

The Equal Protection Clause and *Romer v. Evans*

Overview

Students will learn about the Equal Protection Clause of the U.S. Constitution through a documentary about *Romer v. Evans*. Students will consider the constitutionality of special legal protections that are afforded members of some minority groups in an effort to achieve equality. They will also learn about the mechanics of state politics, including the interactions between governors, special interest groups, state citizens, and the judiciary.

Grades

10-11

NC Essential Standards for American History: The Founding Principles, Civics & Economics

- FP.C&G.1.4: Analyze the principles and ideals underlying American democracy in terms of how they promote freedom
- FP.C&G.2.3: Evaluate the U.S. Constitution as a “living Constitution” in terms of how the words in the Constitution and Bill of Rights have been interpreted and applied throughout their existence
- FP.C&G.2.7: Analyze contemporary issues and governmental responses at the local, state, and national levels in terms of how they promote the public interest and/or general welfare
- FP.C&G.3.4: Explain how individual rights are protected by varieties of law
- FP.C&G.3.8: Evaluate the rights of individuals in terms of how well those rights have been upheld by democratic government in the United States.
- FP.C&G.5.2: Analyze state and federal courts by outlining their jurisdictions and the adversarial nature of the judicial process.

NC Essential Standards for American History II

- AH2.H.2.1: Analyze key political, economic, and social turning points since the end of Reconstruction in terms of causes and effects (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).
- AH2.H.2.2: Evaluate key turning points since the end of Reconstruction in terms of their lasting impact (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).

Materials

- LA Times Article - Voters Approve Prop 8, attached
- *Romer v. Evans*, Voices of American Law DVD Documentary
 - available at <https://law.duke.edu/voices/>
- Television and DVD player
- *Romer v. Evans* Viewer’s Guide and Answer Key, attached
- *Romer v. Evans* Opinion Excerpts, attached
- Analyzing the Opinion, activity strips attached
- Civic Participation Letter to the Editor (can be assigned as an in-class or homework activity), assignment attached
- Deliberation Exercise (optional), instructions attached
- “Appeals court strikes down Calif.’s gay marriage ban” article and questions, attached (optional)
- “A law professor explains why N.C.’s new discrimination statute is unconstitutional” article, attached (optional)
- “The cunning trick in North Carolina’s radical new anti-LGBT law” article, attached (optional)

- This article is more appropriate for AP classes.

Essential Questions

- What does equality mean in our society?
- Why might some minority groups need laws granting them special protection?
- How do groups with opposing views resolve conflicts using the political system?
- What is the effect of amending a state's constitution?
- What are some ways that special interest groups can influence the electorate?
- How do state and local governments impact the lives of individual citizens?
- What role might the Supreme Court play in state politics?
- Should the meaning of the Constitution change over time?

Duration

60+ minutes (time varies depending on which activity options teachers select)

Student Preparation

- As this lesson addresses potentially sensitive topics, such as discrimination based on sexual orientation, it is important students are prepared to respectfully deal with controversy. Firm expectations of respect, safety, and civil communication must be present in the classroom in order for this lesson to be successful.
- Prior to this lesson, provide students with the attached copy of the *Los Angeles Times* newspaper article "Voters Approve Proposition 8 Banning Same-Sex Marriages." Ask them to read the article and to think about the arguments put forth by each side of the debate. You may wish to ask students to write down a list of the arguments for and against Proposition 8.
- **Optional Writing Assignment:** The text of the Equal Protection Clause is printed at the bottom of the newspaper article handout. Ask students to think about the meaning of the Clause after they have finished reading the article. Tell students to assume the role of a contributor to a political blog covering the Proposition 8 debate. Ask them to write two informal paragraphs for their blog explaining their ideas about how the Equal Protection Clause applies to the situation in California. Encourage students to express their own opinions rather than just summarizing several arguments.

Procedure

Warm-Up: Is Profiling Ever OK?

1. Ask students to imagine that they are the owners of a new luxury apartment building. Inform them that, as the landlords, they have the ability to decide who can and cannot rent an apartment in their building. One by one, write the names and descriptions of the following prospective tenants that wish to rent in the students' building. Tell students to silently consider whether there is anyone in this list they would not want to rent to and why. (Tell students that they will not be sharing these answers out loud and should not give any verbal indication as to their opinions.)
 - Maria, an eighteen-year-old college student.
 - Faris, a devout Muslim.
 - Douglas, owner of two golden retrievers.
 - Lisa, whose three cousins, uncle, and grandmother will also be living with her.
 - Demetrius, an African-American middle-aged male.
 - Sandra, a woman recently evicted from another apartment for failure to pay her rent.
 - Janine, an open lesbian.
2. Ask students to raise their hands if there was anyone on the list that they would not rent to. If there are any students who do not raise their hands, signifying that they would rent to anyone on the above list, ask them to explain why. Discuss whether students believe that they should or should not be allowed to take certain characteristics into account when renting out apartments. (Again, remind students not to comment

regarding which of the above people they would or would not rent to. Rather, they should discuss the right to do so.) Pose the following discussion topics to the class:

- In your opinion, what characteristics should a landlord be able to consider when renting out his/her apartments? (Students might mention past rental history, credit scores, current occupation, etc. Not comments on the board.)
- Are there any of these characteristics that a classmate has mentioned that you disagree with?
- What problems would arise if it were legally allowed to discriminate against a prospective tenant based on his or her race? Religion?
- How does this warm-up illustrate the concept of equality?

The Equal Protection Clause

3. Write the following excerpt from the Equal Protection Clause of the Fourteenth Amendment on the board: “No state shall...deny to any person within its jurisdiction the equal protection of the laws.” Ask for volunteers from the class to discuss their ideas about the meaning of the Clause, using the following discussion prompts:

- What does it mean for a state to equally protect all of its citizens?
- Can you think of any past examples of states denying certain groups equal protection?
- Is it possible for every law to treat all people the same way? Explain.
 - What about the law that says that driver’s licenses cannot be issued to people under the age of sixteen? Is that acceptable, even though it does not apply to all people equally? Why or why not?

Documentary: *Romer v. Evans*

4. Explain to students that you will be showing a documentary about an amendment to the Colorado State Constitution that would prohibit the state from passing laws offering special protections to homosexuals. Remind students to treat the controversial issues presented in the film with sensitivity. Depending on your course, it may be helpful to explain or review the process and implications of amending a state’s constitution.

- **Teacher’s Synopsis of the Case**

By the early 1990s, several cities in Colorado had passed ordinances protecting government employees from discrimination based on their sexual orientation. In 1991, the city of Colorado Springs attempted to enact similar legislation. The proposed law was strongly opposed by conservative and religious groups in the area. These groups, especially one called Colorado for Family Values, were eager to prevent the passage of any laws that would give what they considered to be “special rights” to homosexuals based on their sexual orientation. They decided to campaign in favor of an amendment to the Colorado state constitution that would repeal existing laws protecting homosexuals, as well as prevent new ones from being created. Supporters of the proposed amendment managed to get the required 50,000 signatures to put the proposed amendment, now called Amendment 2, on the November 1992 ballot.

Although the polls predicted that Amendment 2 would fail to garner enough votes, on election night it ended up passing. Pro-gay groups like the Colorado Legal Initiatives Project (CLIP) were prepared for this outcome and promptly filed a lawsuit challenging the constitutionality of Amendment 2. They claimed that Amendment 2 had no purpose other than animosity toward homosexuals, and that hatred was not a legitimate government interest that could justify the fact that the amendment applied only to gays. The trial court and the Colorado Supreme Court, on appeal, agreed with this argument and held that Amendment 2 was unconstitutional. The case was appealed to the Supreme Court, where the lower court rulings were upheld in an important 5-4 decision.

- **Viewing Options**

You may choose to use one or several of the following suggestions while showing the documentary:

- Distribute the Viewer’s Guide handout before showing the film and ask students to fill in the blanks with the correct answers as they watch.

- Pause at pre-determined intervals for a brief discussion/explanation session to ensure that students are following the film. The time codes and some suggestions for discussion are listed below:
 - **Discussion Point #1:** (*Pause at 10:03 after Noebel finishes*) Ask students to identify the goal of supporters of Amendment 2. What was this amendment proposed in response to?
 - **Discussion Point #2:** (*Pause at 16:03 after Romer finishes*) Explain or review the term “plaintiff.” Ask students why Angela Romero might be a good plaintiff for CLIP to have when challenging Amendment 2. Also, you might ask students how they feel about the governor publicly taking sides in this debate.
 - **Discussion Point #3:** (*At the end of the film*) What was the main argument of Amendment 2 opponents like Dubofsky? How did Solicitor General Tymkovich respond to that argument?

Analyzing the Decision

5. Students may be surprised to see that the case video ends without revealing the Supreme Court’s decision. Depending on your curriculum, before revealing the outcome of the case, you may wish to review important information about the Supreme Court and its functions.
 - Remind students that the Supreme Court is made up of nine justices, nominated by a President of the United States and confirmed by the United States Senate.
 - Explain that while the Court’s official decision is contained in a “majority opinion,” some of the justices may have a different viewpoint. For example, some might agree with the ultimate decision reached by the majority, but for different reasons. This is called a concurring opinion. Other justices may disagree with both the reasoning and the decision in the majority opinion. These justices express their views in dissenting opinions.
 - You may touch on various parts of the appellate process, including petitions for certiorari, the filing of amicus briefs, and oral arguments.

6. Below are two options for revealing the Court’s decision. Choose the one that best fits your goals for the class:
 - **Option #1: Reading the Opinion (Individual Work)**
 - Hand out the Opinion Excerpt (Appendix) to the students and ask them to read Justice Kennedy’s majority opinion. Explain that, as the majority opinion, this decision reflects the official holding of the Court.
 - Depending on the grade level of the class, it may be helpful for you to ask for volunteers to read each paragraph aloud. Reading aloud will enable you to explain any words or concepts that the class finds to be difficult to understand.
 - Once the students have finished reading Justice Kennedy’s opinion, ask for students to share with the class what they think the decision is. Offer guidance to point students in the proper analytical direction.
 - After the class has finished discussing the majority opinion, ask the students to read the excerpt from Justice Scalia’s dissenting opinion. When they have finished, encourage the class to discuss how the dissent is different from Justice Kennedy’s majority opinion.
 - **Option #2: Analyzing the Opinion (Group Work)**
 - This exercise requires the Analyzing the Opinion handout (Appendix). Before class, cut the handout along the lines to create six group prompts, labeled Group 1-6.
 - Divide the class into six groups. Pass one prompt to each group. Explain to students that they will be closely reading a few sentences from the majority opinion in *Romer v. Evans*. Ask each group to discuss amongst themselves what they think the Supreme Court meant by these important sentences. Allow approximately 5-10 minutes for in-group discussion.
 - One by one, prompt the groups to help you reveal the outcome of the case. Go in order from Group 1 to Group 6, asking each group the question assigned to it in the guide below:
 - Group 1: What does the Constitution say about laws that treat different groups of people differently in our country?

- ✓ *Goal Answer: They aren't tolerated, they aren't desirable, et al.*
- Group 2: What is the State's argument in favor of Amendment 2?
 - ✓ *Goal Answer: By prohibiting special protections for homosexuals, Amendment 2 puts them in the same position as everyone else.*
- Group 3: What is the Supreme Court's argument against Amendment 2?
 - ✓ *Goal Answer: Amendment 2 says that only homosexuals cannot have laws that grant them special protections. The law doesn't prevent anyone else from having laws that grant them special protections.*
- Group 4: When will a classification within a law be tolerated by the Constitution?
 - ✓ *Goal Answer: In most cases, when the classification bears a rational relation to a legitimate end.*
- Group 5: Is there a legitimate government interest promoted by this law?
 - ✓ *Goal Answer: No, because desire to harm a politically unpopular group is not a legitimate interest.*
- Group 6: Can Amendment 2 remain a part of Colorado's constitution?
 - ✓ *Goal Answer: No, because it violates the Equal Protection Clause of the U.S. Constitution.*

Equal Protection in Context: Letter to the Editor Activity

7. Ask students to think of the various ways that Colorado citizens were able to be involved in the political process during the debate over Amendment 2. Remind them that civic participation is not reserved just for elected officials and that there are many ways for all citizens to participate in the political process and explain the following instructions:
 - Inform students that many media sources, including newspapers, provide a forum for readers to express their own opinions on topics important to their community and world. Explain that while these forums today may take the form of internet blogs or discussion boards, the assignment today will be to write a letter to the editor of your Local Newspaper about a gay marriage amendment similar to the ones faced by the people of Colorado and California.
 - Hand out the attached "Letter to the Editor" assignment sheet. Ask students to read the scenario described in the assignment about a proposed amendment to the constitution of the fictional state of Cardinal.
 - Remind students to cite examples from the newspaper article they read and/or the *Romer v. Evans* case video to support their arguments.

Additional Activities: Deliberation Exercise

- This activity will require students to have their homework handout on hand from the night before. (You may wish to have extra copies in case some students have lost their article.)
- Divide students into groups of 4 or 6 people (it should be an even number if possible). Pass out the attached Deliberation Exercise handout. Make sure students have their *L.A. Times* article on hand; this will be the document used during the deliberation.
- Explain to students that the in-class activity will be a deliberation exercise and not a debate. This means that there will not be any argument about which side of the deliberation is right or wrong. Rather, this will be an exercise in identifying and understanding competing viewpoints in the *L.A. Times* article. Emphasize that this exercise is not about any individual student's personal views on gay marriage.
- Once students are in their groups with the handout, each group will divide into two Teams, A and B. This is explained in the handout as well. Allow ten minutes for each Team to find the arguments it will present to the rest of the group.
- After the ten minutes have passed, announce that it is time for the Teams to meet together and share the arguments they found in the *L.A. Times* article. Allow five minutes.
- Next, ask the Teams to now explain to their group the opposing viewpoints to the arguments they just articulated. Allow five minutes.

- Once the groups have finished sharing arguments, explain that an important part of deliberation is a personal evaluation of the merits of competing arguments. Ask each student to individually reflect on the different viewpoints and write a paragraph explaining which side was ultimately more convincing in their mind.

VOTERS APPROVE PROPOSITION 8 BANNING SAME-SEX MARRIAGES

From the Los Angeles Times , November 5, 2008

A measure to once again ban gay marriage in California led Tuesday, throwing into doubt the unions of an estimated 18,000 same-sex couples who wed during the last 4 1/2 months. As the measure, the most divisive and emotionally fraught on the state ballot this year, took a lead in early returns, supporters gathered at a hotel ballroom in Sacramento and cheered.

"We caused Californians to rethink this issue," Proposition 8 strategist Jeff Flint said. Early in the campaign, he noted, polls showed the measure trailing by 17 points. "I think the voters were thinking, well, if it makes them happy, why shouldn't we let gay couples get married. And I think we made them realize that there are broader implications to society and particularly the children when you make that fundamental change that's at the core of how society is organized, which is marriage," he said.

But in San Francisco at the packed headquarters of the No on 8 campaign party in the Westin St. Francis Hotel, supporters of same-sex marriage refused to despair, saying that they were holding out hope for victory. "You decided to live your life out loud. You fell in love and you said 'I do.' Tonight, we await a verdict," San Francisco Mayor Gavin Newsom said, speaking to a roaring crowd. "I'm crossing my fingers."

Elsewhere in the country, two other gay marriage bans, in Florida and Arizona, were well ahead. In both states, laws already defined marriage as a heterosexual institution. But backers pushed to amend the state constitutions, saying that doing so would protect the institution from legal challenges.

Proposition 8 was the most expensive proposition on any ballot in the nation this year, with more than \$74 million spent by both sides.

The measure's most fervent proponents believed that nothing less than the future of traditional families was at stake, while opponents believed that they were fighting for the fundamental right of gay people to be treated equally under the law. "This has been a moral battle," said Ellen Smedley, 34, a member of the Mormon Church and a mother of five who worked on the campaign. "We aren't trying to change anything that homosexual couples believe or want -- it doesn't change anything that they're allowed to do already. It's defining marriage. . . . Marriage is a man and a woman establishing a family unit."

On the other side were people like John Lewis, 50, and Stuart Gaffney, 46, who were married in June. They were at the San Francisco party holding a little sign in the shape of pink heart that said, "John and Stuart 21 years." They spent the day campaigning against Proposition 8 with family members across the Bay Area. "Our relationship, our marriage, after 21 years together has been put up for a popular vote," Lewis said. "We have done what anyone would do in this situation: stand up for our family."

The battle was closely watched across the nation because California is considered a harbinger of cultural change and because this is the first time voters have weighed in on gay marriage in a state where it was legal. Campaign contributions came from every state in the nation in opposition to the measure and every state but Vermont to its supporters. And as far away as Washington, D.C., gay rights organizations hosted gatherings Tuesday night to watch voting results on Proposition 8. "I am nervous," Human Rights Campaign President Joe Solmonese said from a brewery in the nation's capital.

"This is the biggest civil rights struggle for our movement in decades. . . . The outcome weighs incredibly heavily on the minds of every single person in the room."

Eight years ago, Californians voted 61% to define marriage as being only between a man and a woman. The California Supreme Court overturned that measure, Proposition 22, in its May 15 decision legalizing same-sex marriage on the grounds that the state Constitution required equal treatment of gay and lesbian couples.

Opponents of Proposition 8 faced a difficult challenge. Bob Stern, president of the Center for Governmental Studies, said California voters "very, very rarely reverse themselves" especially in such a short time. Both sides waged a passionate -- and at times bitter -- fight over whether to allow same-sex marriages to continue. The campaigns spent tens of millions of dollars in dueling television and radio commercials that blanketed the airwaves for weeks.

But supporters and opponents also did battle on street corners and front lawns, from the pulpits of churches and synagogues and -- unusual for a fight over a social issue -- in the boardrooms of many of the state's largest corporations.

Most of the state's highest-profile political leaders -- including both U.S. senators and the mayors of San Francisco, San Diego and Los Angeles -- along with the editorial pages of most major newspapers, opposed the measure. PG&E, Apple and other companies contributed money to fight the proposition, and the heads of Silicon Valley companies including Google and Yahoo took out a newspaper ad opposing it.

On the other side were an array of conservative organizations, including the Knights of Columbus, Focus on the Family and the American Family Assn., along with tens of thousands of small donors, including many who responded to urging from Mormon, Catholic and evangelical clergy.

An early October filing by the "yes" campaign reported so many contributions that the secretary of state's campaign finance website crashed. Proponents also organized a massive grass-roots effort. Campaign officials said they distributed more than 1.1 million lawn signs for Proposition 8 -- although an effort to stage a massive, simultaneous lawn-sign planting in late September failed after a production glitch in China delayed the arrival of hundreds of thousands of signs.

Research and polling showed that many voters were against gay marriage, but afraid that saying so would make them seem "discriminatory" or "not cool," said Flint, so proponents hoped to show them they were not alone. Perhaps more powerfully, the Proposition 8 campaign also seized on the issue of education, arguing in a series of advertisements and mailers that children would be subjected to a pro-gay curriculum if the measure was not approved. "Mom, guess what I learned in school today?" a little girl said in one spot. "I learned how a prince married a prince." As the girl's mother made a horrified face, a voice-over said: "Think it can't happen? It's already happened. . . . Teaching about gay marriage will happen unless we pass Proposition 8."

Many voters said they had been swayed by that message. "We thought it would go this way," Proposition 8 co-chair Frank Schubert said. "We had 100,000 people on the streets today. We had people in every precinct, if not knocking on doors, then phoning voters in every precinct. We canvassed the entire state of California, one on one, asking people face to face how do they feel about this issue. And this is the kind of issue people are very personal and private about, and they don't like talking to

pollsters, they don't like talking to the media, but we had a pretty good idea how they felt and that's being reflected in the vote count."

Fourteenth Amendment:

"No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

Romer v. Evans Viewer's Guide

Name _____ Date _____

1. What experience prompted Governor Roy Romer to issue an executive order?
2. Summit Ministries, a large evangelical church, is based where?
3. How many signatures were necessary to get the initiative on the ballot?
4. Name one reason that Colorado for Family Values felt Amendment 2 was necessary.
5. What was the first task of the Colorado Legal Initiatives Project?
6. What was Angela Romero's job?
7. When his commercials were deemed inappropriate for television, what did Tebedo do to communicate his message to voters?
8. Who became the first named defendant in the case against Amendment 2?
9. What did Dubofsky claim was the motivation of supporters of Amendment 2?

Romer v. Evans Viewer's Guide (Answer Key)

1. What experience prompted Governor Roy Romer to issue an executive order?

Hearing a gay government employee say that he felt uncomfortable revealing his identity while at a meeting in the Governor's Mansion.

2. Summit Ministries, a large evangelical church, is based where?

Colorado Springs.

3. How many signatures were necessary to get the initiative on the ballot?

50,000.

4. Name one reason that Colorado for Family Values felt Amendment 2 was necessary.

To prevent gays from having special rights; to promote morality; etc.

5. What was the first task of the Colorado Legal Initiatives Project?

Hiring a lawyer.

6. What was Angela Romero's job?

Police officer; youth officer; etc.

7. When his commercials were deemed inappropriate for television, what did Tebedo do to communicate his message to voters?

He sent out a pamphlet.

8. Who became the first named defendant in the case against Amendment 2?

Governor Romer.

9. What did Dubofsky claim was the motivation of supporters of Amendment 2?

Hatred; prejudice; etc.

***Romer v. Evans* Opinion Excerpts**

Excerpt from the Majority Opinion, written by Justice Kennedy:

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution...

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible...The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.

We cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint...[T]he protections Amendment 2 withholds...are protections taken for granted by most people either because they already have them or do not need them...

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons...If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence...It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."...Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause.

Excerpt from Justice Scalia's Dissenting Opinion:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "'bare . . . desire to harm'" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality is evil. I vigorously dissent.

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

Analyzing the Opinion

GROUP 1:

"[T]he Constitution 'neither knows nor tolerates classes among citizens...' The Equal Protection Clause enforces this principle..."

GROUP 2:

"The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights."

GROUP 3:

"The amendment imposes a special disability upon [homosexual] persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint...[T]he protections Amendment 2 withholds...are protections taken for granted by most people either because they already have them or do not need them..."

GROUP 4:

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons... We will uphold the legislative classification so long as it bears a rational relation to some legitimate end."

GROUP 5:

"[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. 'If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'"

GROUP 6:

"Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause."

Name _____ Date _____

Civic Participation: Letter to the Editor

You are a citizen of the state of Cardinal. In two months, the citizens of Cardinal will be voting on whether or not to amend the state constitution. The proposed amendment, called Proposition 1, is similar to California’s Proposition 8. Proposition 1 reads:

“Marriage in the state of Cardinal is only valid if it is between one man and one woman.”

You have decided to voice your opinion on this important issue by writing a letter to the state’s most popular newspaper, the *Cardinal State Gazette*. Using the sources that were presented in class, including the Proposition 8 newspaper article, the case of *Romer v. Evans*, and the Equal Protection Clause of the U.S. Constitution, write a well-constructed letter to the editor in support of or against the passage of Proposition 1. You may use the space provided below, or a separate sheet of paper if you need more room.

Deliberation Exercise

Name _____ Date _____

STEP ONE:

Once you have been assigned to a small group, divide into two Teams, A and B. Within your Team, look over the *L.A. Times* article you read for homework. Identify the competing arguments in the article for and against Proposition 8. If you are in Team A, focus on the arguments made by supporters of Proposition 8. If you are in Team B, focus on the arguments made by opponents of Proposition 8.

STEP TWO:

Each Team should write down the most compelling arguments for its side, as articulated by the *L.A. Times* article:

STEP THREE:

Each Team should choose a Representative to share what it has written with the entire group. Team A will present its arguments first. Team B will then follow. Each Team should listen carefully to the opposing arguments.

STEP FOUR:

Each Team should now choose a new Representative. This person will be responsible for repeating the opposing Team's arguments. Team B will begin, and Team A should correct Team B's Representative if he or she articulates an argument incorrectly. The Teams will then switch roles and repeat.

STEP FIVE:

The deliberation has ended. On your own, describe/summarize which arguments you found most compelling and why.

Appeals court strikes down Calif.'s gay marriage ban

By Elizabeth Weise and Joan Biskupic, Originally appeared in *USA Today* on 2/8/2012

SAN FRANCISCO – The fight over whether states can prohibit gay marriage moved one step closer to the Supreme Court on Tuesday when a federal appeals court struck down California's ban, declaring that it served "no purpose ... other than to lessen the status and human dignity of gays and lesbians in California."

The 2-1 decision, a victory for challengers of Proposition 8 yet narrowly crafted, is the latest in a saga playing out in California and reverberating nationwide. The case will likely become a momentous test of whether the U.S. Constitution forbids states from blocking same-sex couples from marrying.

It set off immediate reactions among a crowd of about 100 supporters of gay marriage who had gathered at the federal courthouse to await word of the ruling.

Will Clayton, 49, of San Francisco said the ruling was "a step in the right direction." He and his boyfriend of five years who lives in Den Bosch in the Netherlands are waiting until they can legally marry here.

Defenders of Proposition 8, which was passed by voters in 2008, expressed outrage. "No court should presume to redefine marriage. No court should undercut the democratic process by taking the power to preserve marriage out of the hands of the people," said Brian Raum, senior counsel for the Alliance Defense Fund, a Christian legal aid group that helped defend Proposition 8.

Tuesday's decision by the U.S. Court of Appeals for the 9th Circuit affirms a 2010 ruling by U.S. District Court Judge Vaughn Walker invalidating Proposition 8. The effects of Walker's decision, and the issuance of licenses to gay people, have been on hold during the litigation.

Judge Stephen Reinhardt, writing for the appeals court, stressed that the panel's decision was narrow and based on California's earlier granting of marriage licenses to gay people. The decision was limited to the situation in California and did not broadly assert a right for gays to marry.

"Whether under the Constitution same-sex couples may ever be denied the right to marry, a right that has long been enjoyed by opposite-sex couples, is an important and highly controversial question," Reinhardt wrote. "It is currently a matter of great debate in our nation, and an issue over which people of good will may disagree, sometimes strongly. ... 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.'"

He noted that Proposition 8 wrongly took that full designation away from a whole class of people and that the "strictly limited effect of Proposition 8 allows us to address the amendment's constitutionality on narrow grounds."

Reinhardt relied on the Supreme Court's 1996 decision *Romer v. Evans*, which forbids government from singling out any class of people, particularly gay men and lesbians, "for disfavored legal status" without sufficient grounds. The majority said Tuesday that the arguments offered by Proposition 8 defenders, including that it was necessary to promote child rearing by biological parents, failed to meet the *Romer* test.

California voters had approved Proposition 8, defining marriage as only between a man and a woman, in November 2008 to reverse a state Supreme Court ruling that May that gave gay couples a right to marry based on the California Constitution.

Reinhardt, an appointee of President Carter, was joined in the decision by Judge Michael Daly Hawkins, an appointee of President Clinton. Judge Randy Smith, an appointee of President George W. Bush, dissented. "Here, the people of California might have believed that withdrawing from same-sex couples the right to access the designation of marriage would, arguably, further the interests in promoting responsible procreation and optimal parenting," Smith wrote, adding that although the assumptions underlying that rationale may be erroneous, they provide sufficient grounds for a policy against same-sex marriage.

Proposition 8 defenders may seek a review by the full 9th Circuit or try to go directly to the Supreme Court. Archbishop Timothy Dolan of New York — president of the U.S. Conference of Catholic Bishops, which backed Proposition 8 — called the ruling a "grave injustice."

"The people of California deserve better. Our nation deserves better. Marriage deserves better," he said.

The other major religious force in the 2008 effort was the Church of Jesus Christ of Latter-day Saints, or Mormon Church. Spokesman Michael Purdy said Tuesday that the church regrets the ruling. "Millions of voters in California sent a message that traditional marriage is crucial to society," he said. "They expressed their desire, through the democratic process, to keep traditional marriage as the bedrock of society, as it has been for generations."

"It's fantastic," said Lori Hawkins, 53, of San Francisco, who attended the rally here with her husband, Ray, 52. "There was a time in California history when we couldn't have gotten married" she said. She pointed to her white husband and said that as a Chinese American, she would have been barred from marrying him.

Many California officials also praised the decision. It "stands as a victory for the fundamental American principle that all people are equal and deserve equal rights and treatment under the law," said Lt. Gov. Gavin Newsom, the former San Francisco mayor who directed the city clerk to begin issuing marriage licenses to gay couples when voters approved the measure.

Source: <http://www.usatoday.com/news/nation/story/2012-02-07/gay-marriage-california-proposition-8/53000180/1>

After reading the article, answer the following questions:

1. What is Proposition 8? When was it passed?
2. Did the 9th Circuit Court uphold or overturn, District Court Judge Vaughn Walker's 2010 decision regarding Proposition 8? What was Judge Reinhardt's reasoning for the 9th Circuit Court's decision?
3. How is the Supreme Court's decision in *Romer v. Evans* related to the 9th Circuit's decision regarding Proposition 8?
4. What question regarding same-sex marriage was not answered by the 9th Circuit Court's decision?
5. Do you agree with the 9th Circuit Court's decision? Why or why not?

“Appeals court strikes down Calif.’s gay marriage ban” Answer Key

1. What is Proposition 8? When was it passed?

Proposition 8 was a ballot initiative that banned same-sex by adding an amendment to the California Constitution. It was passed in 2008.

2. Did the 9th Circuit Court affirm or overturn, District Court Judge Vaughn Walker’s 2010 decision regarding Proposition 8? What was Judge Reinhardt’s reasoning for the 9th Circuit Court’s decision?

The 9th Circuit Court affirms Judge Walker’s decision, which struck down Proposition 8. Judge Reinhardt’s reasoning was that “Proposition 8 wrongly took that full designation away from a whole class of people and that the ‘strictly limited effect of Proposition 8 allows us to address the amendment’s constitutionality on narrow grounds.’”

3. How is the Supreme Court’s decision in *Romer v. Evans* related to the 9th Circuit’s decision regarding Proposition 8?

*“Reinhardt relied on the Supreme Court’s 1996 decision *Romer v. Evans*, which forbids government from singling out any class of people, particularly gay men and lesbians, “for disfavored legal status” without sufficient grounds. The majority said Tuesday that the arguments offered by Proposition 8 defenders, including that it was necessary to promote child rearing by biological parents, failed to meet the *Romer* test.”*

4. Was this decision narrow or broad? What question regarding same-sex marriage was not answered by the 9th Circuit Court’s decision?

The court’s decision was narrow because it only focuses on the Constitutionality of Prop 8 in California. The court didn’t attempt to answer the broader questions of the Constitutionality of same-sex marriage. They mainly said that Prop 8 was unconstitutional because it was taking away a marriage right already granted to same-sex couples.

5. Do you agree with the 9th Circuit Court’s decision? Why or why not?

Answers will vary.

A law professor explains why N.C.'s new discrimination statute is unconstitutional

BY ENRIQUE ARMIJO

Special to the (Raleigh) News & Observer

In 1992, Colorado adopted a statewide solution to what it viewed as a local problem: Cities, towns and counties were amending their discrimination ordinances to protect homosexuals and other LGBT residents within their borders. Colorado voters responded by approving an initiative that amended the Colorado Constitution to deprive any political subdivision of the power to use its law to protect gays, lesbians and bisexuals.

The U.S. Supreme Court, in a decision called *Romer v. Evans*, found that Colorado's constitutional amendment violated the rights of gay Coloradans under the U.S. Constitution's Equal Protection Clause. The amendment, stated the court, deprived one "politically unpopular group" – gays and lesbians in Colorado – from exercising their rights to persuade their local governments for the protections that other groups in those cities already enjoyed. There was no explanation for such a deprivation of rights, said the court, other than "animosity toward the class of persons affected."

The *Romer* decision celebrates its 20th birthday this May, but so far as the majority of the North Carolina legislature and Gov. Pat McCrory are concerned, it is as if the decision had never been reached at all. Just as Colorado did more than two decades ago, North Carolina lawmakers have taken away what Charlotte saw fit to give: equal rights under the law to all of its residents. And because no other city or town can now do what Charlotte tried to do, now no gay or transgendered person, or any advocate for that person, can make the case to his or her town council or county commission that what the law should view as right can change.

House Bill 2's defenders will argue that, unlike the Colorado constitutional amendment in *Romer*, which singled out city ordinances that sought to protect homosexuals from discrimination, HB2 does no such singling. Instead, the North Carolina law establishes a floor for local nondiscrimination ordinances throughout the state with respect to all the groups of people it protects. No federal judge in the United States would take this contention seriously. It is, as the recently departed Justice Antonin Scalia – a jurist that many of HB2's supporters surely admired – might say, applesauce.

HB2 was written by the legislature and signed by the governor, in an "emergency session," in response to one thing: a law passed in Charlotte that protected LGBT people in that city from discrimination in public housing and employment. McCrory can defend his signing of the law by talking about privacy in locker rooms as much as he likes; HB2 is a direct and unmistakable legislative response to Charlotte's expansion of existing rights to gay, lesbian and transgendered people in that city. When the government deprives one group of people of rights that others enjoy – here, the right to lobby local lawmakers for legal protection from discrimination – the government violates the Constitution's Equal Protection Clause.

On that point, the teachings of *Romer* are clear. And now that HB2 has been challenged in court, the federal district court in Greensboro will surely agree and enjoin the law from going into effect.

Our legislature has promulgated, and our governor has signed, a facially unconstitutional law that has zero prospect of ever being enforced; is specifically directed at a minority group that has suffered direct discrimination in our state; and takes power away from cities to remedy that harm. So much for local control.

If North Carolina's voters believe this disenfranchisement-by-statute is a proper exercise of legislative power, then the law's supporters will reward McCrory come November. I'm no politician. But I have my doubts.

Enrique Armijo teaches Constitutional Law at Elon University School of Law in Greensboro. He can be reached at earmijo@elon.edu.

Read more here: <http://www.charlotteobserver.com/opinion/article68961827.html#storylink=cpy>

The cunning trick in North Carolina's radical new anti-LGBT law

By Jeff Guo April 1, 2016, *The Washington Post*

When the city of Charlotte outlawed LGBT (Lesbian, Gay, Bisexual, Transgender) discrimination in February, civil rights groups knew that political retaliation was coming.

The blow landed last week. In a single day, the governor and legislature of North Carolina unveiled, deliberated, passed, and signed into law a bill that activists have described as the most extreme anti-LGBT measure in the country — forcing transgender people into bathrooms that differ from their gender identity and disabling cities from creating laws protecting LGBT people.

What happened in North Carolina may have been startling for its swiftness, but it was a classic countermove in the modern conflict over gay rights. When liberal cities enact laws to protect LGBT people, conservative state governments respond by preempting them.

North Carolina is now the third state in the last five years to ban local anti-discrimination ordinances after a city tried to protect LGBT people. This is a maneuver of questionable constitutionality.

“They jammed this through with virtually no notice,” says Shannon Minter, legal director of the National Center for Lesbian Rights. “Everything about this process stinks. It’s got all the hallmarks of a bill that’s based on animus.”

Arkansas lawmakers passed a similar law last year, after the [city of Fayetteville sought to prohibit](#) bosses, landlords, and shopkeepers from discriminating against LGBT people in a bill that was rescinded soon after. Tennessee’s legislature also passed a law in 2011, after Nashville and Davidson County cut ties with businesses that discriminated against LGBT workers.

Though North Carolina’s law goes the furthest — it limits what bathrooms transgender people can use — what these three measures have in common is that they were all engineered to test the limits of what the U.S. Constitution allows. The 14th Amendment promises equal protection under the law, meaning that governments can’t single out and punish groups of people for no good reason. But the Supreme Court has been consistently vague about what that promise means for LGBT people. This latest controversy may finally clear some things up.

On Monday, the ACLU, Lambda Legal, and Equality North Carolina filed a lawsuit arguing that North Carolina's new law “violates the most basic guarantees of equal treatment and the U.S. Constitution.” Legal experts say this will be a tough case to litigate, but if it proceeds, it has the potential to set a landmark precedent. It may force the Supreme Court to confront a question that for decades it has stubbornly refused to answer: What does the Constitution actually imply about gay rights?

What the North Carolina law says

The North Carolina bill has two parts. First, it requires public schools and agencies to segregate bathrooms by the biological sex on someone’s birth certificate. This provision has attracted the lion’s share of the attention so far because it is the first statewide law of its kind. Civil rights activists fear that by forcing trans women into men’s rooms, and forcing trans men into women’s room, the new law will put transgender people at risk of violence.

The second part of North Carolina’s bill prohibits any city or county from creating new anti-discrimination laws. It’s very similar to laws already on the books in Tennessee and Arkansas, all of which are carefully worded not to mention gay people at all. The impact of these laws is clear though. In North Carolina, for instance, the immediate effect will be to make LGBT discrimination legal again in Charlotte.

These anti-discrimination laws share a famous common ancestor. In 1992, voters in Colorado approved a constitutional amendment prohibiting any agency, school district, or local government from protecting “homosexual, lesbian or bisexual” people. This invalidated the LGBT anti-discrimination ordinances in Denver, Aspen and Boulder. Those cities promptly sued the state, arguing that the measure violated the Equal Protection clause of the 14th Amendment.

That lawsuit, known as *Romer v. Evans*, reached the Supreme Court in late 1995 and resulted in a landmark victory for gay rights the next year. But everything happened in a very strange way.

The strange decision in *Romer v. Evans*

The Equal Protection clause of the 14th Amendment says that laws in the United States must apply equally to everyone. Of course most legislation fails to treat people equally — and that’s okay. There just needs to be a reason — a “rational basis” — even if it’s a flimsy one.

Laws discriminate by age all the time, for instance. If a state wanted to ban the sale of gummy snacks to people under the age of 16, that would be ludicrous, but probably legal. Lawyers could argue that children under 16 are at higher risk for choking on these candies. The justification doesn’t have to be all that convincing; it just has to be not crazy.

When laws discriminate against certain kinds of people, though, the courts become much more suspicious. Lawyers often speak of a three-tiered system. At the top are categories like race, national origin or religion. Laws that explicitly discriminate against race are practically impossible to justify and hardly ever survive judicial review. Even laws that do not mention race can be struck down if it can be proven that they were enacted with discriminatory intent.

To a lesser extent, the courts are also wary of laws that discriminate by sex. This middle tier of review is called “intermediate” or “heightened” scrutiny, and it’s a relatively recent development. In 1976, the Supreme Court struck down an Oklahoma law that allowed young women but not young men to buy certain kinds of weak beer. Oklahoma tried argue that young men were more likely to drive drunk, so they shouldn’t be allowed to buy beer until they were 21. But the court didn’t find that reason convincing enough for the law to stand. On the other hand, the court has upheld other kinds of sex-based discrimination — it ruled in 1981 that the draft was legal even though the military only required men to register.

For everyone else, courts use the extremely lenient “rational basis” standard. Practically speaking, nearly any law can clear this low bar. In the words of New York University constitutional law professor Kenji Yoshino, [this is](#) essentially “a free pass for legislation.”

Laws that discriminate against sexual orientation tend to be judged at this lowest level of scrutiny. Courts generally don’t believe that gays and lesbians are a class of people who deserve special protection under the Constitution. For these reasons, it’s extremely hard to win a case just by saying that a law is unfair to LGBT people.

Except that’s exactly what happened in 1996, when the Supreme Court struck down Colorado’s anti-LGBT law in *Romer v. Evans*.

Civil rights groups had been hoping the court would recognize that sexual minorities, like racial or religious minorities, deserved extra protection under the Constitution beyond rational basis review. But the Supreme Court refused to elevate LGBT people. Instead, Justice Anthony Kennedy said that Colorado’s law failed even the flimsy rational basis standard.

“[Colorado’s] amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests,” Kennedy [wrote](#) in the majority opinion, which struck down the Colorado law with the unlikeliest of legal tools.

It was like a toy gun had suddenly spit out a real bullet.

LGBT rights in limbo

The Supreme Court has never really cleared up what it thinks about LGBT people. Not once has it said that sexual orientation is a suspect classification, like race or religion. But there seems to be a winking understanding that LGBT people do deserve some special consideration.

“Formally, the issue is somewhat up in the air,” says Katie Eyer, an associate professor at Rutgers who teaches anti-discrimination law. “But I think most observers agree at this point that the federal courts and the Supreme Court in particular do give some level of meaningful scrutiny to laws that discriminate based on sexual orientation.”

Recent legal victories for gay rights have danced around this issue. In *Lawrence v. Texas*, the Supreme Court struck down anti-sodomy laws not because they discriminated against gay people, but because these laws intruded on the “[realm of personal liberty](#).”

“The petitioners are entitled to respect for their private lives,” Kennedy wrote in the majority opinion. “The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” In the gay marriage cases, *United States v. Windsor* and *Obergefell v. Hodges*, the court used hybrid reasoning that blended a number of concepts in the Constitution, among them the rights to liberty and equal protection under the law. But again, the opinions fell short of recognizing sexual orientation as a suspect class. *Obergefell* in particular has been criticized by [legal scholars](#) for [being](#) muddy and confusing.

“Justice Kennedy squandered an important opportunity to leave a more enduring gay rights legacy,” University of Washington law professor Peter Nicolas [wrote of the decision last year](#).

So while gay rights activists cheered the outcome of these marriage cases, the legal status of LGBT people remains in limbo. This is where the lawsuit in North Carolina comes in.

The trick in North Carolina’s anti-LGBT law

North Carolina’s law uses a trick pioneered in Tennessee. A few years ago, Tennessee lawmakers passed a funny-sounding bill called the “Equal Access to Intrastate Commerce Act.”

The official goal was to make the state more business-friendly by prohibiting cities from burdening companies with anti-discrimination ordinances. The implicit goal was to disarm Nashville and Davidson County’s new LGBT anti-discrimination ordinance. The law said that only the state could dictate what kinds of people deserved protection from discrimination — and LGBT were conspicuously left out.

Tennessee’s law is a spiritual twin to the Colorado law that the Supreme Court struck down in *Romer v. Evans*. But it’s different in a crucial way. Tennessee’s law doesn’t mention LGBT people at all. That’s an intentional dodge.

In *Romer v. Evans*, the Supreme Court made a big deal over how Colorado had singled out gay people, by name, in a piece of legislation. But the language of the Tennessee law is completely neutral — essentially, it freezes discrimination law until the state says otherwise. In practice, of course, the law closes the door on LGBT people, who were starting to win anti-discrimination protections in some liberal Tennessee cities.

Civil rights groups hoped that courts would see through the subterfuge in the Tennessee law. They argued that the measure was clearly motivated by anti-gay animus, violating the Constitution's Equal Protection clause. But a lawsuit against Tennessee failed; in 2014, an appeal court dismissed it on a technicality, ruling that the plaintiffs couldn't prove they suffered any harm from the new law.

The big question remained unanswered. Would the Supreme Court finish what it started in *Romer v. Evans*?

The Court's unfinished business

For years, constitutional scholars have been puzzling over the Supreme Court's strange stance on LGBT issues. One thing is clear: The court has repeatedly insisted that sexual orientation gets no special treatment under the Constitution's promise of equal protection.

Theoretically, a law crafted to disadvantage LGBT people is constitutionally okay as long as a judge can imagine some reason for it. That's the meaning of the "rational basis" standard. *A law just has to be not crazy.*

In *Romer v. Evans*, the Supreme Court said it was applying the rational basis standard, but it ignored plenty of eligible justifications for a blanket ban on LGBT protections — cost, religious deference and so on. In overturning Colorado's law, the Supreme Court seemed to be overzealous.

Constitutional scholars even have a name for what the court was doing — they say that it was applying "rational basis with a bite." Many view it as a signal that the court is ready to evolve on an issue.

The court did something very similar in the 1970s, when it started recognizing sex as a protected class. At first, the court took baby steps without explaining what it was doing, which confused many people. But after a few years, the court finally announced that it had actually changed its mind about what the Constitution says about laws that discriminate based on gender.

"The word on the street — or, in the case of lawyers and law professors, the word on the internet — is that *Romer* cannot mean what it says, but instead must be a way-station to declaring homosexuality a quasi-suspect classification like gender or illegitimacy," legal scholars Daniel A. Farber and Suzanna Sherry [wrote at the time](#) of the *Romer* decision.

So does North Carolina's law violate the Constitution?

The lawsuit in North Carolina urges courts to finally treat gender identity and sexual orientation as suspect or quasi-suspect classifications under the Equal Protection clause. This has long been a goal in the gay rights community. It would mean that politicians could no longer pass laws that target LGBT people without some serious explaining.

There are other claims in the lawsuit as well. The transgender bathroom provisions in North Carolina's law may run afoul of Title IX, the federal law that prohibits sex discrimination in schools. According to the Department of Education's interpretation of the law, Title IX also bans transgender discrimination, which the DOE considers a form of sex discrimination.

By forcing students to use the bathroom that matches their birth certificate instead of the bathroom that matches their gender identity, North Carolina may be jeopardizing over [\\$4 billion dollars](#) in education funding that it receives annually from the federal government. A similar lawsuit involving Title IX and transgender restrictions in Virginia [is already before](#) the 4th Circuit, whose jurisdiction includes North Carolina, so this issue could be decided first.

But the most thrilling outcome for LGBT activists would be a win on the constitutional arguments. It's something of a long shot, as we've seen. For decades, gay rights groups have lobbied the Supreme Court to recognize that LGBT people are a historically persecuted group that deserve heightened protections under the Constitution's promise of equal treatment under the law. (An alternate argument is LGBT people should already receive heightened protections because LGBT discrimination is a form of sex discrimination, and sex is already a quasi-suspect class.)

Versions of these arguments have come before the Supreme Court in the famous sodomy cases *Bowers v. Hardwick* (1986) and *Lawrence v. Texas* (2003) as well as the in gay marriage cases, *United States v. Windsor*(2013) and *Obergefell v. Hodges* (2015) — but never with much success.

The closest the court ever came to sympathizing with the plea for equal protection was in *Romer v. Evans*, when it struck down Colorado’s anti-LGBT law. But even then, it would not admit that it was applying heightened scrutiny. It was a strange half-measure. (This situation has been in limbo for so long that some legal scholars wonder if the entire scheme of tiered scrutiny — one of the first concepts that’s taught in constitutional law — is becoming obsolete.)

North Carolina’s new law is an evolved cousin of Colorado’s law. Both were created to stymie local LGBT protections, but Colorado’s law singled out gay people by name, while North Carolina’s law is more coy. So if the Supreme Court wants to strike down North Carolina’s law for disadvantaging gay people, it will have to use more firepower than it did in *Romer v. Evans*. It may finally have to come out and say what it has been hinting at for years.

If gender identity and sexual orientation became recognized as a protected classes, deserving of heightened judicial scrutiny, the repercussions would be enormous. Not only would it inflame the struggle between religious rights and gay rights, but it would call into question many of the anti-LGBT bills being considered around the nation. In recent years, particularly since the legal victories for same-sex marriage, conservative groups have focused their attention on state legislatures, where they lobby for restrictions on the rights of LGBT people. Heightened judicial scrutiny would tank many of those measures.

The North Carolina lawsuit has a long road ahead of it. But it has the makings of a milestone case. If it ever reaches the Supreme Court, it will force the justices to tackle an issue that they have repeatedly hemmed and hawed over.

The court has ruled that bans on sodomy are unconstitutional. It has ruled that bans on same-sex marriage are unconstitutional, too. But is it constitutional for a law to discriminate against LGBT people? The Supreme Court has been mysterious on that subject for a very long time.

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https://www.washingtonpost.com/news/wonk/wp/2016/04/01/the-cunning-trick-in-north-carolinas-radical-new-anti-lgbt-law/?utm_term=.f1cfae922570