MILKING THE MARRIAGE POWER:
CAN FEDERAL PARLIAMENT LEGISLATE FOR SAME-SEX MARRIAGE?

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1 INTRODUCTION

In 2004, the *Marriage Act 1961* (Cth) was amended to define marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. A panicked response to the wave of Australian couples intending to travel overseas to take advantage of recently legalised same-sex marriage in Canada, the amendment definitively affirmed marriage as an exclusively heterosexual institution, and precluded the recognition of same-sex marriages entered into overseas. It was deemed ‘one of the most unfortunate pieces of legislation that has ever been passed by the Australian Parliament’ by former Family Court of Australia Chief Justice, Alastair Nicholson. In the decade since, there has been a tumult of interest on both sides of the same-sex marriage debate.

Whilst Federal and State Bills seeking to extend marriage to same-sex couples have been routinely defeated, the popular pressure for marriage equality has swelled significantly. 14 countries and several sub-national jurisdictions have now legalised same-sex marriage. Notably, New Zealand did so in April this year – the *Marriage (Definition of Marriage) Amendment Bill 2013* was passed with a convincing 77-44 vote – making it the first in the Asia-Pacific region. Two potentially landmark cases are currently being heard in the United States Supreme Court, to be decided by the end of June 2013. One considers the constitutionality of California’s *Proposition 8* which bans gay marriage; the other a challenge to the federal *Defense of Marriage Act* (*DOMA*) which defines marriage as between only a man and a woman for...

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4 University of Sydney Law School, Honours 2013. Information in this paper is current as at 31 May 2013.
1 s 5(1), as amended by *Marriage Amendment Act 2004* (Cth) sch 1 item 1.
3 *Marriage Act 1961* (Cth) s 88EA, as amended by *Marriage Amendment Act 2004* (Cth) sch 1 item 3.
5 Note that the broader issue of ‘marriage equality’ also concerns the rights of transgender and intersex persons to marry, but is beyond the scope of this paper.
6 As at 21 May 2013, provided that Uruguay and New Zealand enact legislation approved by their lawmakers; Laura Smith-Park, ‘UK’s House of Commons approves same-sex marriage’, *CNN* (online), 21 May 2013 <http://edition.cnn.com/2013/05/21/world/europe/uk-same-sex-marriage/>.
federal purposes, and asserts that no state shall be required to recognize inter-state same-sex marriages.7

Capturing the spirit of the dissension is Justice Ruth Bader Ginsburg’s statement that DOMA effectively creates ‘two kinds of marriage: the full marriage, and then this sort of skim milk marriage’.8 In the United States, state laws determine who is married, but federal law determines the entitlements of married couples, and denies same-sex couples a huge range of federal benefits which are afforded to their heterosexual peers.9

In Australia, same-sex couples are not subject to such substantive inequities. A raft of legislative reforms in 2008 extended equal rights in areas such as veteran affairs, social security, employment, immigration, workers’ compensation, superannuation and income tax.10 However, Justice Ginsburg’s analogy befits the Australian context, where inequality persists in relationship recognition. So long as same-sex couples are denied access to the socially-resonant institution of marriage, two classes of relationship are perpetuated; heterosexual unions as ‘full-cream’, and same-sex relationships as ‘skim-milk’. Mere legislative equality is nutritious enough, but a watery substitute for symbolic recognition.

This paper explores how the seemingly unstoppable issue of same-sex marriage will play out in Australia. The next section outlines the central constitutional issue; namely, whether Federal Parliament is empowered to legislate for same-sex marriage; and how this question will come before the High Court. The paper then analyses different approaches to constitutional

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8 United States v Windsor No. 12-307 (2nd Cir) (27 March 2013, oral arguments).
interpretation; their strands, merits, drawbacks and past application; to determine how the question might be resolved under each, and whether this represents an appropriate course. Section 3 looks at originalism, Section 4 at non-originalism, and Section 5 at ‘middle-way’ approaches.

2 THE CONSTITUTIONAL ISSUE

While questions of public opinion and social policy carry the political debate, there can be no challenge in the High Court based on human rights. This is because Australia does not have a Bill of Rights, unlike countries such as Canada where legal reforms were aimed at ensuring consistency with equality provisions in the Canadian Charter of Rights and Freedoms. There are thus two options: same-sex legislation at the federal level, or at the state level. Both eventualities are discussed below. In either case, a High Court determination is inevitable, because the central (and highly contentious) issue is the scope of the Marriage Power contained in the Constitution s 51(xxi):

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to…marriage.

Ultimately, the question for the High Court will be: ‘Does the Marriage Power give Federal Parliament power to legislate for same-sex marriage?’ How the Court answers this question depends on their interpretation of the constitutional term ‘marriage’, the scope of which has never been thoroughly canvassed. So far there have been judicial intimations, but no direct High Court authority on whether s 51(xxi) is broad enough to encompass same-sex marriage. The answer is crucial, for if the Court considers that Federal Parliament does have power, any

11 See especially Re Wakim; ex parte McNally (1999) 198 CLR 511, 553 where McHugh J said in obiter that ‘arguably “marriage” now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others’.
12 Speculating as to how the High Court will decide is further complicated by recent appointments; Gaegeler J replaced Gummow J in October 2012, Keane J replaced Heydon J in March 2013. The current Bench has not made any constitutional rulings that may indicate the dominant approach to constitutional interpretation.
federal legislation on the topic could stand. The States would have great difficulty in legislating for same-sex marriage, because of the risk of inconsistency (discussed below in Section 2.1.2). On the other hand, the Court’s rejection of Federal competence would more readily facilitate State same-sex marriage legislation, but would hamper the pursuit of uniform federal marriage regulation. The result is sure to hinge on the critical interplay of constitutional factors and political impetus at the federal and state levels.

Academics have taken disparate tacks to interpreting s 51(xxi). In 2008 Geoffrey Lindell concluded that, though difficult and probably unlikely at the time, it would be ‘by no means impossible, given the inherent flexibility of the relevant principles of constitutional interpretation’ to hold that Federal Parliament does have the power to legislate for same-sex marriage. Brock and Meagher submit that the High Court would find such legislation valid if they interpret ‘marriage’ as a constitutionalised ‘legal term of art’; Meagher further asserts that such legislation would be invalid under the ‘connotation and denotation’, moderate originalist and non-originalist approaches. George Williams, however, believes that the High Court, by taking an evolutionary approach, is more likely than not to hold that Federal Parliament does have power. Jeffrey Goldsworthy asserts that it is possible to make a respectable argument consistent with originalism, through a ‘non-literal, purposive approach’, that the Marriage Power does support same-sex marriage legislation.

However, the dearth of High Court attention calls for a more comprehensive analysis of the spectrum of interpretive approaches that might be applied to s 51(xxi). It is not suggested that the High Court’s determination will turn on an explicit advance prescription of methodology. This has not been decisive in past constitutional jurisprudence; indeed, Gleeson CJ and Gummow J have portended the dangers of doing so, highlighting the myth of the one

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18 Eg, the originalism/progressivism debate was not decisive in the Gleeson Court: Dan Meagher, ‘Guided by Voices? – Constitutional Interpretation on the Gleeson Court’ (2002) 7 Deakin Law Review 261, 289.
‘revelatory theory’. Nevertheless, each Justice will apply a theory of constitutional interpretation (whether articulated or not), to ultimately determine the issue at hand.

This paper will show that a number of interpretive approaches conduce to reading s 51(xxi) as including the power to legislate for same-sex marriage. A non-originalist approach does so by taking account of contemporary values such as human rights, and the practical need for uniform regulation of the institution of marriage. A strong argument can be made that this approach is warranted, given the vastly different social landscapes of 1900 and 2013. On the other hand, original intent has always had a primary place in construing statutory terms, and particularly the Constitution. Originalism does not, however, readily accommodate same-sex marriage, except by means of the ‘legal term of art’ approach. Addressing the tension between originalism and non-originalism, this paper will also demonstrate that on moderate originalist approaches, which advert to the Framers’ intentions without being constrained by anachronistic assumptions, s 51(xxi) may be interpreted as granting Federal Parliament the power to legislate for same-sex marriage.

2.1 HOW THE CONSTITUTIONAL QUESTION WILL COME ABOUT

As mentioned above, a High Court challenge will be prompted in one of two ways; by the passing of federal or state legislation. As a preliminary matter it is important to chart how each scenario will play out, because of the ramifications for Australia’s recognition of same-sex marriage.

2.1.1 Federal Legislation

The first option would involve Federal Parliament legalizing same-sex marriage by altering the Marriage Act to define ‘marriage’ as a union between two people (not just a man and a woman).

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20 The Honourable Justice Michael Kirby has argued that for purpose of transparency, these theories should be articulated: The Hon Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 Melbourne University Law Review 1, 5.
This would undoubtedly provoke a High Court challenge regarding Parliament’s competency to make such a law under s 51(xxi).21

The likelihood of this option playing out in the immediate future is slim. In reply to criticism that Australia is lagging behind New Zealand, Prime Minister Julia Gillard affirmed her anti-same-sex marriage stance,22 though Members of the Labor Party are allowed a conscience vote on the issue. Opposition Leader Tony Abbott has similarly affirmed the Coalition’s position that marriage be confined to heterosexual couples, though he conceded that a conscience vote may be allowed after the September 14 Federal election. However, even as support grows amongst Coalition Members, it is doubtful that the party room position will change.23 While Greens Senator Sarah Hanson-Young reintroduced the Marriage Equality Amendment Bill 2013 in March this year, its rejection last year was forceful; defeated 98 to 42 in the House of Representatives. In May, Greens deputy leader Adam Bandt indicated his intention to have the Bill brought up for vote in the House of Representatives on 6 June 2013. Aimed more at elevating the issue pre-election to clarify for voters where each Member stands, the Bill would likely fail given Tony Abbott’s present refusal to allow Coalition Members a conscience vote. 24 In April, Independent Tony Windsor called for a national poll on same-sex marriage to be held on Federal election day.25 Supported by the Greens and other cross-

21 A constitutional challenge could be mounted by the States. ‘Standing’ has also potentially been widened by a recent High Court decision which accepted an individual’s challenge to the constitutionality of the school chaplaincy scheme, on the grounds that his contentions were supported by the Attorneys-General intervening on behalf of Victoria and Western Australia: Williams v Commonwealth (2012) 288 ALR 410, 447 (Gummow and Bell JJ) and 414 (French CJ). Alternatively, the Commonwealth Attorney-General could seek a declaration of validity in relation to the federal legislation to bring the issue before the High Court: Attorney-General (Cth) v T&G Mutual Life Society Ltd (1978) 144 CLR 161.


23 Eg, NSW Premier Barry O’Farrell came out in support of same-sex marriage legislation the day after the New Zealand Parliament voted to change its national laws, and challenged Tony Abbott to allow a conscience vote on the issue: Sean Nicholls, ‘O’Farrell comes out for same-sex marriage’, The Sydney Morning Herald (online), 19 April 2013 <http://www.smh.com.au/opinion/political-news/ofarrell-comes-out-for-samesex-marriage-20130418-2i31b.html>. However, Tony Abbott has predicted that if this were allowed, only a dozen (at most) Coalition MPs would vote in favour of same-sex marriage: Michael Gordon, ‘No revisiting gay marriage: Abbott’, The Age (online), 4 May 2013 <http://www.thage.com.au/opinion/political-news/no-revisiting-gay-marriage-abbott-20130503-2jigyv.html>.


benchers, Windsor’s call was rejected by Tony Abbott as ‘muddying the waters’. It was met with apprehension by Australian Marriage Equality national convenor Rodney Croome and George Williams, who cautioned that the surrounding debate would be ‘divisive and irrational’. Even if a poll goes ahead, it is more likely to take the form of a plebiscite than referendum. The Government would therefore not be bound to support the result on such a ‘conscience’ issue, and the constitutional issue would remain unresolved.

2.1.2 State Legislation

The second option would involve the States enacting marriage equality legislation. Following attempts in Tasmania and South Australia, the NSW State Marriage Equality Bill 2013 was introduced by a cross-party working group of Coalition, Labor, an Independent and Greens Members of Parliament. It is currently the subject of a Legislative Council inquiry, with The Committee on Social Issues due to report on its viability and desirability in July 2013.

Clearly the States have the power to pass laws with respect to marriage; s 51 powers are concurrent, and the States have plenary power to make laws for the ‘peace, welfare, and good government’ of the State. Indeed, before referral to the Commonwealth in 1961, the States each administered their own marriage systems. It is well accepted that same-sex legislation at the Federal level is more appealing, as it provides for uniform administration, but same-sex marriage advocates have resorted to State-based legislation in light of staunch Federal resistance. If the Bill is enacted, it will be challenged in the High Court, either by an individual whose legal rights or interests are actually affected by the law, or the Federal or a State

26 Ibid.
27 Ibid; George Williams has said that: ‘[National polls of this kind] attract extreme views and give licence to the media to report them. This would likely include absurd and offensive claims that vilify gay and lesbian people. There are real dangers in holding a vote on contentious moral topics like gay marriage, abortion and euthanasia.’ George Williams, ‘Windsor push could open can of worms’, The Sydney Morning Herald (online), 30 April 2013 <http://www.smh.com.au/opinion/politics/windsor-vote-push-could-open-can-of-worms-20130429-2iosl.html>.
28 Williams, ‘Windsor push could open can of worms’, above n 27.
29 The Same-Sex Marriage Bill 2012 (Tas) was voted down in the State’s upper house in September 2012. The Marriage Equality Bill 2012 (SA) will be considered by Parliament this year.
30 Williams, ‘Can Tasmania Legislate for Same-Sex Marriage?’, above n 16, 125.
government. As with a challenge to federal legislation, the Court would have to answer the question, ‘Does Federal Parliament have the power to legislate for same-sex marriage under the Marriage Power?’

If the Court considered that Federal Parliament did have power, the next issue would be whether (or to what extent) the State law is rendered inoperative by virtue of the Constitution s 109, which provides that a State law is invalid to the extent of its inconsistency with a Commonwealth law. It is unclear how this would play out.

Direct inconsistency occurs when State laws ‘alter, impair or detract from the operation of a law of the Commonwealth’. To avoid this, State same-sex marriage legislation could not provide for federal recognition of State marriages, or allow for same-sex marriage whilst a person is already married under the Marriage Act. Ultimately, the State legislation would need to be very circumscribed, so much so that it calls into question its very legal desirability. Patrick Parkinson has convincingly argued that State ‘same-sex marriage’ would effectively be a hybrid institution, legally distinct from ‘marriage’ and with dire consequences in the case of inter-state recognition and dissolution. Even if the State laws were self-contained, an argument of inconsistency could be made that the existence of two kinds of marriage (Marriage Act and State same-sex) would be ‘misleading or confusing’ or would diminish the symbolic importance of marriage in the federal sense.

Indirect inconsistency occurs when State laws intrude upon a ‘subject matter of a Federal enactment that…was intended as a complete statement of the law governing a particular matter or set of rights and duties’. Some contend that the comprehensive nature of the Marriage Act provisions regulating validity and formation of marriage indicate an intention to

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31 The individual might be a person who is a party to a same-sex marriage recognized under a State law, who challenges the validity of that marriage down the track: Williams, ‘Can Tasmania Legislate for Same-Sex Marriage?’, above n 16, 132. If an individual challenge is supported by an Attorney-General intervener, ‘the questions of standing (could) be put to one side’: see Williams v Commonwealth (2012) 288 ALR 410, 447 (Gummow and Bell JJ) and 414 (French CJ). Another possibility is that the High Court gives an advisory opinion: Geoffrey Lindell, Answers to Questions on Notice to Standing Committee on Social Issues (NSW), Inquiry into Same Sex Marriage Law in NSW, 19 March 2013, 5-6.
32 Victoria v Commonwealth (1937) 58 CLR 618, 630 (Dixon J).
33 Patrick Parkinson, Submission No 102 to Standing Committee on Social Issues (NSW), Inquiry into Same Sex Marriage Law in NSW, 2 February 2013.
34 Brock and Meagher, above n 14, 276.
35 Victoria v Commonwealth (1937) 58 CLR 618, 630 (Dixon J).
cover the field of all forms of marriage including same-sex marriage.36 Others argue that the 2004 amendments explicitly narrowed the scope of the Marriage Act to heterosexual marriage.37 This is a difficult position to take, because it requires an argument that Parliament’s intention changed in 2004; that it previously did intend to cover the field. Some posit the significance of the Marriage Act only seeking to prevent recognition of same-sex marriage in respect of unions under foreign law (s88EA),38 if Parliament had wanted to preclude domestic same-sex marriage, it could have explicitly done so. However, the more convincing argument is that such a provision was thought unnecessary, as foreign law would not govern such marriages.39 That Federal Parliament intended to cover the field is also supported by the incongruity of domestic and foreign same-sex marriages being treated differently under the Marriage Act. The Explanatory Memorandum confirms the agenda to ‘protect the institution of marriage by ensuring that…same sex relationships cannot be equated with marriage’.40 Moreover, even if there is no inconsistency at present, the Commonwealth could explicitly legislate its intention to cover the field of marriage, thus rendering the State laws inoperative.

On the other hand, if the High Court considered that s 51(xxi) does not include power to legislate for same-sex marriage, the only inconsistency argument that could be made is that the creation of other personal relationships by State law would by their nature undermine the primacy of the legal institution of heterosexual marriage recognized by the Marriage Act. This is supported by the Marriage Act Case which held that the Marriage Power would include the incidental power to deny validity to bigamous marriages.41 In the case that Federal Parliament

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36 Brock and Meagher, above n 14, 268; Geoffrey Lindell, ‘State legislative power to enact same-sex marriage legislation, and the effect of the Marriage Act 1961 (Cth) as amended by the Marriage Amendment Act 2004 (Cth)’ (2006) 9(2) Constitutional Law and Policy Review 25, 28; see especially Patrick Parkinson, above n 33, 3 where he referred to Taylor J’s statement in Attorney-General (Vic) v The Commonwealth (1962) (‘Marriage Act Case’) 107 CLR 529, 558 that, ‘The Marriage Act 1961 is a comprehensive statute enacted pursuant to the power of the Parliament of the Commonwealth to make laws for the peace order and good government of the Commonwealth with respect to “Marriage”. It contains a great many provisions and its main purpose is to establish a uniform marriage law throughout the Commonwealth.’

37 Williams, ‘Can Tasmania Legislate for Same-Sex Marriage?’, above n 16, 130.

38 Ibid.


40 Explanatory Memorandum, Marriage Amendment Act 2004 (Cth), General Outline.

41 Attorney-General (Vic) v The Commonwealth (1962) (‘Marriage Act Case’) 107 CLR 529, 557–558. The incidental legislative power includes the express grant in s 51(xxxxxxxx) which enables Parliament to legislate with respect to ‘matters incidental to the execution of any power vested by this Constitution in the Parliament…’ or the implied power which attaches to each individual grant in s 51: Re Dingjan; ex parte Wagner (1995) 183 CLR 323, 352 (Toohey J).
does not have the legislative scope, a uniform federal marriage scheme could nevertheless be developed by the States referring power under s 51(xxvii). This, however, rests upon a willingness of the Federal government and all State governments to achieve this outcome. The final possibility is a referendum under the Constitution s128 to amend s 51(xxi) to allow Federal Parliament to legislate for same-sex marriage.

Taking a step back, how the prospective inconsistency debate plays out is critical to the operativeness of any State legislation, but less important in the long-term. The goal of State legislation is largely political; it is intended to demonstrate the entrenchedness of the same-sex marriage cause, and put pressure on the Federal government to amend the Marriage Act. This section has demonstrated that regardless of how it comes about – by the Federal Government amending the definition of marriage in the Marriage Act to embrace same-sex relationships, or by State same-sex marriage legislation inciting a claim of inconsistency – the question of the scope of the Marriage Power will come before the High Court. As Federal and State governments face mounting domestic and international pressure to legalise same-sex marriage, adjudication looms ever closer.

3 ORIGINALISM

Let us now turn to the first interpretive technique that the High Court might use to construe s 51(xxi). Under originalism, the orthodox approach to constitutional interpretation, the fundamental object is to ascertain the meaning of the term ‘marriage’ at the date of enactment, 1900. The Court is not to ‘vary its construction from time to time to meet the supposed changing breezes of popular opinion.’ Given the chronistic emphasis, it is difficult to see how an originalist reading supports the inclusion of same-sex marriage under the Marriage Power, or is even appropriate to interpreting it. This section discusses the strands of literalism,

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43 R v Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild (1912) 15 CLR 586, 592 (Griffith CJ).
‘connotation and denotation’, textualism and intentionalism, and ‘legal term of art’. It suggests that only the latter facilitates a reading of s 51(xxi) that is consistent with same-sex marriage.

3.1 LITERALISM

Ushering in the Australian era of literalism, The Engineers Case in 1920 emphasised textual primacy, but the majority also stated that the Constitution is to be read ‘naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it’. Consisting of just a single word, s 51(xxi) should not be read narrowly, but at the same time, must be read as fully descriptive of the subject matter. When elucidated by reference to context, it becomes clear that there is no room for same-sex marriage.

In terms of common law, Lord Penzance’s definition in the 1866 English case Hyde v Hyde and Woodmansee still resonated in Australia in 1900; marriage was seen as a ‘voluntary union for life between one man and one woman to the exclusion of all others’. This was the definition implicitly adhered to in the Marriage Act Case; all judges assumed that marriage referred to the institution concerning a ‘husband and wife’. However, while McTiernan J would have confined its meaning to monogamous marriage, Windeyer J considered that the legislative power might extend to marriages differing essentially from the monogamous Christian tradition. However, only recent judicial discussion has acknowledged the changing idea of marriage and family as encompassing same-sex relationships. In Re Wakim; ex parte

44 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 152.
45 Bank of NSW v The Commonwealth (1948) 76 CLR 1, 333 (Dixon J).
46 [1866] LR 1 PD 130, 133. See also, John Quick and Robert Garran, The annotated Constitution of the Australian Commonwealth (Angus and Robertson, 1901), 608-609 which states that ‘marriage as a head of legislative power…denotes that form of union or cohabitation between man and woman which is entered in accordance with the conditions and formalities prescribed by law, and which confers a recognized status both on the parties and on their children.’; Re F; Ex parte F (1986) 161 CLR 376, 399 where Brennan J stated that marriage as a subject of legislative power embraces ‘those relationships which the law…recognises as the relationships which subsist between husband, wife and the children of the marriage’; R v L (1991) 174 CLR 379, 392 where Brennan J commented that the traditional Hyde v Hyde and Woodmansee definition ‘has been followed in this country and by this Court’. This was ultimately the definition adhered to in Re Wakim; ex parte McNally (1999) 198 CLR 511.
47 (1962) 107 CLR 529.
48 Ibid, 549.
49 Ibid, 576-577 (adverting to domestic recognition of polygamous marriages recognized in overseas jurisdictions, and Aboriginal tribal marriages).
McNally (1999), McHugh J said in obiter that ‘arguably “marriage” now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others’. In Re Patrick: An application concerning contact, Guest J of the Family Court said that in recognising a ‘family’ the ‘issue of...homosexuality is, in my view, irrelevant’.

In terms of statute law, it was not until the 1970s that homosexual acts began to be decriminalised in the Australian states. It was only in 1994 that the Australian Capital Territory became Australia’s first jurisdiction to acknowledge same-sex couples legally, through the Domestic Relationships Act 1994. Thus, referring to historical evidence of what was probably in the minds of citizens at the end of the 19th Century, it is clear that the common conception of marriage was heterosexual.

### 3.2 CONNOTATION AND DENOTATION

Another orthodox approach is to draw a distinction between the connotation and denotation of a term. The connotation is the term’s ‘essential meaning’; the qualities that a thing must have in order to come within the term. The denotation refers to all things that have these qualities. In interpreting the Constitution, the Court is bound only by the connotation. Goldsworthy and Meagher have each posited that the connotation of ‘marriage’ in 1900 was ‘formal, monogamous, heterosexual unions’; that is, heterosexuality is a core element. However, it is not clear that the High Court would similarly connote the term, much less take this interpretive approach in the first place.

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50 198 CLR 511, 553.
54 Zines, above n 42, 21.
Firstly, though well-established, it is a far from universally admired approach.\textsuperscript{56} There are few examples where it has been (at least expressly) utilized, and even then its application has been trenchantly questioned.\textsuperscript{57} Secondly, the distinction between connotation and denotation is purely philosophical; there are so many levels of abstraction that it is impossible to hone in on the ‘essential’ quality of marriage. The connotation identified by Goldsworthy is debatable; for example, given that adultery does not obviate one’s marital status under current law,\textsuperscript{58} how is ‘monogamy’ essential? Similarly, as expressed by the Massachusetts Supreme Judicial Court, ‘it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been’.\textsuperscript{59}

This arbitrariness in distinguishing core elements from temporal facts cuts both ways; the ability to veil non-originalist tendencies under the guise of this originalist approach is discussed below in Section 5.2.1. It is worth noting Kitto J’s assertion that reference to the history of earlier legislation to establish the scope of a legislative power is more likely to establish the minimum content of a power than its outside limits.\textsuperscript{60} Similarly, when speaking of trade marks in the \textit{Union Label Case}, Higgins J said: ‘The usage in 1900 gives us the central type; it does not give us the circumference of the power’.\textsuperscript{61} On these principles, it is difficult to justify identifying heterosexuality as a core component simply because it was a feature of marriage in 1900.

Finally, if, as discussed below in Section 3.4, marriage is a ‘legal term of art’ – a shifting institution as opposed to a readily ascertainable object – it is anathematic to apply the connotation/denotation distinction.\textsuperscript{62}

\textsuperscript{57} Meagher, ‘Guided by Voices? – Constitutional Interpretation on the Gleeson Court’, above n 18, 266-269.
\textsuperscript{58} \textit{Family Law Act 1975} (Cth) s 48.
\textsuperscript{59} \textit{Goodridge v Department of Health} 798 NE 2d 941 (Mass. 2003), 961 n 23. See also \textit{Halpern v Attorney-General (Canada)} (2003) 225 DLR (4th) 529, 553.
\textsuperscript{60} Lansell v Lansell (1964) 110 CLR 353, 363.
\textsuperscript{61} \textit{Attorney-General (NSW) v Brewery Employees Union of NSW} (1908) (‘\textit{Union Label Case}’) 6 CLR 469, 610.
\textsuperscript{62} Meagher, ‘Guided by Voices? – Constitutional Interpretation on the Gleeson Court’, above n 18, 272, 286.
3.3 TEXTUALISM v INTENTIONALISM

Taking a purposive approach to the Marriage Power does not pasteurize the definitional problem. *Cole v Whitfield*, in its use of the Convention Debates, signalled the High Court’s move from textualism to intentionalism.⁶³ Where the former looks only to the words of the *Constitution* to ascertain the Framers’ intent, the latter looks also to extrinsic materials such as preparatory debates and previous draft Bills.⁶⁴ However, with no evidence that the Framers turned their minds to the prospect that same-sex couples might ever seek to marry, one cannot determine what their intentions would have been in that regard.

During the Convention Debates, questions of ‘morality and respectability’ were discussed.⁶⁵ For instance, the representatives of the states aside from NSW and Victoria were concerned to keep marriage and divorce laws within each colony, for fear of ‘the marital tie being dragged down to the level of NSW [and Victoria]’ where recently passed legislation had rendered divorce ‘exceedingly easy’ to obtain.⁶⁶ From its very unfathomability in the late 19th Century it is safe conjecture that same-sex marriage would have been seen as scandalous by the Framers and raised even more harried concerns. On the other hand, the purpose of including the Marriage Power was to ‘make possible uniform national regulation of a vitally important legal relationship that underpins family life, child rearing, and therefore social welfare throughout the nation’.⁶⁷ During the Debates, Mr Wise (NSW) asserted that despite differences of religious or moral sentiment, it was imperative to ‘always [preserve] such supreme control on behalf of the commonwealth as is necessary to prevent scandals from people having one status in one state, and another status in another state’.⁶⁸

*Cole v Whitfield* is often seen as applying the ‘common law mischief rule’, but it is purely speculative to say that the Framers would have seen greater ‘mischief’ in sanctioning

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⁶⁵ Official Record of the Debates of the Australasian Federation Conference (Second Session), Sydney, 22 September 1897, 1078-1081.
⁶⁶ Ibid, 1078 (Mr. Glynn, South Australia).
⁶⁸ Official Record of the Debates of the Australasian Federation Conference (Second Session), Sydney, 22 September 1897, 1079.
prospective same-sex marriage at the federal level, or conversely in denying Federal Parliament power to legislate for same-sex marriages (and hence impeding uniform regulation) had the question been adverted to.

3.4 **LEGAL TERM OF ART**

Federal power to legislate for same-sex marriage may, however, be a possibility if the High Court were to take a ‘legal term of art’ approach. This orthodox technique involves recognising marriage as a legal institution that, before 1900, was the subject of change by the common law and statutes of the United Kingdom and Australian colonies. Arguably, to apply the literalist strand to a ‘legal term of art’ is erroneous, for legal institutions were still developing (and being challenged) when the *Constitution* was drafted. To consider that their ‘essential meaning’ was frozen in 1900 would ‘betray that pre-federation history, the common law tradition and maybe even the intentions of the framers’. There are strong arguments for recognising marriage as a ‘legal institution’. Its constituent elements, social purpose and attendant formalities have shifted a great deal over time, as this paper will now elucidate.

Marriage was initially customary, involving a private exchange of mutual promises. It became a matter of religious significance when the church and ecclesiastical courts took ownership around the time of William the Conqueror. In England, the *Marriage Act 1753* made solemnisation by a priest and witnesses a legal requirement. Designed to prevent clandestine unions, the Act gave marriage a civil character whilst recognising the place of religious rites. These provisions were adopted by NSW in the *Marriage Act 1836* and remained in force until referral to the Commonwealth in 1961. Many religious aspects of marriage were removed with the passing of the *Family Law Act 1975* (Cth).

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69 Brock and Meagher, above n 14, 270.
70 Ibid.
71 Ibid, 267.
73 Brock and Meagher, above n 14, 268.
The Full Family Court in *Re Kevin* held that marriage was an evolving, not static, institution:

‘[W]e think it is plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. *The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time.*’\(^{74}\)

Indeed, laws widening the grounds of divorce defy the early conception of marriage as a union ‘for life’.\(^{75}\) That adultery is no longer a criminal offence corrodes the stringency of ‘to the exclusion of all others’. The courts have recognized that the primary purpose of marriage is not, as once perceived, procreation.\(^{76}\) While the decision in *Re Kevin* adhered to the notion of marriage as a heterosexual union, the court affirmed that parties to a marriage do not have to be biologically capable of having children, by declaring the marriage between a woman and a post-operative transsexual man to be valid.\(^{77}\) Moreover, since 1975 Australian law has provided no basis for invalidating a marriage on any ground relating to consummation or sexual conduct.\(^{78}\)

The Family Court has also acknowledged that the legal term ‘family’ is necessarily broad and need not be hetero-nuclear; in *Re Patrick* a same-sex couple and their child were recognized as a ‘family’.\(^{79}\) Same-sex couples are also allowed to adopt in a number of states, and can have

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\(^{74}\) Attorney-General (Cth) v Kevin (2003) 30 Fam LR 1, 22 (Nicholson CJ, Ellis and Brown JJ) (emphasis added).

\(^{75}\) By the time of federation the definition of marriage had already undergone change regarding its once indissoluble character. Australian divorce laws, modelled on the UK *Matrimonial Causes Act 1857*, recognized adultery as the only grounds for dissolving a marriage, and wives seeking a divorce had to additionally prove some aggravating circumstance such as incest, cruelty or desertion. Although towards the end of the 19\(^{th}\) Century NSW and Victoria recognized some additional grounds, the notion of divorce was still largely tied to ‘fault’. Grounds of divorce were widened even further (to include mere breakdown of a marriage) by the *Matrimonial Causes Act 1959* (Cth) and the *Family Law Act 1975* (Cth): Geoffrey Lindell, Answers to Questions on Notice to Standing Committee on Social Issues (NSW), Inquiry into Same Sex Marriage Law in NSW, 19 March 2013, 8-9.


\(^{77}\) Attorney-General (Cth) v Kevin (2003) 30 Fam LR 1, 66 (Nicholson CJ, Ellis and Brown JJ).

\(^{78}\) See *Family Law Act 1975* (Cth) s 51; *Marriage Act 1961* (Cth) ss 23, 23A, 23B. The common law defence to rape within marriage has also been rejected: *PGA v The Queen* (2012) 245 CLR 355.

\(^{79}\) *Re Patrick: An application concerning contact* (2002) 28 Fam LR 579, 650 (Guest J).
children through IVF. Moreover, federal reforms in 2008 removed provisions from the *Family Law Act 1975* which discriminated against same-sex parents. Significantly, there is also popular support; latest polls indicate that 64% of the Australian public are in favour of same-sex marriage.

These developments illustrate that marriage was and is a changing institution. In the contemporary context, both society and the law recognise that marriage may be based on a myriad of reasons, including romance, companionship, financial stability and creating or supporting a family unit. None of these grounds normatively or in fact disqualify same-sex couples.

*The Technological/Scientific Development Analogy*

In considering the ‘legal term of art’ approach, some authors seek to analogue the Marriage Power with construction of powers concerned with technological developments. Indeed, Brock and Meagher draw attention to the High Court’s use of the approach in construing the Intellectual Property Power s 51(xviii). In *Grain Pool*, the majority said of intellectual property rights:

‘Given the cross-currents and uncertainties in the common law and statute at the time of federation, it is plainly within the head of power in s 51(xviii) to resolve them. It is also within power…to determine that there be *fresh rights* in the nature of copyright, patents of invention and designs and trademarks’.

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80 Same-sex couple adoption was made available in the Australian Capital Territory in 2004, New South Wales in 2010, and Western Australia in 2002: *Parentage Act 2004* (ACT) sch 1 pt 1.2, *Adoption Amendment (Same Sex Couples) Act 2010* (NSW), *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) s 6. South Australia is currently the only jurisdiction in Australia to ban fertile single women and lesbians from accessing IVF treatment. However, on May 4 2012 the *Assisted Reproductive Treatment (Equality of Access) Amendment Bill 2012* (SA) was passed by the Legislative Council. The Bill now makes its way to the Legislative Assembly.

81 Above n 10.


83 Brock and Meagher, above n 14, 270.

Even though changes to marriage pertain to cultural and social values rather than technological or scientific development, marriage has similarly been viewed as a ‘recognisable but not immutable institution’. However, though useful, it is by no means a conclusive analogy, for two reasons.

Firstly, as pointed out in Grain Pool, the ‘special reason’ why no narrow approach could apply to the Intellectual Property Power is that ‘a universal feature of the twentieth century [was] the dynamic progress and momentum of science and technology’. While the principal inventions of the century were for the most part undiscovered or unforeseen, ‘…the Constitution certainly envisaged that the Commonwealth was entering an age of special technological inventiveness’. So much is evident in the provision of s 51(v) in wide terms: ‘postal, telegraphic, telephonic and other like services’.

Thus, construing future (even unforeseeable) technological developments as coming under the s 51(v) head of power is consistent with originalism. S 51(xxi), however is not formulated as explicitly contemplating the inclusion of future developments. Although the marriage institution had been through many social and cultural developments, it cannot be said to have the same degree of ‘dynamism’ as technological developments, let alone a dynamism explicitly recognized by the Constitution. Secondly, those objects identified in s 51(xviii) did not have a settled meaning at the time the Constitution was enacted. For example, the question of whether ‘patents’ needed to be a physical product, or could just be a process that produced a useful result, was still awaiting final decision. Marriage, on the other hand, had a certain legal definition in 1900.

However, there is a clear difference between heads of power dealing with ‘concrete, physical objects’ where ‘the boundaries of the class are fixed by external nature’ (such as lighthouses or railways) and ‘artificial products of society’, as Higgins J pointed out in the

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87 Ibid.
88 Ibid.
89 Goldsworthy ‘Interpreting the Constitution in its Second Century’, above n 17, 695.
90 This question was not settled until the judgement in National Research Development Corporation v Commissioner of Patents (1959) 102 CLR 252.
91 Constitution s 51(vii), s 51(xxxii).
Union Label Case, and the Court acknowledged in Grain Pool. It is thus more appropriate to treat the Marriage Power, concerning as it does an artificial socio-legal construct, similarly to powers over other social constructs like trade marks; as ‘involving a power to alter those rights, to define those rights, to limit those rights, to extend those rights, and to extend the class of those who may enjoy those rights’. Indeed, Higgins J characterized the Intellectual Property Power as akin to the Marriage Power and suggested that ‘Parliament could prescribe what unions are to be regarded as marriages’.

This is not to condone the stream rising above the source. As Higgins J himself stated, a single constitutional term is ‘not a peg on which Parliament may hang legislation’. It is, however, to acknowledge that the source of the marriage definition is not set in 1900; Parliament could extend the marriage institution to same-sex couples in line with the contemporary conception. Furthermore, if Federal Parliament did legalise same-sex marriage, a presumption in favour of constitutionality would arise under the ‘legal term of art’ approach, because legislation would represent a consensus throughout Australia as to the legitimacy and morality of same-sex marriage.

Social institutions are not always interpreted under the auspices of ‘legal term of art’. Indeed, strands of moderate originalism akin to this technique have been invoked to interpret constructs such as ‘trial by jury’ and ‘aliens’. These approaches will be explored in Section 5.2.

3.5 ORIGINALISM v NON-ORIGINALISM

In looking not only to which interpretive approaches facilitate a reading of s 51(xxi) as granting Federal Parliament power to legislate for same-sex marriage, but also which are appropriate to

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92 Union Label Case (1908) 6 CLR 469, 611 (Higgins J); Grain Pool (2000) 202 CLR 479, 19 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
94 Union Label Case (1908) 6 CLR 469, 610.
95 Ex parte Walsh & Johnson; In re Yates (1925) 37 CLR 36, 117.
reading the head of power, it is worth noting some general arguments of the originalist v non-originalist debate. These will only be referred to briefly, as they are already well-canvassed in the literature.97

Firstly, some argue that strict originalism is the only appropriate role for the (unelected and unrepresentative) judiciary to take; judges should not refer to consequences or policy considerations.99 However, in practice, neutral interpretation is impossible. The sparseness of the Constitution and indeterminacy of language mean that interpretation will necessarily involve policy and external considerations.99 ‘Marriage’ as a constitutional concept is difficult to define, not least because same-sex marriage was an unforeseen prospect in 1900. This ambiguity undermines Kay’s contention that originalism is ‘most likely to produce relatively clear and stable rules’.100

Another argument for original intent is that the Constitution itself prescribes a method of change; if the contemporary landscape or values are so out of step with the 1900 meaning to warrant alteration, the appropriate course to hold a referendum. However, there are strong counter-arguments against reliance on s 128: a referendum can only be brought about by the Commonwealth; is arguably inappropriate for minority rights issues; and referendums have a poor record of success, often put down to the difficulties in fairly formulating the question to be put to the people.101

Ultimately, the Constitution applies to a fundamentally different Australia from the one in the minds of the Framers and people at its conception. Like the Race Power s 51(xxvi) whose clearly racially discriminatory sentiments are no longer acceptable, the Marriage Power s 51(xxi) if interpreted in a strict originalist light bears an anachronistic pall deeply incongruous for a document which is intended to endure. Whilst one cannot dismiss the arguments for originalism, it is also important to consider non-originalist interpretive techniques.

98 Kirk, above n 64, 326. Bork argues that ‘only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy’: Robert H Bork, The Tempting of America: The Political Seduction of the Law (Free Press, 1990), 143.
99 Kirk, above n 64, 327; Zines, The High Court and the Constitution, above n 42, ch 17.
101 Kirk, above n 64, 352-353.
NON-ORIGINALISM

The non-originalist interpretive approach is predicated on the Constitution being a document that is ‘intended to endure for ages to come, and adapt to various crises of human affairs’. Thus, it is said that interpretation should take account of the ‘conditions, needs, practices, preferences, expectations and standards of modern times’, and does not depend on the Framers’ intentions. Such a dynamic or progressive interpretation, which compels the Court to the broader construction unless there is something to indicate otherwise, would likely facilitate a reading of s 51(xxi) as giving Federal Parliament the power to legislate for same-sex marriage. However, while policy concerns and questions of social consequence and morality will inevitably inform the constitutional interpretation, the High Court is unlikely to explicitly espouse non-originalism, as it is has been negatively associated with ‘judicial activism’.

The originalist orthodoxy has dominated the Australian constitutional scene; indeed, there is no similarly strong tradition of non-originalist interpretation. Its strongest proponents are Justices Kirby, Mason and Deane, though the latter’s oft quoted passage from Theophanous referring to Framers Andrew Inglis Clark’s vision of the Constitution as a ‘living force’ rather than ‘a lifeless declaration of the will and intentions of men long since dead’ is tempered by a closer reading of Clark which suggests that he was essentially an originalist.

However, the term ‘marriage’ defies an essentialist definition, and same-sex marriage was

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102 McCulloch v Maryland 17 U.S. (4 Wheat) 316 (1819), 415 (Marshall CJ). See also Union Label Case (1908) 6 CLR 469, 612 (Higgins J); Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29, 81 (Dixon J).
104 Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 42, 35.
105 Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309, 367-8 (O’Connor J).
106 This was the approach taken in Reference re Same-Sex Marriage [2004] 3 SCR 698 by which the Canadian Supreme Court upheld the power of the Dominion Parliament to enact same-sex marriage legislation. However, it is not suggested that the High Court of Australia will necessarily follow this approach given the differences between the Australian and Canadian Constitutions such as the exclusive nature of legislative powers provided under the latter, and the division of powers regarding solemnisation and other aspects of marriage: 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)’ above n 36, 36.
108 Kirk, above n 64, 333; Goldsworthy ‘Originalism in Constitutional Interpretation’, above n 42, 17. Before the passages quotes by Deane J, Clark said: ‘It has been repeatedly stated that the fundamental rule for the interpretation of a written law is to follow the intention of the makers of it as they have disclosed it in the language in which they have declared the law’: Andrew Inglis Clark, Studies in Australian Constitutional Law (1901), 21-22.
unforeseen by the Framers. As demonstrated above in Section 3, originalism does not provide a clear response as to how to resolve this ambiguity.

4.1 DYNAMIC / PROGRESSIVE INTERPRETATION

The Honourable Justice Michael Kirby has expressed irritation with sometimes tortured attempts to reconcile the needs of contemporary society with the Framers’ intentions, deriding the search for original intention as a form of ‘ancestor worship’. In Grain Pool he vehemently declared that upon enactment the words of the Constitution were: ‘set free from the framers’ intentions…The words gain their legitimacy and legal force from the fact that they appear in the Constitution; not from how they were conceived by the framers a century ago’. He added that he did not believe discernment of the 1900 meaning was ‘crucial or even important’. On his approach, where the Constitution is ambiguous, the Court should adopt a meaning in line with principles of universal and fundamental rights. In Kartinyeri v Commonwealth, for example, which concerned the scope of the (amended) Race Power, Gaudron J said it was difficult to fathom circumstances in which a law which operated to disadvantage a racial minority would be upheld as valid.

In order to discern the state of ‘contemporary values’, non-originalists may advert to principles reflected in international law (although this is somewhat controversial), foreign law, domestic law, as well as policy concerns.

4.1.1 International Law

In terms of international law, Australia is a State Party to the International Covenant on Civil and Political Rights (‘ICCPR’), which includes Article 23 ‘the right of men and women of marriageable age to marry’, Article 2 ‘non-discrimination in enjoyment of the rights protected

109 The Hon Justice Michael Kirby, above n 20.
111 Ibid, 525.
114 Historically, various judges have used international law in constitutional interpretation. However, more recently, Gummow and Hayne JJ have been critical of the use of international law in this way: Kristen Walker, ‘International Law as a Tool of Constitutional Interpretation’ (2002) 28 Monash University Law Review 85.
by the *ICCPR*, and Article 26 ‘all persons are “equal before the law” and receive “equal protection of the law”’. Similar provisions are found in the *Universal Declaration of Human Rights* (*UDHR*) Articles 16 and 7.

In the case of *Toonen v Australia*, Tasmania’s sodomy laws were examined by the UN Human Rights Committee (*UNHRC*) and deemed to be a breach of the *ICCPR* privacy provision Article 17.\(^\text{115}\) The Committee noted that the reference to ‘sex’ in Articles 2 and 26 is to be taken as including sexual orientation, but explicitly declined to make a finding that there had been a breach of Article 26.\(^\text{116}\) In *Joslin v New Zealand*, the UNHRC held that a signatory state’s refusal to enable same-sex couples to marry did not violate the *ICCPR* provisions.\(^\text{117}\) In particular, they stated that Article 23, being the only substantive Covenant provision to use ‘men and women’ rather than general terms such as ‘all persons’, has facilitated a consistent and uniform understanding that the right extends only to heterosexual marriage.\(^\text{118}\) Though not binding, the Committee’s views are persuasive.\(^\text{119}\) However, one can question whether the case would be decided the same way today, more than a decade later. At the time of the *Joslin* decision, only the Netherlands had legalised same-sex marriage. Since then, 13 countries have done so, and more seem set to follow. It is also interesting to note that when Australia’s human rights record was scrutinized as part of the UN Human Rights Council’s Universal Periodic Review in 2011, Australia’s failure to enact same-sex marriage legislation was honed in on as an area of concern.\(^\text{120}\) Today, the *ICCPR* and *UDHR* provisions may be seen as extending the right to marry to all persons, regardless of gender or sexual orientation.\(^\text{121}\)


\(^\text{116}\) Ibid, 8.7.


\(^\text{118}\) Ibid, 8.2.

\(^\text{119}\) Kristen Walker, ‘The Same-Sex Marriage Debate in Australia’ (2007) 11(1-2) *The International Journal of Human Rights* 109, 117. Note that two recent decisions of the European Court of Human Rights held that same-sex marriage is not a human right under the *European Charter of Human Rights (ECHR)*: *Schalk and Kopf v. Austria*, Application no. 30141/04, European Court of Human Rights (24 June 2010); *Affaire Gas et Dubois v. France*, Application no. 25951/07, European Court of Human Rights (14 March 2012). This is significant as the *ECHR* follows the *ICCPR* and *UDHR*.


\(^\text{121}\) Walker, ‘The Same-Sex Marriage Debate in Australia’ above n 119, 116; Castan Centre for Human Rights Law, Submission No 1253 to Standing Committee on Social Issues (NSW), *Inquiry into Same Sex Marriage Law in NSW*, 5 March 2013, 10-12.
At this point it is worth noting a separate head of power which the High Court is likely to consider in its adjudication of Federal competency to legislate for same-sex marriage. An argument might be raised that Federal Parliament has the requisite power under the treaty component of the External Affairs Power s 51(xxix); that is, same-sex marriage legislation would be a proportionate discharge of Australia’s equality and non-discrimination obligations under the ICCPR. However, this is a less than secure foothold as the ICCPR offers no explicit protection from discrimination on the basis of sexual orientation. Moreover, to be valid under s 51(xxix), the domestic law must have a clear and proportionate relationship to the international obligation. George Williams and Andrew Lynch suggest that Federal Parliament may be able to outlaw discrimination on the basis of sexuality, but it is probably going too far to positively legislate for same-sex marriage under this head of power.

4.1.2 Foreign Law

Returning to the non-originalist interpretation of s 51(xxi), the Court may be able to look to foreign law, as more and more countries enact same-sex marriage legislation. However, this is problematic in that some 180 nations still have not enacted same-sex marriage legislation (and many lack more basic equality laws), and Australia’s federal system and lack of Bill of Rights preclude any close analogies being drawn to those that have.

4.1.3 Domestic Law

Finally, the Court could look to domestic values of equality as informing the scope of ‘contemporary values’. Notably, all Australian states and territories prohibit discrimination on the basis of sexual orientation. Moreover, an aspect of liberal democracy and the rule of law is that all Australians should have equality before the law. It might be argued that an interpretation of s 51(xxi) which precludes Federal Parliament from legislating for same-sex

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122 Brock and Meagher, above n 14, 277.
123 Andrew Lynch, George Williams and Emily Burke, Submission to the Senate Legal and Constitutional Affairs Committee (Cth), Inquiry into the Marriage Equality Amendment Bill 2010, 15 March 2012, 5.
marriage defies Australia’s contemporary aversion to discrimination on the basis of sexual orientation.

Overall, by determining ‘contemporary values’ by reference to principles of international, foreign and domestic law, a non-originalist perspective may well facilitate a reading of s 51(xxi) as encompassing same-sex marriage.

4.1.4 Policy Concerns

From a functionalist perspective, non-originalist arguments have tended to surface when practical consequences are discussed, as in Koowarta and the Tasmanian Dam Case which addressed the modern realm of international relations.127 The Marriage Power debate involves serious policy concerns, almost necessitating a non-originalist analysis. If the s 51(xxi) power is limited to heterosexual marriage, it places same-sex marriage in the States’ purview. Patrick Parkinson cogently reasons that State Bills purporting to allow same-sex couples to marry actually create a new status of ‘same sex marriage’. In order to avoid inconsistency with the Federal Marriage Act (see Section 2.1.2), State legislation would have to shy away from labelling unions between same-sex couples as ‘marriage’. That is, their validity would hinge on establishing a legal relationship that is sufficiently different from that recognized by the Marriage Act.128 This creates two problems.

Firstly, that of symbolism. State law cannot offer same-sex couples access to the cultural richness of federally-recognized ‘marriage’, merely a ‘skim milk’ version. In (necessarily) differentiating between heterosexual and homosexual couples, there is a danger of perpetuating discrimination and exclusion.

Secondly, a State law would ‘create a hybrid status, being a kind of “marriage” with its own unique set of rules for limited purposes under [State law], and a de facto relationship in federal law and in the law of other states and territories. Under some circumstances it may be neither a marriage nor a de facto relationship in federal law’.129 This would create confusion, as same-sex couples would be on a different relationship register from heterosexual couples, and

128 Indeed, George Williams expressed his opinion that the Same-Sex Marriage Bill 2012 (Tas) would survive any inconsistency challenge precisely because it used circumscribed terminology: Williams, ‘Can Tasmania立法for Same-Sex Marriage?’, above n 16, 128.
129 Parkinson, above n 33, 1.
would go through a different divorce process.\textsuperscript{130} Marriage celebrants would need to apply for special authorization to conduct a ‘same-sex marriage’.\textsuperscript{131} The issue of subsequent marriage is also murky: the South Australian Bill, for example, seemed to allow a person to be married under both its own terms and the \textit{Marriage Act}; the Tasmanian Bill voided a same-sex marriage if a subsequent federally-recognised marriage was entered into (thus conferring an inferior status on same-sex marriage).\textsuperscript{132}

Finally, same-sex marriages entered into in one State would only be recognized and dissolvable in that State.\textsuperscript{133} As put by Geoffrey Lindell: ‘[T]he last thing we want to encourage is the notion of limping marriages which are recognised in some jurisdictions and not others. Parties to such relationships should be certain about their status wherever they reside in Australia or for that matter the rest of the world.’\textsuperscript{134}

Under a non-originalist approach, these functional policy concerns tend to the conclusion that s 51(xxi) should include competence to legislate for same-sex marriage. Even on an originalist approach, the prospect of a disharmonious body of state legislation might reasonably be considered to defy the Framers’ intention to allow for the development of a uniform marriage and divorce system.\textsuperscript{135} However, it is not definitive, as Australia’s federal system often produces legislation on a state-by-state basis until it prompts uniform national action; this is envisaged by the States’ referral power.

\section*{4.2 DANGERS OF NON-ORIGINALISM}

One must be mindful of the dangers in applying the non-originalist approach. Sir Daryl Dawson has said that ‘[t]he metaphor of a living tree does nothing to tell the judge where he should

\begin{footnotesize}
\begin{itemize}
\item[130] Ibid, 11.
\item[131] Ibid.
\item[132] Ibid, 13.
\item[133] Except for dissolution within the scope of the national cross-vesting legislation (ie. that it is ancillary to some other dispute for which the court has jurisdiction): Ibid, 12.
\item[134] Geoffrey Lindell, Answers to Questions on Notice to Standing Committee on Social Issues (NSW), \textit{Inquiry into Same Sex Marriage Law in NSW}, 19 March 2013, 5.
\end{itemize}
\end{footnotesize}
allow growth to take place or where he should apply the pruning knife’. Indeed, turning to universal principles where there is textual ‘ambiguity’ is unhelpful in that all constitutional provisions require a degree of interpretation. It also offers little guidance when there are various (potentially contrasting) principles of international, foreign and domestic law, and competing social values and policy considerations. This attracts arguments that the judiciary should not be the body weighing these competing values; they are unelected and unrepresentative of the Australian people.

Goldsworthy has vigorously criticized Kirby J’s approach as ‘radical non-originalism’; that dangerously, it may construe the Constitution in line with any modern sense that serves good government. He suggests that on Kirby J’s approach, all the Court has to work with are (1) the words of the Constitution, (2) its own earlier decisions interpreting those words (which are then put aside because earlier decisions based on originalist reasoning are of little weight) and (3) its perceptions of contemporary values and governmental needs. Radical readings, while not inevitable, are not ruled out. However, this perhaps misrepresents the approach; in its application Kirby J did consider the ‘history, purpose and language’ of constitutional terms. Thus he declined to interpret a parallel to the s 51 phrase ‘peace order and good government’ in the NSW Constitution Act as a substantive limitation on Parliament’s powers, which some judges in the NSW Court of Appeal would have done in spite of judicial history signifying plenary power. He also referred to the Convention Debates and historical context to flesh out the meaning of s 47 of the Constitution regarding disputed elections. Indeed, Kirby J’s approach does not aim ‘to defeat the intention of the Constitution and its framers. On the contrary, it [aims] to achieve its high and enduring governmental purposes’.

138 Ibid, 682.
139 Eg, Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations (1986) 7 NSWLR 372, 406.
140 Building Construction Employees and Builders’ Labourers Federation of NSW v Minister for Industrial Relations (1986) 7 NSWLR 372. The High Court rejected that interpretation in Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1.
142 The Hon Justice Michael Kirby, above n 20, 9.
In reality, the ‘slippery slope’ argument does not hold in interpreting the Marriage (or any other) Power. The Court cannot have wanton reference to capricious values or circumstances; the arguments that same-sex marriage might be encompassed by the term ‘marriage’ are based on a perception of strong, established social recognition (see Section 3.4). Appropriating Bill Maher’s humorous take on same-sex marriage to the constitutional setting:

‘[Recognition of same-sex marriage] is not a slippery slope to [recognition of] rampant interspecies coupling. When women got the right to vote, it didn’t lead to hamsters voting. No court has extended the equal protection clause to salmon…’\(^{143}\)

Clearly marriage cannot refer to anything. Non-originalism seeks a pragmatic solution to the needs of contemporary society which reliance on original intention cannot offer. Indeed, an analogy may be drawn to constitutional interpretation of the ‘voting franchise’, for which even more cautious judges partly accepted the ‘evolving meaning’ thesis.\(^{144}\) Whilst ‘the people’ would originally have referred to men (of certain qualification) and non-Indigenous persons, in *Langer v Commonwealth*, McHugh J construed ‘the people’ as an abstraction ‘whose content will change from time to time’\(^ {145}\). In *McInty v Western Australia*, Brennan J accepted that the franchise has historically expanded in scope such that it is ‘at least arguable that the qualifications of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote’.\(^ {146}\) To construe ‘marriage’ as applying only to heterosexual marriages may be as incongruous as construing the voting franchise as applying only to non-Indigenous, propertied men.


\(^{144}\) Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 42, 3.


\(^{146}\) (1996) 186 CLR 140, 166-167.
5  MIDDLE WAYS

There are undoubtedly great theoretical differences between the original intention and progressivist doctrines; the former privileges the meaning of constitutional terms as understood in 1900 and intended by the Framers, the latter aims to interpret the Constitution in a way amenable to the needs and values of modern society. However, in reality most decisions will take account of both imperatives. This is because ‘the tension between stability and change exists under either view’. Attempts to interpret s 51(xxi) exemplify this tension, as the power deals with an historically rich and enduring institution, which is nevertheless subject to much social and cultural change. What other approaches, which combine the original intention and progressivist methodologies, might the High Court then utilize?

Goldsworthy and Kirk canvas a number of methods for giving the Constitution a more flexible operation, including (1) ‘non-literal, purposive interpretation’ and (2) ‘underlying non-originalism’, under which ‘connotation and denotation’ and ‘context-dependent criteria’ are explored. Typecast under the banner of ‘moderate originalism’, their starting point is originalism, because ‘the most basic principle of statutory interpretation is the adoption of an originalist approach’. The process of evolution is then guided by the original, intended meaning.

5.1  NON-LITERAL, PURPOSIVE INTERPRETATION

Whereas an originalist approach post-Cole v Whitfield would look to extrinsic materials to discern the Framers’ intention as to the same-sex marriage question (which is obviously deficient), the ‘non-literal, purposive interpretation’ considers the ‘spirit rather than [the] letter’ of the text more broadly. For example, the United States Constitution gives Congress the

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147 Zines, ‘Dead Hands or Living Tree? Stability and Change in Constitutional Law’, above n 97, 16.
148 Kirk, above n 64, 344.
149 Goldsworthy ‘Interpreting the Constitution in its Second Century’, above n 17, 704.
power to raise ‘Armies’ and ‘a Navy’, and to regulate ‘the land and naval Forces’.

Air forces were unforeseen when the Constitution was enacted, and would not come within the connotation of ‘Armies’ or ‘Navies’, which are defined as land and sea-based forces. However, Congress is regarded as having the power to raise air forces because the purpose of the provision is clearly to allow Congress to have complete control over the country’s military forces.

Applying the analogy, the ultimate purpose of the Marriage Power was to make possible uniform national regulation of the legal relationship. During the Debates, the Honourable RE O’Connor (NSW) cited this imperative: ‘We want to bring about not only a recognition of the status, but a uniformity of the laws in regard to marriage and divorce…’.

Even the representatives of South Australia and Tasmania, who sought to retain significant State control over the institution for the time being, concurred. As The Honourable CH Grant (Tas) said, ‘[It] might be provided that the federal parliament, having the assent of the states, should eventually; have the power to evolve a uniform law of marriage’. The Honourable Sir JW Downer (SA) asked with rhetorical vehemence, ‘What subject is more fitted for general legislation? In what subject do we want a universal law more than that dealing with the most sacred relations that concern not merely the individuals who are parties to the contract…but also those who are to come afterwards?’

The current NSW Inquiry, introduction of 5 Federal and 3 State Bills, and international climate strongly suggest that same-sex marriage legislation is an inevitability. Its uniform regulation requires Commonwealth legislation, and this can be achieved by construing s 51(xxi) is a way consistent with the Founders’ pragmatic purpose.

It is important to note that the purpose of s 51(xxi) was not to delineate what marriage was. A moralistic purpose; for example, to prevent polygamous, even consanguineal marriages; could have been expressed by inserting a definition of marriage. Rather, the Framers left it to

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151 Art 1 s 8.
153 Ibid.
154 Official Record of the Debates of the Australasian Federation Conference (Second Session), Sydney, 22 September 1897, 1080.
155 Ibid, 1079.
156 Ibid, 1081.
the Parliaments to flesh out not only the formalities of solemnisation, but also the pre-requisite conditions for marriageability.

Finally, it is worth noting that the case is less contrived than the United States military force analogy; the latter requires a distinct departure from the literal words (it invokes a ghost addendum ‘and air forces’), but same-sex marriage would in the contemporary setting literally come within the formulation ‘marriage’.

5.2 UNDERLYING NON-ORIGINALISM

5.2.1 Connotation and Denotation

The Honourable Justice Michael Kirby has said that resort to formulae such as ‘connotation and denotation’ may sometimes disguise rather than clarify the real reasons why one choice is preferred in a particular case and another is rejected.157 Indeed, applying a high level of generality to the connotation of a constitutional term can produce very wide results, and essentially mask a progressivist reading. By ostensibly adverting to the Framers’ intended meaning, the interpretation appears to fall within originalism.

An example can be seen in the Court’s interpretation in Cheatle v R of the s 80 guarantee of a ‘trial…by jury’ for federal indictable offences.158 It is particularly apt for the s 51(xxi) debate, because both relate to cultural/social shifts and the attendant policy concerns. In 1900, jurors had to be propertied men. The Court fixed upon ‘representative of the wider community’ as the essential feature of the institution.159 Clearly, excluding women and unpropertied men would not be appropriate for the modern day. However, the Court chose to characterize the institution at an abstract level without explaining why that level was chosen, rather than profess to taking a non-originalist approach.

157 The Hon Justice Michael Kirby, above n 20, 9.
158 (1993) 177 CLR 541.
159 Ibid, 560-561.
Also illustrating the flexibility of the ‘connotation and denotation’ approach are the cases which considered the ‘naturalization and aliens’ power s 51(xix). The Framers considered aliens to be non-British subjects.\textsuperscript{160} In Nolan v Minister for Immigration and Ethnic Affairs, ‘aliens’ were defined at a high level of abstraction; essentially, as citizens or subjects of a foreign state.\textsuperscript{161} The Court considered Britain to be such a foreign state at least since enactment of the Australian Citizenship Act 1948, and so non-citizen British subjects were aliens within s 51(xix).\textsuperscript{162} This interpretation clearly fits contemporary needs, taking into account the development of Australian sovereignty and citizenship, and the Crown’s shift to a national (rather than imperial) office. However, no theoretical reasoning was given to explain why ‘foreign state’ as opposed to ‘non-British Empire’ was considered connotative.\textsuperscript{163}

Similarly, one could dismiss the Lord Penzance qualifier of ‘a man and a woman’ as part of the denotation of ‘marriage’. By connoting marriage as ‘the union of two people voluntarily entered into for life’, one could still claim to adhere to the ‘essential elements’ as conceived by the Framers. Indeed, this could be extended even further; for example, if contemporary values called for fixed-term marriages, ‘for life’ might be considered denotative.

\textbf{5.2.2 Context-Dependent Criteria}

A parallel approach is that of ‘context-dependent criteria’\textsuperscript{164} In Re Wakim; Ex parte McNally, McHugh J said that many constitutional terms ‘are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers…intended that they should apply to whatever facts and circumstances succeeding

\begin{footnotes}
\footnote{160} Official Record of the Debates of the Australasian Federal Convention, Melbourne, 22 January – 17 March 1898, 1788 (Isaacs), 1790-1791 (Holder), 1791 (Braddon), 1797 (Cockburn).
\footnote{161} (1988) (‘Nolan’) 165 CLR 178.
\footnote{162} Ibid, 183-186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), 189-192 (Gaudron J).
\footnote{163} This was echoed in Sue v Hill, where Britain was held to be a ‘foreign power’ within the meaning of s 44(i): (1999) 163 ALR 648, 662-675 (Gleeson CJ, Gummow and Hayne JJ), 692-696 (Gaudron J). Gaudron J stated [at 692-694] that “foreign power” is an abstract concept…To acknowledge that, in some constitutional provisions, some words and phrases are capable of applying to different persons or things at different times is not to change the meaning of those provisions’, but did not explain how to determine the level of abstraction invited by a constitutional term.
\footnote{164} Kirk, above n 64, 335.
\end{footnotes}
generations thought they covered.’ Their essential feature is an abstract concept, dependent on the common perception. He gave examples including the power to make laws with respect to ‘trading or financial corporations formed within the limits of the Commonwealth’ s 51(xx), ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’ s 51(xxxv), and ‘external affairs’ s 51( xxix). Indeed, in WA National Football League, Mason J asserted that the words ‘trading corporation’ were intended to refer to ‘such corporations as should from time to time be described as trading corporations’. In R v Coldham, ‘industrial disputes’ was given its ‘popular meaning’ as a ‘question of fact’. In Koowarta, Stephen J asserted that matters ‘generally regarded at any particular time’ as being of international concern come within the scope of the external affairs power.

Use of this approach has been limited. McHugh J stated that the level of abstraction for some constitutional words is much harder to identify, and pointed to ‘marriage’ as an example. However, while Goldsworthy asserts a paucity of ‘relative terms’ in the Constitution, Kirk suggests that a careful reading produces a lengthy list of context-dependent criteria. It is difficult to see why s 51(xxi) would be precluded from this list. Firstly, it seems arbitrary to affix a level of abstraction to any provision (aside from s 92 which has an historical meaning). Even the archetype of ‘thing with fixed external boundaries’, the lighthouse, might require a progressivist interpretation if in the future lighthouses were replaced by a different system for guiding sea vessels. Secondly, the Convention Debates evidence the Framers’ view of marriage as contingent on community values. Mr Wise (NSW) said that ‘…in all social questions such…as marriage, each community might be allowed to legislate according to its

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166 Ibid, 552-553.
167 R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190, 233.
168 (1983) 153 CLR 297, 312.
171 Kirk, above n 64, 335.
own ideas of right and wrong…’.

Though speaking to geographical and religious difference rather than temporality, he acknowledged social context-dependency. The Honourable CH Grant (Tas) also spoke about federal parliament ‘\textit{evolv[ing]} an [sic] uniform law of marriage’.

If we were to frame ‘marriage’ as a term whose dynamic operation was intended by the Framers, it could be interpreted as ‘such unions/legal relationships as should from time to time be described as marriages’ and hence encompass same-sex marriage if Federal Parliament were to legislate for it.

The ambiguities of this approach are apparent. What is required or valued by modern society is not, as claimed in \textit{R v Coldham}, a matter of fact. Rather, it requires the High Court to make a choice. One approach to this ‘choice’ is illustrated by Gaudron J’s dissent in \textit{Nolan}, where she said in respect of s 51(xxix): ‘For most purposes it is convenient to identify an alien by reference to the want or absence of the criterion which determines membership of that community.’

In noting that it was not until the 1987 amendment that the definition of an ‘alien’ as a ‘non-British subject, Irish citizen or protected person’ was removed from the \textit{Citizenship Act}, Gaudron J contended that the Act’s definition could not control the constitutional meaning of ‘alien’, but could, until its repeal in 1987, serve to identify those whom the Parliament had legislated to recognize as members of the Australian community.

This view was adopted by the majority in \textit{Re Patterson} to overturn \textit{Nolan}, such that it held that a British subject in essentially the same position as Nolan was not an alien and could not be deported. Applying Gaudron’s approach to s 51(xxi), the High Court might use the \textit{Marriage Act} as the ‘time to time’ descriptor which serves to identify those who are qualified to marry. Obviously then, the argument for including same-sex marriage in the Marriage Power hinges on Federal Parliament amending the \textit{Marriage Act}.

There are great difficulties in referring to Australian legislation to give meaning to constitutional concepts like ‘alien’ or ‘marriage’. Indeed, in \textit{Re Patterson}, Kirby J pointed out

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173 \textit{Official Record of the Debates of the Australasian Federation Conference} (Second Session), Sydney, 22 September 1897, 1079.

174 Ibid.

175 (1988) 165 CLR 178, 189.

176 Ibid, 190-193.

177 \textit{Re Patterson; Ex parte Taylor} (2001) 207 CLR 391.
that to take into account amendments to the *Citizenship Act* ran contrary to Gibbs CJ’s reproach, with which many other judges have concurred, that Parliament cannot provide its own definition of ‘alien’ for the purposes of s 51(xix).\(^{178}\) This follows the renowned assertion in *Australian Communist Party v Commonwealth* that Parliament cannot ‘recite itself into power’.\(^{179}\)

However, where the original meaning at 1900 is no longer appropriate, and some degree of judicial choice must factor, domestic legislation is, like international law and evidence of public opinion, indicative of contemporary conceptions. Indeed, Brock and Meagher assert that the ‘democratic credentials’ of potential Federal legislation allowing same-sex marriage are important, ‘especially…if such legislation were to be enacted pursuant to a conscience vote in Parliament’.\(^{180}\) This is because it would reflect a national consensus as to ‘the morality and legitimacy of same-sex marriage…The presumption in favour of constitutionality ought to be at its strongest when federal legislation determines complex and intractable moral issues of this kind’.\(^{181}\)

However, it is important to note that Gaudron J’s focus on federal legislation is but one option under the ‘context-dependent criteria’ approach. The High Court might also or alternatively look to other factors (such as other domestic legislation, international law, foreign law and public opinion as discussed in Sections 3.4 and 4.1) as indicative of contemporary values. Normatively, duly considering and weighing each of these factors is the preferable course.

### 6 CONCLUSION

As more and more States seek to push through same-sex marriage legislation, and pressure mounts on the Federal Government to amend the *Marriage Act*, it becomes ever more apparent that a High Court judgment on the scope of the Marriage Power is in the offing. Whether the High Court will interpret s 51(xxi) as encompassing the power to legislate for

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\(^{179}\) (1951) 83 CLR 1, 206 (McTiernan J).

\(^{180}\) Brock and Meagher, above n 14, 272.

\(^{181}\) Ibid.
same-sex marriage is very much an open question, for in matters of constitutional interpretation, ‘much depends upon the particular question to be resolved and the concatenation of factors which may be relevant to it’. More specifically, much depends on which interpretive approach(es) the judges choose to take, and how they weigh the attendant factors.

This paper has considered originalist, non-originalist and middle-way approaches to constitutional interpretation. The literalist and intentionalist strands of originalism, focussed as they are on the common understanding of ‘marriage’ in 1900, would not construe s 51(xxi) as encompassing same-sex marriage. The converse is most likely true of a dynamic non-originalist approach, which aims to ensure that the Constitution accommodates contemporary community values and policy concerns. This paper has also demonstrated the potential for subversion; the ‘connotation and denotation’ approach may facilitate a non-originalist reading under the guise of originalism. However, it is not advocated because it is philosophically problematic and non-prescriptive.

The Marriage Power is uniquely complex, because same-sex marriage was a completely unforeseen concept at the time of constitutional enactment. Consequently, to apotheosize original intent would be absurd. It thus seems inevitable that the Court will give credence to the modern context. However, non-originalism entails the theoretical danger of radical readings, although a close analysis of even Kirby J’s dynamic approach shows that historical context and the Framers’ intentions will rarely (if ever) be ignored as completely irrelevant. The problem of interpreting s 51(xxi) is thus best resolved by an approach which invokes both originalism and non-originalism.

Taking a step back, one can conflate the ‘legal term of art’, ‘context-dependent criteria’ and ‘non-literal purposive’ interpretive approaches. All consider original intent by construing s 51(xxi), in its generality and evolving subject matter, as intended to be dependent on social understandings. They then invoke factors such as domestic legislation, international values, foreign law and public opinion to flesh out ‘contemporary community values’. Provided that they acknowledge the necessary invocation of judicial choice (in the interest of transparency),

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this goes some way to ameliorating the raging tension between originalism’s anachronism, and non-originalism’s instability and seeming unboundedness.

The socio-political debate teems, and with a paucity of High Court guidance on the scope of s 51(xxi), the legal debate remains unpasteurised. Some years ago, Geoffrey Lindell hypothesised that the longer the same-sex marriage issue is postponed for decision, the greater the chances of its eventual acceptance.\(^{183}\) Indeed, the more time that passes, the more public support that is garnered. More countries recognise same-sex marriage, and more compelling are the arguments that this is representative of contemporary values. Continuing on this trajectory, it seems that when the High Court does come to determine the scope of s 51(xxi), it may well rule that Federal Parliament does have the power to legislate for same-sex marriage, and offer ‘full-cream marriage’ to Australian couples regardless of sexual orientation.

\(^{183}\) 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)’, above n 36, 29.
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