples have other viable options for legal recognition under state law. For example,

⁸⁶ *Id.*

⁸⁷ AUSTL. CONST. § 51(xxi).

⁸⁸ *Id.*

⁸⁹ Austl. Const. § 109.

⁹⁰ Marriage Amendment Act, 2004, No. 126, sched. 1 (Austl.).

⁹¹ *Id.* § 5(1).

⁹² *Id.* § 88(B).

⁹³ *Id.* § 88(EA).

in Tasmania, the Relationships Act gives registered same-sex couples status equal to married couples under nearly all state laws, including property transfers and state superannuation.⁹⁴ In December 2005, the Australian Capital Territory (“ACT”) announced that it was drafting legislation to provide for civil unions in the territory.⁹⁵ Jon Stanhope, chief minister of ACT stated, “Civil unions will deliver real, functional equality under ACT law for couples who either do not have access to the commonwealth Marriage Act or who prefer not to marry.”⁹⁶ The civil-union act would have allowed same-sex couples to join in civil unions as freely as opposite-sex couples, and would have resulted in the same legal recognition for partners in civil unions as for married couples.⁹⁷ However, while civil unions in the ACT would have been available for all Australians, such unions would have been valid only in the ACT and would not have affected national laws governing taxation, superannuation, and health care.⁹⁸ With such understanding, the Civil Unions Act⁹⁹ passed in the legislative assembly in 2006, giving formal recognition to same-sex partnerships.¹⁰⁰ However, the success of the Act was short lived; it was rejected by the governor-general before the first same-sex couple entered into a civil union.¹⁰¹ “On June 13th Michael Jeffrey, the governor-general, who represents Queen Elizabeth, Australia’s head of state, rejected the law on [Prime Minister] Howard’s advice. Mr. Howard argues the ACT’s law unacceptably equates gay civil unions with marriage.”¹⁰² At the time of this comment’s publication, the ACT government planned to revive “its plan to make same-sex unions legal in the territory as the federal Government reassesses legal discrimination against homosexuals.”¹⁰³

⁹⁴ Andrew Darby, *Tasmania Accepts Same-sex Partners* (Jan. 3, 2004), available at <http://www.theage.com.au/articles/2004/01/02/1072908908416.html>.

⁹⁵ Press Release, Jon Stanhope, Chief Minister, Australian Capital Territory, ACT to Legislate for Civil Unions (Dec. 2, 2005).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Perry, *supra* note 15.

⁹⁹ Australian Capital Territory’s Civil Unions Act, A2006-22 (2006), *repealed and never effective*.

¹⁰⁰ *No Wedding Bells*, *supra* note 15.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *ACT Revives Gay Union Plans*, THE AUSTRALIAN, Oct. 23, 2006, available at <http://www.theaustralian.news.com.au/printpage/0,5942,20629183,00.html>.

III. THE HIGH COURT OF AUSTRALIA IS LIKELY TO FIND THAT THE MARRIAGE AMENDMENT ACT DOES NOT EXCEED PARLIAMENT'S AUTHORITY TO MAKE LAWS WITH RESPECT TO MARRIAGE

If the Marriage Amendment Act is challenged, the High Court of Australia is likely to find it was within the constitutional authority of Parliament to pass the Marriage Amendment Act. On its face, it appears that the constitutional analysis of the Marriage Amendment Act under Australian law is more straightforward than the analysis of DOMA under the U.S. Constitution. Marriage is one of the forty enumerated subjects on which the commonwealth is authorized to legislate.¹⁰⁴ Thus, it appears that it was within the constitutional authority of Parliament to pass the Marriage Amendment Act. However, statutory interpretation in Australia traditionally required that words be interpreted according to their meaning at the time the legislation was passed.¹⁰⁵ Possibly, therefore, the interpretation of marriage may be limited to what that word meant when the constitution was adopted in 1900.¹⁰⁶ Thus, it is arguable that Parliament cannot legislate on the topic of same-sex marriage because the term *marriage* was not interpreted to encompass same-sex marriage in 1900. If the word *marriage* in the constitution refers only to heterosexual marriage, then same-sex marriages could be authorized by state legislation.¹⁰⁷ However, “the purpose of granting power to the Commonwealth Parliament to legislate with respect to marriage was to make possible uniform national regulation of a vitally important legal relationship. . . .” It is difficult to predict how the High Court may rule on same-sex marriage, in part because “High Court decisions

¹⁰⁴ Austl. Const. § 51(xxi); George Williams, *Human Rights Under the Australian Constitution* 137 (1999).

¹⁰⁵ Jeffrey Goldsworthy, *Constitutional Law: Interpreting the Constitution in Its Second Century*, 24 MELB. U. L. REV. 667, 678 (2000) (stating that orthodox principles of statutory interpretation were applied to the Australian Constitution for the first century after its adoption). Some legal authorities challenge this method of interpretation. For example, see Honorable Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?* 24 MELBOURNE U. L. REV. 1, 11 (2000) (“When an old line of authority is overturned, this may sometimes be explained not by reference to an error in the perception of the Justices who propounded that authority at the time of its invention and first applications, but rather by the fact that the eyes of new generations of Australians inevitably see the unchanged language in a different light. The words remain the same. The meaning and content of the words take [color] from the circumstances in which the words must be understood and to which they must be applied”).

¹⁰⁶ Goldsworthy, *supra* note 105, at 699. Goldsworthy indicates that one concern “about the consequences of originalism is whether or not the Commonwealth Parliament has power to legislate for same-sex marriage.” *Id.* On the one hand, “in 1900 the word ‘marriage’ meant a union of a man and a woman—and this would almost certainly have been regarded as an essential part of the connotation, and not merely the denotation, of the word.” *Id.* But on the other hand, “it is possible to make a respectable argument consistent with originalism that leads to the opposite conclusion.” *Id.*

¹⁰⁷ *Id.* at 700.

on the express and implied rights in the Australian Constitution have been neither consistent nor coherent.”¹⁰⁸

This confusion and uncertainty led both New South Wales and Tasmania to introduce same-sex marriage bills in their state legislatures providing for marriage between adults of the same sex.¹⁰⁹ Although the Marriage Amendment Act was already in force, Tasmania introduced the Same-Sex Marriage Bill 2005, Same-Sex Marriage (Celebrant and Registration) Bill, and Same-Sex Marriage (Dissolution and Annulment) Bill 2005 on April 12, 2005.¹¹⁰ In New South Wales, legislation of the same title was introduced into the Legislative Council on May 4, 2005.¹¹¹

While there are convincing arguments both for and against upholding the constitutionality of the Marriage Amendment Act, the High Court will likely determine that Parliament does have the power to define marriage as exclusively the union between a man and a woman, effectively prohibiting same-sex marriage. However, the question is unresolved. The issue, therefore, is determining, “on what side of the line does extending the marriage power to same-sex marriages fall?”¹¹²

A. *Some Arguments Suggest the High Court Will Determine That the Commonwealth Parliament Does Not Have the Authority to Pass Laws Touching Upon Same-Sex Marriage*

1. *Parliament Does Not Have the Authority to Define Constitutional Terms.*

Under Australian law, Parliament lacks authority to define terms because no law can give power to any body, other than a court, to determine conclusively any issue upon which the constitutional validity of the law depends.¹¹³ This doctrine is often metaphorically described by the maxim “the stream cannot rise above its source.”¹¹⁴ While the historic record

¹⁰⁸ WILLIAMS, *supra* note 104, at 227.

¹⁰⁹ Same-Sex Marriage Bill 2005 (Tas).

¹¹⁰ Alex Bainbridge, *Greens Introduce Bill for Same-Sex Marriage*, GREEN LEFT WEEKLY (Apr. 20, 2005), available at <http://www.greenleft.org.au/back/2005/623/623p5d.htm>; Cooper, *supra* note 15, at *3 n.3. See also Parliament of Tasmania, Passage of Bills, http://www.parliament.tas.gov.au/bills/20_of_2005.htm (last visited Dec. 26, 2005).

¹¹¹ Cooper, *supra* note 15, at *3 n.3.

¹¹² Goldsworthy, *supra* note 105, at 701. Goldsworthy, law professor at Monash University, argues that same-sex marriage falls within the meaning of marriage in section 51, but warns that “[t]his purposive argument is admittedly dangerously slippery.” *Id.*

¹¹³ Leslie Zines, *The High Court and the Constitution* 177 (1981).

¹¹⁴ GEOFFREY SAWER, *AUSTRALIAN FEDERALISM IN THE COURTS* 116 (1967) (quoting *Heiner v. Scott* (1914) 19 C.L.R. 381, 393; ZINES, *supra* note 113, at 177 (quoting *Heiner*, 19 C.L.R. at 393).

implies that the constitution framers believed the High Court would possess the final word on constitutional powers, no specific case points to this authority.¹¹⁵ The decision in *Australian Communist Party v. Commonwealth*¹¹⁶ is considered to be the closest to a declaration of such power and, therefore, is arguably the Australian equivalent of *Marbury v. Madison*¹¹⁷ in the United States.¹¹⁸ When a law is clearly within the legislature's authority, some Australian judges may allow the legislature leeway in conferring power on public servants.¹¹⁹ However, when the legislative power's *source* is at issue, the courts must be concerned with the separation of power between the commonwealth and the states; "similar latitude should not be allowed to the Commonwealth Parliament or government regarding determination of those questions."¹²⁰ As a result of this doctrine, the Parliament does not have the authority to assert a conclusive determination of constitutional law.¹²¹ Except during times of war when laws have deference power, the constitutional validity of a law cannot be made to depend upon the opinion of the Parliament.¹²² Thus, as the court quipped in *Communist Party*,¹²³ the "power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the lawmaker, a lighthouse."¹²⁴

This interpretation of legislative authority could have a substantial impact on any potential High Court decision on the constitutionality of the Marriage Amendment Act. Like the lighthouse analogy, Parliament clearly has the authority under section 51 (xxi) to make laws with respect to marriage,¹²⁵ but this does not mean that Parliament may make laws with respect to anything that is, in the opinion of the lawmaker, a marriage. If the High Court determined that the term *marriage* in the constitution referred to a union between only a man and a woman, i.e., its traditional meaning at the time the constitution was adopted, then the commonwealth Parliament would have the authority to regulate only opposite-sex marriages. Parliament would not, therefore, have the authority to pass a law either allowing or prohibiting same-sex marriages. If this determination is made,

¹¹⁵ WILLIAMS, *supra* note 104, at 199.

¹¹⁶ *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1.

¹¹⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹¹⁸ WILLIAMS, *supra* note 104, at 199.

¹¹⁹ ZINES, *supra* note 113, at 177.

¹²⁰ *Id.* at 177-78.

¹²¹ *Id.* at 178.

¹²² *Id.* (citing *Communist Party*, 83 C.L.R. 1).

¹²³ *Communist Party* (1951) 83 C.L.R. 1, 258.

¹²⁴ ZINES, *supra* note 113, at 178 (quoting *Communist Party*, 83 C.L.R. at 258).

¹²⁵ AUSTL. CONST. § 51(xx).

the Marriage Amendment Act will either be interpreted simply as providing a partial definition of marriage that does not conflict with a state's inclusion of same-sex marriage or will be struck down entirely. In order to evaluate this possibility, it is important to analyze the scope of the traditional interpretation of marriage, as understood at the time the constitution was written.

2. *Under the Orthodox Principles of Legal Interpretation, Parliament May Only Have the Authority to Pass Laws on Marriage as It Was Understood at the Time the Constitution was Written*

While marriage is a subject of power granted to the commonwealth,¹²⁶ “[a]ccording to the orthodox rules of [Australian] legal interpretation, the meaning to be given to a term is that which it had at the date of the enactment,”¹²⁷ in this case, the 1900 constitution. Historically, the High Court looked at the connotation of a term, which is equivalent to the essence or nature of the meaning of the term.¹²⁸ The specifics of a term may change over time, for instance the term *vehicle* logically expanded to cover electric cars or water jet-skis, even though these “vehicles” did not exist in 1900. However, if the word *vehicle* suddenly became the term used to describe drug paraphernalia, a provision in the constitution that discussed vehicles would not automatically expand to use of illegal drugs.

[I]n the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.¹²⁹

Therefore, in order for the High Court to “retain the confidence of the Australian people . . . [it must not] travel beyond what the text and structure of the Constitution can reasonably support.”¹³⁰ Strict originalism is motivated “by a proper respect for people in the present—namely, the electors of Australia and their elected representatives, who, pursuant to [section] 128 of the Constitution, have exclusive authority to change their

¹²⁶ *Id.*

¹²⁷ ZINES, *supra* note 113, at 15 (citing *R v. Barger* (1908) 6 C.L.R. 41 at 68; *King v. Jones* (1972) 128 C.L.R. 221, 229; *Bonser v. La Macchia* (1969) 122 C.L.R. 177).

¹²⁸ ZINES, *supra* note 113, at 15.

¹²⁹ *Id.* (quoting *R v. Commonwealth Conciliation and Arbitration Commission*); *Ex parte Association of Professional Engineers* (1959) 107 C.L.R. 208, 267.

¹³⁰ WILLIAMS, *supra* note 104, at 249 (quoting *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104, 197 (McHugh, J.)).

own Constitution.”¹³¹ The original meaning, therefore, must be the starting point for current interpretation.

The principle of originalism could be applied to the High Court’s determination whether Parliament has the authority to pass federal laws regarding same-sex marriage. “In 1901, ‘marriage’ was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others.”¹³² This definition was offered in 1866 by Lord Penzance in *Hyde v. Hyde*¹³³ and accepted in Australia in 1901.¹³⁴ If that interpretation of the term was accepted today, it would deny Parliament the authority to legislate regarding same-sex marriages, because same-sex marriage is outside the scope of the term’s original meaning.¹³⁵ As a corollary, if the connotation of marriage in 1900 only encompassed opposite-sex couples, then Parliament also does not have the authority to *prohibit* same-sex marriage. Only if the constitutional marriage power extends to same-sex unions does Parliament have the power to pass laws authorizing or denying same-sex marriage at all. Ironically, in order to ban same-sex marriage, Parliament would need to depend on the definition of marriage to include same-sex marriage.¹³⁶

The High Court has not ruled directly on the topic of the definition of marriage in the constitution in any detail.¹³⁷ It is unclear “whether, for the purpose of the constitution, marriage should be given the definition it had in 1901, when the constitution came into effect, or in 1961, when the Marriage Act was passed, or whether it should have its contemporary, everyday meaning.”¹³⁸ The High Court judges’ opinions on the authority of Parliament vary widely. Justice Brennan takes a view that it is “beyond the powers of the Commonwealth Parliament to legislate for any other form of marriage” besides that encompassed by the *Hyde* definition.¹³⁹ At the other extreme, Justice McHugh states “arguably marriage now means, or in the

¹³¹ Goldsworthy, *supra* note 105, at 683.

¹³² *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511, 553 (McHugh, J.).

¹³³ *Hyde v. Hyde*, (1866) 1 L.R.P. & D. 130, 133 (as cited by Alastair Nicholson, *The Legal Regulation of Marriage*, 29 MELBOURNE U. L. REV. 556, 558 (2005)).

¹³⁴ Goldsworthy, *supra* note 105, at 699. It is important to note, however, that not all Australian scholars believe Lord Penzance’s definition was accurate even at the time he gave it. The mere fact that contemporaneous law established civil divorce indicates that a marriage never truly was defined as a union for life. Nicholson, *supra* note 133, at 558.

¹³⁵ Dan Meagher, *The Times Are They a-Changin’?—Can the Commonwealth Parliament Legislate for Same Sex Marriages?*, 17 AUSTRALIAN J. FAM. L. 1, 3 (2003).

¹³⁶ Monika Ciolek et al., *Submission of the New South Wales Council for Civil Liberties and the University of New South Wales Council for Civil Liberties to the Senate Legal and Constitutional Committee’s Inquiry into the Provisions of the Marriage Legislation Amendment Bill 2004*, July 30, 2004, at *8, available at <http://www.nswccl.org.au/docs/pdf/marriage%20bill%20submission.pdf>.

¹³⁷ Nicholson, *supra* note 133, at 563.

¹³⁸ *Id.*

¹³⁹ *Id.*

near future may mean, a voluntary union for life between two *people* to the exclusion of others.”¹⁴⁰

The Marriage Amendment Act defines marriage as between a man and a woman but does not explicitly prohibit marriage as between same-sex couples, perhaps unintentionally vacating the field of same-sex marriages. If the High Court determines that the term marriage is confined to opposite-sex couples, then Parliament would be unable to override any state legislation authorizing same-sex marriage, because the commonwealth's power would not extend to the subject matter.¹⁴¹ If the commonwealth has the authority to pass laws only with respect to opposite-sex marriages, section 109 (the Australian equivalent to the U.S. Supremacy Clause¹⁴²) will be inapplicable. The commonwealth's law prevails only “to the extent of the inconsistency,”¹⁴³ but if the commonwealth's law addresses marriage involving only opposite-sex couples, and states create additional categories that also qualify as marriage, there is technically no inconsistency. This leaves room for the states to choose whether to pass legislation on the matter.¹⁴⁴ A state law defining marriage between same-sex couples is operative to all persons not covered by Parliament's definition. If a state attempted to legislate that marriage did not include opposite-sex couples, then there would be a conflict between the state and commonwealth laws, and the state law would be invalid. A state law, however, becomes inoperative because of inconsistency only to the extent of that inconsistency.

If the High Court determines that Parliament is restricted to passing laws regarding marriage exclusively with respect to unions between a man and a woman, then the states should be able to pass supplementary legislation further defining marriage as also a union between two people of the same sex. Because the topic of marriage shares concurrent jurisdiction with both the states and the commonwealth, a same-sex couple married under a valid state law could be entitled to all of the privileges and responsibilities of marriage throughout the commonwealth.¹⁴⁵

¹⁴⁰ *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511, 553 (McHugh, J.) (emphasis in original); Nicholson, *supra* note 133, at 563.

¹⁴¹ Goldsworthy, *supra* note 105, at 700.

¹⁴² U.S. CONST. art. 6, § 2, *see supra* note 29 for text of Supremacy Clause.

¹⁴³ Austl. Const. § 109.

¹⁴⁴ *See* P. H. Lane, *Some Principles and Sources of Australian Constitutional Law* 224 (1964).

¹⁴⁵ AUSTL. CONST. § 118. Section 118 of the constitution states, “[f]ull faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.” *Id.*

B. *In the Alternative, Arguments Suggest the High Court Will Determine That the Commonwealth Parliament Has the Authority to Pass a Law Prohibiting Same-Sex Marriage*

While there are some arguments to suggest that the High Court may find that Parliament did not have the authority to pass the Marriage Amendment Act, it is more likely that the court will determine that Parliament does possess the constitutional authority to legislate on matters regarding same-sex marriage. Before Parliament enacted the Marriage Amendment Act, same-sex marriage proponents in Australia persuasively argued that the term *marriage* in section 51(xxi) of the constitution encompasses same-sex marriage and therefore Parliament has the authority to *legalize* same-sex marriage at the commonwealth level.¹⁴⁶ It has been argued that the constitution was “set completely free in 1901 from the intentions, beliefs and wishes of those who drafted it so that it is viewed by each succeeding generation of Australians with the eyes of their own times.”¹⁴⁷ That argument may now come back to haunt those proponents because, if true, the logical extension of Parliament having the authority under section 51(xxi) to legalize same-sex marriage is that Parliament may also have the authority to prohibit it.¹⁴⁸

Parliamentary powers listed in section 51 grant plenary powers which are “to be construed with all the generality that its words will admit.”¹⁴⁹ The High Court has adopted a broad interpretation for construing the commonwealth powers listed in section 51 of the constitution.¹⁵⁰ Each of

¹⁴⁶ See, e.g., Meagher, *supra* note 135, at *54-58.

¹⁴⁷ Kirby, *supra* note 105, at 4. Justice Kirby has been said to advocate an “extreme and radical version of non-originalism, which concedes almost no relevance at all to either the *Constitution’s* original meaning or its founders’ intentions.” Goldsworthy, *supra* note 105, at 679.

¹⁴⁸ In 2000, Jeffrey Goldsworthy stated that there is a powerful argument that even though same-sex couples do not come under the precise literal meaning of the word marriage chosen by the drafters of the Constitution, same-sex marriage does come within the purpose of the term marriage and is so closely related to the word’s original meaning that it can be included by a simple and obvious expansion of the term. Goldsworthy, *supra* note 105, at 700. In 2003, a year before Parliament passed the Marriage Amendment Act, Dan Meagher, a lecturer at the School of Law at Deakin University in Australia, argued that as a constitutional term of art, the meaning of marriage as a union between a man and a woman was potentially not frozen in 1900, but instead could be held to have evolved to accommodate an innovative parliamentary response to a new and unforeseen social, technological, and economic circumstances. Meagher emphasizes, however, that there is no approach to constitutional interpretation with “sufficient connection between a law that recognizes same sex marriages and the marriage power without betraying its core interpretive principle. Meagher, *supra* note 135, at *54-58. See also *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511, 553 (McHugh, J.).

¹⁴⁹ *Re Dingjan; Ex parte Wagner* (1995) 183 C.L.R. 323, 369 (citing *R v. Public Vehicles Licensing Appeal Tribunal (Tas.)*; *Ex parte Australian National Airways Proprietary Ltd.* (1964) 113 C.L.R. 207, 225).

¹⁵⁰ WILLIAMS, *supra* note 104, at 228.

the powers granted in section 51 “can support not only laws which operate directly on the subject matter of the paragraph in question but also laws which do not operate directly but which can be seen as incidental to the power.”¹⁵¹ Legislative power “carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter.”¹⁵² For example, in 1991, the Commonwealth Parliament passed the Political Broadcasts and Political Disclosures Act 1991,¹⁵³ which introduced Part IIID into the Broadcasting Act 1942.¹⁵⁴ In *Australian Capital Television Proprietary Ltd. v. The Commonwealth of Australia*, the plaintiffs sought declarations that Part IIID was invalid.¹⁵⁵ While the plaintiffs claimed several constitutional violations, they accepted “that the legislative powers conferred by [section] 51(v) with respect to ‘postal, telegraphic, telephonic and other like services’ . . . on the Parliament by the Constitution . . . would support the Act.”¹⁵⁶ Their concession is strong indication that section 51 powers are typically interpreted broadly. By similar measure, it is probable that the High Court will interpret the term *marriage* broadly, as it also is a section 51 plenary grant of power to Parliament. If construed generally, the ability to prohibit same-sex marriage likely will be held to affect the subject matter of marriage, and, therefore, be constitutional.

Even cases in which the High Court has held that Parliament exceeded its section 51 authority give an indication that the Court likely will conclude that the Marriage Amendment Act did not exceed that scope. The close decision in *Re Dingjan; Ex parte Wagner* provides an example.¹⁵⁷ At that time, the Industrial Relations Act 1988 allowed a party to a contract to make an application to the Australian Industrial Relations Commission to review the contract to determine if it was unfair, harsh, or against the public’s interest.¹⁵⁸ The law applied only to contracts that related to “constitutional corporations.”¹⁵⁹ Parliament based its authority to pass such a law on

¹⁵¹ *Re Dingjan*, 183 C.L.R. at 352 (Toohey J.).

¹⁵² *Id.* (quoting *Grannall v. Marrickville Margarine Proprietary Ltd.*, (1955) 93 C.L.R. 55, 77).

¹⁵³ Political Broadcasts and Political Disclosures Act, 1991 (Austl.)

¹⁵⁴ Part IIID of the Broadcasting Act 1942 “establish[ed] a regulatory regime governing the broadcasting on television and radio of political advertisements and other matter.” *Australian Capital Television Proprietary Ltd. v. The Commonwealth of Australia* (1992) 177 C.L.R. 106, 124 (Mason, C.J.). The sections introduced in Part IIID prohibited broadcasting by radio or television certain types of matter during an election period in relation to an election to the commonwealth Parliament, a state Parliament, the legislature of a territory, or a local government authority. *Id.*

¹⁵⁵ *Id.* at 123-24.

¹⁵⁶ *Id.* at 133.

¹⁵⁷ *See Re Dingjan*, 183 C.L.R. 323.

¹⁵⁸ Industrial Relations Act, 1988, 127A(2) (Austl.).

¹⁵⁹ Industrial Relations Act, 1988, 127C(1) (Austl.).

section 51(xx) of the constitution,¹⁶⁰ which gives the commonwealth the power to make laws with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.” Four justices of the High Court (Justices Brennan, Dawson, McHugh, and Toohey) determined that sections of the Industrial Relations Act 1988 exceeded the section 51(xx) authority of Parliament to pass such a law. Declaring that when a law is too broad it is invalid, Justice Brennan asserted that the legislative power conferred by section 51(xx) does not extend to things *relating to* corporations, but instead it confers on the Parliament only a power to legislate *with respect to* the matters enumerated in the section.¹⁶¹ Justice Toohey declared, “[t]he words ‘with respect to’ require a ‘relevance to or connection with the subject assigned to the Commonwealth Parliament.’”¹⁶² Justice Dawson, however, pointed out that section 51(xx) is different from most of the other paragraphs in section 51, as it “describes the subject matter of the legislative power which it confers by reference to categories of persons, albeit artificial persons, [and therefore] a different approach is required in determining whether a law falls within its terms.”¹⁶³ Justice Dawson uses the example of a law directed at interstate trade and commerce: “For example, a law directed at interstate trade and commerce will be a law upon that subject and so fall within [section] 51(i). But a law directed at trading or financial corporations . . . is not necessarily a law upon the subject matter of those bodies.”¹⁶⁴ Further, Justice McHugh, concerned with Parliament legislating outside the scope of the subject matter on which it is authorized to legislate, noted that “as long as the law in question can be characterized as a law with respect to trading, financial or foreign corporations, the Parliament of the Commonwealth may regulate many subject matters that are otherwise outside the scope of Commonwealth legislative power.”¹⁶⁵ Three justices (Justices Deane, Gaudron, and Chief Justice Mason), on the other hand, asserted that the law did not exceed Parliament’s authority.¹⁶⁶

The fact that the High Court determined that Parliament did not have the authority to pass such a law initially appears to support the argument that the court also may not uphold the Marriage Amendment Act because the court interpreted Parliament’s authority to pass commonwealth legislation

¹⁶⁰ *Re Dingjan; Ex parte Wagner* (1995) 183 C.L.R. 323, 337.

¹⁶¹ *Id.* at 339.

¹⁶² *Id.* at 352 (quoting *Grannall v. Marrickville Margarine Proprietary Ltd.* (1955) 93 C.L.R. 55, 77).

¹⁶³ *Id.* at 345 (Dawson, J.).

¹⁶⁴ *Id.*

¹⁶⁵ *Re Dingjan; Ex parte Wagner* (1995) 183 C.L.R. 323, 368 (McHugh, J.).

¹⁶⁶ *Id.* at 333 (Mason, C.J.), 342 (Deane, J.), 367 (Gaudron, J.).

narrowly. However, section 51(xxi) of the constitution, which gives Parliament the power to make laws with respect to marriage, is more similar to Dawson's example of interstate trade and commerce. Marriage is a subject matter over which Parliament has the authority to pass laws. The power is not granted to Parliament by reference to, for instance, married persons. The Marriage Amendment Act clearly impacts the subject matter of marriage. By allowing Parliament to pass a law eliminating same-sex marriage, there is no concern that it is regulating a subject matter outside the scope of its initial authority. The ultimate question is whether there is "a sufficient connection between the law and the subject matter to be able to say that the law is one with respect to that subject matter."¹⁶⁷ A law defining the scope of marriage clearly is one with respect to the subject matter of marriage.

Overall, section 51 powers are plenary grants to Parliament and are interpreted broadly. A commonwealth law is likely to be upheld if it addresses the subject matter of an entity the constitution explicitly bestowed authority upon Parliament to regulate.

IV. THE MARRIAGE AMENDMENT ACT, IF VALID, WILL LIKELY TRUMP ANY STATE OR TERRITORY LAW THAT ALLOWS SAME-SEX MARRIAGE

If the High Court determines that Parliament possesses the authority to pass the Marriage Amendment Act, the court is likely to find that the legislation supersedes any contradictory state law. However, there are at least two opposing arguments regarding an Australian state's authority to enact its own same-sex marriage law since the passage of the Marriage Amendment Act.

One argument is that under the Marriage Amendment Act, states have no authority at all to pass same-sex marriage laws.¹⁶⁸ Under this theory, if Tasmania and New South Wales (or any other state) passed bills legalizing same-sex marriage at the state level, those laws either would have little or no impact upon existing marriage laws, or would be struck down by the High Court as conflicting with commonwealth law.¹⁶⁹

¹⁶⁷ *Id.* at 353 (Toohey, J.).

¹⁶⁸ See Nicholson, *supra* note 133, at 556. "With very limited exceptions relating, for example, to a person's age or the consanguinity of the parties to a proposed marriage, the legal capacity to marry has never been expressly restricted by Australian law. Recent legislation has changed that position. The Marriage Amendment Act 2004 . . . proscribes both same-sex marriage contracted in Australia and the recognition of same-sex marriages validly contracted overseas" (internal citations omitted). *Id.* at 556-57.

¹⁶⁹ Cooper, *supra* note 15, at *3. See also, Veggie Cari & Benjamin Kiely, Comment, *The Legal Regulation of Marriage – Update*, 29 MELB. U. L. REV. 569, 572 (2005). "Purporting to rely on the State's residual marriage power, the Tasmanian Greens tabled the Same-Sex Marriage Bill 2005 (Tas). However,

The second argument is that the Marriage Amendment Act “made crystal clear that federal marriage law deals only with different-sex marriage, [and therefore] the states are now free to pass constitutionally valid laws for same-sex marriage.”¹⁷⁰ Proponents of this theory assert that Australia’s Marriage Amendment Act should be interpreted in a similar way to DOMA in the United States; the federal legislation would regulate marriage only with respect to federal benefits, but state same-sex marriage laws would operate in a different and mutually exclusive field.¹⁷¹ If the Commonwealth Parliament does not execute or possess the authority to pass laws prohibiting same-sex marriage, then the field of same-sex marriage is left wide open to the states.

Commonwealth Parliament would be unable to override or modify such legislation, since *ex hypothesi*, its power would not extend to the subject matter. The word “marriage” would then have two different meanings in Australian law: its meaning in the Constitution, confined to heterosexual marriage, and a broader meaning defined partly by State legislation.¹⁷²

Therefore, it is possible that the High Court would uphold the constitutionality of the Marriage Amendment Act but still allow states to enact legislation defining marriage with a broader meaning than is indicated in the commonwealth legislation.

However, presuming that the Marriage Amendment Act is upheld constitutionally, the High Court will likely agree with the first argument; under the Marriage Amendment Act, states have no authority to pass contradictory same-sex marriage laws. Section 109 of the constitution will be invoked to invalidate any state law that violates Parliament’s intention to

given that Tasmania has comprehensively legislated under the Relational Act 2003 (Tas) to regulate same-sex unions, the Labor government, supported by the Liberal opposition, has made clear that it is unconvinced that same-sex couples have anything to gain as a matter of law in the reforms proposed.” (internal citations omitted) *Id.*

¹⁷⁰ Rodney Croome, *Marching Under the Banner of Marriage*, GREEN LEFT WEEKLY, May 11, 2005, <http://www.greenleft.org.au/back/2005/626/626p10.htm>. According to Rodney Croome’s article, George Williams, an Australian constitutional law scholar whom I cite to many times in this Comment, stated that he believed that State same-sex marriage laws would occupy a different field than the federal legislation, and therefore would likely be upheld by the High Court. In reference to the Marriage Amendment Act, Croome quotes Williams as saying, “An analogy can be drawn with the approach taken by the High Court to whether a federal industrial award overrides a state award. The court has held that, where a federal award makes no provision on a particular matter, a state award may be able to operate on that matter without being overridden under [section] 109.” *Id.*

¹⁷¹ *Id.*

¹⁷² Goldsworthy, *supra* note 105, at 700.

cover the field and be the exclusive source of law on the topic of defining marriage.

A. *Section 109 of the Constitution Allows for Broad Commonwealth Authority*

If Parliament exercises its power to legislate on matters regarding marriage, then section 109 of the constitution demands that such federal legislation supersede any conflicting state legislation. “States retain legislative power in those subject matters not expressly granted to the Commonwealth Parliament by [section] 51. [Furthermore, section] 51(xxi) is a concurrent power meaning that the States as well as the Commonwealth have legislative power with respect to ‘marriage.’”¹⁷³ If the commonwealth law has not occupied the field, a state law possibly would control not only in that state, but could bind the commonwealth to recognize same-sex marriages from that state as well.

On the other hand, where federal legislation is inconsistent with state legislation, it renders the state legislation invalid, in accordance with section 109 of the constitution.¹⁷⁴ “‘Invalid,’ in this context, means ‘inoperative’ rather than void, meaning that inconsistent state legislation is revived if the overriding Commonwealth legislation is repealed.”¹⁷⁵ However, it is beyond the powers of a state or territory “to enact laws, or to cause laws to operate, in a manner inconsistent with or repugnant to the laws of the paramount legislature.”¹⁷⁶

Section 109 has been interpreted broadly by the High Court in favor of commonwealth legislation. State legislation will be deemed inconsistent and inoperative if (1) “it is impossible to obey both laws,” (2) “if one law purports to confer a legal right, privilege, or entitlement that the other law purports to take away or diminish . . . ,” or (3) “if the Commonwealth law shows a legislative intention to ‘cover the field’ [or] . . . be all the law there is on that topic.”¹⁷⁷

¹⁷³ Meagher, *supra* note 135, at 5, n.9 (citing Goldsworthy, *supra* note 105, at 700).

¹⁷⁴ *Viskaskas v. Niland* (1983) 153 C.L.R. 280.

¹⁷⁵ WILLIAMS, *supra* note 104, at 12 (citing *Carter v. Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 C.L.R. 557, 573).

¹⁷⁶ *See Attorney General (NT) v. Minister for Aboriginal Affairs* (1989) 25 F.C.R. 345, 367.

¹⁷⁷ WILLIAMS, *supra* note 104, at 12.

B. *Parliament Intended to Cover Marriage as a Matter Subject to Commonwealth Authority*

If one closely examines the language of the Australian amendment, it becomes clear that Parliament did not in fact specifically ban same-sex marriage. The exact wording of the added provision in question reads, “marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”¹⁷⁸ The phrase “to the exclusion of all others” is not set off from “the union of a man and a woman” by a comma and does not contain the word *only*. Its plain meaning is that marriage is a union between a man and a woman and no other third party. “To the exclusion of all others” specifically applies to the union being between only two people. The phrase does not refer back independently to the definition of marriage and therefore does not define marriage as being restricted to a heterosexual couple. Unlike the language in the United States’ DOMA, which clearly stated that “the word ‘marriage’ means *only* a legal union between one man and one woman as husband and wife,”¹⁷⁹ the Australian law makes no such assertion that a union between a man and a woman is the only acceptable meaning. Therefore, if a state passed legislation legalizing same-sex marriage, it technically would not be impossible to obey both laws. The High Court could interpret that a marriage between two men does not violate the commonwealth definition, as there is no indication that marriage can only be defined narrowly.

On the other hand, it is clear that Parliament had an intention to cover the field with the addition of specific language defining marriage. The Marriage Act 1961 was fully functional and operational prior to the Amendment in 2004, which sought only to limit the definition of marriage to cover unions between a man and a woman. The existence of the amendment itself is strong indication of Parliament’s intent. The provisions added to the Marriage Amendment Act that expressly prohibit recognition of same-sex marriages solemnized in other nations is an indication that Parliament intended to prohibit any same-sex marriage solemnized in Australia as well. The Commonwealth’s legislative intention to cover the field gives strong indication that the High Court will determine that section 109 applies; any state laws that attempt to define marriage as other than between a man and a woman will be invalidated.

The High Court has dealt with the issue of ascertaining the precise limits of the field that the commonwealth legislation intended to cover. In

¹⁷⁸ Marriage Amendment Act, 2004, No. 126, sched. 1 (Austl.).

¹⁷⁹ 1 U.S.C. § 7 (2000) (emphasis added).

Viskauskas v. Niland,¹⁸⁰ the court considered a suit that was brought in New South Wales arising from an incident in which three persons were allegedly refused service in a hotel bar on the grounds of their race.¹⁸¹ The complainants alleged unlawful discrimination based on race, in violation of the New South Wales Anti-Discrimination Act 1977.¹⁸² The commonwealth, however, also had legislation covering the same issue in the Racial Discrimination Act 1975.¹⁸³ In ruling that the section 109 of the constitution invalidates the sections of the New South Wales Act that are inconsistent with the commonwealth act, the court stated that the commonwealth cannot “admit the possibility that a State law might allow exceptions to the prohibitions of racial discrimination or might otherwise detract from the efficacy of the Commonwealth law.”¹⁸⁴ The Racial Discrimination Act 1975 “deals with the subject of racial discrimination.”¹⁸⁵ As such, the state antidiscrimination act was inoperable.

By similar measure, the Marriage Amendment Act deals with the subject of marriage. It is therefore likely that the High Court will use similar reasoning to conclude that any state legislation that attempts to undermine the commonwealth's Act will be declared invalid by section 109. Thus, if a state's same-sex marriage law interferes with or allows exception to the commonwealth's Marriage Amendment Act, and the Act is within Parliamentary authority, then state legislation allowing same-sex marriage likely would not stand.

V. PROPONENTS OF SAME-SEX MARRIAGE IN AUSTRALIA SHOULD NOT ATTEMPT TO PASS STATE SAME-SEX MARRIAGE LAWS, BUT INSTEAD SHOULD PRESS FOR CIVIL UNIONS AND DE FACTO RELATIONSHIPS

Proponents of same-sex marriage in Australia should use a different tactical approach than proponents in the United States. In the United States, proponents of same-sex marriage can advocate for state same-sex marriage laws without fear of triggering a Supreme Court decision holding that DOMA preempts state law. Even though DOMA defines marriage as a union between a man and a woman, it applies exclusively to acts of Congress. Therefore, a state law defining marriage as a union between two people does not technically conflict with DOMA.

¹⁸⁰ *Viskauskas v. Niland* (1983) 153 C.L.R. 280.

¹⁸¹ *Id.* at 284.

¹⁸² *Id.*; Anti-Discrimination Act, 1977, § 19 (Austl. NSW).

¹⁸³ *Viskauskas*, 153 C.L.R. at 284; Racial Discrimination Act, 1975, § 9 (Austl. Cth).

¹⁸⁴ *Viskauskas*, 153 C.L.R. at 292.

¹⁸⁵ *Id.*

In Australia, on the other hand, the scope of Parliament's authority to define marriage under the Marriage Amendment Act is uncertain. Because the constitution authorizes Parliament to pass laws with respect to marriage, arguably a commonwealth law defining marriage as a union between a man and a woman binds the states as well.

As discussed above, in 2005, legislation providing for same-sex marriage was introduced in both New South Wales and Tasmania.¹⁸⁶ Undoubtedly, proponents of this legislation are in favor of same-sex marriage. While pushing for state same-sex marriage is an effective way to change public perception in the United States, it is a dangerous approach for advocates of same-sex marriage in Australia.

Australian state laws authorizing same-sex marriage arguably will conflict with the Marriage Amendment Act. In hearing a case regarding this conflict, the High Court is likely to determine that Parliament does have the authority to pass legislation on the subject of same-sex marriage. If it finds a conflict, therefore, the High Court will likely invalidate the state legislation. This action would leave Australians without the ability to enact same-sex marriage laws at the state level.

Proponents of same-sex marriage in Australia may argue that by not pushing forward with state same-sex marriage laws, they are conceding in advance that the High Court will rule against them. However, a decision by the High Court adverse to their position may be more damaging than just the prevention of same-sex marriage. Currently, there is no serious commonwealth opposition to state de facto relationships. However, Prime Minister Howard expressed his dissatisfaction with any recognition of same-sex partnerships.¹⁸⁷ The commonwealth's interjection into the ACT government's attempt to pass a civil-union law¹⁸⁸ indicates that states may be bound by federal definitions. If advocates of same-sex marriage were to force a decision before the High Court and lose, the loss might propel opponents of same-sex marriage to enact even stronger commonwealth legislation prohibiting rights for same-sex couples. If the High Court extends the definition of marriage to include same-sex marriage, it could extend the definition of marriage to include all marriage-like entities. If that happened, the Commonwealth Parliament could have the authority not only to prohibit states from passing same-sex marriage laws, but also could prohibit states from allowing civil unions or de facto partnerships.

¹⁸⁶ Cooper, *supra* note 15, at *3 n.3.

¹⁸⁷ See, e.g., *Howard Hits Out At Gay Marriage*, THE AGE, available at <http://www.theage.com.au/articles/2003/08/05/1059849376651.html>; NEW SOUTH WALES COUNCIL, *supra* note 9.

¹⁸⁸ *ACT Revives Gay Union Plans*, *supra* note 103; *No Wedding Bells*, *supra* note 15.

As a result of the uncertain scope of Parliament's authority to pass laws regarding marriage, supporters of same-sex marriage in Australia should proceed carefully. A decision unfavorable to their position by the High Court likely would cripple their efforts to promote equality of benefits for same-sex couples. However, currently, there is little opposition to states passing laws granting equal tangible state benefits. At this point, therefore, instead of pushing for state same-sex marriage laws, Australians in favor of same-sex marriage should promote alternatives to same-sex marriage. With a change in public perception, advocates may be able to convince Parliament to amend or repeal the Marriage Amendment Act. A direct challenge, however, could be detrimental to the efforts to legalize marriage as a union between two *people*.

VI. CONCLUSION

The Marriage Amendment Act in Australia and the DOMA in the United States both define marriage as a union between a man and a woman. In the United States, this definition clearly extends only to marriage for federal purposes. States, such as Massachusetts, have the power to enact same-sex marriage laws and to confer all of the state benefits of marriage to same-sex couples. In Australia, however, the constitution gives Parliament express authority to pass laws on the subject of marriage. Arguably, this means that Australian states and territories are precluded from passing same-sex marriage laws. If the High Court of Australia upholds the authority of Parliament to prohibit all same-sex marriages, opponents of same-sex marriage may encourage Parliament to pass even greater restrictions for same-sex couples in Australia. Proponents of same-sex marriage, therefore, should not push for state same-sex marriage laws like those that have been introduced in Tasmania and New South Wales. A direct state/commonwealth conflict of laws may trigger a High Court decision upholding the commonwealth's authority to bind states to a scheme that embraces only opposite-sex marriage. In order to achieve full marriage equality, Australians need to first change public perception through the passage of state civil unions and eventually lobby to convince Parliament to authorize same-sex marriage through commonwealth legislation.