

GIVING THE NOD TO SPEECH ACTS

Attentive readers will remember that we left the question of lobbying judges in the Jan/March, 2005 Bar Rag. “Push” or “spam” lobbying can be regulated, I suggested, without offending free speech restraints since regulation would be addressing the *how* rather than the *what* of talking. Well, that was the idea.

This *what* from *how* divide can be seen in the following example, which arises on one of those second thoughts, which should have been in the previous article. I’m sitting in a crowded theater and I pick up my mobile and write a text message to the stage manager, “There’s a fire in the theatre.” The time, place and manner of what I have said can be regulated (that is, prohibited, permitted, conditioned, etc.) without having to discuss the content. The text message is *in* venue or *a* venue, reader’s choice, and venue is a designed interaction that can be regulated; it’s a thing that’s shaped.

This is why I suggested that Justice Scalia in both *Watchtower* and the *Minnesota Republican Party* has a point when he says: Why are we looking at the typical venue that includes candidates advocating, attacking and defending propositions, points or shouldness with anyone (on-line, in public, on TeeVee), and comparing this venue with spamming or door-to-door selling of religion or vacuum cleaners? Or the venue which some anonymous guy wants to hijack with his urge to announce a pending fire, real or imagined?

The reader who is eager for more controversy can chew on the following rule. Let’s allow judges to talk about everything other than pending cases, provided that they also don’t make themselves the victims of spam or push lobbying.

Some obvious points: One is that by writing a rule that has to do with a judge’s existing caseload, you’ve written a rule that is not just related to but seems to go right into the beating heart of the court system. Court systems employ judges to get jobs done (so that judges are service debtors), and court systems get their performance from judges on (mostly) cases by assigning a caseload to each judge hired to supply professional talent. (This may be the first time anyone has said that assignment of cases has a constitutional shadow.)

But there is more. If a judge can't talk about pending cases, this suggests that if she wants to talk, she needs to do a check of what cases have been assigned to her. This doubles-down on the anti-spam lobbying or getting-yourself-buttonholed rule. You can't respond spontaneously because you have to see what service you've owed the state and the state is a jealous patron of your talent. On the other hand, a judge who wanted to talk about the nasty bits of patent infringement litigation (he's a state court judge) is not going to have too much trouble getting his staff to see if he has any patent cases in front of him.

The utility of this rule has limits, but it does suggest that a judge would want to think (before he talks) (1) about the subject matter but also (2) about the level of abstraction. The after-dinner speech, the law review article, Judge Roberts' article on *Appellate Advocacy*, and, in particular, how-to articles suggest both acceptable venue and types of approaches to judicial off-the-bench (or candidate) talk which open up vast areas of content. History and how-to are two of the best examples.

And now the formula: "I'm not commenting on pending cases, and I'll follow the law, but I think the rule in this type of case should be so-and-so." We have covered the first third of the formula when the judge as a service debtor comes into focus. The last bit is really the intro to a shouldstatement; it's like saying *Congress shall make no law* because it alerts the reader/listener that content is coming on.

Now for the middle part. It's the commitment to *stare decisis*, to stand by the law; that's the tease here. This is a present/future tense promise that states, as formula, what the judge as service debtor is committed to do for the state. We're in a weird place here: The formula itself isn't a content restriction, exactly, but having to say it, is itself a sort of burden. It's like judges getting permission from the Administrative Office to testify before the legislature, but less. It's an add-on, but still a speech add-on (or speech act).

What's dodgy *and* dicey with this speech act is that it promises a debate about the judge's power to define what power(s) the judge should have. At our leave-taking here, we are at the Mysteries that no one since Alcibiades has parodied and which John Marshall celebrated. It's obviously a subject for another time.

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Apparatus

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