Y
ears ago, while writing a New
Yorker profile of Supreme Court
Justice William J. Brennan Jr.,
I asked him a schoolboy ques-
tion: “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, uncharac-
teristically 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 Pennsyl-
vania 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 pub-
licity, 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 Correspon-
dence to detail throughout the colonies how
British soldiers and customs officers were turn-
ing 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 Jeff-
erson was so insistent that habeas corpus (which
I explained) be clearly in the body of the Con-
stitution, I got a standing ovation. I was not
that eloquent a speaker, but the students had
discovered America!

Continued on page 6

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One of the country’s leading advocates of the First Amend-
ment, he is the author of such books as Free Speech for Me
but Not for Thee: How the American Left and Right Relentless-
ly Censor Each Other and The War on the Bill of Rights and
the Gathering Resistance.
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—invariably asked Obama to “straightforwardly” answer the following question: “Is it your intention to censor
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 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 spectrums, 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 someone 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 synecdoche 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

Sprio 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 she 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?