



**TUCKER CARLSON**  
New senior fellow once saw Cato as “samizdat”  
**PAGE 3**



**DAMBISA MOYO**  
Foreign aid has failed Africa  
**PAGE 5**



**REALIZING FREEDOM**  
Tom Palmer’s writings on law and liberty  
**PAGE 3**

# Cato Policy Report

May/June 2009

Vol. XXXI No. 3

## An Endangered Native Species: The First Amendment

BY NAT HENTOFF

**Y**ears ago, while writing a *New Yorker* profile of Supreme Court Justice William J. Brennan Jr., I asked him a schoolboy question: “What’s your favorite part of the Bill of Rights?”

“The First Amendment, of course,” he said. “All the rest of our liberties flow from our rights of free speech, free press, free exercise of religion, freedom of assembly, the right to criticize our government.” Then, uncharacteristically somber, he asked me a question: “How can we get the words of the Bill of Rights off the pages and into the lives of students?” He knew I was on my way to rural Pennsylvania where I’d been asked to speak to middle-school and high-school students about the first Ten Amendments.

“Tell them stories,” Brennan said, “of how we earned those rights and liberties.”

I started to; and a few months later, during a book fair in Miami, I rather dramatically found out how wise his counsel had been. We authors were required there to work for publicity, and I was assigned to talk about my book, *Living the Bill of Rights*, to a large assembly of black, white, and Latino high school students.

Just before I went on, a teacher advised me: “Don’t expect too much reaction. All they real-

ly care about are music and clothes.”

I told them stories. How Samuel Adams and the Sons of Liberty exercised the First Amendment, before we had a Constitution, by creating the Committees of Correspondence to detail throughout the colonies how British soldiers and customs officers were turning Boston colonists’ homes and offices upside down to find contraband.

“That’s also how we got the Fourth Amend-

ment right to privacy,” I told the high school students. After an hour or so of stories about winning the rights to confront witnesses against us in court, and why Thomas Jefferson was so insistent that habeas corpus (which I explained) be clearly in the body of the Constitution, I got a standing ovation. I was not that eloquent a speaker, but the students had discovered America!

*Continued on page 6*



**NAT HENTOFF** is a senior fellow at the Cato Institute. One of the country’s leading advocates of the First Amendment, he is the author of such books as *Free Speech for Me but Not for Thee: How the American Left and Right Relentlessly Censor Each Other* and *The War on the Bill of Rights and the Gathering Resistance*.

The Cato Institute’s full-page ad opposing the so-called stimulus bill galvanized opposition when it was published in the *New York Times*, the *Wall Street Journal*, the *Washington Post*, and other newspapers nationwide. At the 21st Annual Benefactor Summit in March, it made yet another appearance—on a T-shirt! Director of health policy studies Michael F. Cannon displays the T-shirt—which attendees received—at his talk on Obama’s health care plans. A similar ad on climate change ran in newspapers in March. **PAGES 4, 17**

Continued from page 1

I kept doing that around the country, but Johnny Appleseeds can only do so much. In recent years, as civics classes have largely disappeared from public schools—replaced by testing for tests mandated by No Child Left Behind, and city and state pressures to keep reading and math scores rising—stories about who we are as Americans are seldom told in classrooms.

Evidence of the present lack of understanding and concern about the First Amendment among adults 18 or older is disturbingly—I'd say alarmingly—revealed in the 2008 annual "State of the First Amendment" survey by the First Amendment Center in Nashville, which also provides continuing news and analysis of these issues ([firstamendmentcenter.org](http://firstamendmentcenter.org)).

I've long relied on this annual First Amendment test of the citizenry, conducted by University of Connecticut professors at New England Survey Associates. Among the current findings: "4 in 10 Americans were not able to name any First Amendment right whatsoever, the highest figure in the 11-year history of the survey."

And, no doubt encouraging the growing number of Democrats in Congress who are eager to bring back the Fairness Doctrine, "66% say the government should be able to require television broadcasters to offer an equal allotment of time to conservative and liberal broadcasters."

What startles me is that "62% would apply that same requirement to newspapers." I'm aware that James Madison, the principal architect of the First Amendment, is not a household name in this nation; but this readiness to give government the power to tell us what we cannot read in print, as well as hear and see on broadcast radio and television, requires the kind of remedial education I haven't seen mentioned by any of those who want to reform the No Child Left Behind Act.

In Congress, among the leaders of the crusade to have the federal government ensure that we get "fair and balanced" information and commentary on radio and broadcast TV are Dianne Feinstein, Chuck Schumer, Dick Durbin, Tom Harkin, and Nancy Pelosi. Cheering them on is former President Bill Clinton, who has fully exercised his First Amendment rights in just about every conceivable forum of expression.

## “Driven by the unquenchable popularity of conservative radio hosts, Democrats in Congress are intent on curbing the First Amendment.”

Having directly experienced the Fairness Doctrine during my years in radio at WMEX in Boston in the 1940s and early 50s, I can testify on the effect of government insistence that when controversial issues of public importance are aired, there must be "reasonable opportunity for opposing viewpoints to be heard" on the same station.

Like the other staff announcers, I interviewed public officials with decidedly controversial and combustible views, such as the legendary James Michael Curley (portrayed by Spencer Tracy in *The Last Hurrah*). And on my own jazz and folk music programs, I expressed views, including political ones, that some listeners angrily objected to.

After the boss had hired a legal firm to deal with charges of Fairness Doctrine violations from the FCC that continued to increase, he summoned the staff and brusquely informed us: "*There will be no more controversy on this station!*"

As these gag rules at radio stations around the country multiplied, the FCC ruled in 1987 that "the intrusion of government into the content of programming occasioned by the enforcement of the [Fairness Doctrine] unnecessarily restricts the journalistic freedom of broadcasters . . . [and] actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogative of broadcast journalists."

In the same year, the congressional champions of government regulation of fairness nonetheless refused to be intimidated. The House passed a revival of the Fairness Doctrine by a 3 to 1 margin; and in the Senate, it passed by nearly 2 to 1. The First Amendment

was ringingly rescued by President Ronald Reagan, whose *Death Valley Days* I used to watch regularly on television.

In vetoing the bills, Mr. Reagan, who, unlike the present incumbent, had never taught constitutional law, nonetheless showed an inspiringly clear understanding of the First Amendment: "History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through freedom and competition that the First Amendment sought to guarantee."

### THE WAR ON RUSH LIMBAUGH

But now, driven by the unquenchable popularity of Rush Limbaugh, Sean Hannity, Laura Ingraham, and other conservative radio hosts, Democrats in Congress are intent on curbing the First Amendment, whether or not they can resurrect the Fairness Doctrine itself. An example of their passionate devotion to guarantee that we be protected from bias on the air was an exchange last November on Fox News Live between host Neil Cavuto, criticizing President Obama's tax proposals, and Sen. Robert Menendez (D-NJ).

Increasingly stung by the host's refusal to retract his objections to Obama's urgent program, Senator Menendez, with icy concern, said: "I hope you are not one of the ones forced off the air" when the Democratic majority revives the Fairness Doctrine.

A White House spokesperson says that President Obama does not intend to reinstate the Fairness Doctrine. However, he and the congressional Democrats have not abjured alternative free-speech restrictions that would be called by a name other than the "Fairness Doctrine." Apparently, Obama's concern and that of the Democrats seems to be the devotion of so many Americans to predominantly conservative talk radio.

Rush Limbaugh, whose virtuoso radio show Obama has advised Democrats (humorously, I hope) not to listen to, is aware that the essence of the Fairness Doctrine could slip back under different guises. In a February 20 *Wall Street Journal* column, "Mr. President, Keep the Airwaves Free," Limbaugh—showing a quite scholarly understanding of the legal history of the Fairness Doctrine—irreverently asked Obama to "straightforwardly" answer the following question: "Is it your intention to censor

talk radio through a variety of contrivances, such as [federal regulations regarding] ‘local content,’ ‘diversity of ownership,’ and ‘public interest’ rules—all of which are designed to appeal to populist sentiments but, as you know, are the death knell of talk radio and the AM band?” (Sen. Dick Durbin has already introduced legislation to this effect.)

Limbaugh could have added that once the Democratic majority passed bills to dilute the impact of the conservative hosts (and thereby the ratings of stations that carry them), the momentum could continue to impose “fairness” on cable television. And why not the Internet?

President Obama may be too young to remember one of broadcasting’s most straightforward and unyielding champions of the First Amendment, Richard Salant, head of CBS News during the full toxic power of the original Fairness Doctrine.

When I came to New York in the 1950s as a journalist and, briefly, with my own program on WNBC-TV, I got to know Salant, and he sent me his take on the Fairness Doctrine or its equivalents:

Suppose the English governor had told Tom Paine that he could go ahead and publish all he liked—but only if at the back of his pamphlets, he also printed the Royal Governor’s views. That command, far from being an implementation of free speech, would have been just the opposite. It’s a restriction on speech if, in order to be allowed to express your own views, you also have to present those of someone arguing on the other side.

Just as the principal of a public school is the head teacher, I would suggest to President Obama that as head teacher of constitutional law to his own party, he provide them with Richard Salant’s invocation of what it would have been like for Tom Paine to express himself under a Royal Fairness Doctrine.

## FREE SPEECH ON CAMPUS

In addition to the parlous state of the First Amendment in Congress, its health on college campuses has long been greatly imperiled by administrations so concerned with sensitivities of students that they enforce

“The First Amendment on college campuses has long been greatly imperiled by administrations so concerned with sensitivities of students that they enforce political correctness.”

political correctness.

FIRE (the Foundation for Individual Rights in Education, on whose Advisory Board I sit) defends the free-speech rights of students and professors across the political and ideological spectra, far more continually than any other organization, including—to my surprise—the American Civil Liberties Union, which seldom gets involved in these punitive gag rules on politically incorrect speech.

The censorship of our purportedly future leaders and their professors is administered through college and university “speech codes” (sometimes incorporated into “codes of conduct”). To create a harmonious learning atmosphere, these edicts ban expressions (verbal or otherwise) that may “offend” students by “insulting” or “harassing” them on the basis of race, religion, gender, transgender, political affiliations, and views.

For example, with a broad, intimidating ukase, the University of Iowa’s code forbids sexual harassment that “occurs when somebody says or does something sexually related that you don’t want them to say or do, regardless of what it is.”

And at Jackson State University, expressions by students are banned that “degrade,” “insult,” or “taunt” others as well as “the use of profanity” and “verbal assaults” based on ethnicity, gender, and the known or presumed beliefs of their fellow students.

As of this writing, FIRE reports that “77 percent of public colleges and universities maintain speech codes that fail to pass constitutional muster” despite “ten federal court decisions unequivocally striking down campus speech codes on First Amendment grounds from 1989 to 2008.”

As these prohibitions were beginning—based, it seemed to me, on the conviction of higher education administrators that there is a constitutional right not to be offended—I asked Justice Brennan what he thought of them.

Instantly, he said, “they should all be scrapped.”

## “WE HAVE HAD TO FIND A WAY TO LIMIT IT”

As for Rush Limbaugh’s perceptive concern that if the President joins the Democratic leadership in Congress in achieving a disguised version of the Fairness Doctrine, the “contrivances” Congress is likely to substitute to rein in Limbaugh, Hannity, et al. were described on Bill Cunningham’s ABC Sunday evening radio show by Brian Anderson, editor of the Manhattan Institute’s *City Journal* as “local community panels” exercising their reviewing authority to recommend against relicensing stations. Already suggested is having those renewals come up every two years rather than every eight years. Such threats could make skittish local stations program more “balance” to satisfy those panels. And if stations, fearing the loss of their licenses, also insist on mandating reply time during conservative hosts’ program, Anderson adds, it would be difficult to syndicate those shows nationally.

In *Manifesto for Media Freedom*, Anderson and coauthor Adam Thierer quote a senior adviser to House Speaker Nancy Pelosi as having welcomed with uncommon candor legislation restoring the Fairness Doctrine itself. The source said Pelosi agreed that “conservative radio is a huge threat and political advantage for Republicans, and we have had to find a way to limit it.”

And they will.

## FREE SPEECH IS FOR EVERYBODY

Spiro Agnew, much rebuked and scorned by Democrats while he was vice president, isn’t around anymore; but remembering his overlooked First Amendment views, I believe he wouldn’t object to my bringing him back as a witness against sensitizing the First Amendment to make it fair. In my book, *Free Speech for Me but Not for Thee*, I took political-

ly incorrect pleasure in quoting Agnew's tribute, however inadvertent, to George Orwell's warning that "if large numbers of people believe in freedom of speech, there will be freedom of speech, even if the law forbids it. But if public opinion is sluggish, inconvenient minorities will be persecuted, even if laws exist to protect them."

Although many Americans claiming that they believed in freedom of speech did not rise to protect Spiro Agnew, he said—contrary to the present sluggish public opinion revealed in "The State of the First Amendment" survey, college speech codes, and the congressional urgency to rearm the Fairness Doctrine:

Every time I criticize what I consider to be excesses or faults in the news business, I am accused of repression, and the leaders of the various media professional groups wave the First Amendment as they denounce me.

That happens to be my amendment, too. It guarantees my free speech as it does their freedom of the press. . . . There is room for all of us—and for our divergent views—under the First Amendment.

Another witness I bring into the conversation who is here in spirit is my First Amendment hero, Justice William O. Douglas, who, as the Fairness Doctrine began to spread its tentacles, said: "I fail to see how constitutionally we can treat TV and the radio differently than we treat newspapers. . . . The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or benevolent ends."

The camel, though not called the Fairness Doctrine, may soon be well within the tent—all the more reason, in the continuous debate about leaving no children behind, that attention must be paid to restoring civics classes—with teachers who know how to tell the enlivening stories of how the First Amendment demonstrates why we are Americans.

I heard that last phrase, "why we are Americans," back in 1984 from Kathryn Sinclair, a high school senior in Murfreesboro, Tennessee, as I was covering the story of this so politically incorrect young woman refusing her high school principal's demand that he have prior restraint over her valedictorian's

speech before she could deliver it.

The principal finally, grudgingly, let her speak freely; but, as I wrote in *Living the Bill of Rights*, this troublemaker "was so ostracized for her solo rebellion by her fellow students that she finished her senior year at home. Before she left the school, some students were wearing armbands reading 'K.K.O.' (for 'Kick Kathryn Out')."

As I was leaving town, this spunky young lady told me: "They don't realize that they're doing exactly what I'm fighting for. They're utilizing their freedom of speech."

These days, I think quite often of that insistent American—as I did on February 26 when at first, I was heartened when the Senate passed Sen. Jim DeMint's amendment, the Broadcast Freedom Act, to bar the return of the Fairness Doctrine. But then I found out how Dick Durbin and other leaders of the Democratic majority in Congress were planning strategies to insinuate "contrivances" I've described to mandate "balance" in what they choose for us to hear and see on radio and broadcast television.

Tom Paine would have found rousing contrary ways to defy these educationally disadvantaged censors. Will we? ■



**CATO UNIVERSITY 2009**

## Economic Crisis, War, and the Rise of the State

**JULY 26-31, 2009 • SAN DIEGO, CA**

A one-of-a-kind opportunity to explore the threats to liberty, privacy, and independence in the rush for government-imposed solutions to past and present crises.

**FULL DETAILS:**

**[www.cato-university.org](http://www.cato-university.org)**

