Nevada Commission on Ethics v. Carrigan: Recusing Freedom of Speech

By Jeffrey M. Shaman

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Nevada Commission on Ethics v. Carrigan[1] is one of those cases where the Supreme Court reached the right result for the wrong reasons--in this instance, egregiously wrong reasons. In the course of its opinion in *Carrigan*, the Court precipitously abandoned well-established First Amendment principles and methodology, opting instead for a more restrictive approach that limits freedom of speech. This was particularly surprising, given that in recent years the Court has been inclined to follow prevailing First Amendment jurisprudence. Under the leadership of Chief Justice John Roberts, the Court has made a number of decisions that adhere to accepted First Amendment doctrine and that strengthen the constitutional protection for freedom of expression.[2] Even in cases where the Roberts Court rejects free speech claims, it usually does so without forsaking settled First Amendment principles or methodology.[3] In *Carrigan*, however, the Court chose to go in a different direction.

The case arose when Michael Carrigan, as an elected member of the City Council of Sparks, Nevada, voted to approve a casino project for which his long-time friend and campaign manager had worked as a paid consultant. After receiving and investigating complaints against Carrigan, the Nevada Commission on Ethics ruled that Carrigan's action violated a state ethics rule prohibiting public officials from voting on legislative matters with respect to which they have a conflict of interest. Carrigan claimed that the Commission's ruling violated his right to freedom of speech under the First Amendment. However, in an opinion written by Justice Scalia, the Supreme Court ruled that there had been no violation of the First Amendment. Given that there is much to question about the Scalia opinion, it is surprising that it was joined in full by no less than seven other justices. Only Justice Alito, who filed a separate opinion concurring in the judgment,[4] saw fit to raise a (partially) divergent view.[5]

As delineated by Justice Scalia, the case presented the issue of whether the act of casting a vote by an elected state official is a form of constitutionally protected speech. In approaching that issue, Justice Scalia, who believes that the Constitution should be interpreted according to its

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* Vincent de Paul Professor of Law, DePaul University College of Law. The author wishes to thank Nancy Aguirre for her diligent research assistance.

[1] Nevada Commission on Ethics v. Carrigan, 564 U.S. ___, 131 S.Ct. 2343 (2011).

[2] *See* Citizens United v. FEC, 558 U.S. 50, 130 S.Ct. 876 (2010); United States v. Stevens, 559 U.S. ___, 130 S.Ct. 1577 (2010); Doe v. Reed, 561 U.S. ___, 130 S.Ct. 2811 (2010); Snyder v. Phelps, 562 U.S. ___, 131 S.Ct. 1207 (2011); Brown v. Entertainment Merchants Assoc., 564 U.S. ___, 131 S.Ct. 2729 (2011); Sorrell v. IMS Health Co., 564 U.S. ___, 131 S.Ct. 2653 (2011); Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. ___, 131 S.Ct. 2806 (2011).

[3] *See* Holder v. Humanitarian Law Project, 561 U.S. ___, 130 S.Ct. 2705 (2010); Christian Legal Society Chapter of University of California Hastings College of Law v. Martinez, 561 U.S. ___, 130 S.Ct. 2971 (2010).

[4] *Carrigan*, 131 S.Ct. at 2354-55 (Alito, J., concurring in part and concurring in the judgment).

[5] Although joining the Scalia opinion for the Court, Justice Kennedy additionally filed a concurring opinion noting that the case did not concern anything other than an asserted First Amendment right to engage in the act of casting a vote. *Id*. at 2352-54.

original understanding,[6] attempted to discern the meaning of the First Amendment at the time it was ratified in 1791. His opinion stated:

> [A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional….Laws punishing libel and obscenity are not thought to violate "the freedom of speech" to which the First Amendment refers because such laws existed in 1791 and have been in place ever since. The same is true of legislative recusal rules.[7]

It should be noted that Justice Scalia's claim that laws punishing obscenity have existed since 1791 is incorrect. Although laws banning libel were commonplace in 1791, laws banning obscenity were virtually nonexistent at that time.[8] In fact, the very first prosecution for obscenity in the United States did not occur until 1815, almost a quarter century after the ratification of the First Amendment.[9] Justice Scalia's error calls attention to one of the hazards of originalism as a method of constitutional interpretation, namely, that the justices sometimes get history wrong.[10]

Moreover, Justice Scalia's reliance on the original understanding of the First Amendment as the controlling source of its meaning is a departure from long-standing First Amendment jurisprudence. Throughout the years the Supreme Court's interpretation of the First Amendment rarely has been determined by its original understanding.[11] The development of First Amendment doctrine, beginning with the seminal opinions of Justice Holmes, has been essentially non-originalist in its methodology.[12] The Court's decision in *Roth v. United States*, ruling that obscenity is not within the protection of the First Amendment, makes reference to the history of the First Amendment and the intent of its framers,[13] but otherwise the original understanding of the First Amendment has played a minor role in its interpretation.[14] Much of the doctrine developed by the Court regarding freedom of speech cannot be explained by the original understanding of the First Amendment, and some of the Court's most important decisions concerning freedom of speech cannot be squared with the original understanding of the First Amendment. For example, at the time of the First Amendment's framing, all fourteen states had criminal laws prohibiting profanity and blasphemy, yet no one could seriously assert

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[6] *See* Antonin Scalia, *Common-Law Courts in A Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37-41 (Amy Gutmann ed., 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U CIN. L. REV. 849, 852-54 (1989).

[7] *Carrigan*, 131 S.Ct. at 2348.

[8] Geoffrey Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI L. REV. 1857, 1861-63 (2007) ("Indeed, the most striking fact about that era was the absence of any laws regulating such material.")

[9] *Id* at 1863.

[10] *See* Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 91-93, 98-102 (2010).

[11] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 923-24 (3d ed. 2006).

[12] *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

[13] Roth v. United States, 354 U.S. 476, 482-83 (1957).

[14] *See* CHEMERINSKY, *supra* note 11.

today that such laws do not violate the First Amendment.[15] And the long-standing historical pedigree of laws punishing libel did not stop the Supreme Court from ruling in *New York Times v. Sullivan* that such laws were constitutionally circumscribed by the First Amendment.[16]

Be that as it may, Justice Scalia was determined in *Carrigan* to adhere strictly to originalist methodology, and he devoted a good portion of his opinion to documenting the historical lineage of legislative recusal rules. Yet Justice Scalia was not content to accept the historical record concerning legislative recusal rules on its face. After surveying the historical record showing that legislative recusal rules have been "commonplace for over 200 years,"[17] Justice Scalia sought an explanation as to why legislative recusal rules were not considered to violate the First Amendment. "How can it be," he wondered, "that restrictions upon legislators' voting are not restrictions upon legislators' protected speech?"[18] Unfortunately, the disquisition that Justice Scalia devised in response to that query led him on a convoluted course of problematic reasoning. He began by asserting that:

> The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. As we said in *Raines* v. *Byrd*, 521 U. S. 811, 821 (1997)… the legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." [19]

By this account, when casting a vote, a member of the legislature acts as a trustee or representative of the people and has no personal right to his or her vote. Still, this hardly explains why an ethics rule that restricts a member of the legislature from voting does not violate the First Amendment. Even when acting as a representative of the people—indeed, *especially* when acting as a representative of the people—a member of the legislature should be entitled to full constitutional protection for his or her legislative functions. Suppose that a legislator was denied the right to vote due to race or religion—surely no one would claim that there was no constitutional violation because the legislator did not have a personal right to vote.[20] Whether a legislator's vote is considered the exercise of a personal right or a right held in trust for the

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[15] In *Cohen v. California*, 403 U.S. 15 (1971), the defendant was convicted of disturbing the peace for being in a courtroom while wearing a jacket inscribed with the words "Fuck the Draft." The Supreme Court overturned the conviction on the ground that it violated the First Amendment. The Court has given First Amendment protection to profane speech in several other cases. *See, e.g.*, Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

[16] New York Times v. Sullivan, 376 U.S. 254 (1964).

[17] Nevada Commission on Ethics v. Carrigan, 564 U.S. ___, 131 S.Ct. 2343, 2348 (2011).

[18] *Id*. at 2350.

[19] *Id*. at 2350. Justice Scalia added that:

> In this respect, voting by a legislator is different from voting by a citizen. While "a voter's franchise is a personal right," "[t]he procedures for voting in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process." *Coleman* v. *Miller*, 307 U.S. 433, 469–470 (1939) (opinion of Frankfurter, J.).

[20] See *McDaniel v. Paty*, 435 U.S. 618 (1978), in which the Supreme Court held that the Free Exercise Clause of the First Amendment was violated by a provision of the Tennessee Constitution barring ministers and priests from serving as members of the legislature.

people whom the legislator represents is irrelevant to the question of whether the First Amendment is violated by a law barring a legislator from voting.

The more relevant inquiry, which should have been addressed initially, is whether a legislator's vote is an expressive act—in other words, symbolic speech—within the scope of the First Amendment. In Justice Scalia's view, the vote of a member of the legislature is a non-symbolic act.[21] Indeed, he goes so far as to insist that voting has no symbolic meaning at all:

> There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies, see *Texas* v. *Johnson*, 491 U. S. 397, 406 (1989). But the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication.[22]

This statement is confusing, if not incoherent. As Justice Scalia sees it, burning a flag symbolizes disagreement with policy, but the act of voting "symbolizes nothing." Does not the act of voting against a measure, like the act of burning a flag, symbolize "disagreement with policy?" Conversely, does not the act of voting for a measure symbolize agreement with policy? According to Justice Scalia, the act of voting has more in common with a physical assault than with flag-burning because voting "discloses" the view of a legislator, but does not "communicate" it. This seems to be the quintessence of splitting hairs; one wonders why Justice Scalia thinks that disclosing a view does not entail communication of a view. The Merriam-Webster dictionary defines both "communicate" and "disclose" as meaning "to make known" and Thesaurus.com lists the two words as synonyms of each other, yet Justice Scalia has somehow gotten it into his mind that a legislator's vote discloses information but does not communicate information.

Justice Scalia believes that in casting a vote a legislator is performing a governmental act as a representative of his or her constituents rather than expressing a message or opinion.[23] But, sadly, the Justice has fallen prey to a false dichotomy; the act of casting a vote and the expression of a message or opinion are in no way mutually exclusive. Yes, casting a vote as a member of the legislature is the performance of a governmental act, but at the same time it is an expressive act that communicates meaning. It was on this point that Justice Alito parted company with Justice Scalia. To Justice Alito, casting a vote clearly is an expressive act. As he explained:

> Voting has an expressive component in and of itself. The Court's strange understanding of the concept of speech is shown by its suggestion that the symbolic act of burning the American flag is

[21] *Carrigan*, 131 S.Ct. at 2350.
[22] *Id.* at 2350 (emphasis in original).
[23] *Id*. at 2351 n.5.

> speech but John Quincy Adams calling out "yea" on the Embargo Act was not.[24]

Justice Alito further noted that "our history is rich with tales of legislators using their votes to express deeply held and highly unpopular views, often at great personal or political peril."[25] To illustrate the point, Justice Alito recounted Sam Houston's deeply unpopular vote against the Kansas-Nebraska Act of 1854, as well as John Quincy Adams' vote in favor of the Embargo Act of 1807, a vote that very likely cost him his Senate seat.[26]

Unmoved by the invocation of history in this instance, Justice Scalia dismissed this line of thought in a paragraph dripping with sarcasm, insulting not only to Justice Alito, but also to members of legislative bodies across the nation:

> How do [legislators] express those deeply held views, one wonders? Do ballots contain a check-one-of-the-boxes attachment that will be displayed to the public, reading something like "( ) I have a deeply held view about this; ( ) this is probably desirable; ( ) this is the least of the available evils; ( ) my personal view is the other way, but my constituents want this; ( ) my personal view is the other way, but my big contributors want this; ( ) I don't have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote 'aye'?[27]

Leaving aside the acrimony of this diatribe, one is struck by how illogical it is. Justice Scalia ignores that the vote of a legislator expresses whether the legislator favors or opposes the measure in question. This, in itself, is important information concerning the affairs of government. That a legislator's vote does not express the specific reason underlying the vote in no way vitiates the fact that the vote expresses whether the legislator favors or opposes the measure. It makes no sense to claim that because a legislator's vote does not impart a specific reason for favoring or opposing a measure, it therefore expresses nothing at all. If, during a referendum campaign, an individual makes a speech or circulates a flyer that says nothing more than "Vote Yes on Proposition XYZ," surely that would count as speech, despite the fact that no specific explanation was manifest in support of Proposition XYZ.[28] And just as surely, a legislator's vote should count as speech even though unaccompanied by a specific explanation for it.

In regard to expressive quality, one might also compare the act of casting a vote to the act of making a financial contribution to a political campaign, which the Court has long recognized as an expressive activity within the scope of protection afforded by the First Amendment.[29] Deborah Hellman maintains that giving money to a political campaign clearly is less expressive

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[24] *Id*. at 2354 (Alito, J., concurring in part and concurring in the judgment).
[25] *Id.*
[26] *Id.*
[27] *Id*. at 2350.
[28] *See* Doe v. Reed, 561 U.S. ___, 130 S.Ct. 2811, 2817 (2010).
[29] *See* Buckley v. Valeo, 424 U.S. 1, 25-29 (1976); Randall v. Sorrell, 548 U.S. 230, 246-53 (2006).

than voting for a proposed bill. [30] Furthermore, if the act of casting a vote has a number of possible meanings, the same is true of the act of making a campaign contribution, which, after all, may be made for a wide variety of reasons.[31] Yet the Court has never doubted that campaign contributions are a First Amendment activity expressive in nature.

In his concurring opinion in *Carrigan*, Justice Alito asserted that in addition to incorrectly analyzing the expressive character of voting, Justice Scalia's position was at odds with *Doe* v. *Reed*,[32] which had just been decided in the preceding Supreme Court term. *Reed* presented the question of whether the First Amendment was violated by a provision in the State of Washington Public Records Act requiring that the names and addresses of all persons who signed a referendum ballot petition be publicly disclosed. The Court eventually upheld the provision in question on the ground that it preserved the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability. The Court reached that conclusion, however, only after first concluding that the provision was subject to review under the First Amendment because it restricted an expressive activity:

> An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." In either case, the expression of a political view implicates a First Amendment right.[33]

As Justice Alito explained, in *Reed* the state argued that its law did not impinge upon freedom of speech because signing a petition is "a legally operative legislative act and therefore does not involve any significant expressive element." In an opinion written by Chief Justice Roberts,[34] the Court rejected the state's argument:

> It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that

[30] Deborah Hellman, *Why power isn't speech*: Nevada Commission on Ethics v. Carrigan *and the unraveling of campaign finance doctrine*, BALKINIZATION (June 14, 2011, 3:56 PM), http://balkin.blogspot.com/2011/06/why-power-isnt-speech-nevada-commission.html.

[31] *Id.*

[32] *Reed*, 130 S.Ct. at 2811.

[33] *Id*. at 2817 (citations omitted).

[34] Justice Roberts delivered the opinion of the Court, which was joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor. Justices Breyer and Alito filed concurring opinions. Justice Sotomayor filed a concurring opinion, in which Justices Stevens and Ginsburg joined. Justice Stevens filed an opinion concurring in part and concurring in the judgment, in which Justice Breyer joined. Justice Scalia filed an opinion concurring in the judgment. Justice Thomas filed a dissenting opinion.

> activity of its expressive component, taking it outside the scope of the First Amendment.[35]

From Justice Alito's perspective, *Reed* stands for the proposition that the act of voting, whether by a member of the public or a member of the legislature, has an expressive character that is not cancelled simply because it may affect the outcome of the legislative process:

> Just as the act of signing a petition is not deprived of its expressive character when the signature is given legal consequences, the act of voting is not drained of its expressive content when the vote has a legal effect.[36]

Justice Scalia, although concurring in the judgment in *Doe v. Reed*, did not join the majority opinion, declaring that he "doubt[ed] whether signing a petition that has the effect of suspending a law fits within 'the freedom of speech' at all."[37] In *Carrigan*, Justice Scalia insisted that *Reed* did not establish the expressive character of voting. He claimed that:

> [*Reed*] held only that a citizen's signing of a petition—"core political speech,"—was not deprived of its protected status simply because, under state law, a petition that garnered a sufficient number of signatures would suspend the state law to which it pertained, pending a referendum. See *Reed*, 561 U. S., at ___ (slip op., at 6); *id.*, at ___ (slip op., at 3) (opinion of Scalia, J.). It is one thing to say that an inherently expressive act remains so despite its having governmental effect, but it is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so. We have never said the latter is true.[38]

Notice that in denying that *Reed* stands for the proposition that voting has an expressive character, Justice Scalia cited his own (concurring) opinion in *Reed* and not the majority opinion, which he had declined to join. His view of *Reed* stands in marked contrast to what the majority opinion actually stated. As noted above, the majority in *Reed* rejected the argument that providing operative legal effect to an expressive activity somehow deprives that activity of its expressive component.[39] To the contrary, the majority opinion in *Reed* explicitly stated that "[p]etition signing remains expressive even when it has legal effect in the electoral process."[40] Justice Scalia's account of *Reed*, then, is a blatant revision of what was clearly stated in the majority opinion of that case. It is a ploy to override the majority opinion in *Reed* with Justice Scalia's own concurring opinion that was joined by no other justice on the Court. In addition, it

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[35] *Reed*, 130 S.Ct. at 2818.
[36] Nevada Commission on Ethics v. Carrigan, 564 U.S. ___, 131 S.Ct. 2343, 2354-55 (2011) (Alito, J., concurring in part and concurring in the judgment).
[37] *Reed*, 130 S. Ct. at 2832 (Scalia, J., concurring in the judgment).
[38] *Carrigan*, 131 S.Ct. at 2351.
[39] *Supra*, at notes 34-35.
[40] *Reed*, 130 S.Ct. at 2818.

should not be overlooked that in discussing *Reed*, Justice Scalia described the act of signing a petition as "inherently expressive," but refused to recognize the same expressive quality in a legislator's act of casting a vote. Why Justice Scalia believes that signing a petition is inherently expressive but casting a vote is not remains a mystery.

Justice Scalia's opinion in *Carrigan* is deeply flawed, prompting one to wonder what led him to write such an unsatisfactory discourse. It seems he went astray at the start of his opinion, by focusing his analysis on the original meaning of the First Amendment. Once down that path, there was no turning back for Justice Scalia, and one mistake led to another. After surveying the historical record to find that legislative recusal rules have been "commonplace for over 200 years,"[41] Justice Scalia was at pains to rationalize why such rules did not contravene the original understanding of the First Amendment. The only explanation he could adduce was that a legislator's vote was a non-expressive act that did not implicate the First Amendment. As it unfortunately turned out, though, that explanation depended upon a good deal of legerdemain, not to mention the outright denial of reality.

In *Carrigan*, had Justice Scalia, instead of wandering down the originalist byway, adhered to prevailing First Amendment doctrine, the case could have been decided with the same result but without repudiating the expressive value of a legislator's vote. Under the First Amendment, in considering a challenge to a law, the Court normally weighs the character and magnitude of an injury to freedom of speech against the precise interests put forward by the government as justification for the law in question.[42] Had the Court followed this process in *Carrigan*, there would have been no need to deny the expressive quality of a legislator's vote; rather, the inquiry could have focused on a determination of whether there was constitutional justification for the Nevada ethics rule prohibiting public officials from voting on legislative matters with respect to which they have a conflict of interest. In *Timmons v. Twin Cities Area New Party*[43] and *Burdick v. Takushi*,[44] two cases involving restrictions upon voting procedures that Justice Scalia cited in his opinion in *Carrigan*, the Court explained that regulations that impose severe burdens on the First Amendment right to vote call for strict judicial scrutiny and must be narrowly tailored to advance a compelling state interest; while regulations imposing less severe burdens on the right to vote trigger less exacting scrutiny, according to which a state's "important regulatory interests" will usually suffice to justify "reasonable, nondiscriminatory restrictions."[45] Under either standard, the Nevada rule prohibiting public officials from voting on legislative matters concerning which they have a conflict of interest should be upheld as constitutional because the rule was narrowly designed to serve the state interest of preventing corruption and the appearance of corruption. There is no doubt that this is a strong state interest sufficiently compelling under the highest level of scrutiny to justify the Nevada ethics rule.[46]

Given Justice Scalia's escalating commitment to originalism, it is not surprising that in *Carrigan* he chose to abandon well-established First Amendment principles in favor of an

[41] *Carrigan*, 131 S.Ct. at 2348.
[42] Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citing Anderson v. Cellebrezze, 470 U.S. 780, 789 (1983)).
[43] Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).
[44] *Burdick*, 504 U.S. at 428.
[45] *Timmons*, 520 U.S. at 359; *Burdick*, 504 U.S. at 434.
[46] *See* Buckley v. Valeo, 424 U.S. 1, 25-29 (1976); McConnell v. Federal Election Commission, 540 U.S. 93, 143-44 (2003).

originalist approach. Nor is it surprising that Justice Thomas joined the Scalia opinion in *Carrigan*, as he, too, is devoted to the originalist cause--on occasion more radically so than Justice Scalia.[47]

What is surprising, however, is that so many other justices in *Carrigan* were willing to join an opinion opting for an originalist approach to the First Amendment while forsaking firmly-established First Amendment doctrine. Aside from Justices Scalia and Thomas, no other justice on the Court previously has shown a strong inclination to follow an originalist path, especially not when doing so entails turning away from prevailing constitutional principles. Most of the justices presently on the Court have written or signed on to opinions that adhere to long-standing non-originalist First Amendment methodology. In recent years, the Court has decided a number of free speech cases in which that methodology played a dominant role.[48] Justice Scalia's originalist approach in *Carrigan* is an aberration that flies in the face of proven First Amendment principles.

Moreover, it is dismaying that so many justices signed on to such a flawed opinion, by turns incoherent, illogical, and disrespectful of precedent. It is particularly puzzling that Chief Justice Roberts was willing to join an opinion skewing his circumspect analysis in *Doe v. Reed*, written just the previous term.[49] Inexplicably, no less than seven members of the Supreme Court signed on to the Scalia opinion in *Carrigan* and thereby implemented the dubious ruling that the vote of a member of a legislature is a non-expressive act entitled to no protection whatsoever under the First Amendment. Perhaps the day will come when the Supreme Court will repudiate the tortured logic displayed in *Carrigan* and will restore the principle that a legislator's vote is an expressive act under the First Amendment that may not be restricted except where there is a strong reason to do so. Short of that, one can only hope that Justice Scalia's opinion in *Carrigan* will fade into obscurity, one of those anomalous expositions that reached the right result for all the wrong reasons.

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[47] *See* United States v. Lopez, 514 U.S. 549, 584-85, 601-02 (1995) (Thomas, J., concurring); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); M.L.B.v. S.L.J., 519 U.S. 102, 138-39 (1996) (Thomas, J. dissenting); McDonald v. City of Chicago, 561 U.S. 3025, 130 S.Ct. 3020, 3058-88 (2010) (Thomas, J., concurring); Brown v. Entertainment Merchants Assoc., 564 U.S. ___, 131 S.Ct. 2729, 2751-62 (2011) (Thomas, J., dissenting).

[48] *See* Citizens United v. FEC, 558 U.S. 50, 130 S.Ct. 876 (2010); United States v. Stevens, 559 U.S. ___, 130 S.Ct. 1577 (2010); Holder v. Humanitarian Law Project, 561 U.S. ___, 130 S.Ct. 2705 (2010); Doe v. Reed, 561 U.S. ___, 130 S.Ct. 2811 (2010); Christian Legal Society Chapter of University of California Hastings College of Law v. Martinez, 561 U.S. ___, 130 S.Ct. 2971 (2010); Snyder v. Phelps, 562 U.S. ___, 131 S.Ct. 1207 (2011); Sorrell v. IMS Health Co., 564 U.S. ___, 131 S.Ct. 2653 (2011); Brown v. Entertainment Merchants Assoc., 564 U.S. ___, 131 S.Ct. 2729 (2011); Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. ___, 131 S.Ct. 2806 (2011).

[49] *See supra*, at notes 32-41.