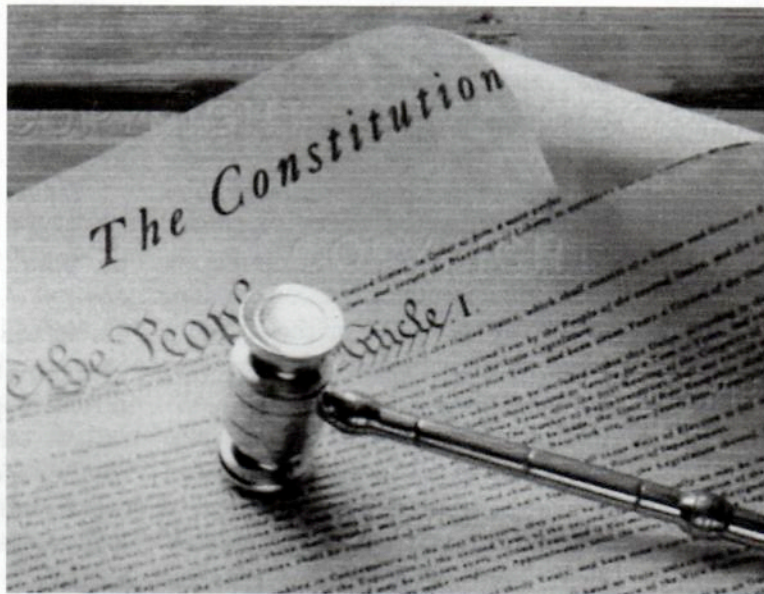


## THE CASE AGAINST JUDICIAL REVIEW

by David Cobb

### INTRODUCTION

“Judicial Review” is not a term familiar to most Americans, but it should be. The concept is a profoundly important operational underpinning of the United States legal system. Anyone working to make this country a more peaceful, just, ecologically sustainable, and democratic place should be eager to examine this basic doctrine.



In a nutshell, **judicial review is the power of a court to review the actions of executive or legislative bodies to determine whether the action is consistent with a statute, a treaty or the U.S. Constitution. In its most basic expression, it is the authority of the unelected Supreme Court to declare acts of elected members of Congress or the elected President unconstitutional.** (Of course, the current occupant of the White House was never elected, but rather installed in what can only be described as a judicial coup d'etat.)

It is important to recognize that there is absolutely no explicit reference to the concept of judicial review in the Constitution itself. Proponents of judicial review merely infer that power from Article III of the Constitution which states: “The judicial Power of the United States,

shall be vested in one Supreme Court... and shall extend to all Cases... arising under this Constitution...”

The inference that this flimsy language somehow grants our Supreme Court the power to define the parameters of the Constitution seems tenuous at best and may come close to contradicting the specific language of that document. Specifically, the Tenth Amendment

states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people.” Additionally, why is it that if the Court has the legitimate authority to declare acts of Congress unconstitutional, that power was used so sparingly in the early decades of the country’s history?

**Judicial review is an undemocratic extension of the undemocratic nature of the Constitution itself, a document protecting the rights of property over the rights of people. Given that the Constitution was drafted by a small number of people who met behind closed doors, the fact that a small number of unelected judges overrule citizen**

continued on page 2

**By What Authority** (ISSN: 524-1106) is published two times a year by the Program on Corporations, Law & Democracy. The title is English for *quo warranto*, a legal phrase that questions illegitimate exercise of privilege and power. We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. Today, a minority directing giant corporations and backed by police, courts, and the military, define our culture, govern our nation, and plunder the earth. **By What Authority** reflects an unabashed assertion of the right of the sovereign people to govern themselves.

POCLAD is a group of eleven people instigating democratic conversations and actions that contest the authority of corporations to govern. Our analysis evolves through historical and legal research, writing, public speaking, and working with organizations to develop new strategies that assert people's rights over property interests.

**BWA** is a tool for democracy proponents to rethink and reframe their work. To that end we encourage readers to engage us with comments, questions, and suggestions.

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## Judicial Review

(continued from page 1)

initiatives or laws passed by legislative bodies is not very surprising.

### WARNINGS OF JEFFERSON AND LINCOLN

The Court first exercised the power of judicial review in the 1803 case of *Marbury vs. Madison*. The decision caused an uproar, leading Thomas Jefferson to express his deep reservations about the principle. He wrote: "To consider judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and for privilege. But their power [is] the more dangerous, as they are in office for life, and not responsible to elective control." **Jefferson cautioned that judicial review would make the Constitution nothing but "a mere thing of wax in the hands of the Judiciary, which they may twist and shape into any form they please."**

It was not until 1856, in the repugnant case of *Dred Scott vs. Sanford*, that the Court invalidated a second federal law. In this instance, it was a provision of the Missouri Compromise that prohibited slavery from expanding into federal territories. In overturning this provision the Court proclaimed that people of African descent could never be citizens of this country under any circumstance, whether slaves or not. The Court specifically held that all persons of African descent were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect." As reprehensible as the Court's decision was, it was merely an affirmation of the tenor of Article IV, Section 2 of the original Constitution which held that escaped slaves were not

free people but had to be returned to their masters and, hence, were property.

This case caused Abraham Lincoln to speak out against judicial review during his first inaugural address. He said: "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

I recognize that many people, including friends and allies with whom I often agree, have a positive view of the United States Supreme Court. Notwithstanding the odious decision of *Dred Scott*, they point to the 1954 case of *Brown vs. Board of Education* and the subsequent civil rights cases as examples of the Court doing justice by overturning Jim Crow segregation laws.

But it is important to remember that the *Brown* decision actually overturned the prior Supreme Court decision of *Plessy vs. Ferguson*, which held the odious doctrine of "Separate but Equal" to be constitutionally acceptable. And the current Supreme Court used judicial review earlier this year in *Parents Involved in Community Schools vs. Seattle School District* to overturn school desegregation plans in Seattle and Louisville, basically gutting the venerable *Brown* decision.

Stated simply, **civil rights victories were not won by eloquent lawyers making refined legal arguments in the courts. They required the sustained education, agitation and perspiration of committed citizens willing to engage in protracted struggles against ruling elites.**

I appreciate that many people are understandably nervous about what might happen to constitutional protections in the chaotic worlds of practical politics and everyday life. But it is up to all of us, "We the People," to take responsibility for protecting our liberties. Guarding them is not, nor should it be, the exclusive preserve of judges.

## PROTECTING OUR OWN RIGHTS AND LIBERTIES

The Constitution belongs to us collectively as we act in political dialogue with one another – whether in an official or activist capacity or in the course of our day-to-day activity. A strong case can be made that an engaged and active citizenry will be more effective at protecting our civil liberties than the courts. This was certainly true in the “humanization” of the Constitution throughout our history. Social movements have brought about the addition of amendments to that document, including the first ten, the Bill of Rights, establishing protections absent in the original document.

The lack of citizen initiative was evident during the very real and serious threats to people’s liberties during the “communist scare” of the 1950s. When Senator Joseph McCarthy persecuted political dissidents many honorable Americans were lulled into inaction, believing that the judicial branch would step in and declare McCarthy’s actions unconstitutional.

In the course of the *Lochner* Era (roughly 1900 -1937) the Supreme Court used judicial review to strike down 170 state and federal labor laws attempting to make working conditions more fair and just. During this time the Supreme Court declared unconstitutional laws limiting the number of hours bakers could work (*Lochner vs. New York*, 1905), outlawing child labor in factories employing children under 14 (*Hammer vs. Dagenhart*, 1918), and mandating a minimum wage (*Adkins vs. Children’s Hospital*, 1923).

In *Freedom’s Law: The Moral Reading of the American Constitution* (1976), legal scholar Ronald Dworkin spells it out: “...On controversial and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, the people and their representatives simply have to accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly

“The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”

—Abraham Lincoln

special.” And this from an acknowledged defender of judicial review!

But let’s move beyond support or opposition to judicial review based on whether we support or oppose the outcome of particular decisions. **The sobering reality is that judicial review is politically illegitimate. The fundamental premise of this government is that all legitimate political power resides with the people.** By allowing a ridiculously small number of unelected, unaccountable, appointed-for-life judges to dictate what is constitutionally acceptable or unacceptable is to disenfranchise ordinary citizens and to utterly ignore the principles of self-governance and political equality.

We have come to treat the Constitution as something beyond our competence, something whose meaning should be decided by judges, assisted by a cadre of trained lawyers and academics. This servility to a lawyerly elite is a trou-

blesome and dangerous departure from the proud heritage of freedom-loving revolutionaries. America’s founding generation celebrated the central role of “the people” in supplying government with its energy and direction.

Indeed, we must never forget that there was and is a violence associated with the founding of this country – violence perpetrated against indigenous peoples of the continent, against human beings brought in chains as slaves, against women. But these offenses were not addressed by a group of judges issuing rulings. On the contrary, judicial opinions usually justified and legalized the injustice.

The most noble sentiment underlying the American Revolution is the belief that we are capable of governing ourselves – that we do not need Kings, Masters or Judges to decide our fate. According to Larry Kramer, author of *The People Themselves*, **American revolutionaries considered the notion of “Popular Sovereignty” more than an empty abstraction, more than a mythic philosophical justification for government. The idea of “the people” was more than a flip rhetorical gesture to be used on the campaign trail. Ordinary Americans once exercised active control over their Constitution.**

The constitutionality of governmental action was met with vigorous public debate and contention, the outcome of which might be greeted with celebratory feasts and bonfires or belligerent resistance. The Constitution remained, fundamentally, an act of popular will – the people’s charter, made by the people. Ordinary people were responsible for seeing that it was properly interpreted and implemented. People of earlier generations took that responsibility seriously.

So the question for us is whether “*We the People*” today are willing and able to do the same?

After all, properly understood, “*We the People*” are the government. So let’s be the government.

# Reflections on Atlanta and the United States Social Forum

by Kaitlin Sopoci-Belknap



This past June something profoundly important happened in Atlanta, and I was fortunate to have been a participant. Of course, I am referring to the first-ever United States Social Forum.

History will likely record the event as the most significant gathering of social and political change activists since the famous “Battle of Seattle,” when thousands of Americans gathered to voice their opposition to the undemocratic and unaccountable World Trade Organization.

The U.S. Social Forum brought together over 15,000 folks from every region of the country: activists, organizers, people of color, working people, poor people, and

indigenous people. We convened with a shared commitment to broaden and deepen the many social movements already growing in this country.

**The forum slogan summarized our shared vision: “Another World Is Possible – Another U.S. Is Necessary!”**

There were over 900 workshops during the five days we were together, and every day culminated in a provocative plenary discussion. There were also film festivals, information tents and tables, cultural performances, art exhibits, poetry slams, rallies, a soccer tournament, and an all-night cabaret.

I am especially proud that POCLAD provided leadership in

organizing a space for people to network and conspire, to reflect and design a strategy around the challenge of building a democracy movement in this country. (Check out [www.democracytrack.org](http://www.democracytrack.org) for details). Over forty organizations joined the initiative – groups working on independent politics, electoral reform, grassroots democracy, corporate power, the schools, the media, water rights and more. We set up the “Democracy Tent,” a 40 foot square space that became an integral part of U.S. Social Forum events. The tent housed those organizations involved in the Democracy Track, our tables and materials, as well as community space for small meetings and cultural events.

The need for convening in these ways could not be more pressing. Our world requires deep and systemic change in every aspect of our relationship to one another and the planet: how we supply and use energy; protect our many common resources, natural and social; produce and distribute goods and services. The imperialist, militarist policies of the U.S. government require radical evolutionary change toward relations with peoples and nations characterized by justice and respect. We need to redistribute power, wealth and environmental space to low-income and working class people, especially to people of color, who have historically been oppressed and victimized.

*“Another World Is Possible – Another U.S. Is Necessary!”* It has a ring to it.

# TOWARD A NEW LABOR THEORY

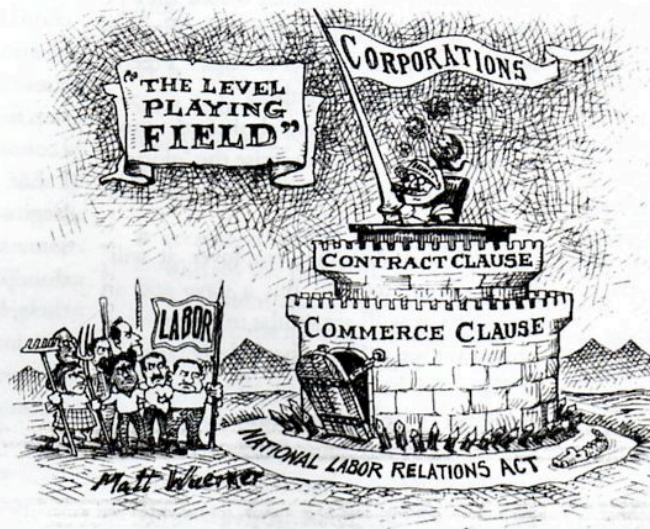
## ... FROM PART I- PRIVATE VS. PUBLIC ROUTES TO WORKER RIGHTS

In these United States, unions travel a road with employer corporations to negotiate contracts that apply *only* to their members in a particular bargaining unit. This is a *private* road and these contracts are *private* laws.

Private laws are written by the parties that negotiate them and sign them. These private contracts may cover wages, hours, health insurance, pensions, vacations, sick days, and working conditions.

In countries where labor parties are strong, unions travel primarily on a public road where issues relating to fundamental human rights are defined through a public legislative process in which every individual receives benefits. This is in sharp contrast to the USA's *private* corporate process in which only workers employed at a particular company where there is union representation get to negotiate benefits and wages. In the United States that private process is backed by constitutional doctrine that disempowers workers and privileges a corporate elite.

Unions in industrial countries that traveled primarily on public roads during the last century did so by building strong labor parties. These parties influenced the national debate, political process and lawmaking to a significant degree. Benefits U.S. citizens view as an employer's power to grant (or not) are the



*Editor's Note:* Former POCLAD principal, Peter Kellman, is primary author of a soon-to-be-published history of the struggle for workers' rights. Here are excerpts to pique your interest. Peter is a member of the National Writers Union/UAW and a lecturer at the University of Southern Maine and Heartwood College of Art in Kennebunk, Maine. He is president of the Southern Maine Labor Council and works for the Southern and Western Maine Labor Councils, AFL-CIO. His two previous books: *Building Unions: Past, Present and Future*, and *Divided We Fall: The Story of the Paperworkers' Union and the Future of Labor*, are both available from The Apex Press.

legal *rights* of European, Canadian and Australian employees. For example, it is *the law* in Spain and France that provides workers with 30 paid vacation days per year.

## THE WORKER IN THE U.S. CONSTITUTION

The Framers of the Constitution didn't use their political power to protect workers' rights. They used the Constitution to promote their own interests and protect their own property. In other words, they wrote *their class advantage* into the Constitution.

Delegates to the Constitutional Convention were mostly slave-owning planters, and northern men of property and commerce who profited from the slave system. The Framers needed the support of other sectors of society, such as farmers, shopkeepers and craftsmen to get their Constitution adopted. So they... wrote a preamble to the Constitution that begins "We the People," and gives as two of its goals the need to "establish

Justice" and "promote the general Welfare."

However, as Woodrow Wilson said, "The federal government was not by intention a democratic government." Quite the contrary, "it had meant to check the sweep and power of popular majorities." It had "in fact been originated and organized upon the initiative of and primarily in the interest of the mercantile and wealthy classes."

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# New Labor Theory

(continued from page 5)

## THE RALLYING CRY OF “FREE LABOR”

President Lincoln’s initial goal in the Civil War was not to end slavery but to maintain the Union. As the war advanced, it became clear to him that the union could not exist part slave and part free. “Free labor” became a rallying cry for the Union forces. Today, the term sounds like people working for nothing, but years ago it was a popular term for the opposite of slavery. ...to the working classes “free labor” meant to be full citizens of the Republic – educated, organized and participating in every aspect of governance.

As recently as the 1930s, lawyers referred to labor law as “master-servant” law. “Master-servant” is a concept of English common law adopted by U.S. courts during the early days of the Republic because slavery and servitude defined many employment relationships.

The phrase, “man-servant,” still defines employment relationships today. For example, even if you are lucky enough to belong to a union, you are *guilty* until proven innocent at work.<sup>1</sup> If the boss in a union shop fires a worker, the union can file a grievance and eventually the worker will get her job back if in her firing the boss violated a contract.<sup>2</sup>

Without a union, the worker is presumed guilty and without recourse, unless protected by a state or federal anti-discrimination law. **Guilty until proven innocent or guilty with no recourse, the relationship is still master over servant. ...Yesterday’s slave masters are today’s corporate managers because at work they deny their employees freedom of speech, assembly and due process.** The names changed but the relationship remains the same.

## WORKERS CLAIM CONSTITUTIONAL RIGHTS – THE 13TH AMENDMENT

After the Civil War, workers traveling down the public road claimed their rights under the Thirteenth Amendment, a “glorious labor amendment,” enacted in 1865.<sup>3</sup> ...The Thirteenth Amendment states: “Neither slavery nor involuntary servitude... shall exist within the United States,” and

“Congress shall have the power to enforce by appropriate legislation, the provisions of this article.”

The purpose of the Thirteenth Amendment, wrote the U.S. Supreme Court in *Bailey vs. Alabama* (1911), was not simply to eliminate slavery, but “to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit.”<sup>4</sup> Being free implied that people are free to do something. But what would they be free to do? **Employers declared: “Free to quit!” Workers thundered back: “Free to be full citizens in a Republic!”**

After slavery was abolished, most workers did not get to exercise the “glorious labor amendment.” Instead they were classified “employee at will.”

Unlike a slave, an “employee at will” has the right to quit. But a slave and an “employee at will” are similar in a number of important ways. Under both designations a worker can be fired (in the case of an employee) or sold (in the case of a slave) for any reason at any time. While at work, an employee does not have First Amendment rights of free speech and assembly or Fourteenth Amendment rights of due process and equal protection. A slave never has these rights.

Unless the worker has a union contract, the boss makes all the rules and can unilaterally change them at any time.

## ... FROM PART II – THREE LABOR THEORIES

*Editor’s Note: Author Kellman elaborates on theories which labor in the United States applied in its formative years.*

These theories are based on the assumption that working people have constitutional rights. Labor’s strategies and tactics have revolved around how to make those rights real.

- In “**Worker as Citizen**,” promoted by the Knights of Labor in the 1880s, unions rely on the legislative process to promote labor’s cause.
- In “**Voluntarism**,” promoted by the American Federation of Labor, founded in 1886, private contracts with employers dominate the labor scene.

- “**Syndicalists**” or the Industrial Workers of the World (I.W.W.), founded in 1905, discard both the legislative and the private contractual approach. They supported the organization of “one big union” that will call one big strike to cripple the capitalist system and replace it with a decentralized, worker-run democracy.

The Knights envisioned a society in which the economy was composed of privately created producer and consumer cooperatives, along with banking, communication and transportation as public industries run by the state. The Socialists went a step further, calling for the state to plan the economy. The American Federation of Labor assumes a capitalist society run by large corporations where unions represent some workers in an industrial-labor relations process. The Wobblies said no to all of these, holding that workers need to pull off a major strike that brings capitalism’s downfall and replaces it with a Cooperative Commonwealth.

## ...FROM PART III – MAKING THE CONSTITUTION WORK

### U.S. SUPREME COURT

**Although not granted the authority under the Constitution, the U.S. Supreme Court took it upon itself to interpret the Constitution. Congress didn’t stand in the way.** *Black Worker*, a labor journal published by the Brotherhood of Sleeping Car Porters, in reference to a case in which the Supreme Court ruled an act of Congress unconstitutional, stated:

“This power in very truth was never delegated to the Supreme Court by the Constitution. It was usurped. It is a ridiculous procedure, to say the least, that a group of nine old tottering men should be permitted to nullify the will of the people where expressed in Congressional acts that are unpopular with the philosophy of erstwhile corporation lawyers...”<sup>5</sup>

Most of the time the Court – an unelected body of lawyers – rules in favor of a small minority with a lot of power and

wealth. In the past that minority was men of commerce and slave masters. Today, it's corporate owners and managers.

### LABOR ENFORCES THE CONSTITUTION: THE NORRIS-LAGUARDIA ACT

The reason the American Federation of Labor was clear about the need to violate "manifestly unjust decisions in the courts" was that "judges in both state and federal courts issued more than 1800 injunctions against strikes between 1880 and 1931."<sup>6</sup>

...finally, after much direct action and political activity the Norris-LaGuardia Act was passed by a Republican Senate, a Democratic House and signed by Republican President Hoover in 1932. ...it took the dreaded labor injunction out of the hands of federal judges, except in cases involving property destruction. ...The Act provided a framework for real labor rights in the United States, declaring:

"...it is necessary that [the worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor..."

The next hoop was the Supreme Court. ...It took general strikes, sit-downs strikes, mass picketing and political action to force a majority of the Court to support Congress on labor law. The justices knew that if they didn't concede some rights to labor, the ruling class faced an awakening labor movement and possible revolution. So in 1937 the Supreme Court reversed its long-standing bias against laws that protected the working class and found the National Labor Relations Act (NLRA)<sup>7</sup> of 1935 constitutional.<sup>8</sup> The action of the Court was characterized at the time as "the switch in time that saved nine."

### ...FROM PART IV – POTHOLES IN THE PUBLIC ROAD

In 1938 the Supreme Court ruled in *NLRB vs. Mackay Radio* that permanent

replacement of striking workers was legal.<sup>8</sup> Thus, the right to strike reverted to the right to quit.

In 1941, the Court decreed in *NLRB vs. Virginia Electric* that the corporate voice could roar its disapproval by holding one-on-one and captive audience meetings with workers to intimidate them into voting against the union in union representation elections, thus ending the right of workers to freely choose a union.<sup>10</sup>

Congress passed the Taft-Hartley Act in 1947. Union people called it the "Slave Labor" Act. It gutted the Norris-LaGuardia and National Labor Relations Acts by:

- creating the Taft-Hartley injunction, whereby the President can set in motion injunctions against strikes that allegedly "imperil the national health or safety;"
- allowing state legislatures to ban the union shop;
- outlawing the closed shop;
- prohibiting secondary boycotts;
- taking away a union's control over negotiated pension funds and health and welfare funds;
- taking away the right of foremen to organize.

### ...FROM PART V – FIXING THE PUBLIC ROAD

Let's start fixing the road by once again reading the working class into the Constitution and driving corporations out. **Labor needs to bring to the fore the notion of collective rights by acting in solidarity. The road is a long one. Two pieces of road construction equipment must be brought in by the work crew: freedom of association and collective rights and activities** (the right to boycott, to strike, to act in solidarity, and engage political action).

The National Labor Relations Act allows workers to strike and engage in collective work stoppages. But the Supreme Court decided that the company has the right to permanently replace strikers as soon as they walk out the door. Under these circumstances, the right to strike is little more than the right to risk or sacrifice your job.

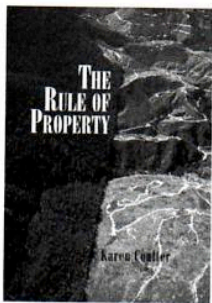
What is really going on here is that the NLRB makes sure the company has the

ability to maintain production *as the company defines production*, the familiar principle being: what is good for the corporate giant is good for America. But what about workers? Are workers' needs and rights not part of the national interest? ...**Unless workers are free to exercise the rights to strike and boycott, there is no right to organize and the promise of industrial and political democracy can never be fulfilled.**

We can *exercise political power and govern*. It's time for labor to stop spending its precious resources building a private road that a minority of the working classes get to travel and start building a public road that is open to *everyone*. With this perspective, propelled by our "*glorious labor amendment*" and fortified by *worker solidarity*, organized labor will once again find itself on the cutting edge of a mass people's movement.

### Endnotes

1. Bureau of Labor Statistics. Union Members in 2003. Released, January 21, 2004.
2. The principle of "fire now, grieve later" was established in *3 LA 799 - Ford Motor Co, and UAW Local 600 (CIO)*. Opinion No. A-116, Case No. 364, June 30, 1944.
3. Forbath, William E., *Law and the Shaping of the American Labor Movement*, Cambridge, MA: Harvard University Press, 1991, p. 137.
4. *Bailey vs. Alabama*, 219 U.S. 219, 241 (1911).
5. *Black Worker*, May 20, 1935, p. 4.
6. Leon Fink, "Labor, Liberty and the Law: Trade Unionism and the Problem of the American Constitutional Order," *In Search of the Working Class: Essays in American Labor History and Political Culture*, Urbana: University of Illinois Press (1994), p. 150.
7. The Act encouraged union organizing as a way to cut down on strikes, increase wages and the purchasing power of workers, and to "grow" the economy out of the Depression.
8. *N.L.R.B. vs. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The National Labor Relations Board (NLRB) was the implementing body of the NLRA.
9. *National Labor Relations Board vs. Mackay Radio* - 304 U.S. 333 (1938).
10. *National Labor Relations Board vs. Virginia Electric & Power Co.* - 314 U.S. 469 (1941).



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