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Supreme Court upholds recusal rule

By Robert Barnes, Published: June 13

Ethics laws that require a legislator to abstain from voting when there is a potential conflict of interest are as old as the union, the Supreme Court ruled Monday, and do not violate the First Amendment's protection of free speech.

The court's unanimous decision overturned a Nevada Supreme Court decision that said public officials' votes were a form of constitutionally protected self-expression. In an opinion by Justice Antonin Scalia, the court said laws requiring legislators to recuse themselves from voting on issues in which they have an interest "have been commonplace for over 200 years."

In announcing the decision, Scalia said that when a public official votes, he is not acting as an individual but as a "political representative engaged in the legislative process."

"Acting in that capacity, his vote is not his own speech but a mechanical function of government," Scalia said.

Although unanimous in deciding that legislative voting lacked First Amendment protection, the court left open that Nevada's ethics law might be open to challenge in other ways.

For instance, Scalia said the issue of whether it is unconstitutionally vague was not before the court. Similarly, he said, the court was not called upon to decide whether the restrictive law burdens the right of association between politicians and their supporters.

The challenge to Nevada's law came from a city council member from the Sparks, Nev., Michael Carrigan, who was reprimanded by the state ethics commission for voting on a casino proposal for which his campaign manager was hired as a consultant.

The law prohibits a public official from voting on an issue when a "reasonable person" would suspect a conflict because of financial ties or the interest of a spouse or family member. It also includes a catchall category for "any other commitment or relationship that is substantially similar" to those spelled out.

Carrigan said Nevada's law was overly broad and that he should be able to vote on the project, so long as he disclosed his relationship with the consultant.

Although the case involved grass-roots-level municipal issues, it held great import for guiding how governments may police potential conflicts of interest.

Backed by 14 other states, Nevada argued that finding a free-speech right to cast a legislative vote would endanger "bedrock conflict-of-interest rules in virtually every state," including basic laws "that have been an accepted and necessary part of representative self-government since before the ratification of the First Amendment."

Scalia agreed: "The Nevada Supreme Court and Carrigan have not cited a single decision invalidating a generally applicable conflict-of-interest recusal rule."

He said the same was true for the judicial recusal rules. Although lawmakers and judges are different, he said, "there do not appear to have been any serious challenges to judicial recusal statutes as having unconstitutionally restricted judges' First Amendment rights."

Justice Anthony M. Kennedy joined the decision but said he would be concerned about a law that forbids lawmakers from voting on an issue simply because it was of great importance to those responsible for the politician's election.

"Just as candidates announce positions in exchange for citizens' votes . . . so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose," Kennedy wrote. "These are the mechanisms that sustain representative democracy."

Justice Samuel A. Alito Jr. did not fully join Scalia's opinion that voting was only a "symbolic act" that was a function of a legislator's office, rather than an expression of personal views.

"Voting has an expressive component in and of itself," Alito wrote. But he agreed with the outcome of the case because "legislative recusal rules were not regarded during the founding era as impermissible restrictions on freedom of speech."

The case is *Nevada Commission on Ethics v. Carrigan*.

In another decision, the court ruled 5 to 4 along familiar ideological lines to limit the ability of mutual-fund shareholders to press securities fraud suits.

In an opinion by Justice Clarence Thomas, the court threw out a suit against Janus Capital Group Inc. It said shareholders cannot sue Janus and a subsidiary for allegedly producing misleading prospectuses for a third entity, the Janus Investment Fund. Because they are separate legal entities, the majority said, the parent company is not liable for the prospectuses issued by the investment fund.

The court's consistently liberal members joined a dissent by Justice Stephen G. Breyer. The relationship between the entities, Breyer said, "could hardly have been closer."

The case is *Janus Capital Group v. First Derivative Traders* .

The court also announced it could not come to agreement about a citizenship law that treats American fathers and mothers differently. It says American mothers need to have lived in the United States continuously for only a year before the birth of a child to bestow citizenship privileges. But the period is longer for an American father.

With Justice Elena Kagan recused because she had worked as solicitor general, the court said it was split 4 to 4. That allows a lower court decision against Ruben Flores-Villar, born to an unmarried American father and Mexican mother, to stand. But it does not set a national precedent.

The case is *Flores-Villar v. U.S.*