

NOTE

Proposition 8 Is Unconstitutional, But Not Because the Ninth Circuit Said So: The Equal Protection Clause Does Not Support a Legal Distinction Between Denying the Right to Same-Sex Marriage and Not Providing It in the First Place

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I. INTRODUCTION

In 2008, advocates for marriage equality¹ lost a hard-fought and contentious campaign battle in California: voters approved Proposition 8 and eliminated the right to same-sex marriage.² The battle, however, had only begun. Two same-sex couples whose plans to marry had been cancelled by the passage of Proposition 8 sued the state in federal district court, maintaining that Proposition 8 violates the Constitution.³ They won. The district court issued a landmark decision in which the court broadly held that banning same-sex marriage violates both the Equal Pro-

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1. This Note will use the terms “marriage equality” and “same-sex marriage.” Although the term “gay marriage” is widely used, it is noninclusive. For example, the term does not include bisexual or transgendered persons. See Patrick Busch, *Is Same-Sex Marriage A Threat to Traditional Marriages?: How Courts Struggle with the Question*, 10 WASH. U. GLOBAL STUD. L. REV. 143, 143 n.1 (2011). But see Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 5 n.6 (2006) (choosing the term “genderless marriage” because “same-sex marriage” suggests something different from opposite-sex marriages).

2. CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

3. See generally *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

tection Clause and a person's fundamental right to marry.⁴ Then, four and a half years later, the Ninth Circuit Court of Appeals affirmed the district court's ruling—but on significantly narrower legal grounds.⁵ Now, the Supreme Court has granted certiorari.⁶

This Note is about the Ninth Circuit's decision. In *Perry v. Brown*, the Ninth Circuit held that Proposition 8 is unconstitutional. But in doing so, the court stepped back from the breadth of the district court's decision. The Ninth Circuit did not address whether same-sex marriage is a fundamental constitutional right. Nor did the Ninth Circuit address whether the Equal Protection Clause categorically prevents states from limiting marriage to opposite-sex couples. Instead, the Ninth Circuit reached the narrow conclusion that Proposition 8 violates the Equal Protection Clause because it *withdrew* a preexisting legal right from a marginalized group without any legitimate purpose.⁷

But U.S. Supreme Court precedent does not support the narrowness of the Ninth Circuit's holding in *Perry* because the difference between withdrawing and withholding the right to same-sex marriage is not legally significant. Rather, under the U.S. Supreme Court's equal protection jurisprudence, *any* denial of the right to same-sex marriage is unconstitutional. The Ninth Circuit interpreted *Romer v. Evans* and *U.S. Department of Agriculture v. Moreno* to mean that taking away a right is legally distinct from not providing a right in the first place.⁸ But these cases do not stand for this proposition. Instead, *Romer* and *Moreno* stand for the proposition that animus toward a specific group of people, on its own, is never a rational basis for a law.⁹ While the government had indeed with-

4. *Id.* at 995, 997. The Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

6. *See* *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012). In addition to *Hollingsworth*, the Court granted certiorari in a case presenting the question of whether the Fifth Amendment prohibits the federal government from exclusively recognizing opposite-sex marriages pursuant to the Defense of Marriage Act. *See* *United States v. Windsor*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012). Oral argument in *Hollingsworth* will take place on March 26, 2013; oral argument in *Windsor* will take place the following day. *October Term*, SUPREMECOURT.GOV (Jan. 7, 2013), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMar2013.pdf. A decision is expected sometime in June. Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES (Dec. 8, 2012), <http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html>.

7. *Perry*, 671 F.3d at 1095.

8. *Id.* at 1083.

9. *See* Samuel A. Marcossan, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their "First Line of Defense" in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217, 242 (1998).

drawn a previously recognized right in both cases, this fact was significant only to the extent that it provided *evidence* of animus.¹⁰ As such, the Ninth Circuit was correct in concluding that Proposition 8 lacks a rational basis and can be explained only by animus.¹¹ The court, however, was incorrect in creating a withdrawal–withholding distinction that limits the applicability of its decision.

The Ninth Circuit should have held that the Equal Protection Clause prohibits any denial of the right to same-sex marriage, regardless of whether it is withdrawn or withheld. As the decision stands, *Perry* only provides legal protection to same-sex marriage in the event that a state has granted the right, but then takes it away.¹² *Perry* is unnecessarily meaningless in states that have never allowed same-sex marriage.¹³ Accordingly, the Supreme Court should affirm the Ninth Circuit, but disregard its reasoning. The Court should instead adopt the district court’s reasoning.

Part II provides background information on the facts and district court bench trial that led to the Ninth Circuit’s decision in *Perry*. Part III then summarizes and explains the decision. Part IV argues that the U.S. Supreme Court’s equal protection jurisprudence does not support the narrowness of the *Perry* court’s holding. Part V concludes.

II. PROPOSITION 8 AND THE DISTRICT COURT’S DECISION

On November 4, 2008, California voters eliminated the right to same-sex marriage by approving Proposition 8.¹⁴ The passage of Propo-

10. See Michael C. Dorf, *Does the 9th Circuit Prop 8 Ruling Recognize a Constitutional Endowment Effect?*, DORF ON L. (Feb. 7, 2012, 3:37 PM), <http://www.dorfonlaw.org/2012/02/does-9th-circuit-prop-8-ruling.html> (“[The court’s] reasoning is sounder if one understands the references to taking away as simply evidence of animus.”).

11. *Perry*, 671 F.3d at 1095.

12. Only one state falls in this category: California. See Robin West, *Reaction: A Marriage Is a Marriage Is a Marriage: The Limits of Perry v. Brown*, 125 HARV. L. REV. F. 47, 48 (2012), http://www.harvardlawreview.org/issues/125/february12/forum_828.php (“*Perry v. Brown* is nothing more than a *sui generis* decision for a unique set of facts.”).

13. In this category are the other forty states where same-sex marriage is not allowed. Nine states—Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington—as well as the District of Columbia, the Suquamish Indian Tribe, and the Coquille Indian Tribe allow same-sex marriage. *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Feb. 18, 2013); William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. TIMES (Aug. 11, 2011), <http://www.nytimes.com/2011/08/12/us/12tribe.html>.

14. Jessie McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html>. That same day, voters in two other states, Florida and Arizona, passed similar bans on same-sex marriage. *Id.* There are currently thirty-five states with laws against same-sex marriage. See *Where State Laws Stand*, *supra* note 13.

sition 8, which overturned *In re Marriage Cases* (the *Marriage Cases*), a California Supreme Court decision that had legalized same-sex marriage,¹⁵ ended a 141-day period during which thousands of same-sex couples married.¹⁶ The following section tells two stories: how Proposition 8 came to pass and how a federal district judge later struck it down.

A. Background

The legality of same-sex marriage has a tumultuous history in California. In 1999, California became the first state to legislatively extend legal status to same-sex couples when it enacted a domestic partnership registry.¹⁷ But the following year, not long after President Bill Clinton signed the Defense of Marriage Act (DOMA),¹⁸ California enacted a nearly identical law.¹⁹ Proposition 22, a successful voter initiative, statutorily restricted the availability of marriage to heterosexual couples.²⁰ Four years later, San Francisco Mayor Gavin Newsom deliberately disobeyed the law and ordered the county clerk's office to grant marriage licenses to all couples, regardless of sex.²¹ The clerk's office followed the mayor's orders until, several weeks later, the California Supreme Court directed the Mayor to comply with state law.²²

Days later, the City of San Francisco initiated a lawsuit in state court seeking a declaratory judgment that Proposition 22 had violated the

15. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

16. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

17. CAL. FAM. CODE § 297 (1998); *Marriage, Civil Unions and Domestic Partnerships: A Comparison*, EQUALITY MAINE, <http://equalitymaine.org/marriage-civil-unions-and-domestic-partnerships-comparison> (last visited Feb. 18, 2013). California has since expanded the rights available under domestic partnership status such that the law provides, in effect, everything but the label of marriage. See CAL. FAM. CODE § 297.5(a) (2003) ("Registered domestic partners shall have the same rights . . . as are granted to and imposed upon spouses.").

18. 1 U.S.C. § 7 (2000) ("[T]he word 'marriage' means only a legal union between one man and one woman . . ."), *invalidated by* *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116, (U.S. Dec. 7, 2012) (No. 12-307). After the Hawaii Supreme Court held that strict scrutiny was the appropriate measure for determining the constitutionality of statutes limiting same-sex marriage to heterosexual couples, see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), a conservative outcry over the prospect that states would soon legalize same-sex marriage led to DOMA. Although President Clinton has never apologized for signing DOMA, in the years since doing so he has voiced support for same-sex marriage. See *Defending DOMA*, NYMAG.COM (Feb. 26, 2012), <http://nymag.com/news/frank-rich/bill-clinton-doma-2012-3> (quoting President Clinton's various stances on the issue).

19. Evelyn Nieves, *Those Opposed to 2 Initiatives Had Little Chance from Start*, N.Y. TIMES (Mar. 9, 2000), <http://www.nytimes.com/2000/03/09/us/2000-campaign-california-those-opposed-2-initiatives-had-little-chance-start.html>.

20. CAL. FAM. CODE § 308.5 (2000) (limiting marriage to "between a man and a woman").

21. *Schwarzenegger*, 704 F. Supp. 2d at 927.

22. *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 499 (Cal. 2004).

state constitution.²³ The trial court agreed,²⁴ but the California Court of Appeals did not.²⁵ The issue appeared before the California Supreme Court the following year.

1. The California Supreme Court's Legalization of Same-Sex Marriage
in the *Marriage Cases*

In a 4-3 decision issued May 15, 2008, the California Supreme Court declared that Proposition 22, and any denial of the right to same-sex marriage, was prohibited under its state constitution, thus legalizing same-sex marriage in California.²⁶ The court invalidated Proposition 22 after determining that all Californians have a fundamental state constitutional right to marry whomever they please.²⁷ Moreover, although domestic partnership status provided an avenue to receiving the same substantive legal rights enjoyed by married couples,²⁸ attaching a separate designation to that bundle of rights was a violation of the Equal Protection Clause.²⁹ Notably, the court applied strict scrutiny, not rational basis review or even intermediate scrutiny, in its equal protection analysis.³⁰ Heightened review was appropriate, the court explained, because Proposition 22 blocked a historically marginalized group from obtaining a significant legal right on the basis of a characteristic similar to gender and race.³¹

23. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).

24. *In re Coordination Proceeding*, Special Title Rule [1550(c)], *Marriage Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), *rev'd in part*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384.

25. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675.

26. *In re Marriage Cases*, 183 P.3d at 453.

27. *Id.*

28. CAL. FAM. CODE § 297.5(a).

29. *In re Marriage Cases*, 183 P.3d at 443.

30. *Id.* at 442. When a law is challenged under the Equal Protection Clause, courts use one of three levels of scrutiny to decide whether the law is constitutional: strict scrutiny, intermediate scrutiny, or rational basis review. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 719 (3d ed. 2009). To withstand strict scrutiny, the government must prove that the law is necessary to achieve a compelling purpose. *Id.* Under intermediate scrutiny, the law must be substantially related to an important purpose. *Id.* The lowest level of scrutiny, rational basis review, requires only that the law be rationally related to a legitimate purpose. *Id.* at 720. This three-tiered system has, however, come under attack as an inflexible and insensible way to apply the Equal Protection Clause. *See, e.g.*, Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 141 (2011) (exploring the "inconsistencies and absurdities" that result from conducting equal protection analysis under the three levels of review).

31. *In re Marriage Cases*, 183 P.3d at 442.

In the months following the *Marriage Cases*, around 18,000 same-sex couples got married in California.³² But for those celebrating the court's landmark decision, the celebration did not last long. Even before the high court reached its decision in the *Marriage Cases*, opponents of same-sex marriage were already on their way to overturning it.³³

2. Campaign and Passage of Proposition 8

In October 2007, months before the *Marriage Cases*, Protect Marriage, the same group responsible for Proposition 22, filed another initiative.³⁴ This time, however, rather than seeking to amend California's family laws as Proposition 22 did, Protect Marriage sought to amend the state constitution.³⁵ The California Marriage Protection Act, or Proposition 8 as it later came to be known, proposed adding a section to the state constitution expressly providing that California only recognizes marriages between a man and a woman.³⁶ To qualify for the ballot, Proposition 8 needed enough signatures from registered voters to exceed eight percent of the number of votes counted in California's most recent gubernatorial election.³⁷ At the time, at least 694,354 were needed.³⁸

Just weeks before the state supreme court struck down Proposition 22, supporters of Proposition 8 submitted 1,120,801 signatures, far exceeding the requisite amount to qualify for the November 2008 ballot.³⁹ In the months to come, as thousands of same-sex couples exercised their long-awaited right to marry, Protect Marriage carried out a massive

32. Jesse McKinley, *Same-Sex Marriage Ruling Set for Tuesday in California*, N.Y. TIMES (May 22, 2009), <http://www.nytimes.com/2009/05/23/us/23calif.html?ref=samesexmarriage>.

33. See Letters from Dennis Hollingsworth et al. to Initiative Coordinator, Office of the Cal. Att'y Gen. (Oct. 1, 2007), available at http://www.ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf.

34. *Id.*

35. *Id.*

36. The initiative included the following proposed language:

SECTION 1. Title

This measure shall be known and may be cited as the "California Marriage Protection Act."

SECTION 2. Article I, Section 7.5 is added to the California Constitution, to read:

Sec. 7.5. Only marriage between a man and a woman is valid or recognized in California.

Id.

37. CAL. CONST. art. II, § 8(b).

38. See Press Release, Secretary of State Debra Bowen Certifies Eighth Measure for November 4, 2008, General Election (June 2, 2008), available at <http://www.sos.ca.gov/admin/press-releases/2008/DB08-068.pdf>.

39. *Id.*

statewide campaign to eliminate that right.⁴⁰ Religious and conservative groups quickly mobilized to rally support for the initiative in California.⁴¹ As they did so, organizations across the country donated millions of dollars to the effort and the initiative drive was quickly on its way to becoming the most expensive election fight over a social issue in U.S. history.⁴² Offensive television commercials and billboards spread quickly throughout the state, using bigoted stereotypes and false information to encourage voters to ban same-sex marriage.⁴³ Supporters of marriage equality fought back against the initiative and garnered similar national support,⁴⁴ but their efforts were ultimately unsuccessful. Due to Protect Marriage's substantial support from powerful religious organizations,⁴⁵ and a deficit in public support for marriage equality,⁴⁶ Proposition 8 passed on November 4, 2008, with 52% of the vote.⁴⁷

While many across the country celebrated President Obama's historic election, reaction in California to the passage of Proposition 8 was

40. Laurie Goodstein, *A Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES 2 (Oct. 26, 2008), <http://www.nytimes.com/2008/10/27/us/27right.html?pagewanted=2>.

41. *Id.*

42. *California Voters Approve Proposition 8 Gay Marriage Ban*, TELEGRAPH (Nov. 5, 2008), <http://www.telegraph.co.uk/news/worldnews/3387562/California-voters-approve-Proposition-8-gay-marriage-ban.html>.

43. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 990 (N.D. Cal. 2010) ("The campaign conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships."). A particularly egregious example of the Proposition 8 campaign's tactics is a television advertisement depicting a young girl rushing home after school to tell her mother, "I learned how a prince married a prince and how I can marry a princess"—the commercial then abruptly cuts to an ominous voice warning viewers, "Think it can happen? It's already happened." *Yes on Proposition 8, It's Already Happened*, YOUTUBE (Oct. 7, 2008), <http://www.youtube.com/watch?v=0PgjcgqFYP4>; see also John Wildermuth, *Report: Anti-Gay TV Ads Swayed Prop. 8 Voters*, S.F. CHRON. (Aug. 4, 2010), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/08/03/ba8n1e0f15.dtl> ("The anti-gay side knows how to stimulate and exploit anti-gay prejudices." (quoting David Fleischer, author of the Prop. 8 Report)).

44. See *California Voters Approve Proposition 8 Gay Marriage Ban*, *supra* note 42; see also Julie Bloom, *Brad Pitt Supports Same-Sex Marriage*, N.Y. TIMES (Sept. 18, 2008), http://www.nytimes.com/2008/09/19/arts/19arts-bradpittsupp_brf.html.

45. See, e.g., Jessie McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES (Nov. 14, 2008), <http://www.nytimes.com/2008/11/15/us/politics/15marriage.html>. By no means, however, was the Mormon Church alone in its support of Proposition 8—other major contributors included Focus on the Family, the Catholic Fraternal Group, the Knights of Columbus, and the American Family Association. See Goodstein, *supra* note 40.

46. See *California Voters Approve Proposition 8 Gay Marriage Ban*, *supra* note 42. Although Proposition 22 passed with substantial support in 2000—62%, see Nieves, *supra* note 19—supporters of marriage equality had expected public opinion to have changed since that time.

47. McKinley, *supra* note 32.

swift and pronounced.⁴⁸ In the week following the general election, same-sex marriage advocates protested on the steps of the state capitol and in front of organizations that had supported the initiative.⁴⁹ One demonstration outside of a Mormon temple in Oakland was so large that the California State Patrol had to shut down nearby highway ramps to protect the crowd from traffic.⁵⁰

Legal action was not far behind—cities across California quickly petitioned the state supreme court to review the legality of the initiative.⁵¹ In asserting the substantive unconstitutionality of Proposition 8, they argued alternatively that revisions to the state constitution require approval from the state legislature.⁵² The following year, however, the court upheld Proposition 8, concluding that the measure was a valid use of the voter initiative process.⁵³ And even though the *Marriage Cases* had established a constitutional right to same-sex marriage only one year prior, the court interpreted that decision as enshrining only the right to enter into a “protected family relationship that enjoys all of the constitutionally based incidents of marriage.”⁵⁴ The court reasoned that, because the initiative did not disturb the legality of domestic partnerships, same-sex couples had not lost any substantive rights, only the “designation of marriage.”⁵⁵

Having upheld Proposition 8, the California Supreme Court not only devastated supporters of marriage equality, but also left them wondering where to go next.⁵⁶ Many set their sights on future state elections as an opportunity to pass an initiative of their own, one that would invalidate Proposition 8 and reinstate the right to same-sex marriage.⁵⁷ Others

48. *In California, Protests over Gay Marriage Vote*, N.Y. TIMES (Nov. 9, 2008), <http://www.nytimes.com/2008/11/10/us/10protest.html?ref=californiasproposition8samesexmarriage>.

49. *Id.*

50. *Id.*

51. Jessie McKinley, *Top Court in California Will Review Proposition 8*, N.Y. TIMES (Nov. 19, 2008), <http://www.nytimes.com/2008/11/20/us/20marriage.html>.

52. Brief for Petitioner at 2, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047).

53. *Strauss*, 207 P.3d at 116. The only saving grace for same-sex couples in California was the court’s decision to leave undisturbed the legality of the nearly 18,000 same-sex marriages performed during the summer of 2008. *See id.* at 121.

54. *Id.* at 75.

55. *Id.* In other words, the court somehow concluded that Proposition 8 did not “*fundamentally alter* the meaning and substance of state constitutional equal protection principles as articulated in [the *Marriage Cases*].” *Id.* at 61.

56. John Schwartz, *California High Court Upholds Gay Marriage Ban*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/27marriage.html>.

57. Jesse McKinley, *Proposition’s Opponents Say Fight Will Continue*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27react.html>.

felt that with a Democratic majority in Congress, and a newly elected Democratic president, the best option was a push for federal legislation.⁵⁸

Yet some saw an avenue in federal court. In a case that would make national headlines for years to come,⁵⁹ two same-sex couples, Kristin Perry and Sandy Stier, and Paul Katami and Jeffery Zarrillo, filed a complaint in the Northern District of California on May 22, 2009.⁶⁰ Their argument was simple: Proposition 8 violates the U.S. Constitution's guarantees of due process and equal protection under the Fourteenth Amendment.⁶¹

B. Trial

On the first day of a twelve-day bench trial in January 2010, Judge Vaughn Walker interrupted both parties' opening statements more than once to remind them that this case was to be about evidence, not rhetoric.⁶² Specifically, it was to be about evidence that answered the following question: as a matter of fact and law, does denying the right to same-sex marriage violate the U.S. Constitution?

In arguing that Proposition 8 is unconstitutional, plaintiffs presented extensive testimony from eight lay witnesses and nine expert witnesses.⁶³ Generally, lay witnesses were Californians in same-sex relationships who emphasized three points: (1) a domestic partnership is not the same as a marriage, and this difference had caused them hardships;⁶⁴ (2)

58. Jeremy W. Peters, *Debate over Gay March Exposes Split in Approach*, N.Y. TIMES (Oct. 9, 2009), <http://www.nytimes.com/2009/10/10/us/10march.html>.

59. Adding notable attention to the lawsuit, plaintiffs' attorneys were Ted Olson and David Boies. The last time that Olson, a longtime Republican who had served in the Reagan and Bush administrations, appeared in court with Boies, a longtime Democrat, was when Olson and Boies faced off in the landmark decision, *Bush v. Gore*, 531 U.S. 98 (2000). Jesse McKinley, *Two Ideological Foes Unite to Overturn Proposition 8*, N.Y. TIMES (Jan. 10, 2010), <http://www.nytimes.com/2010/01/11/us/11prop8.html>. For a succinct background on Ted Olson's decision to support the fight for marriage equality, see Eve Conant, *The Conscience of a Conservative*, NEWSWEEK (Jan. 8, 2010), <http://www.thedailybeast.com/newsweek/2010/01/08/the-conscience-of-a-conservative.html>.

60. Complaint for Declaratory Relief, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. CV 09-2292-VRW). The named defendants, among them Governor Arnold Schwarzenegger, declined to defend Proposition 8; as such, the district court allowed the initiative's supporters to intervene, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. See *Perry v. Brown*, 671 F.3d 1052, 1068 (9th Cir. 2012), cert. granted, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144) (citing FED. R. CIV. P. 24(a)).

61. Complaint for Declaratory Relief at §§ 40–44, *Schwarzenegger*, 704 F. Supp. 2d 921 (No. CV 09-2292-VRW).

62. Jesse McKinley, *Personal Focus as Same-Sex-Marriage Trial Opens in California*, N.Y. TIMES (Jan. 11, 2010), <http://www.nytimes.com/2010/01/12/us/12prop8.html>.

63. *Schwarzenegger*, 704 F. Supp. 2d at 932.

64. See *id.* at 932–33. To give an example of this difference and the everyday difficulties it causes, one witness testified that when he and his partner went to a bank and asked to open a joint

marrying the person whom they love would provide significant meaning and happiness to their lives;⁶⁵ and (3) being denied the right to marry excludes them from the rest of society.⁶⁶ The expert witnesses focused on the societal and personal benefits of marriage, its history as an institution, and the ways in which marriage equality would improve California.⁶⁷

Defense counsel for Proposition 8⁶⁸ pursued a different strategy. Having had difficulty gathering witnesses, their case revolved around the presentation of two expert witnesses and two taped depositions; they spent the rest of their time cross-examining the plaintiffs' witnesses.⁶⁹ Not a single official representative of the Proposition 8 campaign testified at trial.⁷⁰ The defense's first expert witness argued three points: (1) the purpose of marriage is to regulate procreation; (2) children would be less likely to succeed if society encourages marriages that cannot result in biological children; and (3) same-sex marriage would erode the institution of marriage.⁷¹ The second expert maintained that same-sex couples possess significant political power in both California and the rest of the country, and therefore, had not been "invidious[ly]" discriminated against by Proposition 8.⁷² For support, he cited instances where "religious, political, and corporate" assistance had helped secure victories for same-sex rights.⁷³ Neither expert fared well on cross-examination.⁷⁴

account, the teller assumed that because they were "partners," they must want a business account. *Id.* at 933. Another witness provided an additional example: "I'm a 45-year-old woman. I have been in love with a woman for 20 years and I don't have a word to tell anybody about that." *Id.*

65. *Id.* at 933.

66. *Id.*

67. *Id.* at 940–44. Not only would the right to same-sex marriage provide personal benefits to same-sex couples, it would provide substantial economic benefits to the State of California. *Id.* at 941.

68. The parties defending Proposition 8 were not the defendants named in the lawsuit—state representatives, including former Governor Arnold Schwarzenegger, refused to defend the initiative. Appearing in defense of Proposition 8 were representatives of the groups Protect Marriage and Yes on 8. *See id.* at 921.

69. *Id.* at 944–50. To explain its minimal support, the defense told the court that previously scheduled witnesses had declined for fear of appearing on television and suffering retaliation from opponents of Proposition 8. The court, however, was not convinced. *Id.* at 944. The U.S. Supreme Court had in fact foreclosed the possibility of witnesses appearing on television when a divided bench issued a permanent stay on broadcasting the trial. *See Hollingsworth v. Perry*, 558 U.S. 183 (2010). After the Court's decision, however, defense counsel for Proposition 8 made no attempt to call the allegedly frightened witnesses to the stand after the Court eliminated the risk of unwanted publicity. *Schwarzenegger*, 704 F. Supp. 2d at 944.

70. *Schwarzenegger*, 704 F. Supp. 2d at 944.

71. *Id.* at 950–52.

72. *Id.*

73. *Id.* at 951.

C. Judge Vaughn Walker's Ruling

After considering the evidence, Judge Vaughn Walker, in an eighty-three-page opinion, directed judgment in favor of the plaintiffs and struck down Proposition 8.⁷⁵ His findings of fact, eighty of them in total, amounted to an extensively thorough and detailed evidentiary record.⁷⁶ Judge Walker organized his findings under three questions: (1) Are there good reasons to ban same-sex marriage? (2) Does California benefit by distinguishing between marriage and domestic partnerships? (3) Does Proposition 8 further a legitimate state interest or does it only advance personal moral values? As a matter of *fact*, the answer to each question was “no.”⁷⁷ While plaintiffs’ witnesses had put forth credible witness testimony, and that testimony found support in both evolving historical norms and societal values, defense counsel had summarily failed to convince the court of its case.⁷⁸ Judge Walker saw little reason to give credit to either of the defense’s expert witnesses—not only was their testimony undermined by a lack of established, peer-reviewed research, one witness had made previous statements directly contradicting his in-court testimony.⁷⁹ Moreover, substantial evidence indicated that Proposition 8 was driven by religious values and moral disapproval.⁸⁰

Turning to his conclusions of law, Judge Walker ruled that Proposition 8 violates the constitutional rights to due process and equal protection under the law.⁸¹ Addressing the right to due process, the judge explained as follows. First, the fundamental constitutional right to marry, as established in Supreme Court jurisprudence, applies to same-sex couples and opposite-sex couples alike.⁸² Second, California’s domestic partner-

74. *See, e.g., id.* at 950 (“Blankenhorn was unwilling to answer many questions directly on cross-examination and was defensive in his answers”); *id.* at 952 (“Miller stated he had not investigated the ways in which anti-gay stereotypes may have influenced Proposition 8 voters.”).

75. *See Schwarzenegger*, 704 F. Supp. 2d at 1004.

76. *Id.* at 953–1003.

77. *See id.*

78. *Id.* at 931 (“While proponents vigorously defended the constitutionality of Proposition 8, they did so based on legal conclusions and cross-examinations of some of plaintiffs’ witnesses, eschewing all but a rather limited factual presentation.”).

79. *Id.* at 952. The second expert witness, contrary to his testimony that same-sex couples have substantial political power, had published a book in which he stated that “the direct initiative system, by bypassing checks and balances, is weighted heavily toward majority rule *at the expense of certain minorities*,” those minorities including “homosexuals.” *See* Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1057 (2001) (emphasis added).

80. *Schwarzenegger*, 704 F. Supp. 2d at 938.

81. *Id.* at 991–1002.

82. *Id.* at 991–93 (citing *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

ship benefits are insufficient as a proxy for the right to marry.⁸³ Third, Proposition 8 is unconstitutional because the denial of a fundamental right requires a compelling government interest, and defendants had failed to demonstrate one.⁸⁴ Addressing the right to equal protection, Judge Walker began by emphasizing that, like laws targeting groups based on race or gender, Proposition 8 singles out same-sex couples for disparate treatment.⁸⁵ Even though this type of classification merits strict scrutiny, the judge considered heightened review unnecessary because the initiative could not even withstand rational basis review.⁸⁶ In response to six purportedly legitimate interests furthered by Proposition 8,⁸⁷ the court dismissed each as baseless and concluded by noting that private moral disapproval can never provide a legitimate basis for laws.⁸⁸

Judge Walker's ruling sparked celebrations reminiscent of the state supreme court's decision in the *Marriage Cases*.⁸⁹ To many, such a sweeping federal condemnation of laws limiting the right to marriage, supported so thoroughly by factual determinations, had serious implications for the future of same-sex marriage across the entire country.⁹⁰ But the fight was not over. Having recorded a decisive trial court victory in the fight to overturn Proposition 8, the next stop was the Ninth Circuit.⁹¹

83. *Id.* at 993–94.

84. *Id.* at 994–1002 (citing *Zablocki*, 434 U.S. 374).

85. *Id.* at 994.

86. *Id.* at 995. For an explanation of the three levels of review, see CHEMERINSKY, *supra* note 30.

87. Defense counsel put forth the following as rational bases for upholding Proposition 8: (1) [R]eserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.

Schwarzenegger, 704 F. Supp. 2d at 998.

88. *Id.* at 1003.

89. See, e.g., Jesse McKinley & John Schwartz, *Court Rejects Same-Sex Marriage Ban in California*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/2010/08/05/us/05prop.html>.

90. John Schwartz, *In Same-Sex Ruling, an Eye on the Supreme Court*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/2010/08/06/us/06assess.html>.

91. Before it arrived at the Ninth Circuit, the case made a quick stop at the California Supreme Court after the Ninth Circuit requested guidance on a standing issue. See *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011). Because the state representatives originally named as defendants in the lawsuit refused to defend Proposition 8, the Ninth Circuit needed to know whether the intervening parties, Protect Marriage and Yes on 8, had standing to defend the initiative. *Id.* at 1005. The court concluded that they did. *Id.* at 1035. Whether the U.S. Supreme Court agrees is another matter—observers have noted the possibility that the Court will dispose of the case on this standing issue, and thus, avoid making any decisions about the constitutionality of same-sex marriage. See, e.g., Kenji Yoshino, *Commentary on Marriage Grants: Different Ways of Splitting the Difference—The Menu of Options*

III. THE NINTH CIRCUIT'S DECISION IN *PERRY V. BROWN*

On appeal before the Ninth Circuit, a three-judge panel upheld the trial court's ruling that Proposition 8 is unconstitutional in a 2-1 decision written by Judge Reinhardt.⁹² From the outset, the court emphasized that Proposition 8 caused a singular effect: the deprivation of a previously held right to marry, "nothing more, nothing less."⁹³ Because California had legalized same-sex marriage in the *Marriage Cases*, the state had provided thousands of couples with the option of designating themselves as "married" rather than as "domestic partners."⁹⁴ By removing this new legal entitlement, Proposition 8 serves only to "lessen the status and human dignity" of same-sex couples.⁹⁵ But Judge Reinhardt understood these facts as posing a different constitutional question than if California had never extended the right at all. In other words, he created a distinction between withdrawing the right and withholding it:

We need not and do not answer the broader question in this case, however, because California had already extended to committed same-sex couples both the incidents of marriage and the official designation of "marriage," and Proposition 8's only effect was to take away that important and legally significant designation, while leaving in place all of its incidents. This unique and strictly limited effect of Proposition 8 allows us to address the amendment's constitutionality on narrow grounds.⁹⁶

Thus, the court did not address whether same-sex marriage is a fundamental constitutional right, nor did it address whether withholding the right to marry from same-sex couples violates the Equal Protection Clause.⁹⁷ The way the Ninth Circuit saw it, these issues were not before

in Hollingsworth v. Perry, SCOTUSBLOG.COM (Dec. 8, 2012, 9:48 AM), <http://www.scotusblog.com/?p=156327>.

92. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144). Judge Stephen Reinhardt wrote the majority, which Judge Michael Hawkins joined. Judge N. Randy Smith, dissenting, would have overturned the district court's ruling. *Id.* at 1096. In Judge Smith's opinion, Proposition 8 is rationally related to a legitimate government purpose. *Id.* In support of his position, he cited, rather crassly, Justice Potter Stewart's concurrence in *Zablocki v. Redhail* for the proposition that states can prohibit certain kinds of marriages, such as those between siblings, more than two people, or children. *Id.* at 1098 (Stewart, J., concurring) ("Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife." (quoting *Zablocki v. Redhail*, 434 U.S. 374, 392 (1978))).

93. *Id.* at 1063.

94. *Id.* at 1077.

95. *Id.* at 1063.

96. *Id.* at 1064.

97. *Id.*

the court. Thus, rather than write what it perceived would be dicta, the Ninth Circuit only addressed the following question: does *withdrawing* the right to marry from same-sex couples violate the Equal Protection Clause?⁹⁸

In answering “yes,” the court drew support from *Romer v. Evans* where the U.S. Supreme Court struck down a voter-enacted constitutional amendment that had limited the rights of gay, lesbian, bisexual, transgendered, and queer (LGBTQ) citizens in Colorado.⁹⁹ In *Romer*, a successful voter initiative called Amendment 2 had invalidated a series of municipal and county laws that specifically outlawed discrimination on the basis of sexual orientation.¹⁰⁰ The initiative had also banned local and state government from enacting similar laws in the future.¹⁰¹ Writing for the majority, Justice Kennedy held that Amendment 2 was unconstitutional because the Equal Protection Clause precludes laws that impose “disfavored legal status” on a particular group of citizens.¹⁰² The Court arrived at this conclusion after noting that animus alone can never provide a rational basis for laws under the Fourteenth Amendment.¹⁰³ Because Colorado had failed to establish a rational basis for Amendment 2, the initiative had been enacted in violation of the Equal Protection Clause.¹⁰⁴

To the Ninth Circuit, Proposition 8 was just like Amendment 2: both laws (1) targeted a group of people and altered its legal status; (2) withdrew previously established rights; (3) refused equal protection un-

98. *See id.* Most commentators have understood Judge Reinhardt’s decision to frame this issue narrowly as an attempt to prevent the U.S. Supreme Court from reversing the district court’s rejection of Proposition 8. Whether this strategy will work is anybody’s guess, but at least some observers think the Court might take the bait. *See* Jane Schacter, *Reaction: Splitting the Difference: Reflections on Perry v. Brown*, 125 HARV. L. REV. F. 72, 73 (2012), http://www.harvardlawreview.org/issues/125/march12/forum_858.php (“[T]he appellate court’s limited approach is more likely than the district court’s approach to either be embraced by the Supreme Court or stand unreviewed.”). *But see* Orin Kerr, *Thoughts on the Road From Walker to Reinhardt to Kennedy*, VOLOKH CONSPIRACY (Feb. 8, 2012, 2:05 PM), <http://volokh.com/2012/02/08/thoughts-on-the-road-from-walker-to-reinhardt-to-kennedy> (“I have no idea what the Supreme Court might do in the *Perry* case. But my own sense is that Judges Walker and Reinhardt are not quite as clever as some people seem to think. Or, at the very least, the reasoning of their opinions don’t [sic] really matter very much.”); Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down*, BALKINIZATION (Feb. 7, 2012, 7:18 PM), <http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html> (“[I]t strikes me as most unlikely that Kennedy would adhere to Reinhardt’s twisted version of *Romer* to invalidate Proposition 8.”).

99. *See Perry*, 671 F.3d at 1080 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

100. *Romer*, 517 U.S. at 627.

101. *Id.*

102. *Id.* at 633–34.

103. *Id.*

104. *Id.*

der the law in a “literal sense”; (4) relegated LGBTQ citizens to a solitary class; and (5) “constitutionalize[d]” that class’s disadvantages.¹⁰⁵ Moreover, the court saw no meaningful difference in the fact that Amendment 2 invalidated a broad spectrum of legal rights while Proposition 8 only eliminated the right to marry.¹⁰⁶ Rather, “the surgical precision” with which Proposition 8 targeted the rights of same-sex couples made it even more discriminatory than Amendment 2.¹⁰⁷ Given the signs that Proposition 8, like Amendment 2, was based on animus toward a particular class, the court then considered several purported rational bases for the law.¹⁰⁸ Convinced by none, the Ninth Circuit held that no rational basis can justify Proposition 8’s withdrawal of California’s previously established same-sex marriage rights. For this reason, the court concluded, Proposition 8 violates the Equal Protection Clause.¹⁰⁹

To justify its withdrawal–withholding distinction, the Ninth Circuit again turned to *Romer*. The court reasoned that although the Equal Protection Clause does not affirmatively require states such as Colorado to pass special statutory protections against discrimination, once those protections became law, the Equal Protection Clause does require that their *repeal* be justified by a rational basis.¹¹⁰ Judge Reinhardt explained, “The relevant inquiry in *Romer* was not whether the *state of the law* after Amendment 2 was constitutional The question, instead, was whether the *change in the law* that Amendment 2 effected could be justified.”¹¹¹ For further support, the court cited *U.S. Department of Agriculture v. Moreno*, where the U.S. Supreme Court struck down a law that Congress passed in order to prevent “hippie” communities from receiving food stamps.¹¹² Had Congress not previously elected to provide food

105. *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

106. *Id.* at 1081.

107. *Id.*

108. Proponents of Proposition 8 offered four bases: “(1) furthering California’s interest in childrearing and responsible procreation, (2) proceeding with caution before making significant changes to marriage, (3) protecting religious freedom, and (4) preventing children from being taught about same-sex marriage in schools.” *Id.* at 1086.

109. *Id.* at 1095.

110. *Id.* at 1083. This is why the court saw no reason to express its opinion on the existence of a fundamental right to same-sex marriage. *Id.* In *Romer*, there was no claim that Colorado citizens had a fundamental right to the specific protections provided by the antidiscrimination statutes struck down by Amendment 2. The Court merely held that singling these laws out for eradication was discriminatory. *Romer v. Evans*, 517 U.S. 620, 644–34 (1996). To the Ninth Circuit then, it was immaterial whether the Constitution guaranteed a fundamental right to marry—the only important fact was that the right existed and Proposition 8 took it away. *See Perry*, 671 F.3d at 1064.

111. *Perry*, 671 F.3d at 1083.

112. *Id.* at 1084 (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

stamps, the Equal Protection Clause would not have been at issue because there is no fundamental right to food stamps.¹¹³ But once Congress provided food stamps, the withdrawal of that benefit from a particular group of people was unconstitutional because it lacked a rational basis.¹¹⁴ Analyzing Proposition 8 with this understanding of *Romer* and *Moreno*, the Ninth Circuit reasoned that the right to same-sex marriage is like food stamps and antidiscrimination statutes: while withholding the right might be constitutional,¹¹⁵ withdrawing it without a rational basis is not.

To summarize, the Ninth Circuit affirmed Judge Walker's ruling, but in doing so, limited its holding to situations where a state has conferred the right to same-sex marriage but has then taken it away. This limitation is based on the notion that *Romer* and *Moreno* stand for the proposition that, in equal protection terms, withdrawing an existing right is different than failing to provide it at all.¹¹⁶

IV. RIGHT RESULT, WRONG REASON: WHY *PERRY V. BROWN* SHOULD HAVE BEEN DECIDED MORE BROADLY

Although the Ninth Circuit's holding provided a favorable outcome for proponents of marriage equality in California, its narrowness makes little sense. A careful analysis of the U.S. Supreme Court's equal protection jurisprudence reveals that the Ninth Circuit's conclusion should have been broader—the court should have held that the Equal Protection Clause prohibits the withholding, not just the withdrawal, of the right to same-sex marriage.

A. The U.S. Supreme Court's Equal Protection Jurisprudence Fails to Support the Narrowness of the Ninth Circuit's Holding in Perry v. Brown

Perry's narrow holding was met with mixed reviews.¹¹⁷ Yet considering that the decision *invalidated* Proposition 8, the debate was, surprisingly, not split along the ideological lines that typically divide the debate

113. *Id.*

114. *Id.*

115. Again, Judge Reinhardt expressed no opinion on this issue. Had he done so, however, few commentators doubt that he would have held in favor of marriage equality. Known to many as the “liberal lion on the Ninth Circuit,” *see infra* note 127, he is so famously progressive that the *Onion* satirized his role on the bench as follows: “In accordance with my activist agenda to secularize the nation, this court finds Christmas to be unlawful.” *Activist Judge Cancels Christmas*, *ONION* (Dec. 14, 2005), <http://www.theonion.com/articles/activist-judge-cancels-christmas,1856>.

116. *Perry*, 671 F.3d at 1084.

117. Compare Mazzone, *supra* note 98 (criticizing the opinion as “dishonest and foolish”), with Dan Markel, *The Savvy of Perry*, *PRAWFSBLAWG* (Feb. 7, 2012, 11:09 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/the-savvy-of-perry.html> (applauding the opinion as “[g]enius”).

over same-sex marriage. In fact, some of the heaviest criticism came from *supporters* of same-sex marriage who felt that Judge Reinhardt had decided the opinion too narrowly.¹¹⁸ Because the decision only applies in states that have withdrawn—as opposed to withheld—same-sex marriage rights, *Perry* is quite conservative in its scope. Take Washington for example. The state legislature passed a measure legalizing same-sex marriage in early 2012.¹¹⁹ But in Washington, a new law cannot take effect until ninety days after its legislative passage.¹²⁰ This ninety-day period provides citizens who oppose the law a chance to veto it through the referendum process by putting the law to a statewide vote.¹²¹ So in 2012, opponents of marriage equality qualified Referendum 74 for the ballot,¹²² which if passed, would have nullified the new law legalizing same-sex marriage.¹²³ Referendum 74 failed.¹²⁴ But if it had not, the right to same-sex marriage would never have existed in Washington. Thus, in this situ-

118. William N. Eskridge Jr., *The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93 (Feb. 22, 2012), <http://www.stanfordlawreview.org/online/perry-marriage-equality> (“Judge Reinhardt’s *Perry* opinion has come under heavier fire from commentators favoring marriage equality than from those opposed to equality.”). Some suggested that the court should have based its holding on substantive due process along the lines of *Lawrence v. Texas*, 539 U.S. 558 (2003), where the U.S. Supreme Court established a fundamental right to sexual intimacy. See, e.g., Dale Carpenter, *Prop. 8 Simply Can’t Justify Itself*, L.A. TIMES (Feb. 13, 2012), <http://articles.latimes.com/2012/feb/13/opinion/la-oe-carpenter-proposition-eight-ruling-20120213>. Another possible avenue to overturn Proposition 8 may have been the Court’s sex discrimination jurisprudence. See Ilya Somin, *Why Same-Sex Marriage Bans Qualify as Sex Discrimination*, VOLOKH CONSPIRACY (Feb. 7, 2012, 8:35 PM), <http://volokh.com/2012/02/07/same-sex-marriage-bans-and-sex-discrimination>.

119. See Lornet Turnbull, *Gregoire Signs Gay Marriage into Law*, SEATTLE TIMES (Feb. 13, 2012), http://seattletimes.nwsourc.com/html/localnews/2017497028_gaymarriage14m.html.

120. WASH. CONST. art. II, § 1(d) (“No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted.”). Any legislative act is “subject to referendum” unless it qualifies as one of the following: (1) an act necessary for preservation of the public peace or (2) an act necessary to provide financial support to an existing public institution. *Id.* § 1(b); State *ex rel.* McLeod v. Reeves, 157 P.2d 718, 720 (Wash. 1945).

121. WASH. CONST. art. II, § 1.

122. Referendum 74’s key ballot language was as follows:

The legislature passed Engrossed Substitute Senate Bill 6239 concerning marriage for same-sex couples, modified domestic-partnership law, and religious freedom, and voters have filed a sufficient referendum petition on this bill. This bill would allow same-sex couples to marry, preserve domestic partnerships only for seniors, and preserve the right of clergy or religious organizations to refuse to perform, recognize, or accommodate any marriage ceremony. Should this bill be: [] Approved [] Rejected

Referendum Measure No. 74, WASH. SEC’Y STATE, <https://weiapplets.sos.wa.gov/MyVote/OnlineVotersGuide/Measures?electionId=46&countyCode=xx> (last visited Feb. 18, 2013).

123. Rachel La Corte, *Wash. Voters Get Final Say on Gay Marriage Law*, SEATTLE TIMES (Nov. 6, 2012), http://seattletimes.com/html/localnews/2019620143_apwagaymarriage3rddwritethru.html.

124. Rachel La Corte, *Washington Voters Approve Gay Marriage*, SEATTLE TIMES (Nov. 8, 2012), http://seattletimes.com/html/localnews/2019639931_apusgaymarriage3rddwritethru.html.

ation, *Perry* would have provided no legal protection to the legislature's law.¹²⁵ While many commentators have understood *Perry*'s narrowness as an attempt to avoid reversal in the U.S. Supreme Court,¹²⁶ detractors have questioned its legal reasoning.¹²⁷

Regardless of whether Judge Reinhardt's attempt to avoid reversal will work, there are three reasons why the narrowness of Judge Reinhardt's holding in *Perry* does not hold water when read in terms of the U.S. Supreme Court's equal protection jurisprudence: (1) the Ninth Circuit's reliance on *Romer* was misplaced; (2) the distinction between withdrawing and withholding the right to same-sex marriage is not legally significant; and (3) if withdrawing the right to same-sex marriage violates the Equal Protection Clause, then so does withholding the right.

1. The Ninth Circuit's Reliance on *Romer* Was Misplaced

Judge Reinhardt placed far too much emphasis on the fact that both Proposition 8 and Amendment 2 withdrew previously established rights; in doing so, he ignored the differences between the measures.¹²⁸ One notable difference is that Amendment 2 was a constitutional amendment that eliminated a series of statutory rights—Proposition 8, by contrast, reversed a state supreme court interpretation of California's constitution.¹²⁹ Moreover, Amendment 2 eliminated a series of substantive legal protections, whereas Proposition 8 eliminated the right to the designation of marriage, but left the substantive rights associated with marriage intact because it did not affect California's domestic partnership laws.¹³⁰

125. See West, *supra* note 12, at 48 (“*Perry* is thus of no relevance to cases challenging a state’s refusal to extend marriage to include gays and lesbians . . .”). But see Eugene Volokh, *Thoughts on the Ninth Circuit’s Same-Sex Marriage Decision*, VOLOKH CONSPIRACY (Feb. 7, 2012, 3:00 PM), <http://volokh.com/2012/02/07/thoughts-on-the-ninth-circuits-same-sex-marriage-decision> (arguing that *Perry* cannot be limited to situations where a state has withdrawn a previously established right).

126. See, e.g., David Cole, *Gambling with Gay Marriage*, NYRBLOG (Feb. 9, 2012, 11:48 AM), <http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage> (“The court goes to great lengths to . . . reduce the direct consequences of the decision for states that have not yet granted marriage status to same-sex couples, and thereby to render the decision of limited national significance, and less worthy of Supreme Court review.”).

127. See, e.g., Editorial, *Proposition 8 Ruling Was Just But Wobbly*, WASH. POST (Feb. 8, 2012), http://www.washingtonpost.com/opinions/proposition-8-decision-was-just-but-wobbly/2012/02/08/gIQApOh1zQ_story.html (“Judge Stephen Reinhardt, a liberal lion of the federal bench, attempted to camouflage the decision of the U.S. Court of Appeals for the 9th Circuit as narrow and temperate, but it mischaracterized Supreme Court precedent to justify the nullification of Proposition 8.”).

128. See Mazzone, *supra* note 98 (“Proposition 8 is nothing like Amendment 2 in *Romer*.”).

129. *Id.*

130. Editorial, *supra* note 127.

More importantly, however, in *Romer*, Justice Kennedy devoted much of his analysis to the *withholding*, not just the withdrawing, effect of Amendment 2. To the Court, the major problem with the Colorado initiative was that it forbade a class of citizens from attaining “safeguards that others enjoy or may seek without constraint.”¹³¹ On one hand, it is certainly true that Amendment 2 had the effect of withdrawing a right: before Amendment 2, LGBTQ citizens had the right to gain specific protections against discrimination; after Amendment 2, they did not. But the Court was not only concerned with the loss of a right; it was concerned with where that loss left the citizens that it affected.¹³² In other words, the Court was troubled by “the protections Amendment 2 *withholds*.”¹³³ Access to the safeguards prohibited by the law was necessary to enable LGBTQ citizens to lead “an ordinary civic life in a free society.”¹³⁴ *Romer*, then, in a very real sense, was concerned with much more than a mere “change in the law.”¹³⁵ While *Romer* certainly stands for the principle that animus is never a legitimate basis for removing rights from a specific group, it also stands for the principle that animus is never a legitimate excuse for not providing those rights in the first place.¹³⁶ In striking down Amendment 2, the Court signaled its disapproval of any law that imposes a significant legal disability on a specific group, regardless of whether the group had been free from that disability in the past.

In this way, Amendment 2 and Proposition 8 are quite similar—both voter measures not only withdrew preexisting rights, they also had the effect of *withholding* rights by making them harder to acquire. Proposition 8 withdrew the right to marry and left same-sex couples in California with no option for recovering the right other than pursuing their own amendment to the state constitution. This is just like Amendment 2 insofar as it left LGBTQ citizens with no option to secure rights other than “enlisting the citizenry of Colorado to amend the State Constitution.”¹³⁷ Judge Reinhardt erred in reading *Romer* to stand for the principle that legal protections, once provided, cannot be taken away even though they

131. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

132. See Mazzone, *supra* note 98.

133. *Romer*, 517 U.S. at 631 (emphasis added).

134. *Id.*

135. *Perry v. Brown*, 671 F.3d 1052, 1083 (9th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144) (emphasis removed).

136. Cf. Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 288 (2006) (understanding *Romer* to stand for the principle that “[l]aws making it harder for one group of citizens to seek help from the government, as opposed to others, are contrary to the Fourteenth amendment’s equal protection clause”).

137. *Romer*, 517 U.S. at 631.

might not have been necessary in the first place. As one commentator put it, “*Romer* doesn’t stand for the freewheeling proposition that if the state gives you something it can’t later take it away.”¹³⁸ The Court was concerned with more than the fact that Amendment 2 withdrew rights—the Court was equally concerned with the fact that it withheld rights.

2. The Distinction Between Withdrawing and Withholding the Right to Same-Sex Marriage Is Not Legally Significant

In reaching its decision, the Ninth Circuit omitted an important U.S. Supreme Court opinion from its analysis: *City of Cleburne v. Cleburne Living Center*.¹³⁹ Similar to *Romer* and *Moreno*, the Court in *Cleburne* declared unconstitutional a law that burdened a disadvantaged class—but that law did not withdraw a previously established legal right.¹⁴⁰ In *Cleburne*, a municipal zoning ordinance required a special permit to build housing facilities for mentally ill citizens, yet it did not require the same for otherwise similar facilities.¹⁴¹ After a group applied to construct a mental health housing facility, the City of Cleburne rejected its application for failure to fulfill the terms of the special permit requirement.¹⁴² The Court held that the ordinance violated the Equal Protection Clause because the City of Cleburne had no rational basis to restrict the availability of building permits for mental health housing facilities.¹⁴³

Unlike Amendment 2 in *Romer*, the congressional measure in *Moreno*, or Proposition 8 in *Perry*, the zoning ordinance in *Cleburne* did not have the effect of withdrawing a previously held legal right. The City of Cleburne had enacted the permit requirement some fifteen years prior to denying the plaintiffs’ permit application.¹⁴⁴

138. Mazzone, *supra* note 98. To emphasize the problem with reading *Romer* this way, the same commentator further argued that:

Reinhardt’s interpretation of *Romer* cannot be correct in a constitutional democracy. For it would mean that if a court construes a constitution to require the state to give a right to some class of people, it is necessarily unconstitutional to amend the constitution to overturn that ruling. Judges could, in other words, render their own interpretations of constitutional provisions immune to correction. No plausible reading of *Romer* contemplates that.

Id.

139. See Michael C. Dorf, *When the Law Distinguishes Between Failure to Give and Taking Away*, DORF ON L. (Feb. 13, 2012, 4:26 PM), <http://www.dorfonlaw.org/2012/02/actual-constitutional-endowment-effects.html>.

140. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); see Dorf, *supra* note 10 (“Notably, the middle case in the trilogy, *Cleburne v. Cleburne Living Center*, involves a failure to extend a legal right, not a taking away of an already-granted right.”).

141. *Cleburne*, 473 U.S. at 448.

142. *Id.*

143. *Id.*

144. Brief for Petitioner at 7, *Cleburne*, 473 U.S. 432 (No. 84-468).

Judge's Reinhardt's omission matters because *Moreno* and *Romer* cannot adequately be understood without also considering *Cleburne*. These three cases are widely regarded as a trilogy in which the U.S. Supreme Court employed a heightened form of rational basis review.¹⁴⁵ As opposed to typical rational basis review, which is extremely deferential to the government,¹⁴⁶ the standard of review employed in *Moreno*, *Cleburne*, and *Romer* was more searching.¹⁴⁷ To explain this departure, the Court has made clear that the difference is animus—in each case, the law at issue appeared to target a specific group and impose a legal disadvantage upon it.¹⁴⁸

Considering *Cleburne*, the fact that Proposition 8 withdrew a previously established right seems legally significant only to the extent that it provided *evidence* of animus. Along these lines, Judge Reinhardt explained that withdrawing a right shows a “deliberate purpose” to discriminate:

[We] consider Proposition 8 in light of its actual effect, which was, as the voters were told, to “*eliminate* the right of same-sex couples to marry in California.” The context matters. Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place The action of changing something *suggests a more deliberate purpose* than does the inaction of leaving it as it is.¹⁴⁹

Read in isolation, this passage suggests that the court merely saw evidence of animus in California's passage of Proposition 8. Were this the case, however, Judge Reinhardt would not have limited the applicability of *Perry*'s holding by creating a legally significant distinction between the withdrawal and withholding of the right to same-sex marriage.

145. See, e.g., 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, 431 (2005).

146. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955) (upholding Oklahoma law that required prescription for any modification to eyeglasses); *Ry. Express Agency v. New York*, 449 U.S. 166 (1980) (upholding a city ordinance prohibiting advertising on all vehicles except those in the delivery business).

147. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59–64 (1996) (“In these cases, rationality review, traditionally little more than a rubber stamp, is used to invalidate badly motivated laws without refining a new kind of scrutiny.”).

148. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

149. *Perry v. Brown*, 671 F.3d 1052, 1079–80 (9th Cir. 2012), cert. granted, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144) (emphasis added) (quoting OFFICIAL VOTER INFORMATION GUIDE 54 (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm>).

Indeed, the court relied on this distinction for more than evidence of animus.¹⁵⁰ For example, when discussing the argument that Proposition 8 furthers California's legitimate interest in encouraging responsible procreation, Judge Reinhardt reasoned that whether this interest would justify the act of withholding the right to marry is "irrelevant" to the act of withdrawing the right.¹⁵¹ In other words, whether California had a rational basis to withhold the right was, to Judge Reinhardt, an unrelated matter because the court was concerned with whether California had a rational basis to withdraw the right. In these terms, California could have had a rational basis to withhold the right to same-sex marriage, but that same basis might have been irrational when used to rescind the right. To draw this distinction is to alter the rational basis inquiry such that cases where the government has failed to provide equal protection become inapplicable to situations where the government has taken equal protection away. Thus, once the government provides a legal right, the act of withdrawing that right will be subject to a different equal protection analysis than if it had never provided the right at all.¹⁵²

So does the difference between withdrawing and withholding a right matter? No. The Court in *Romer* and *Moreno* was troubled by the action of withdrawing legal rights because it provided evidence of animus, not because the government was under a heightened duty to leave the law unchanged.¹⁵³ The withdrawal-withholding distinction does not have standalone legal significance in the U.S. Supreme Court's equal protection jurisprudence.

3. If Withdrawing the Right to Same-Sex Marriage Violates the Equal Protection Clause, Then So Does Withholding the Right

In addition to the lack of legal support for the withdrawing-withholding distinction, it simply makes no logical or moral sense to treat withdrawing a right as worse than not providing a right in the first place.¹⁵⁴ Under the court's framework, Proposition 22, Protect Mar-

150. See Dorf, *supra* note 10.

151. *Perry*, 671 F.3d at 1088.

152. Professor Michael Dorf has criticized the Ninth Circuit for attributing an "endowment effect" to the Court's holding in *Romer*. See Dorf, *supra* note 139. An endowment effect means that "people value things more highly if they already have those things than if they do not" and, arguably, is an attribute of Takings Clause jurisprudence. See *id.* (citing U.S. CONST. amend. V).

153. See Dorf, *supra* note 10 ("The majority arguably reads *Romer* as standing for some sort of general proposition that it is unconstitutional for the government to bestow a legal right and then take it away, even though the government was under no obligation to bestow the legal right in the first place. But I don't think *Romer* says that.").

154. It makes little sense for another reason: by emphasizing the withdrawal of the right, *Perry*'s holding logically applies only to same-sex couples old enough to marry during the 141-day

riage's first initiative that sought to *prevent* same-sex marriage, would have been constitutional because, at the time it passed, the right to same-sex marriage had never existed in California. Proposition 22's only purpose was to strengthen California's already-existing laws against same-sex marriage;¹⁵⁵ as such, it sought to withhold, rather than withdraw. Yet the parallels between Proposition 8 and Proposition 22 are startling. Both measures were advanced by the same opponents of marriage equality, the only difference being that Proposition 22's effect was prevention while Proposition 8's was nullification. Drawing a distinction between the effects of these measures is to split hairs—in moral terms, withdrawing the right is wrong for the same reasons it is wrong to withhold the right. Thus, Judge Reinhardt's logic begs the question: how can it be wrong to withdraw the right when it is not wrong to withhold the right? It cannot. The reason that withdrawing the right is unconstitutional is, in fact, the same reason that withholding the right is unconstitutional. The only difference is evidentiary—the act of depriving a legal right from a marginalized group might indeed *look* more discriminatory than not providing it in the first place. But this difference is meaningless. The withdrawal and withholding of a legal right both accomplish the same thing: the denial of a right. And as the following section argues, any denial of the right to same-sex marriage violates the Equal Protection Clause.

B. The Ninth Circuit Should Have Held that Denying the Right to Same-Sex Marriage Violates the Equal Protection Clause, Regardless of Whether It Is Withheld or Withdrawn

Given that Judge Reinhardt saw the “deliberate purpose” of Proposition 8 as discriminatory, *Perry*'s holding could easily have amounted to a broad proclamation that any denial of the right to same-sex marriage is a violation of the Equal Protection Clause.¹⁵⁶ Instead, the court mistook evidence for law—while it was correct to characterize Proposition 8's withdrawal of the right to same-sex marriage as evidence of animus, the

period when the right existed in California. If withdrawal, rather than denial, was the injury, then only those who had the right withdrawn were injured. See Jason Mazzone, *Proposition 8's Continuing Constitutionality?*, BALKINIZATION (Feb. 9, 2012, 4:08 PM), <http://balkin.blogspot.com/2012/02/proposition-8s-continuing.html> (“Because the circuit court's decision was based on the injury caused by the withdrawal of a right, Proposition 8 arguably remains constitutional as to gays and lesbians in California who did not previously possess the right to marry. For example, gays and lesbians who came of age after Proposition 8 was adopted did not previously have a right to marry in the state.”).

155. In California, voter initiatives cannot be legislatively overturned. CAL. CONST. art. II, § 10(e).

156. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

inquiry should not have stopped there.¹⁵⁷ Had Judge Reinhardt additionally asked why the right to same-sex marriage might be withheld in the first place, he could have only concluded that the “deliberate purpose” for “declining to extend . . . [the right] in the first place”¹⁵⁸ is no different than the purpose for withdrawing the right.

In support of this conclusion, the court would have needed to look no further than *Loving v. Virginia*, the U.S. Supreme Court’s landmark decision striking down antimiscegenation laws.¹⁵⁹ Among the Court’s reasons for invalidating laws against interracial marriage was the observation that these “prohibitions” served no legitimate purpose other than to further a regime of white supremacy.¹⁶⁰ Although the Court reviews racial classifications under strict scrutiny,¹⁶¹ a legal fact that distinguishes *Loving* from *Perry*,¹⁶² *Loving* still illustrates an important point: the invalidated laws had the effect of *withholding* the right to interracial marriage. And the Court found “patently no legitimate overriding purpose” for doing so.¹⁶³ If instead the State of Virginia had granted the right and then withdrawn it, the thought of the Court reaching a different conclusion seems absurd. There is no way the *Loving* Court would have drawn a withdrawal–withholding distinction. Of ultimate significance to the *Loving* Court was that it could discern only one *deliberate purpose* for antimiscegenation laws: “to maintain White Supremacy.”¹⁶⁴ Similarly, the *Perry* court’s equal protection analysis revealed no “legitimate purpose” for Proposition 8.¹⁶⁵ Had the court not limited its inquiry to the withdrawal–withholding distinction, *Perry*’s and *Loving*’s holdings would have looked a lot alike: any law that denies marriage equality on a purely discriminatory basis violates the Equal Protection Clause.

Moreover, there is no meaningful difference between Proposition 8 and the laws invalidated in the *Moreno–Cleburne–Romer* trilogy. With

157. See Dorf, *supra* note 10.

158. Perry v. Brown, 671 F.3d 1052, 1080 (9th Cir. 2012), cert. granted, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

159. *Loving v. Virginia*, 388 U.S. 1 (1967).

160. *Id.* at 5, 7.

161. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Strict scrutiny is the most rigorous standard of review in equal protection analysis. See CHEMERINSKY, *supra* note 30.

162. See *In re Marriage Cases*, 183 P.3d 384, 437 (Cal. 2008) (“The decision[] in . . . *Loving*, however [is] clearly distinguishable from this case because the anti-miscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons.”).

163. *Loving*, 388 U.S. at 11.

164. *Id.* at 7.

165. Perry v. Brown, 671 F.3d 1052, 1093 (9th Cir. 2012), cert. granted, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

the exception of *Cleburne*, of course, the court agreed.¹⁶⁶ Although the law at issue in each of these cases denied a substantive legal right, whereas Proposition 8 removed only the designation of marriage, this difference is meaningless.¹⁶⁷ With poetic language¹⁶⁸ and quotations from Shakespeare,¹⁶⁹ the court spared no expense in stressing what it means to be married. Even though Proposition 8, by leaving domestic partnership laws undisturbed, had left intact the “incidents” of marriage—filing a joint tax return, for example—it had eliminated “the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship.”¹⁷⁰ Because “the designation of ‘marriage’ . . . serves as a symbol . . . of something profoundly important,”¹⁷¹ the court correctly acknowledged that the right to be married, while not necessarily a substantive right, is just as important as one.

Perry would have fallen nicely in line with *Moreno*, *Cleburne*, and *Romer* because Proposition 8 is about animus toward a specific group of people. As these U.S. Supreme Court decisions demonstrate, even rational basis review does not defer to laws with no explanation other than prejudice. Therefore, after Judge Reinhardt made clear that California lacked a rational basis to withdraw the right to same-sex marriage, he should have also held that the same would have been true had California failed to provide the right in the first place.

This is exactly what Judge Walker did. The trial court invalidated Proposition 8 on the grounds that California lacks a rational basis to deny the right to same-sex marriage.¹⁷² After extensive testimony, Judge Walker concluded that the only basis for Proposition 8 is “a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.”¹⁷³ Based on this conclusion, the court found that Proposi-

166. Presumably the court would have distinguished *Cleburne* on the grounds that the law in that case withheld, rather than withdrew, a legal right. See *supra* Part IV.A.2.

167. See Eskridge, *supra* note 118. Professor William Eskridge has argued that *Loving* requires the reversal of any law that either eliminates benefits associated with marriage or withdraws the designation of marriage because “both laws would violate the equality mandate by creating a subordinate class of citizens.” *Id.*

168. See, e.g., *Perry*, 671 F.3d at 1078 (“A rose by another name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of ‘registered domestic partnership’ does not.”).

169. See *id.*

170. *Id.* at 1079.

171. *Id.* at 1078.

172. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (“Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license.”).

173. *Id.* at 1002–03. Commentators have also criticized Judge Reinhardt’s opinion for not giving any consideration to Judge Walker’s eighty findings of fact, see *id.* at 953–1003, and avoiding

tion 8 violates the Equal Protection Clause because animus alone is never a rational basis for a law.¹⁷⁴ The Ninth Circuit should have simply followed Judge Walker's lead.¹⁷⁵ The U.S. Supreme Court, however, will soon have the chance to do so.

V. CONCLUSION

The U.S. Supreme Court's equal protection jurisprudence does not support the narrowness of the Ninth Circuit's holding in *Perry*.¹⁷⁶ In reaching the holding, Judge Reinhardt misread *Romer* and *Moreno* and, by doing so, limited the applicability of *Perry* to situations where a state has provided the right to same-sex marriage but then eliminated it.¹⁷⁷ While the narrowness of the holding lacks support, the court reached the correct outcome—Proposition 8 violates the Equal Protection Clause.¹⁷⁸ But it does so not merely because it withdrew the right to same-sex marriage. Proposition 8 is unconstitutional because there is never a rational basis to withdraw *or withhold* the right to same-sex marriage, and thus, any denial of the right violates the Equal Protection Clause.¹⁷⁹ Hopefully the U.S. Supreme Court agrees.

them by framing the issue so narrowly. See, e.g., Editorial, *supra* note 127 (“[T]rial court Judge Vaughn Walker did a much better job of documenting and arguing the far broader question of why the Constitution demands the recognition of same-sex marriage.”).

174. *Schwarzenegger*, 704 F. Supp. 2d at 995.

175. For more on same-sex marriage as a constitutional right, see, for example, WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* (1996); *Developments in the Law—Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003).

176. See *supra* Part IV.A.

177. See Dorf, *supra* note 10.

178. See *supra* Part IV.B.

179. See *Schwarzenegger*, 704 F. Supp. 2d at 928.