MAP EXPLANATION

After finding that the Court had jurisdiction, Justice Kennedy’s majority opinion in *Windsor*—35 U.S. 128 (2013) reached the merits and classified *DOMA* as a violation of the Fifth Amendment. In this dissent, Justice Scalia attacked the major doctrinal reasoning on the merits as “tomespecific” holding that invalidating DOMA “may not undermine the right to privacy—” at 2707 (Scalia, J., dissenting).

This Map responds to Justice Scalia’s accusation by discussing how marriage has been viewed as a constitutional right, and how some of the same-sex marital prohibitions demonstrate a substantive due process rights.

The accompanying case descriptions usually failed. Yet Justice Douglas’ majority opinion held the law, as applied to married couples, violated the constitutional right to privacy. “We deal with a matter older than the Bill of Rights—older than our political parties, older than our school system, older than a government that associates a promotion that a way of life, not a cause, a hard-won, long-held, none, public policy, a bilateral, loyalty, not commercial or social projects.” At 40.

Loving v. Virginia, 358 U.S. 419 (1968), In Loving, the unanimous Court struck down Virginia’s miscegenation law on both equal protection and due process grounds. In his opinion, Chief Justice Warren applied strict scrutiny and concluded that the law discriminated irrevocably. He also cited Skinner for the proposition that marriage is a fundamental right and concluded that “[demonstrated in the constitutional freedom on so unsupportable a basis] [at] (a) [is] direct subservience of the principle of equality at the heart of the Fourteenth Amendment ... [that] (b) detract from the State’s citizen of liberty without the process of law.” At 12.

Eisenstadt v. Baird, 405 U.S. 438 (1972) In Eisenstadt, the Court struck down a Massachusetts law that prohibited distribution of contraceptives to unmarried persons. In his plurality opinion, Justice Brennan ostensibly applied rational basis scrutiny but nonetheless rejected all of the state’s asserted rationales for the law. Justice Brennan argued that “[i]f under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible,” as the relevant right to privacy in inferences the individual in the which is in innocuous. At 435.

 Roe v. Wade, 458 U.S. 134 (1973) Roe famously and controversially recognized a substantive due process right to abortion. Justice Blackmun’s majority opinion claimed doctrinal justification for a constitutional right of privacy from the Griswold-Privacy line of cases as well as from other lines including that from *Skinner to Eisenstadt* “This right of privacy,” wrote Justice Blackmun, “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” At 45.

United States Department of Agriculture v. Moreno, 413 U.S. 228 (1973) In Moreno, the Court struck down a portion of a federal law that denied food stamps to households composed of unrelated individuals. Justice Brennan’s majority opinion noted that the statute was unconstitutional. He also showed that the provision was intended to deny “happiness” and “fringe” common fixed stamp. At 534. Justice Brennan wrote, “If the constitutional conception of equal protection of the laws is to be of any effect at all, it must at the very least mean that a bare equality of treatment is not a legitimate governmental interest.” At 534. Justice Kennedy directly cited *Moreno* in Windsor and similarly questioned Congress’s purpose in passing DOMA.

Bowers v. Hardwick, 478 U.S. 186 (1986) The majority in *Bowers*, per Justice White, upheld the state law banning sodomy as a crime against a same-sex challenge. Like Justice Scalia in *Windsor*, Justice White argued that the state’s law was “deeply rooted in this Nation’s history and tradition” *... deeply rooted in this Nation’s history and tradition* (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 507 (1977) (plurality opinion of *Moore*). In dissent, Justice Blackmun forcefully dissented. He contrasted the Court’s precedents differently 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 208.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) The first of four Justice Kennedy majority opinions in the Map, *Casey* (co-authored by Justices O’Connor, Kennedy, and Souter) found that state decisions required upholding Roe’s recognition of a woman’s right to choose an abortion before viability. Regarding the proper 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 thing. No... formula could serve as a substitute, in this area, for judgment and restraint.” At 850 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 42 F. 571, 542 (1964) (Harlan, J., dissenting)).

Romer v. Evans, 517 U.S. 620 (1996) In *Romer*, the Court struck down a Colorado law that prohibited discrimination against GBLTQI+ persons special rights. Justice Kennedy, however, found the law much broader—“It identifies persons by a single trait and then denies them protection across the board... It is not within our constitutional tradition to enunci laws of this sort...” At 633. Arguing that the law’s justification, the defendant compelling social basic review, Justice Kennedy cited *Moore* for its proposition that a bare ban doesn’t harm unpopular groups violates equal protection. In Windsor, Justice Kennedy returned to this proposition and relied heavily on *Romer* in striking down DOMA.

Lawrence v. Texas, 539 U.S. 558 (2003) In *Lawrence*, the Court overruled *Bowers* and struck down Texas’ law against homosexual sodomy. In his majority opinion, Justice Kennedy explicitly embraced the substantive due process logic of Justice Blackmun’s *Bowers* dissent and of the Casey majority. Tellingly, Justice Kennedy also added that only liberties that are “deeply rooted in this Nation’s history and tradition” (harlan, J., dissenting) could be sustained by state laws.

* Note: This Map was prepared by Columbia University’s *Law Review* Colloquy team. Copyright 2013 by Columbia University. Any use of this Map is solely for educational purposes and does not express the views, positions, or opinions of the Columbia Law Review or the University. A VISUAL GUIDE TO UNITED STATES V. WINDSOR: DOCTRINAL ORIGINS OF JUSTICE KENNEDY’S MAJORITY OPINION

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