1998

Comment on Redish and Kaludis's the Right of Expressive Access in First Amendment Theory

Nadine Strossen
New York Law School

Recommended Citation
93 Nw. U. L. Rev. 1135 (1998-1999)

Printed in U.S.A.
Vol. 93, No. 4

A COMMENT ON REDISH AND KALUDIS'S *THE RIGHT OF EXPRESSIVE ACCESS IN FIRST AMENDMENT THEORY*

Nadine Strossen[*]

Along with Professor Redish, the ACLU and I have been accused of "free speech fundamentalism." This is an interesting counterbalance to the other charge we often face—in Robert Bork's recent best-selling book,[1] for example—namely, the charge of being unduly liberal or even radical. In any event, given my "conservative" approach to First Amendment issues, I am of course very enthusiastic about Redish and Kaludis's paper.[2] Concerning claimed access rights, their paper makes the same point that I and the ACLU have been making in a number of contexts recently, including debates over censoring "hate speech"[3] and "pornography,"[4] as well as campaign finance "reform" measures that limit political expression.[5]

The arguments made by access proponents, as well as advocates of these other types of speech regulations, all share two core premises: first, that there is a conflict between classic free speech principles and equality values and, second, that given this conflict, we have to restrict certain expression—namely, hate speech, pornography, and campaign spending—if we want to advance the equality of groups such as racial minorities, women, and non-fat cats.[6] Since the ACLU always has been as committed

---

* Professor of Law, New York Law School; President, American Civil Liberties Union. For assistance with this piece, Professor Strossen gratefully acknowledges her Chief Aide, Amy L. Tenney, and her Research Assistants, Ili Graeler and JoAnn Squillace.

[1] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 97-98, 152-53 (1996).

[2] Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083 (1999).

[3] *See, e.g.*, HENRY LOUIS GATES, JR. ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994); American Civil Liberties Union, *Briefing Paper #16: Hate Speech On Campus* (1996) (visited Sept. 7, 1999) <http://www.aclu.org/library/pbp16.html>.

[4] *See, e.g.*, NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995); American Civil Liberties Union, *Briefing Paper #14: Freedom of Expression in the Arts and Entertainment* (1997) (visited Sept. 7, 1999) <http://www.aclu.org/library/pbp14.html>.

[5] *See, e.g.*, Nadine Strossen et al., *A Reform that Endangers Free Speech*, WASH. POST, July 6, 1998, at A19.

[6] *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993); Burt Neuborne, *A Survey of Existing Efforts to Reform the Campaign Finance System* (1998) (Brennan Center for Justice at NYU School of Law, New York, N.Y.); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

to equality rights as to free speech rights, we do not approach any of these issues by automatically elevating one set of rights over the other.[7] Rather, in each of these situations we have concluded that the asserted tension is in fact a false one; in other words, the speech restriction not only would violate fundamental First Amendment principles, but also would fail to advance the allegedly countervailing equality values. In each of these situations, the speech restriction would be, at best, ineffective in promoting equality and, at worst, counterproductive.

These conclusions follow not just from abstract analysis but also, notably, from actual experience with how the restrictions are enforced. Experience shows, for example, that hate speech codes designed to advance equal rights for racial minorities in fact are disproportionately enforced against expression by and on behalf of those very minorities;[8] that anti-pornography laws intended to advance equal rights for women in fact are disproportionately enforced against expression by and on behalf of feminists;[9] and that campaign "reform" laws touted as opening up the political process to those who lack money, clout, and connections have in fact been used to harass small, issue-oriented, grassroots citizens' groups.[10]

These patterns are not just a matter of coincidence, but rather flow inevitably from the very features of our political system that are stressed by the access proponents and other would-be reformers themselves. As they point out, our government and other major societal institutions reflect certain pervasive hierarchies and biases—including those established on the basis of race, sex, and class. From this analysis of the problem, though, it hardly follows that an effective solution would involve giving more power to government agencies. To the contrary. Yet, all of these touted "reform" strategies—including access rights—do precisely that. Indeed, they give government the particularly dangerous power to pick and choose from among ideas and speakers those that should be either punished or preferred.

Redish and Kaludis make an important new contribution to this general debate. They not only highlight the dire free speech dangers of access rights, they also show that the asserted countervailing benefits are, at best, purely speculative. I will amplify on these two overarching insights of the paper, which are captured by two old sayings. First, if it ain't broke, don't

---

[7] *See* Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 HARV. C.R.-C.L. L. REV. 143 (1994).

[8] *See* Nadine Strossen, *Regulating Racist Speech on Campus*, *in* GATES ET AL., *supra* note 3, at 225-27.

[9] *See* STROSSEN, *supra* note 4, at 224-46.

[10] *See* Steven Hayward & Allison R. Hayward, *Gagging on Political Reform*, 28 REASON 20 (1996) (noting that the FEC "functions more and more as a censor of political expression, especially by issue-oriented, grassroots activists" and that the FEC has focused on "grassroots groups and citizens [which are] far less well-funded"); *see also American Civil Liberties Union Campaign Finance Reform Fact Sheet #3: Why Should Minorities, Women, Low Income or Non-Mainstream Groups be Highly Skeptical of Current Campaign Finance Proposals?* (1998) (visited Sept. 7, 1999) <http://www.aclu.org/congress/cfr061298a.html>.

fix it. Second, the cure is worse than the disease.[11] The first adage is apt because of the exaggerated sense of crisis that impels calls for access rights. As Redish and Kaludis note, though, since access-right advocates initially warned of growing media concentration, intervening technological developments have allayed these concerns. Notable are the phenomenal growth of cable and cybermedia, which their paper describes in general terms.

Just as Redish and Kaludis have provided the first detailed study of the actual free speech dangers of access rights—concluding that those dangers are great—two other authors recently have completed the most detailed study of the actual free speech dangers of media concentration—and they have concluded that those dangers are not great.[12] Their article is entitled *The Media Monopoly and Other Myths*, and the authors are economist Eli M. Noam, Director of Columbia University's Institute for Tele-Information, and attorney Robert N. Freeman, Administrator of Rights and Clearances for NBC News. As some of you know, Eli Noam happens to be my husband. But I assure you that I have other reasons for finding what he says highly persuasive; after all, the *Economist* recently described him as a "telecommunications guru."[13]

Eli and his co-author dispel widespread but unsubstantiated assumptions about increasing media concentration by looking at actual facts and figures. In their words:

> When it comes to concentration, views are strong, talk is cheap, but numbers are scarce. Therefore, we have gotten our hands dirty by collecting the actual market share numbers, industry by industry, company by company, for 60 subindustries from book publishing to film production to microprocessors . . . to trace the concentration trends over the past 15 years.[14]

The result was "probably the most detailed study ever done of media concentration in America."[15] Its conclusion? In their words: "Surprisingly, the overall concentration of the information industry did not increase, but [to the contrary] declined somewhat in the past decade."[16]

---

[11] A third old adage is also relevant: An ounce of prevention is worth a pound of cure. If the newly emerging media are to fulfill their promise and potential, they cannot be shackled by any form of censorship—neither traditional governmental censorship, nor what Owen Fiss calls "managerial" censorship. *See* Owen Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215 (1999).

[12] *See* Eli M. Noam & Robert N. Freeman, *The Media Monopoly and Other Myths*, 29 TELEVISION Q., 1997, at 18.

[13] *A Connected World*, ECONOMIST, Sept. 13, 1997, at S3.

[14] Noam & Freeman, *supra* note 12, at 19. In a conversation shortly before this piece went to press, Eli Noam noted that, since the study was concluded in 1997, several mergers have raised concentration levels somewhat, but aggregate concentration is still lower than it was in 1984, the study's benchmark year. Interview with Eli M. Noam, Director, Columbia University Institute for Tele-Information, in New York, N.Y. (Apr. 4, 1999).

[15] Noam & Freeman, *supra* note 12, at 19.

[16] *Id.* at 20.

In fairness, this study did find some media concentration problems, but they were mostly at the local level—for example, 98.5% of American cities have only one newspaper.[17] But access advocates are certainly not focusing their reformist efforts on local newspapers. And, on the important national level, the Noam and Freeman study stresses that the access opportunities and trends are positive. It concluded: "On the national level, . . . there will be more competition, more conduits, more content. With the number of channels increasing, smaller firms can enter."[18] In short, in terms of access, the system just "ain't broke," so we shouldn't even try to "fix it." Moreover, the so-called "fix" of access rights is really no such thing. In other words, the cure is worse than the disease. Indeed, Redish and Kaludis's paper itself expressly invokes this very phrase.[19]

Again, I would like to stress the insights I have gained from the ACLU's actual experience in confronting government bureaucrats who enforce speech restrictions, including access rules. I may not trust media moguls or other fat-cats who wield economic power or political influence, but if it is a choice between them or the government, I think they are definitely the lesser of the two evils. That great libertarian and egalitarian, Justice William O. Douglas, forcefully expressed the same view in an opinion criticizing the Fairness Doctrine, an access right that the Supreme Court had upheld over his protest and that was designed to promote the broadcast of diverse views about controversial public issues. Douglas explicitly acknowledged that the media are far from perfect in terms of presenting diverse views.[20] However, he immediately warned that "the prospect of putting Government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government."[21]

I will illustrate this lesser-of-two-evils or the-cure-is-worse-than-the-disease point through two examples: the "Fairness Doctrine" that Justice Douglas assailed, and election "reform" laws. In both cases, laws that were intended to equalize access and to enrich and diversify public discourse have too often had the opposite effect. They have caused intrusive government surveillance and regulation of expression with outright harassment of certain speakers and an enormous chilling effect on countless others.

In 1985, the FCC itself concluded that, in operation, the Fairness Doctrine did exactly the opposite of what it was supposed to: it decreased the diversity of broadcast views in general and deterred non-mainstream or anti-establishment views in particular.[22] Echoing other studies, the FCC's

---

[17] *See id.* at 22 ("They rarely editorialize about that.").

[18] *Id.*

[19] Redish & Kaludis, *supra* note 2, at 1118.

[20] *See* CBS v. Democratic Nat'l. Comm., 412 U.S. 94, 161 (1973) (Douglas, J., concurring).

[21] *Id.* at 162.

[22] General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35418 (1985).

report specifically concluded that the Fairness Doctrine had the following four adverse effects. First, it "lessens the amount of diverse views available to the public."[23] Second, it "inhibit[s] the expression of unorthodox opinions."[24] Third, it puts government in the "intrusive role . . . of scrutinizing program content."[25] And finally, it "creates the opportunity for intimidation of broadcasters by governmental officials."[26]

Another strong champion of both free speech and equality values who strongly criticized the Fairness Doctrine, both in theory and in operation, was David Bazelon, the former Chief Judge of the U.S. Circuit Court of Appeals for the D.C. Circuit. In one case, for example, Judge Bazelon dissented from his court's decision upholding the FCC's refusal to renew the license of radio station WXUR in Philadelphia. The FCC denied the license renewal on Fairness Doctrine grounds. But Judge Bazelon explained that, perversely, the doctrine's purposes were in fact disserved by this decision. As he stated:

> [WXUR was] a radio station devoted to speaking out and stirring debate on controversial issues. The station . . . propagate[d] a viewpoint that was not being heard in the greater Philadelphia area . . . . [T]hrough its interview and call-in shows it did offer a variety of opinions on a broad range of public issues, and . . . it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints . . . . It is beyond dispute that [as a result of the FCC's decision,] the public has lost access to information and ideas.[27]

Even worse than using the Fairness Doctrine to shut down or chill the expression of broadcast outlets such as WXUR, which present a range of perspectives, government officials have used the doctrine selectively to silence particular disfavored perspectives. For example, during the Nixon Administration, Fairness Doctrine complaints were made or threatened specifically to reduce broadcast coverage of anti-Vietnam War protests.[28] In sum, government officials have enforced the Fairness Doctrine in ways that, predictably, undermine both free speech and access. And the same is true concerning campaign finance laws that also aim to increase access to channels of expression and influence.

---

[23] *Id.* at 35423.

[24] *Id.* at 35433.

[25] *Id.* at 35434.

[26] *Id.*

[27] Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 70-71 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973).

[28] *See* General Fairness Doctrine Obligations of Broadcast Licensees, *supra* note 22, at 35434; *see also* Hugh C. Donahue, *The Fairness Doctrine is Shackling Broadcast*, 89 TECH. REV. 44, 48 (Nov. 1986) ("On 21 occasions at the height of anti-war demonstrations in October 1969, President Nixon ordered his staff to take 'specific action relating to what could be considered unfair news coverage.' Nixon cowed the networks so successfully that they did not interrupt coverage of weekend football to show massive anti-war demonstrations in the nation's capital.").

The ACLU's longstanding opposition to so-called "reform" efforts in this context, as in the others I have mentioned, does not reflect some knee-jerk exaltation of free speech above equality rights. Rather, our position reflects the lesson that, in operation, these "reforms" are as inimical to the important goal of equalizing political participation as they are to core free speech concerns. That is so because these laws can be—and, predictably, have been—used to stifle precisely the kind of citizen activism that they are supposed to encourage.

The ACLU's first case in this area was all too typical. Back in 1972, we represented three elderly middle-class citizens with no connection to any candidate or political party. They published an advertisement in the *New York Times* that condemned the U.S.'s secret bombings of Cambodia, called for the impeachment of Richard Nixon, and printed an honor roll of those members of Congress who had opposed the bombings. The honor roll included Senator George McGovern, who was then a potential rival to Richard Nixon in the upcoming presidential election.[29]

This ad was a classic example of the type of political speech that the Supreme Court has placed at the top of the First Amendment hierarchy. However, it violated a federal campaign finance reform law, because it could influence the impending presidential election. Invoking this law, the U.S. Government sued our three clients, seeking to bar them from publishing such ads. The government also wrote a letter to the *Times* threatening it with criminal prosecution if it published another such ad.[30] Soon after, the ACLU itself tried to purchase space in the *Times* to publish an open letter to President Nixon, criticizing his position on school desegregation. Consistent with the ACLU's strictly non-partisan stance, our letter did not even mention the election. Yet, the *Times* had been duly intimidated by the government's threatening letter from the previous case, and therefore refused to publish the ad.[31]

The ACLU ultimately won both cases.[32] But the fact remains that it took court battles to vindicate the right to engage in precisely the types of speech, by precisely the types of speakers, that are championed by access advocates in general and campaign finance reformers in particular. Worse

---

[29] *See Testimony of Ira Glasser, Executive Dir., ACLU, before the United States House of Representatives Subcomm. on the Constitution* (Feb. 27, 1997) (visited Sept. 7, 1999) <http://www.aclu.org/congress/t022797a.html>.

[30] *See id.*

[31] *See id.*

[32] *See* United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972) (holding that an advertisement published by the National Committee for Impeachment did not render the Committee "political" under the Federal Election Campaign Act (FECA) and therefore did not subject the Committee to the requirements of the Act); ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (enjoining enforcement of the regulatory procedure adopted under Title I of FECA to enforce spending limitations in the communications media imposed upon candidates for federal office because they imposed impermissible prior restraints, and restricting the scope of "political committees" under Title III of FECA, thereby removing plaintiffs from its purview), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975).

yet, in looking-glass fashion, government officials were suppressing this speech under laws that were touted as equalizing access.

Unfortunately, this pattern has persisted to this day under more recent campaign finance laws. In operation, these laws continue to undermine access, as well as free speech. In the name of campaign finance "reform," the Federal Election Commission ("FEC") has sweepingly suppressed the political speech of citizen activists across the board—from the National Organization for Women[33] to the National Right to Life Committee.[34]

Let me cite another all-too-typical case, decided by the U.S. Court of Appeals for the Second Circuit in 1980. The ACLU represented a local tax reform group from central Long Island. The court agreed with us that the FEC was completely out of line with its heavy-handed efforts to enforce reporting and other burdensome, intrusive requirements against these small-scale activists.[35] Irving Kaufman, the Second Circuit's Chief Judge at the time, was so outraged that he wrote a separate, blistering concurrence. That opinion was joined by another of the court's most respected, and progressive, jurists, Judge James Oakes. Here are some excerpts:

> The defendants in this case undertook to spend the modest sum of $135 for the purpose of preparing and circulating to their fellow citizens a pamphlet addressed to the issue of tax reform . . . .
>
> I confess that I find this episode somewhat perverse. It is disturbing because citizens of this nation should not be required to account to this court for engaging in debate of political issues . . . .
>
> . . . . I continue to believe that campaign "reform" legislation of the sort before us is of doubtful constitutionality. . . .
>
> . . . .
>
> If speakers are not granted wide latitude to disseminate information without government interference, they will "steer far wider of the unlawful zone," thereby depriving citizens of valuable opinions and information. This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled or sterilized. Accordingly, it is not completely surprising that the FEC should view the content of defendants' leaflet in a substantially different light than the members of this court.
>
> The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees. *Buckley v. Valeo* imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our deci-

---

[33] Karen Alexander, *Republican-Backed Measure Would Impose Term Limits on Elections Agency's Controversial General Counsel*, LEGAL TIMES, June 22, 1998, at 2.

[34] *See id.*

[35] *See* Federal Election Comm'n. v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 54-55 (2d Cir. 1980).

> sion today should stand as an admonition to the Commission that . . . it has failed abysmally to meet this awesome responsibility.[36]

Unfortunately, since this rebuke in 1980, the FEC's record continues to warrant the same kind of criticism. As a 1996 article concluded, the FEC has focused its attention on "grassroots groups and citizens who want to take part in the political debate, too—groups far less well-funded and less capable of extricating themselves from the tangle of FEC regulations."[37] Thus, the FEC has functioned "more and more as a censor of political expression, especially by issue-oriented, grassroots activists."[38]

We already have a time-tested engine of access for ideas and influence. Steadily, throughout our history, it has increased the range of participants and perspectives within our political system. And while it has not yet brought us perfect equality or access, it does promise to keep bringing us closer to those important goals. Certainly, its track record is far more impressive than that of purported reformist improvements. I am talking, of course, about the First Amendment.

---

[36] *Id.* at 54 (Kaufman, C.J., concurring) (internal citations omitted).

[37] *See* Hayward & Hayward, *supra* note 10, at 20.

[38] *Id.*