

THIRTEEN FALSE BLACKBIRDS

RUTHANN ROBSON[†]

The United States Supreme Court will soon review the Ninth Circuit's panel opinion invalidating Proposition 8, California's voter-passed constitutional amendment that eliminated same-sex marriage.¹ Predictions about the shape and substance of any eventual opinion are wildly speculative. Nevertheless, perhaps this is the most appropriate time for advice, even wild advice.

This piece is a creative intervention inspired by two disparate sets of thirteen passages: Wallace Stevens' iconic poem, "Thirteen Ways of Looking at a Blackbird,"² and the section "Thirteen Falsities Exposed" in Justice Antonin Scalia's recent co-authored volume *Reading Law*.³ It offers thirteen "false blackbirds" that the majority opinion in *Hollingsworth v. Perry* should avoid.

I.

THE FALSE BLACKBIRD OF NEUTRALITY

Intervenors Hollingsworth and ProtectMarriage.com argued below that Judge Vaughn Walker, the trial judge, was not sufficiently impartial to render a decision on Proposition 8 because of his sexual orientation.⁴ After the decision, and after resigning from the bench, Walker "disclosed that he was gay and that he had for the past ten years been in a relationship with another man."⁵ The proponents of Proposition 8 moved to vacate the judgment, arguing Walker was obligated either to recuse himself because he had an "interest that could be substantially affected by the outcome of the proceeding" or to disclose his potential conflict because "his impartiality might reasonably be questioned."⁶

Judge Ware, the Chief Judge who replaced Walker, held that in "a case that

[†] Professor of Law and University Distinguished Professor, City University of New York School of Law. I am grateful to the editors of the *N.Y.U. Review of Law and Social Change* for their receptivity to the unconventional form of this intervention and their professional work. I am also appreciative of the reactions and research assistance from Emile Primeaux, Class of 2013, City University of New School of Law.

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

2. Wallace Stevens, "Thirteen Ways of Looking at a Blackbird," (1917), available at <http://www.poetryfoundation.org/poem/174503>. The poem is reprinted in the appendix below.

3. Antonin Scalia & Bryan Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) [hereinafter, *READING LAW*].

4. *Perry v. Brown*, 671 F.3d at 1095.

5. *Id.*

6. *Id.*

could affect the general public based on the circumstances or characteristics of various members of that public, the fact that a federal judge happens to share the same circumstances or characteristic and will only be affected in a similar manner because the judge is a member of the public, is not a basis for disqualifying the judge.”⁷

The Ninth Circuit affirmed.⁸

The United States Supreme Court should affirm the affirmation.

But the Court should also affirm that neutrality is aspirational rather than achievable.

It is not achievable by the poet observing blackbirds:

But I know, too
That the blackbird is involved
In what I know.⁹

It is not achievable by the faint-hearted originalist: “The false notion that words should be strictly construed.”¹⁰

But as an aspiration, as an affirmative act, the Justices who have been married should recuse themselves from *Perry*.

A decision rendered by Justices Sotomayor and Kagan would be forthcoming.

II.

THE FALSE BLACKBIRD OF PATRIARCHY

Does it mean anything that two of the three women Justices on the Court have never been married?

Does it tell us anything that half of the total of four women Justices on the Court have never been married?

7. *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1125 (N.D. Cal. 2011) *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

8. *Perry v. Brown*, 671 F.3d at 1095.

9. Stevens, *supra* note 2, ¶ 8.

10. READING LAW, *supra* note 3, at 355.

Here is Judge Ware again:

The presumption that Judge Walker, by virtue of being in a same-sex relationship, had a desire to be married that rendered him incapable of making an impartial decision, is as warrantless as the presumption that a female judge is incapable of being impartial in a case in which women seek legal relief. On the contrary: it is reasonable to presume that a female judge or a judge in a same-sex relationship is capable of rising above any personal predisposition and deciding such a case on the merits.¹¹

Here is Wallace Stevens, a poet, a lawyer, unsuccessful in marriage:

“Do you not see how the blackbird
Walks around the feet
Of the women about you?”¹²

Recall, in *Shelley v. Kraemer*, three Justices recused themselves, presumably because they owned property that had racially restrictive covenants.¹³

Scalia and Garner illustrate one of their maxims by stating:

In *Roe v. Wade*, the Supreme Court declared unconstitutional state statutes that in no way contradicted any specific provision of the Constitution.¹⁴

Recall the opinions of the women Justices in *Roe v. Wade* and *Shelley v. Kraemer*.¹⁵

11. *Perry v. Schwarzenegger*, 790 F. Supp. 2d at 1133.

12. Stevens, *supra* note 2, ¶ 7.

13. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that court enforcement of racially restrictive property covenants violated the Fourteenth Amendment’s Equal Protection Clause); Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 Wash. U. L.Q. 737, 761 (1989) (“Three of the nine Supreme Court Justices did not participate in the covenant cases decision. Justices Jackson, Reed and Rutledge recused themselves. No official reason was given but it was widely assumed that they lived in homes that were subject to restrictive covenants.”)

14. READING LAW, *supra* note 3, at 345 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

15. *Roe v. Wade*, 410 U.S. 113 (1973); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Justice Sandra Day O’Connor, the first female Justice of the United States Supreme Court, was appointed in 1981.

III.

THE FALSE BLACKBIRD OF OBFUSCATION

Justices Kagan and Sotomayor, writing for the Court, should eschew the obfuscation of Justice Kennedy's opinions in *Lawrence v. Texas* and *Romer v. Evans*.¹⁶

Instead, they should study a concurring and dissenting—lovely new words¹⁷—by Eleventh Circuit judges applying *Lawrence* and *Romer* to Florida's explicit ban on "homosexuals" adopting children. In his concurring, Judge Stanley Birch rejected the Court's opinion in *Lawrence* as too—although he does not use the word—poetic.¹⁸ In her dissenting, Judge Rosemary Barkett finds *Lawrence*'s recognition of "the longstanding right of consenting adults to engage in private sexual conduct" to be binding precedent that should invalidate the Florida ban as unconstitutional.¹⁹

Reflection assignment #1: "whatever lip-service is rendered to the idea of justice, no real account is taken of justice," and this is how it should be.²⁰

16. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). In both *Lawrence v. Texas* and *Romer v. Evans*, the constitutional doctrine is unclear and ambiguous, a deficit noticed by many scholars. See, e.g., Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of Lawrence v. Texas*, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 133 (2005) (noting that "the *Lawrence* opinion might have been clearer") (citing Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy after Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 38 (2004) (suggesting that criticism "could be leveled at Justice Kennedy for failing to write a clear, crisp, clean opinion that could serve as a guide in future cases")); Bernard E. Harcourt, *Foreword: "You Are Entering a Gay And Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions about Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 505 (2004) ("Justice Kennedy's pastiche in *Lawrence* is, at a legal theoretical level, incoherent, and under normal circumstances—in many other cases—would be internally contradictory.").

Similarly, Professor Strasser analyzes the various strands of *Romer v. Evans*, noting that one "argument has received less attention than others because of some ambiguous comments made by the *Romer* Court." Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda*, 36 HOUS. L. REV. 1193, 1232 (1999) ("The *Romer* Court noted that the Colorado Supreme Court's decision striking down Amendment 2 was based on the "voting rights cases" and on "precedents involving discriminatory restructuring of governmental decisionmaking. However, in affirming the Colorado Supreme Court, the United States Supreme Court explicitly relied on a 'rationale different from that adopted by the State Supreme Court.'" (citing *Romer v. Evans*, 517 U.S. 620, 625–26 (1996)).

17. Alex Kozinski & James Burnham, *I Say Dissenting, You Say Concurring*, 121 YALE L. J. ONLINE 601 (2012), <http://yalelawjournal.org/2012/04/10/kozinski&burnham.html> ("Increasing numbers of circuit judges are writing dissents from, and concurrences in, orders denying rehearing en banc—colloquially known as dissents and concurrences.").

18. *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 377 F.3d 1275, 1275 (11th Cir. 2004) (Birch, J., concurring in the denial of reh'g en banc).

19. *Id.* at 1307 (Barkett, J., dissenting from the denial of reh'g en banc).

20. READING LAW, *supra* note 3, at 347 (quoting Max Radin, *A Juster Justice, a More Lawful Law*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY 537, 537 (Max Radin & A.M. Kidd

Reflection assignment #2: "...he mistook/ The shadow of his equipage/ For blackbirds."²¹

Instead, they should study—and attempt to emulate—the cogency, clarity, and crispness of the Iowa Supreme Court's unanimous opinion in *Varnum v. Brien*, declaring the exclusion of same-sex couples from marriage violates the state constitution.²²

IV.

THE FALSE BLACKBIRD OF HISTORY I

Justice Scalia warns us against the "false notion that lawyers and judges, not being historians, are unqualified to do the historical research that originalism requires."²³

Wallace Stevens tells us "The river is moving. / The blackbird must be flying."²⁴

In 1858, Senator James Hammond of South Carolina famously defended race-based slavery as natural. Hammond gave the speech to his fellow senators on the floor of the Senate; its written form has been widely available ever since.²⁵

V.

THE FALSE BLACKBIRD OF HISTORY II

Although too often ignored, we may take note that Justice Scalia's historical recitations are often criticized as inaccurate.²⁶

Although scrupulously ignored, we may take note that Wallace Stevens' similarly structured poem, which we will inaccurately call "Like Decorations in a ___ Cemetery,"²⁷ was racist, even for 1935.

eds., 1935)).

21. Stevens, *supra* note 2, ¶ 11.

22. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

23. *READING LAW*, *supra* note 3, at 399.

24. Stevens, *supra* note 2, ¶ 12.

25. Cong. Globe, 35th Cong., 1st Sess. Appendix 68–71 (1858) (statement of Sen. James Henry Hammond, On the Admission of Kansas, Under the Lecompton Constitution).

26. See, e.g., Richard Posner, *The Incoherence of Antonin Scalia: A Review of Reading Law: The Interpretation of Legal Texts*, *THE NEW REPUBLIC* (August 24, 2012), available at <http://www.tnr.com/print/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

27. Wallace Stevens, *Like Decorations in a ___ Cemetery*, 45 *POETRY* 239 (1935), available

Although almost always ignored, we may take note that Senator Hammond's early "lustful appetite" was directed at other young men, though he'd be damned if he didn't marry, and marry he did, in that fortunate manner of young men seeking to enter the Southern slave-owning aristocracy.²⁸

VI.

THE FALSE BLACKBIRD OF COWARDICE

Kagan and Sotomayor, writing their opinion for the Court, need not fear they will be voted out of office.

This was not the case for justices of the Iowa Supreme Court in 2010. When three of the seven justices stood for merit retention in the 2010 election, the unanimous opinion in *Varnum v. Brien* was the focal point of the successful efforts to unseat them.²⁹

All of the current justices on the Iowa Supreme Court are now male and white.³⁰

Justice David Wiggins, who joined the unanimous opinion in *Varnum v. Brien*, is facing retention election in 2012 and has been targeted by anti-same-sex marriage conservatives.³¹

This is not to say that there are not calls to reform the federal judiciary and eliminate life-tenure.³²

at <http://www.poetryfoundation.org/poetrymagazine/browse/45/5#20579785>.

28. See Martin Bauml Duberman, "Writhing Bedfellows" in *Antebellum South Carolina: Historical Interpretation and the Politics of Evidence*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 153 (1989).

29. For an excellent discussion, see Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715 (2011).

30. See Ruthann Robson, *Iowa Supreme Court Update*, CONSTITUTIONAL LAW PROF BLOG (February 25, 2011), <http://lawprofessors.typepad.com/conlaw/2011/02/iowa-supreme-court-update.html> (noting that Governor did not choose the only one of the nine candidates for the three vacancies who was not a white male). For a portrait see Iowa Supreme Court, IOWA JUD. BRANCH, http://www.iowacourts.gov/supreme_court/ (last visited Feb. 9, 2013).

31. *Iowa Conservatives Renew Bid to Defeat Judge who Backs Gay Marriage*, CHICAGO SUN-TIMES, Aug. 12, 2012, <http://www.suntimes.com/news/nation/14431774-418/iowa-conservatives-renew-bid-to-defeat-judge-who-backs-gay-marriage.html>.

32. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 809-13 (2006) (denouncing life tenure as "fundamentally flawed" and "essentially a relic of pre-democratic times," which leaves infrequent vacancies that are subject to an over-politicized appointment process). *But cf.* David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791 (2007) (arguing for life-tenure as a practical approach in contemporary federal court system, and rebutting empirical claim made by Calabresi and

This is not to say that riding in a “glass coach” does not provoke a piercing fear, especially “over Connecticut.”³³

This is not to say that “[o]nly in the theater of the absurd does an aristocratic, life-tenured, unelected council of elders . . .” rule.³⁴

VII.

THE FALSE BLACKBIRD OF *LOCHNER*

The fear of fundamental rights is expressed as a fear of *Lochner*.

In 1905, the Court in *Lochner v. New York* held unconstitutional a state statute limiting the working hours of bakers to sixty hours per week on the theory that men had a “right to purchase or to sell labor” as “part of the liberty protected” by the due process clause.³⁵

The ghost of *Lochner* is said to haunt contemporary judicial recognition of fundamental rights.³⁶

But “spirit” is a “false notion.”³⁷

But the “eye of the blackbird” should animate our perception.³⁸

The Court should declare marriage as a fundamental right.

VIII.

THE FALSE BLACKBIRD OF HUNGER

A fundamental right to marry should include a fundamental right not to marry.

First the Court recognized in *Skinner* the right not to be sterilized³⁹—the right to carry (a child). From this followed *Griswold* and *Eisenstadt*; the right to

Lindgren that changes in average tenure since 1970 are “dramatic” and “unprecedented”).

33. Stevens, *supra* note 2, ¶ 11.

34. READING LAW, *supra* note 3, at 408.

35. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

36. See, e.g., Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 294 (1986).

37. See generally READING LAW, *supra* note 3, at 343–46 (rejecting “[t]he false notion that the spirit of a statute should prevail over its letter”).

38. Stevens, *supra* note 2, ¶ 1.

39. *Skinner v. Oklahoma, ex. rel. Williamson*, 316 U.S. 535 (1942).

access contraception—the right not to carry.⁴⁰ As the Court stated in *Eisenstadt*, the right is “the decision whether to bear or beget a child.”⁴¹

Some might disagree with this reasoning. Justice Scalia, for example, argues that the argument “that the only way to protect childbirth is to protect abortion” instead shows “the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor,” adding that it “drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.”⁴²

The Court, of course, has not declared a fundamental right to eat.

“O thin men of Haddam,
Why do you imagine golden birds?”⁴³

Imagine if the energy for marriage equality had gone into economic equality.

Imagine if the Court ruled there was a positive constitutional right not to be hungry.

IX.

THE FALSE BLACKBIRD OF PIECE OF THE PIE

A fundamental right to marry, meaning a fundamental right to decide whether or not to marry, should prompt a reconsideration of the plethora of laws that now privilege marriage over nonmarriage.

Correctly construed, this right would eviscerate many of the marital benefits that same-sex couples first sought, by more evenly distributing those benefits regardless of coupled status. For example, to the extent that there are presumptive tax benefits—or burdens—for married couples on the basis of marriage without any other showing, those benefits and burdens should be unconstitutional.

Those four thousand federal and state benefits—gone.

Reconsider: “The false notion that tax exemptions—or any other exemp-

40. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

41. *Eisenstadt*, 405 U.S. at 453.

42. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 980–81 n.1 (Scalia, J., dissenting) (1992).

43. Stevens, *supra* note 2, ¶ 7.

tions for that matter—should be strictly construed.”⁴⁴

Reconsider: “The blackbird whirled in the autumn winds./
It was a small part of the pantomime.”⁴⁵

X.

THE FALSE BLACKBIRD OF FEDERALISM

In 1996, Congress passed the Defense of Marriage Act, DOMA, section 3 of which provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.⁴⁶

No matter what any State law provides.

Several decisions finding section 3 of DOMA unconstitutional are presently pending before the United States Supreme Court.⁴⁷ Should Justices Sotomayor and Kagan decide to hear one or more of these cases—the other Justices recused based on their marital status, which required Congressional “defense”—a decision to hold DOMA unconstitutional would favor state power over federal power.

A decision to hold Proposition 8 unconstitutional would favor federal power over state power.

“The half-truth that consequences of a decision provide the key to sound interpretation.”⁴⁸

“I do not know which to prefer,

44. READING LAW, *supra* note 3, at 359, 359–63.

45. Stevens, *supra* note 2, ¶ 3.

46. Pub. L. No. 104-199, 110 Stat. 2419, codified at 1 U.S.C. § 7 (2006).

47. *Golinski v. Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *petition for cert. filed*, 81 U.S.L.W. 3048 (U.S. July 3, 2012) (No. 12–16); *Commonwealth of Massachusetts v. United States Dep’t of Health and Human Services*, 698 F. Supp. 2d 234 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. July 3, 2012) (No. 12–15); *Windsor v. United States*, *petition for cert. filed*, 81 U.S.L.W. 3116 (U.S. July 16, 2012) (No. 12–63).

48. READING LAW, *supra* note 3, at 352, 352–354.

The beauty of inflections
 Or the beauty of innuendoes,
 The blackbird whistling
 Or just after."⁴⁹

XI.

THE FALSE BLACKBIRD OF MONOGAMY

Stevens on monogamy: "A man and a woman / Are one."⁵⁰

Justice Scalia on nonmonogamy: "... it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals."⁵¹ As well as "homosexuality."

The Court on nonmonogamy in 1878: "polygamy leads to the patriarchal principle, and which when applied to large communities, fetters people in stationary despotism, while that principle cannot long exist in connection with monogamy."⁵²

Stevens on nonmonogamy:

A man and a woman
 Are one.
 A man and a woman and a blackbird
 Are one.⁵³

XII.

THE FALSE BLACKBIRD OF SENTIMENTALITY

Dear Justices Sotomayor and Kagan,

Please do not replicate this paean to marriage from the Ninth Circuit opinion:

Newspapers run announcements of births, deaths, and marriages.
 We are excited to see someone ask, "Will you marry me?",

49. Stevens, *supra* note 2, ¶ 5.

50. *Id.* ¶ 4.

51. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

52. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

53. Stevens, *supra* note 2, ¶ 4.

whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see “Will you enter into a registered domestic partnership with me?”. Groucho Marx’s one-liner, “Marriage is a wonderful institution ... but who wants to live in an institution?” would lack its punch if the word ‘marriage’ were replaced with the alternative phrase. So too with Shakespeare’s “A young man married is a man that’s marr’d,” Lincoln’s “Marriage is neither heaven nor hell, it is simply purgatory,” and Sinatra’s “A man doesn’t know what happiness is until he’s married. By then it’s too late.” We see tropes like “marrying for love” versus “marrying for money” played out again and again in our films and literature because of the recognized importance and permanence of the marriage relationship. Had Marilyn Monroe’s film been called *How to Register a Domestic Partnership with a Millionaire*, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The *name* ‘marriage’ signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships.⁵⁴

“The shadow of the blackbird/ Crossed it, to and fro.”⁵⁵

“The false notion that committee reports and floor speeches are worthwhile
...”⁵⁶

XIII.

THE FALSE BLACKBIRD OF DEMOCRACY

Justice Scalia tells us a “Living Constitution” is a “Dead Democracy.”⁵⁷

Justice Scalia is very fond of democracy. (Let’s assume we need no reminders of the passages from his dissents in *Lawrence* and *Romer*).⁵⁸

Except when he is not so fond of democracy. (Let’s assume we need no reminders of opinions he has written or joined declaring democratically enacted

54. *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

55. Stevens, *supra* note 2, ¶ 6.

56. READING LAW, *supra* note 3, at 369.

57. *Id.* at 410.

58. See *Lawrence v. Texas*, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

statutes unconstitutional.)

If reminders be necessary: violent video games,⁵⁹ waste disposal,⁶⁰ racial equality,⁶¹ gun control (times four),⁶² prohibition of violence against women,⁶³ labor protections for employees (times three),⁶⁴ and health care (twice).⁶⁵

And then there is campaign finance: striking down seven democratically enacted attempts to limit the influence of money in democracy.⁶⁶

“Proposition 8 amended California’s Constitution to define marriage as between a man and a woman and is the state’s costliest social initiative to date, with more than \$83 million raised.”⁶⁷

59. See *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011) (declaring unconstitutional California law prohibiting sale of violent video games to minors; opinion by Scalia).

60. See *New York v. United States*, 505 U.S. 144 (1992) (declaring “Take Title” provision of Low-Level Radioactive Waste Policy Amendments Act exceeded Congress’s power under Commerce Clause by attempting to “commandeer” state governments through compulsion); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (declaring a municipal “flow control ordinance” for removal of solid waste unconstitutional because it violated the Dormant Commerce Clause);

61. See *Shaw v. Hunt*, 517 U.S. 899 (1996) (holding that a North Carolina “gerrymandering” redistricting plan violated the Equal Protection Clause of Fourteenth Amendment as it was not narrowly tailored to serve a compelling state interest); *Miller v. Johnson*, 515 U.S. 900 (1995) (declaring unconstitutional under the Equal Protection Clause of the Fourteenth Amendment an “affirmative gerrymandering” scheme in Georgia designed to give racial minorities majority votes in new electoral district); *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992) (declaring unconstitutional under the First Amendment a municipal ordinance criminalizing bias-motivated speech and action); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (holding unconstitutional under the Equal Protection Clause of the Fourteenth Amendment a program which gave preference to minority business enterprises in awarding municipal contracts).

62. See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (declaring unconstitutional federal statute restricting handguns in D.C.); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

63. See *United States v. Morrison*, 529 U.S. 598 (2000) (declaring unconstitutional federal law provision providing civil remedy for gender-based violence).

64. See *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (declaring unconstitutional provisions of the American Disabilities Act as applied to state employees); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (declaring unconstitutional provisions of Age Discrimination Act as applied to state employees); *Alden v. Maine*, 527 U.S. 706 (1999) (declaring unconstitutional provisions of FLSA as applied to state employees).

65. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (upholding congressional taxing power through the enactment of Patient Protection and Affordable Care Act (ACA), including the requirement that most Americans must have health insurance by 2014); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (holding that a Vermont law restricting sale, disclosure and use of records of individual doctors’ prescribing practice violated First Amendment).

66. See *Arizona Free Enter. Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

67. *Who Gave in the Gay Marriage Battle*, L.A. TIMES available at

We will not dwell on *Bush v. Gore*,⁶⁸ but let Justice Scalia explain:

One final personal note: Your judicial author knows that there are some, and fears that there may be many, opinions that he has joined or written over the past 30 years that contradict what is written here—whether because of the demands of stare decisis or because wisdom has come late. Worse still, your judicial author does not swear that the opinions that he joins or writes in the future will comply with what is written here—whether because of stare decisis, because wisdom continues to come late, or because a judge must remain open to persuasion by counsel. Yet the prospect of “gotchas” for past and future inconsistencies holds no fear.⁶⁹

We will let Wallace Stevens explain:

I was of three minds,
Like a tree
In which there are three blackbirds.⁷⁰

We know what Scalia will decide when the Court decides *Hollingsworth v. Perry*.

We know there are many blackbirds, false and otherwise.

<http://projects.latimes.com/prop8/> (last visited Mar. 6, 2013).

68. *Bush v. Gore*, 531 U.S. 98 (2000).

69. READING LAW, *supra* note 3, at xxx.

70. Stevens, *supra* note 2, ¶ 3.

THIRTEEN WAYS OF LOOKING AT A BLACKBIRD

WALLACE STEVENS

I

Among twenty snowy mountains,
The only moving thing
Was the eye of the blackbird.

II

I was of three minds,
Like a tree
In which there are three blackbirds.

III

The blackbird whirled in the autumn winds.
It was a small part of the pantomime.

IV

A man and a woman
Are one.
A man and a woman and a blackbird
Are one.

V

I do not know which to prefer,
The beauty of inflections
Or the beauty of innuendoes,
The blackbird whistling
Or just after.

VI

Icicles filled the long window
With barbaric glass.
The shadow of the blackbird
Crossed it, to and fro.
The mood
Traced in the shadow
An indecipherable cause.

VII

O thin men of Haddam,
Why do you imagine golden birds?
Do you not see how the blackbird
Walks around the feet
Of the women about you?

VIII

I know noble accents
And lucid, inescapable rhythms;
But I know, too,
That the blackbird is involved
In what I know.

IX

When the blackbird flew out of sight,
It marked the edge
Of one of many circles.

X

At the sight of blackbirds
Flying in a green light,
Even the bawds of euphony
Would cry out sharply.

XI

He rode over Connecticut
In a glass coach.
Once, a fear pierced him,
In that he mistook
The shadow of his equipage
For blackbirds.

XII

The river is moving.
The blackbird must be flying.

XIII

It was evening all afternoon.
It was snowing
And it was going to snow.
The blackbird sat
In the cedar-limbs.