

—we attached ourselves to the movements we defended. We identified ourselves with their demands [and] we depended on them for money and support.”

Thus constituted and directed, in the '20s the ACLU proceeded to challenge and organize around anti-evolution statutes in the *Scopes* case, the Espionage Act prosecution of communist Benjamin Gitlow, the Sacco-Vanzetti prosecutions—and in 1937 the anti-labor and anti-free-speech actions of Boss Hague.

The process of change.

The fundamental conflict between the *Davis* and *Hague* decisions explodes widely accepted myths about the decision-making process of the courts. The justices say their decisions are determined by legal precedent and analysis. If this were so—and if the law were separate from political and social forces, as it purports to be—there should be a coherent evolution of legal doctrine.

But in both these cases the Constitution, specifically the First and Fourteenth Amendments, was the source of law. It was identical in both cases, yet *Hague* held that the First Amendment—operating against the states through the Fourteenth Amendment—established an individual right to speak on public streets, sidewalks and parks, while *Davis* had held the exact opposite.

It might be argued that there was a legal barrier to enforcement of the First Amendment in the *Davis* case since it was decided before the Supreme Court's 1925 decision that the First Amendment also applied to the states. But this only begs the question; the constitutional provisions—in the Fourteenth Amendment—were in effect since the Civil War, and the Court could have chosen to apply the First Amendment at any time thereafter. In fact, the Court had discussed the issue before the *Davis* case.

Another possible explanation might be found in earlier decisions that interpreted the general language of the First Amendment. However, in both periods there were precedents and reasoning supporting each side.

Moreover, precedents and reasoning can be distinguished, modified or discarded. The law provides judges with a variety of stylized rationalizations from which they can pick and choose. Social and political judgments guide such choices, even when they are not explicit or conscious. There is no legally required rule or result, and despite endless attempts by judges and legal scholars to find transcendent legal principles, there simply are none.

However, one can make sense of these decisions by examining the social and political contexts in which they were made. Society underwent fundamental changes between *Davis* and *Hague*. Industrialization, World War I, the Depression, the New Deal and the growth of the labor movement led to basic shifts in consciousness and political relations.

These shifts affected judges as well as society generally. Some of the judges, though from the same strata of society as *Davis* era judges, came to see the justice of some left demands. Justice Holmes' reassessment of speech rights would seem to exemplify such change. His was not a change brought on by legal research but of his and society's altered state of consciousness.

Such a social change is transmitted to and affects individuals in various ways—through mass media, public and private associations, professional groups, peer pressures. The judges, like Holmes, who came to place considerable value on freedom of speech, did so not because they were more in touch with the framers of the Constitution or were more competent judges, but because of historical and social events.

These judges generally express this new consciousness in legal terms, and many would honestly deny that their decisions stemmed from new social conditions.

Furthermore, the power of a movement like the CIO in the '30s also places judges in a bind. Though most were likely to be hostile or ambivalent toward labor

Free speech law was transformed in the years between 1919 and 1940. Before that, one spoke on public property at the discretion of local or federal authorities. The constitutional right to freedom of speech wasn't established until 1937, and then only as a result of the activities of militant labor organizations.

and the left, the demand for free speech had clear historical roots and was popular. To deny this demand in the '30s, a judge would risk fomenting a major confrontation in a period of social turmoil. Moreover, it was becoming clear that if labor could not speak and organize legally, it would do so illegally, as the IWW did, often successfully, in its free-speech fights.

Some judges might have welcomed confrontation, but others have found it preferable to bring labor's activities within and under the control of the system, as

Congress did with the NLRA.

Finally, the power of the labor movement in the '30s and the precedents favoring local control over speech also raised institutional concerns. True, upholding the right of free speech required contradicting longstanding precedents and widespread practice. But to deny this demand—so long promised on paper and so widely supported—threatened to raise a public outcry, undermine the Court's authority, and even win support for Franklin D. Roosevelt's court-packing scheme announced in 1937.

The courts rely for their legitimacy on myths about the objectivity and nonpolitical nature of judicial decision-making. This, in turn, lends a broader legitimacy to social and power relations that are reflected, articulated and enforced by the legal system.

Within this context, institutional concerns present a choice between rejecting precedent and ruling against the mainstream of political thought. There was widespread controversy about the courts in the '30s, and the Court had recently moved in the direction of the mainstream in several related decisions.

The various factors discussed here do not necessarily operate intentionally or even consciously, nor do the justices necessarily see themselves as engaged in anything other than a legal analysis. They are accustomed to expressing social and political concerns and values as legal arguments and to implementing changes expressed in legal terms without understanding the nature of the changes they were making.

Thus, even as the law was being changed, the struggle for free speech, waged largely by leftists and finally realized by the labor and left movements, was being redefined as a set of natural rights whose essence and history are legal rather than political. A false pride in the legal system has displaced a source for genuine pride in the people, who fought business interests and the government—including the courts—to achieve recognition of free speech.

David Kairys is a constitutional lawyer in Philadelphia. He is editor and co-author of The Politics of Law, A Progressive Critique. This article is excerpted from "Freedom of Speech" in The Politics of Law, ©1982 David Kairys. Reprinted by permission of Pantheon Books.

PERSPECTIVES

The life of a LETTERS page

By Susan Rubinyi-Anderson

CANCEL MY SUBSCRIPTION! I've suffered through issue after issue of your sorry excuse for a paper, but this last issue has finally brought my patience to an end. How could you, a supposed medium for progressive thought, have printed such a reactionary piece of drivel that sets the movement back decades, perhaps even centuries?

I'm referring, of course, to the offensive defamatory article, "Rutabagas as a Tool of Imperialism." How can you so demean this noble progressive vegetable by linking it to the excesses of the British Empire? Then you go on to insult your readers of Scandinavian descent by implying that the rutabaga's other name, the "swede," exposes secret imperialist designs of Scandinavian countries.

I assume, of course, you're aware that the author of this ignominious piece, J.G. Legume, has been president for many years of the Society for the Promotion of the Turnip. Such blatant favoritism cannot go beyond notice. Though your paper has been helping to fuel my woodstove, I can't endure its scurrilous attacks one issue longer.

Disgustedly yours,
P. Parsnip

The Author Replies:

Parship's letter sinks to hitherto unknown epistolary depths. One wonders if he even bothered to read my article at all or is merely using me as a convenient whipping post for his latest revisionary outbursts. Parship prominently mentions my presidency of SPT yet neglects to identify himself as long-time chair of

the "Rutabaga Boosters." This notoriously sectarian group is noted for its unwarranted tirades against peace-loving vegetables. This newspaper is well rid of Parsnip as a reader, if, indeed, he's capable of reading, something not readily apparent in his letter. J.G. Legume

Parship replies:

I was forced to purchase a newsstand copy of your scandal sheet to read Legume's vile attack on me. Notice that Legume refuses to refute any of the points made in my letter. Rather, she launches into a name-calling smear campaign (typical SPT tactics, of course). I demand an apology and retraction, not

so much for the snide remarks against myself, but against that much maligned vegetable, that symbol of all that's ever been right with our society, that bright beacon of our hopes against the darkness of reaction.

Legume Replies:

Retraction? Not on your life. I stand by everything I've written. If Parsnip wants to indulge in maudlin "poetic" images, let him try the pages of his local food co-op magazine. Food co-ops are riddled with his type, as we've noted from our campaigns for equal space for turnips. The pages of this paper should be reserved for serious political discussions only.

The Non-Jewish Jew by Isaac Deutscher

Isaac Deutscher's biographies of Trotsky and Stalin have won him worldwide respect. In his book *The Non-Jewish Jew and other essays* he writes of his vision of Jewish life, contemporary and traditional. The essays in this book discuss the "remnants of a race" after Hitler; the Jews under Stalin; of the Zionist ideal; the establishment of the state of Israel; the Israeli-Arab war of 1967; and the perils ahead—all with great insight, and with a style that appeals to both scholar and layperson.

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LIFE IN THE U.S.

By Joe E. Gutierrez

I GUESS IT BEGAN BECAUSE WE were angry. A multiplicity of Reagan-inspired events dominoed the labor movement into one ignominious heap of frustration and resentment.

Tuxedo unionism came back with a Brooks Brothers cut. The companies paid the bill and they're still laughing. Corporations paid little or no taxes, and the working stiff was working four months each year for the government. Wisconsin Steel shut down and U.S. Steel was playing games with South Works. Gary, Ind., was no longer the Steel City. Inland Steel was keeping East

came in the form of Jim Balanoff, past district director of District 31 United Steel Workers of America (USWA).

It was October 1982. Sitting in Steward's restaurant on Columbia Avenue, just after leaving a community services meeting at Riverside school, our conversation centered around political stagnation in Hammond. Balanoff looked around the table, growled a little bit and said, "You say you don't like politicians. Well, I'm tellin' ya, you damn well better become one because these are the guys that run this country."

That night Balanoff decided to run for the city council, second district. The transition from union politics to city politics was easy. But the decision to run was tough. Jim just came off a bitter

political advisor and precinct committeeman; and myself, Joe Gutierrez, chair of what became known as "Balanoff's campaign."

Jim's strategy was simple. Go to the people. If they're not registered, register them! If they don't want to be registered, convince them that they should be! We registered more than 700 people. Balanoff met almost every person in the second district. He constantly emphasized, "Government is for the people. But you gotta make it work and the only way to do that is by getting off your butt and doing something. There's a lot of people out there willing to work. They just need leadership. Once the guy on the street understands that he counts, he can make a difference in this crazy political spec-

didn't look good. Balanoff was losing. The administration candidate and the incumbent were cancelling each other out. Jim was nervous. All of a sudden things started to change. Six precincts to go. Then the radio blared Balanoff 792, Torres 836. Our figures showed Balanoff winning by a small margin. WJOB announced Torres the unofficial winner with all the precincts in. We had the complete totals and we still showed Balanoff the winner.

Then we got worried. Three of us raced to City Hall. Their chart showed Torres the winner with 836 votes. We wanted to see the flash cards. Finally a friend sent us to the mayor's headquarters. The place was wild with victory. I explained the discrepancy to the mayor's campaign manager. I told him Balanoff's the winner. He looked at me for a second, said maybe he could help and told me to remind Jim how much the administration helped him. We carried four or five precincts for him, he said. His friend took us out to his car. He had flash cards from all the precincts. We compared totals. Balanoff was the winner by 40 votes.

Back at the hall, Balanoff already had the good news. He called WJOB and told them they were reporting a mistake. They said thank you very much and kept announcing Torres as the unofficial winner. We went to the government complex in Crown Point at 10:00 that night. At 11:00 we were declared winner by the county election chairman. He said, "Our totals show you the winner in the second district, 855 for Balanoff, 817 for Torres. I don't know why the hell you want to get into politics. You must be crazy. Congratulations."

At 10:00 a.m. Torres announced that he was suing for a recount. Six weeks later the recount assured Balanoff the nomination but caused hard feelings and distrust. It's tough to lose, especially when a local radio station declares you a winner every hour on the hour, and then declares you a loser the next day with no explanation.

Anger can be a strong force. A large percentage of the Torres faction left the Democratic Party along with Torres and supported a Republican for mayor.

The Hammond Democratic machine accepted us with open arms. They were in trouble and they knew it.

Campaigning for the general election went into full swing about the first of October. The Grassroots Alliance with Balanoff backed the mayor. Democrats, we pushed a straight Democratic ticket. We were acutely aware of the damage inflicted on the poor people of this country by Republican policies. So was the Republican candidate for mayor of Hammond. He told many people that he was not a republican Republican. He told others that he was really a Democrat.

November 8 the polls opened at 6:00 a.m. Turnout was heavy. One of the old timers said this was a bad sign—the mayor was in trouble. I talked to some of the voters. They said, "Look at the condition of the streets and alleys." I said, "No, look at your utility bills. Why do you think they're so high? Indiana's Republican governor appointed the commission that set our utility rates and they've gone up 100 percent since 1976. That same governor came to Hammond campaigning for your not-republican Republican candidate."

They voted for him anyway. They wanted a change. I refused to believe that working people could vote for a Republican. For the first time in 26 years the city of Hammond had a Republican mayor. But Jim Balanoff was elected to the City Council.

GOP leaders at the local, state and national levels were ecstatic about their party's surprise victory over incumbent Mayor Edward Raskosky. But the voters aren't looking at party. They want new faces with new ideas. The Grassroots Alliance proved one thing. The machine can be beaten. But if the Democratic Party in this or any city thinks it's time to regroup and strengthen the old guard, they're making a mistake.

Joe E. Gutierrez is a grievance committeeman, Local 1010, United Steel Workers of America.

POLITICS



An angry man: Hammond, Ind., councilman Jim Balanoff.

The making of a city councilman

Chicago, Ind., alive and Hammond was surviving.

Hammond was going the way of every town USA. Shopping malls with their Disneyland appeal played Pied Piper, sucking the life out of the inner city. Times were tough for those of us who were working, devastating for those who weren't. And those who weren't were starting to organize.

Hammond has its share of unemployed, especially steelworkers. Pullman Standard closed. Standard Railway closed. Union halls became the meeting place for people wanting to do something, young and old. We were willing to work, but we needed direction. That

loss in his re-election bid for district director. A second defeat would be hard to take, not only for Balanoff but for everyone.

He knew that if he was going to run he had to win. Two days later Jim called the first of many meetings. The nucleus of his organization included: Cliff "Cowboy" Mezo; vice-president of Local 1010; Paul Litton, assistant griever, 1010; Mark Thomsen, griever, 1010; John Beckman and Dennis Terry, directors of the Hammond Community Center; Barbara Hendricks, vice-precinct committeewoman; Seymour Press, 70-year-old, far-from-retired activist in community affairs; Ben Darter, past-president of a steel local, our

trium. People do care, they're just tired of being taken for granted. Even the churches are taking a stand with the poor people of this country. They're starting to tell these corporations that they've got some responsibility to the towns that were built around their smoke stacks. Two or three generations of families work their entire lives in these coke plants and blast furnaces and now the companies want to go somewhere where labor is cheaper. And when they go, the town goes.

"Once we get elected I got a lot of ideas. The people of this district have a right to know how much money the city has, how much it spends and for what. I intend to give them that information. I'd like to see a more professional police force, maybe raise their schooling requirements. Of course their salaries would have to be raised. The fire department is undermanned. And every fire station should have a paramedic. We need more projects to keep kids busy and out of trouble. And the retirees, the forgotten people, they've got lots of needs that have to be addressed. All this takes money. We got to take a long hard look at our priorities as a city. And we've got to bring business back to the city. These aren't revolutionary ideas, they're just changes we need to make now. Hammond can change, but first we got to get elected!"

As the primary neared, there was a wave of excitement spurring everyone on to give a little more. Balanoff was walking from morning to night. He was endorsed by the Teachers Union; the firemen were on his side; the steelworkers from the different mills in the region joined the campaign. We organized a workers rally for Balanoff, hot dogs and beer, declaring, "Send a steelworker to the city council." It couldn't have been better. We were feeling pretty comfortable about the election. There were six candidates. The city administration was pushing one, but we still felt good.

A week after our big rally the guy we thought we had to beat had his affair at the same place we had ours, St. Casimer's on the north side. A couple of us who attended stopped feeling smug when we got there. We had used the smallest banquet room for our affair. This guy used them all, plus the gym. There had to be a thousand people. And they were eating good—pirogi, roast beef, chicken, lasagna. The band sounded like Jimmy Dorsey. Good thing we went—it brought us back to earth.

We planned a "blitz" Saturday before the election. More than 50 of us met at the Oil and Chemical Workers union hall and hit the district with pamphlets. There were 60-year-old women going door-to-door. We did 16 precincts in two and a half hours. Grassroots it was!

Election day we had workers at every precinct. Polls were open from 6:00 a.m. to 6:00 p.m. The turnout was unpredictable. The voters were in and out a couple at a time. There never was a big surge.

At 6:00 p.m. everyone met at the union hall. The results were coming in slow. It