MAP EXPLANATION

After finding that the Court had jurisdiction, Justice Kennedy majority opinion struck down Oklahoma’s Habitual Offender Act. Justice Kennedy directly cited Windsor in 2013. The majority opinion noted that the legislative history “specifically, the Map shows how both the equal protection and substantive due process doctrines have contributed to a constitutional antecedence that affirms the rights of same-sex couples. The accompanying case discussions highlight reasoning and quotes that ultimately influenced the majority opinion in Windsor.

Moreover, the Map takes the sting from Justice Scalia’s criticism that the majority failed to conduct a proper substantive due process analysis. Justice Scalia argued that the opinion failed to ask whether the same-sex marriage prohibition applied to the Nation’s history and tradition.” At 2707 quoting Washington v. Glucksberg, 512 U.S. 72, 721 (1997), and failed to articulate a “stare decisis” when considering whether DOMA violated equal protection. At 236. As demonstrated in the Map, however, the Court has long applied tests other than substantive due process for liberty to protect against the process and equal protection review. Indeed, Justice Kennedy’s majority opinion, as Justice Scalia noted in his dissent, is “an equal protection case by any standard.”

None of the justices dissented with precedent and the doctrinal traditions advanced by Justice Douglas, Brennan, and Blackmun.

NAME: This Map or the territory. It does not purport to represent every case back the majority’s approach in the process of equal protection doctrine. Rather, it highlights representative and influential opinions that define the basic genealogy of Justice Kennedy’s doctrinal argument. Similarly, the Map does not draw every citation connection between opinion, arrows, and doctrinal lines in the same-sex marriage dispute. Finally, note that opinion triangles grow in size based on the number of citations to the opinion represented on the Map.

Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Although the phrase “substantive due process” did not appear in Pierce, the case stands as a prominent example of what substantive due process doctrine means. Justice McReynolds’ majority opinion struck down an Oregon law that required public schools to provide education for all children, finding the law “inviolable because of the spirit of our Constitution and the upbringing and education of [their] children.” At 513 quoting McReynolds’ point that through the Constitution’s “fundamental theory of liberty...excludes any general power of the State to standardize its children.” At 513.

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 538 (1942)

Before, equal protection challenges to state legislation usually failed. Yost Justice Douglas’s majority opinion struck down Oklahoma’s Habitual Criminal Sterilization Act under the Equal Protection Clause. The Act punished those convicted of larceny with sterilization but spared repeat embezzlers. Describing marriage and procreation as “basic civil rights,” Justice Douglas concluded “[t]he law-laws are made by those who have committed inhumanly the same quality of offense...it has made as invalid what is as it had selected a particular race or nationality for oppressive treatment.” At 541.

Griswold v. Connecticut, 381 U.S. 479 (1965)

In Griswold, the Court struck down a Connecticut law prohibiting the sale or use of contraceptives. Justice Douglas’s majority opinion held the law, as applied to married couples, violated the constitutional right to privacy. “We deal with a liberty older than the Bill of Rights—older than our political parties, older than our school systems, Map. More than an association that promotes a way of life, not causes, a ‘broad and long, not political faith, a bilateral loyalty, not commercial or social projects.” At 48.

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

In Loving, the unanimous Court struck down Virginia’s miscegenation laws on both equal protection and the process grounds. In his opinion, Chief Justice Warren applied strict scrutiny and concluded that the law was unconstitutional. He also cited Skinner for the proposition that marriage is a “basic civil right” and concluded that “[d]espite the fundamental freedom on us on a suspepsuable basis...is a substantive right in which the heart of the Fourteenth Amendment...[that] deprive citizen of the State’s citizens of liberty without the process of law.” At 12.


In Eisenstadt, the Court struck down a Massachusetts law that prohibited distribution of contraceptives to unmarried persons. In his plurality opinion, Justice Brennan resolutely applied rational basis scrutiny but rejected all reasoning of the state’s asserted rationales for the law. Justice Brennan argued that “[s]ubjecting the distribution of contraceptives to married persons cannot be prohibited, but a ban on distribution to unmarried persons be equally impermissible,” as the relevant right to privacy inheres in the individual rather than in couples. At 453.


In Baker, the Court struck down a portion of a federal law that denied food stamps to households composed of unmarried individuals. Justice Brennan’s majority opinion noted that the law’s purpose and effect showed that the provision was intended to deny “‘happiness’ and ‘family community’ fixed standards.” At 256 quoting Brennan’s point that “the constitutional concern is equal protection and does not exist anything, it must at the very least amount to a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” At 534. Justice Kennedy directly cited Windsor in Sony and similarly questioned Congress’s purpose in passing DOMA.

The majority in Bowers, per Justice White, upheld the Georgia statute that punished those thrice convicted of same-sex contact against a same-sex challenge. Like Justice Scalia in the Windsor decision, Justice White noted that only liberalism “deeply rooted in this Nation’s history and tradition” deserved constitutional recognition. At 192 quoting Moore v. City of E. Cleveland, 431 U.S. 394, 397 (1977) (per Mr. Justice Brennan). Justice Blackmun forcefully dissented. He conformed the Court’s precedent diligently and argued that the Constitution protected the “right of an individual to conduct intimate relationships in the intimacy of his or her own home.” At 206.

The first of four Justice Kennedy majority opinions in the Map, Casey (co-authored by Justices O’Connor, Kennedy, and Souter) found that state decision required upholding Roe’s recognition of a woman’s right to choose an abortion before fetal viability. Regarding the proposition substantive due process inquiry, Casey quoted Justice Harlan: Due process “is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing...nothing could serve as a substitute, in this area, for judgment and restraint.” At 490 quoting Poe v. U.S. Marshal for S. Dist. U.S. 497, 542 (1914) (Harlan, 1st dissent).


In Bomer, the Court struck down Colorado’s Amendment 2 that prohibited gay, lesbian, and bisexual persons special rights. Justice Kennedy, however, found the law much broader—“[i]t identifies persons by a single trait and then denies them protection across the board...it is not within our constitutional tradition to enjoin laws of this sort.” At 287 quoting Bomer’s argument for its proposition that a ban denies to harm unemperal groups violates equal protection. In Windsor, Justice Kennedy returned to this proposition and relied heavily on Bomer in striking down DOMA.


In Lawrence, the Court overturned Bowers and struck down Texas’ law against homosexual sodomy. In his majority opinion, Justice Kennedy explicitly embraced the substantive due process logic of Justice Kennedy’s Bowers dissent and of the Casey majority. Tellingly, Justice Kennedy also relied on Bomer as evidence that the jurisprudential foundations of Bowers had been tested. Thus, Justice Kennedy in Lawrence used an equal protection case to justify a substantive due process right. In the stroke of a single opinion, Kennedy bridged the two doctrines by citing Lawrence as reason to strike down DOMA. While conceding that precedent grounds would be “deeply rooted in this Nation’s history and tradition” as described in the Court’s prior opinions. Throughout the majority’s opinion identified the only liberalism states and other policies.

United States Department of Agriculture v. Moreno, 413 U.S. 282 (1973)

In Moreno, the Court struck down a portion of a federal law that denied food stamps to households composed of unmarried individuals. Justice Brennan’s majority opinion noted that the law’s purpose and effect showed that the provision was intended to deny “‘happiness’ and ‘family community’ fixed standards.” At 283 quoting Brennan’s point that “the constitutional concern is equal protection and does not exist anything, it must at the very least amount to a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” At 534. Justice Kennedy directly cited Moreno

Regents of the University of California v. Bakke, 438 U.S. 262 (1978)

In Bakke, the Court struck down a New York law that denied admission to medical school to those who had participated in or supported racial integration. Justice Kennedy separately joined the opinion of Justice Fortas and Justice Stewart. With his separate opinion, Justice Kennedy joined the plurality and half of the dissenting justices. Justice Kennedy cited Warren’s decision in the same-sex marriage dispute. Finally, note that opinion triangles grow in size based on the number of citations to the opinion represented on the Map.

A VISUAL GUIDE TO UNITED STATES V. WINDSOR: DOCTRINAL ORIGINS OF JUSTICE KENNEDY’S MAJORITY OPINION

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130

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