# “Free” Labor and Unequal Freedom of Expression

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## Can Workers Speak Freely? Can Capital?

The freedom of “free” labor is, as Marx noted, double. Yes, freedom from constraints on mobility; liberty to sell labor power to any buyer willing to make a purchase. But also, freedom to starve; sundered tethers to any means of production. The bourgeois revolutions that fought to harness the state to the legitimation, promotion, and enforcement of the capital-“free” labor relation often featured rights-based rhetorics of personal liberties such as the right to freedom of speech. (Certain inalienable rights! Les droits de l’homme!) The language of individual liberty obscured – continues to obscure – the language of class. Looking through the lens of class reveals that, in lived practice, purportedly neutral liberties mean something very different for those on opposite sides of the capitalist class relation.

In the twenty-first century United States, the “speech” that is granted Constitutional protection from constraint is identified by the state as an activity of capital, enacted through market transactions. In market transactions, sellers relinquish ownership rights over what is sold; buyers gain them. One outcome is that capital’s command of resources extends into our highly commodified communications system, granting capital an outsize share of voice. Conversely, under a “free” labor regime, workers sell themselves piecemeal, by the hour, by the day. A life cannot be segmented into component parts so neatly. We find that when the labor power is sold, free speech rights enter into the package – labor cedes them and capital gains them.

## A Capitalist Theory of Free Speech

Speech has often but not always been so firmly associated with the activities of capital in the U.S. Furthermore, capital’s campaign to claim speech rights expands beyond the terrain of the class relation, narrowly construed. Jack Balkin, in his 2004 article, “Digital Speech and Democratic Culture,” argued that capital’s self-serving conception of free speech became dominant during the 1990s and early 2000s and radiated from developments in the rapidly changing communications industry. At the turn of the twenty-first century, U.S. telecommunications companies were aggressively pursuing an argument – with a great deal of success in the courts – for a regime that would secure them two powerful accelerants for their capital accumulation: (1) maximal intellectual property rights constraining others’ ability to appropriate and build on the content they produce and distribute and, (2) minimal regulation over the use of their networks. “Implicit in these arguments,” Balkin wrote “is a controversial capitalist theory of free speech. The theory is controversial not because it accepts capitalism as a basic economic ordering principle, but because it subordinates freedom of expression to the protection and defense of capital accumulation in the information economy” (Balkin 2004, p.20). Under this theory, the ruling

interpretation of the First Amendment "ties the right to speak ever more closely to ownership of capital" (Balkin 2004, p.21).

Balkin focused his analysis particularly on information economy businesses, those whose business models rely on the production and/or distribution of cultural/informational content. In the years since he wrote, the capitalist theory of free speech has remained ascendant among the justices of U.S. Supreme Court and has been extended even farther. In 21st century jurisprudence, speech is closely identified with the ownership of property and market exchange. As a highly commodified communications system becomes the venue for more and more communications, the marketplace of ideas metaphor becomes less metaphorical, and even speech that has not taken on the formal qualities of a commodity ends up being treated as analogous to a commodity (Sherman 2019).

In defining the currently-dominant theory of free speech as a "capitalist" theory of free speech, Balkin emphasizes the elements of the current capitalist system that have to do with private ownership of property, relationships of power, and the processes of accumulation. The capitalist theory of free speech also has consequential implications for the capitalist class process – the performance of surplus labor by workers employed for wages and the appropriation of surplus value by their employers. The current free speech regime certainly affords different degrees of freedom to owners vs. non-owners of intellectual property and communications networks, as Balkin emphasizes (Balkin 2004). It also affords very different speech rights to those who sell their labor power than it does to those who purchase labor power. Employers have extraordinarily expansive speech rights. Employees have excruciatingly constrained speech rights. The wage labor system feeds into a system of unequal speech rights and, reciprocally, the system of unequal speech rights feeds into the maintenance of the wage labor system.

The capitalist theory of free speech emerged from the largely successful class war from above waged over the last several decades. For much of the twentieth century, before the ascendance of the currently dominant interpretation, the dominant theory of free speech was that the purpose of free speech is to foster full debate and lead to successful participatory, democratic governance. Variations of this view were articulated by scholars and jurists like Oliver Wendell Holmes Jr., Louis Brandeis, Zechariah Chafee, John Dewey, and Alexander Meiklejohn. There was some evolution in the details of the argument. Progressives of the 1910s, for example, tended to believe in the possibility of a unitary public good and reasoned that after robust public debate resulted in a decided policy outcome, a high degree of enforced compliance with that outcome was appropriate.[1] Beginning in the interwar period and especially in the post-World War II period, fewer people retained the progressive faith in a unitary public good and many looked instead for a reasonable balance of power amongst contending groups. Despite their differences, the variants of this basic theory of free speech all accept the premise that the legitimacy of the government depends on the openness of political debate. Repression of dissent, in this view, delegitimizes the policies chosen and the political system as a whole (Weinrib 2016).

[1] Accordingly, progressives were frustrated when the courts undermined legislative efforts to improve labor conditions – if the democratic process generated minimum wage or maximum hours or workplace safety laws, employers should be bound by those laws. The premise that political outcomes arrived at through acceptably democratic means deserved enforced compliance also meant that during World War I, not only was concerted resistance to the war effort a minority activity, but even robust defense of the right to criticize the war effort was a minority activity, even among progressives. We may, of course, question their judgment that the process of legitimating the war was legitimately democratic.

In conjunction with the enabler-of-democracy theory of free speech, twentieth century First Amendment jurisprudence established a hierarchy of speech categories, some of which merit greater protection from restraint than others. The categories are ranked by the perceived public importance of the speech. Speech that bears on political issues – that is, speech that contributes to the project of democratic self-government – traditionally is held in highest regard by the courts (Fraleigh and Truman 1997, p.21). Whether or not workplaces were included in this vision was a matter of intense struggle. In the early years of its existence, in the 1920s and 1930s, the American Civil Liberties Union aligned with labor radicals in setting a primary, immediate goal of establishing expansive protection for strikes, pickets, and boycotts – activities often met with extreme levels of violence from employers' hired goons. The National Labor Relations Act, subsequent implementation decisions by the National Labor Relations Board, and even some decisions made by the courts, including the Supreme Court, did, in fact, widen the space within which workers could speak in economically consequential ways (Weinrib 2016). Currently, however, workers are definitively *not* sheltered under the free speech umbrella.

## Speaking About the Governance of the Workplace

Workplaces are subject to, as Elizabeth Anderson powerfully articulates it, private government. Government, she explains, is not just an activity of the state. Any time decisions are made that are binding on subjects, we have government. By this definition, workplaces are most definitely a site of government. The distinction between public government and private government, in her formulation, hinges on whether those subject to the government are included in the decision-making process that yields outcomes they are bound to follow. Whether the governing authority is a state or non-state actor is a different question. By Anderson's definition, despotic rule at any site, whether state or non-state, is private government. Struggles for political democracy are an effort to make the government of the nation a public thing. A standard-issue capitalist workplace is thus a site of private government, not because the governing authority is not the state, but because the governance is despotic. Those governed – workers – are *not* included substantively in the decision-making process but *are* bound by its outcomes (Anderson 2017).

The private government authority of employers is sustained in part through the ideological stance that employers do not in fact govern. Many deny that employers really have substantive authority over workers by pointing to the core freedom that "free" labor does have – the right of exit. Anderson finds the denial absurd – "This is like saying that Mussolini was not a dictator, because Italians could emigrate" – but it is nonetheless influential and consequential. Skepticism about state power and resistance to such power are too rarely extended to employers' exercises of power (Anderson 2017, p.55). Whether or not it is recognized as such, a typical workplace is despotic; some workplace dictators are benevolent and some are overtly abusive, but in either case workers do not have authority to participate in the decision-making that governs the workplace. Using the language that John R. Commons summarized in his introductory essay "Institutional Economics," we can say economic agents may exercise "forbearance," meaning that they choose not to exercise all the powers afforded to them. If an employer is so inclined, they *may* invite employee input into decisions, and they *may* forbear to impose consequences for troublesome employee dissent. But that forbearance is at the employer's discretion. The employer may just as readily refuse employee input and suppress dissent "because collective action will permit him and protect him" (Commons 2013 [1931], p.684).

In the realm of speech, U.S. law provides protection from constraints on freedom only when it is the state that imposes the constraint. This is known as the "state action doctrine." The wording of the First Amendment does not say that all people may speak freely in all circumstances; it says that *Congress* may not pass laws restricting speech, press, assembly, or exercise of religion. Indeed, in the early decades of the nation's history, the First Amendment's specification of Congress was commonly understood to mean that speech-restrictive laws were only disallowed at the federal level; individual states could and did pass speech-restrictive legislation. In practice, Congress passed speech-restrictive laws, too, with the Sedition Act of 1798, but the Bill of Rights, ratified in 1791, at least offered grounds on which to challenge a law passed by Congress, whereas the courts explicitly endorsed state-level legislation. Over the course of the twentieth century, the state action doctrine widened to implicate state governments. Current legal thinking applies the same First Amendment constraints to state governments as to the federal government. However, the First Amendment does not place limits on non-state actors who restrain others' speech (Fraleigh and Truman 1997, pp.71-74, 105-106, Weinrib 2016, p.4). Employers regularly restrain workers' speech. Outside the workplace, speech about (municipal, state, or federal) government generally carries the highest level of First Amendment protection (Fraleigh and Truman 1997, p.21). Within the workplace, speech about (private) government is probably the most vulnerable. Worker speech advocating for greater worker voice in governance – i.e. union organizing in not-yet-organized workplaces – is especially aggressively suppressed.

The National Labor Relations Act, first passed in 1935, purports to protect workers' right to organize. In its first dozen years, in fact, it protected unionization efforts so effectively that between 1935 and 1947 private sector unionization surged by a factor of more than four, from 3.8 million unionized workers to 14.6 million, reaching 31.8% of the non-farm labor force (Story 1995, p.358 fn2). Since then, changes to the text of the law (beginning with the Taft-Hartley Act in 1947), changes in NLRB implementation practices, and changes in judicial interpretation of contested cases have routinized and protected massive employer resistance to unionization (Story 1995). Under the NLRA, there is a standardized, bureaucratized process for establishing a union where there has not been one before: the first step toward establishing a union that will be recognized by the NLRB (and – supposedly, according to the law – by the employer) as the representative and bargaining agent for the workers is a "card drive:" at least 30% of current workers must sign cards indicating that they are interested in holding an NLRB-supervised secret-ballot election for union representation. If enough cards are signed, then the union seeking to become the workers' representative for workers can file a petition to hold a representation election. If the parties come to an agreement about the election timing and procedure, there will then be an election in which workers vote for or against the union proposing to represent them. If a simple majority vote for the union, the employer is legally compelled to recognize the union and negotiate a union contract, though they often resist. As John-Paul Ferguson observes, "The organizing drive can break down at any of the stages…: the card drive can sputter out, the organizers can give up and withdraw their petitions before the election, or the vote could go against the union" (Ferguson 2016, pp.58-60). An employer determined to maintain their expansive governance authority will obstruct union organizers' efforts at every stage.

In the early years of NLRA implementation, employers were held to a strict standard of neutrality during unionization efforts; employers who campaigned against unionization or retaliated against union organizers could face penalties severe enough that many were dissuaded from attempting it. Speech was, for that moment, at least some of the time, recognized by some legislators, administrators, and

jurists as an activity of people (not a disposition of property), recognized as an activity that could be performed in collectives (not only individualistically), and recognized as a freedom vulnerable to illegitimate assault from non-state actors (perhaps the most tenuous of the recognitions). Briefly, the state actively restrained capital and made protected space for union organizing. This was a radical departure from the earlier stance of the state toward the capital-labor relation and a short-lived arrangement. It resulted from twenty-plus years of pressure exerted by labor partisans on the apparatus of state power (Weinrib 2016; Story 1995).

Conventional histories of the evolution of civil liberties in the U.S. explain the twentieth century's increased protection for dissent as a reaction to excesses of repression during World War I. In the 1910s, however, "the true impetus for rethinking the American civil liberties tradition was not total war, but class war." Industrialization produced concentrated fortunes. Early attempts to react to rising economic inequality ran into a judiciary that seemed to prefer property to people. Labor partisans, including future founders of the American Civil Liberties Union, saw the Constitution and the courts as obstacles, not tools, for gaining their ends (Weinrib 2016, pp.15-16). The state actively allied with capital in the class struggle through speech restrictions that "targeted soapbox orators and antiestablishment agitators" and through restrictions on strikes, pickets, and boycotts. Suppression of strikes, pickets, and boycotts could be legislative, via ordinance, or judicial, via injunction. "Organized labor was … deeply committed to a vision of free speech more expansive than a right to political advocacy." Soapbox oration alone – though certainly desirable – would not be enough to meet labor's needs. They wanted the ability to form unions and exercise economic power (Weinrib 2016, pp.31-32).

The court system was so resolutely committed to the interests of capital that labor radicals and even those progressives who were as skeptical of unions as they were of capital long thought any achievements would have to be won *against* the courts by weakening them, not *through* the courts by winning cases. In the 1910s, "Mobilization around judicial enforcement of a labor-friendly First Amendment played a minimal part." The *Lochner* decision showed the Supreme Court's willingness to interpret the equal protection guarantees of the Fourteenth Amendment as constraining state legislation that interfered with federally guaranteed rights – in this case the right of contract. (The *Lochner* decision invalidated a maximum-hours law meant to protect workers on the grounds that workers should be "free" to sign a contract obligating them to work themselves to the point of collapse.) The right of free speech could be pursued following the same legal logic, but there was little initial enthusiasm for attempting that strategy. The courts' record on First Amendment rulings clearly favored capital. Furthermore, a strategy built on assertions of individual rights could threaten unions' ability to pursue actions that required compliance of all members. Courts regularly issued injunctions against unions' efforts to block strikebreakers or pursue boycotts and the available language of personal liberties would speak more obviously to the strikebreakers' side than the strikers' (Weinrib 2016, pp.36-38).[2]

[2] "Although their legal reasoning evolved over the early twentieth century, most judges continued to invoke a theory of individual rights based on the sanctity of private property. Courts insisted that such norms were embedded in the Constitution – and labor consequently rejected court-centered constitutionalism, if not the entire judicial enterprise. Put simply, labor leaders were disinclined to pursue a judicial strategy for enforcing union activity as a species of free speech because the judiciary invariably undercut labor's most significant gains. Far better, they thought, to strip the courts of the authority to curtail their activity in the first place" (Weinrib 2016, p.40).

Into the 1920s, whenever labor and labor's supporters pursued court cases making claims for workers' civil liberties, they thought of their exercise as a public relations strategy: they assumed they would lose and that the decisions would expose the grotesque hypocrisy of the legal establishment. They could then publicize the case in pamphlets and sympathetic press outlets and use the outrage of the offended share of the public to rouse more allies to activism. The courts are not immune to public pressure, however, and the labor movement did not have an inexhaustible supply of wronged parties eager to martyr themselves as losing litigants. The ACLU experimented with taking more plausibly winnable cases and arguing them on grounds more plausibly persuasive to judges and, sometimes to the surprise of those involved, they started winning a few. Some labor leaders and allies started to think the courts could be used constructively while others still thought the courts would remain harmful to labor's interests on balance (Weinrib 2016).

By the middle of the 1930s, Franklin Delano Roosevelt's New Deal coalition was in power in the legislative and executive branches while the previous generation's lifetime judicial appointments held on in the courts. As the courts impeded new economic experimentation prompted by the crisis of the Great Depression, the Progressive Era goal of weakening the courts to get them out of the way of legislated social progress resonated more than ever for much of the Left, and, across the political spectrum, even proponents of judicial independence started to worry about a loss of legitimacy. A branch of government that keeps thwarting the apparent popular will is bound to face serious questions. And so, the courts swayed. Generational turnover helped to introduce new perspectives into lower courts and even the old guard on the Supreme Court were moved. Decisions issued in the 1930s began to distinguish property rights from personal rights. In a sudden reversal, New Deal legislation began to be ruled constitutional even when imposing contract constraints that would have been disallowed under the *Lochner* standard. At the same time, personal liberties at greater distance from property and contract were granted greater Constitutional protection. Workers in the broad swath of industries prioritized in the New Deal, which were generally those with workforces that were primarily male and at least at the periphery of the umbrella of whiteness, had new protections for their speech. The newly sympathetic courts would not reflexively silence them and might even rule in their favor. In many labor relations situations, the new National Labor Relations Board would be involved before and sometimes to the exclusion of the courts, and they were, in the early years, even more friendly to white labor than the courts were (Weinrib 2016).

In important ways, the New Deal changed the boundaries and content of citizenship. An important portion of the constituency for Roosevelt's ruling coalition was made up of those whose parents immigrated from southern and eastern Europe at the turn of the twentieth century, the period when the foreign-born percentage of the U.S. population peaked, before practical obstacles to mobility during World War I and then legislated obstacles to immigration in the 1920s slowed the rate of new arrivals. The industrial workforce of the 1930s included millions of first generation, native-English-speaking, born-in-the-U.S. citizens whose parents had navigated life in the U.S. with English-language fluency somewhere on the spectrum from accented to non-existent, and whose whiteness was dubious at most (Cohen 1990). The New Deal in effect issued "white cards" to this group. (Here I am interested in the construction of greater liberty to speak in the workplace and about the workplace, though the story of issuing white cards to the working-class children of European immigrants also includes other important dimensions such as residential geography and homeownership.) While somewhat lessening the scope of capital's domination of included workers, the New Deal also widened the political power gaps between

included and excluded workers. By elevating a wide swath of white workers to a higher citizenship status while excluding others, the New Deal was in many ways hostile to the interests of African American workers. Sadie Alexander bitterly commented, for example, that the National Recovery Act "might well bear the nomenclature Negro Reduction Act" (quoted in Banks 2008).

Even for the included workers, the successes of labor's civil liberties strategy were partial and temporary. Employers quickly organized themselves to reverse any erosion of their customary prerogatives. Importantly, they sought protection for their desired interference in unionization efforts. At the core of their strategy was an appropriation of the First Amendment rights language that labor partisans had used to secure the rights of strike, picket, and boycott. Noticing that the language of civil liberties resonated with much of the public and that labor had deployed a court-based strategy of claiming protected rights status for activities that allowed them to exercise a degree of economic power, employers appropriated those tools for their own ends (Weinrib 2016). They pursued a claim that enforced neutrality violated employers' First Amendment free speech rights. They made quick headway with this strategy; the 1947 Taft-Hartley amendment to the NLRA eliminated the requirement of employer neutrality in union organizing drives and explicitly granted employers protection for almost all of what they wanted to say on the topic; matters have tilted ever farther in employers favor since (Weinrib 2016, Story 1995). Audre Lorde famously warned that the master's house cannot be dismantled with the master's tools. The history of U.S. civil liberties struggles highlights a complementary concern: whatever tools are constructed for demolition of the master's house may be appropriated by the master before the demo job is done. Employers have become adept at wielding the First Amendment as a tool to maintain minority rule.

Under the current free speech regime, employers' speech rights are more expansive than ever. The now-ascendant capitalist theory of free speech treats speech as a right to control over property. Employers use their property rights to amplify their own speech and suppress opposing speech. Spending money for the services of communications professionals and spending money for access to communications networks are granted First Amendment protections. Employers with plenty of property therefore command enormous communicative resources. Through market transactions, employers can purchase copious amounts of anti-union speech and purchase access to communications networks (or deploy internal communications networks they already own) to ensure that employees, government representatives, and the general public see and hear plenty of it. Indeed, the U.S. speech-for-hire industry features an extensive sector devoted to anti-union speech. Union-avoidance specialists carved out a market niche within the consultancy industry, estimated in the 1980s to already be providing $100 million worth of anti-union speech to employers for their deployment against union organizers and union-sympathetic workers (Story 1995, p.359). Such providers have thrived and expanded in the decades since. They work to suppress union organizing, and also to prevent state intervention that might facilitate union organizing. Ruth Milkman writes, "In short, the rules defining labor relations under the NLRA, although nominally still in force, have been captured by the union-avoidance industry and by the employers who rely on it" (Milkman 2015). Case in point: Albert Beeson, in the hearing leading to his confirmation as a member of the NLRB, said that he had "free speeched" employees into voting against unionization and described himself as a "union buster" (Morris 2017, p.872).

In addition to their ability to purchase the professional communications of union avoidance firms and such, employers also have property rights in the time of their employees. Combining their property rights in communicative resources and their property rights in employees' time, they may hold captive

audience meetings in which they fully air their arguments against the union. Employees can be required to attend group or individual meetings with managers and other representatives on the employers' interests. They can be penalized for skipping, leaving early, speaking or asking "disruptive" questions (Morris 2017, p.870). When the NLRA was first passed, captive audience meetings were disallowed, but employers successfully argued that their speech rights were being trampled and so the standard shifted to one that allows captive audience meetings as long as the messages are persuasive rather than coercive. There are now decades of precedent for making fine distinctions between persuasive and coercive statements, between predictions of economic hardships resulting from unionization and threats of economic retaliation for unionization; all this interpretive hair-splitting is based on the linguistic content of the message and blind to the context of intrinsically unequal power within which the message is delivered. (Morris 2017, Story 1995). A comparison of industries covered by the NLRA and those covered by the Railway Labor Act (RLA) demonstrates the falseness of the distinctions between persuasion and coercion that have been drawn by NLRB adjudicators and the courts. The National Mediation Board, which has jurisdiction over transportation industries covered by the RLA (which extends beyond trains to govern airlines as well), considers captive audience meetings to be inherently coercive and disallows them. Union density is roughly ten times higher in the railroad and airline industries than in other industries. It seems unlikely that this correlation is purely coincidental (Morris 2017, p.873).

Perversely, the theory that the purpose of free speech is to grant listeners access to all relevant viewpoints and information before they settle on their choice of political action "is the only [argument] that has found any significant favor with courts and commentators" as a justification for employers' unlimited access to workers as audiences for their anti-union speech (Story 1995, p.382). It would be a disservice to workers who will be voting in a representation election, this argument goes, to enforce employer silence and thus keep the employees ignorant of their employers' perspective. This right to be informed of the employers' viewpoint is so powerful that it cannot be waived; workers are not deemed able to determine for themselves when they have heard enough to know as much as they need to know. If an informed electorate is desirable, surely information as relevant as the employer's full financial statement should also be available to workers, yet those harnessing the informed electorate argument as justification for captive audience meetings have not extended the argument that way. Nor has the informed electorate argument been extended to require that workers be exposed to pro-union perspectives (Story 1995, Morris 2017).

When free speech is treated as a property right, any requirement that speech-enabling property be made available to speakers other than the owner can be interpreted as coerced speech. When this logic is applied to workers, we get the *Janus* decision, holding that requiring Janus to pay a union fee was coerced speech, violating his First Amendment rights. When this logic is applied to private property owners, we get the June 2021 *Cedar Point Nursery* decision, holding that a long-standing California law guaranteeing union organizers the right to speak to farmworkers at the farms where they work constitutes a *per se* physical taking of property without compensation. The employers argued their case and the Supreme Court decided the case on Fifth and Fourteenth Amendment grounds rather than First Amendment grounds. Neither the majority opinion nor the dissent addressed the First Amendment speech and assembly rights of workers. *Cedar Point* is a continuation of securely established NLRB and court decisions that grant employers authority to bar pro-unions speakers and speech from the workplace. Operating under the protection of the state's acceptance of their preferred capitalist theory

of free speech, employers give themselves ample opportunity to air dire warnings to captive audiences of workers about the awful consequences of unionization while blocking pro-union speakers from access to venues and audiences where they might be able to deliver their message.

For workers, 21st century free speech rights in a typical workplace at best meet the 18th- and 19th-century "absence of prior restraint" standard. In this interpretation of the meaning of free speech, speech is considered free if there is no restraint preventing the speech from happening in the first place. Consequences that befall the speaker afterward are not considered an infringement (Fraleigh and Truman 1997, pp.49-50). An absence of prior restraint itself is not guaranteed – speech might even be censored pre-emptively, especially when communication is not mouth-through-air-to-ear but is instead mediated by a company-controlled communication platform. When workers *do* evade prior restraint to criticize the governance of their workplace, whether specifically on the topic of unionization or any other area of management activity, they are vulnerable to retaliation.

Accounts of such retaliation are legion.[3] Bias is baked into employers' meting out of consequences. Given what we know about the racialized readings of social behavior that we are steeped in, there is every reason to expect a racialized skew in what kinds of behaviors are viewed as "disruptive" in a captive audience member, thus leading to job loss. (Story 1995, p.355 fn353 recaps the precedent-setting 1968 case Lytton Sys., Inc., in which a black employee's dismissal as a result of a question asked in a captive audience meeting was upheld by the NLRB – he had asked if he could return to his assigned work duties since he had already heard the presentation at an earlier meeting and his attendance left his post unstaffed.) John-Paul Ferguson finds evidence that employers faced with inter-racial union organizing efforts become especially aggressive, even lawless in their efforts to suppress the effort. In an analysis of data from 1999 to 2008, he showed that when a racially diverse workplace gets as far as holding a union election, they are slightly more likely to vote for a union than are a more homogenous population of workers. However, organizing efforts in racially diverse workplaces are less likely to get to the stage of holding an election, seemingly because of the extreme anti-union aggression of employers earlier in the process. Such extreme aggression is suggested by the large number of unfair labor practices complaints registered with the NLRB arising from employer suppression of interracial organizing campaigns– proportionally more than complaints arising in less diverse workplaces (Ferguson 2016).

Knowing the severity of the potential consequences, workers often, sensibly, restrain themselves. News reports covering workplace issues often identify workers by first name only or quote them anonymously because workers are not really free to speak under their own names. Capital, of course, is freer. If we accept that the workplace is an anomalous democracy-free zone within a larger democratic structure, then the twentieth-century argument that free speech rights have a utilitarian value in improving the outcomes of governance does not apply. Workers weren't going to participate in making business decisions, anyway, so it hardly matters what they would say. A zone of voicelessness within the workplace, however, is hard to contain. Lack of voice in the frankly undemocratic workplace radiates outward to erode voice in the purportedly democratic political realm.

[3] A sampling can be found in, among other places, Alec MacGillis's *Fulfillment* (MacGillis 2021).

## Speaking About the Governance of the State and Country While Being a Worker

The commodification of labor power gives purchasers of labor power extensive authority to govern the actions of employees. As Anderson shows, this governance authority extends far beyond actions directly involved in producing on the company's behalf. Some employers use threat of job loss or workplace penalties short of job loss (reassignment of duties, change of work schedule, loss of opportunities for promotion, etc.) to discipline both on-the-clock and off-the-clock speech, even about matters unrelated to production and job responsibilities (Anderson 2017, pp.39-40).[4] Not only do employers *censor* worker speech that they consider to be against their interests, but they may also use the time purchased from workers to *require* speech acts they consider to be in their interests, though unrelated to production and job responsibilities. In some cases, legally dubious but practically effective, employers even coerce employee speech unrelated to job responsibilities during *un*paid hours. In particular, employers are becoming increasingly assertive about pressuring employees to engage in employer-scripted political speech (Hertel-Fernandez 2018).

In his recent book *Politics at Work*, Alexander Hertel-Fernandez shows that in the past decade, an increasing share of U.S. employers are making increasing demands on employees to engage in political behavior beyond the firm. Having purchased the labor power, many employers – particularly those in heavily regulated industries – see their employees' time as a resource to be deployed for political ends, in pursuit of electoral and policy outcomes that they believe will favor their business interests. This is particularly important because the U.S. tradition of free speech jurisprudence typically grants political speech the highest degree of protection from constraint or coercion. However, other than Hertel-Fernandez's work, there has so far been little attention given in scholarship, labor rights activism, or the legal system to the specific ways that employers constrain or coerce political speech. Under current precedent, the state action doctrine neuters the First Amendment as a tool for empowering workers when private employers are the ones restraining or coercing their speech. Instead, employers are inclined to claim that their own First Amendment rights are violated whenever a policy attempts to rein in their ability to restrict worker speech, and the courts are inclined to agree. As with internal governance of the workplace, greater freedoms for employers directly lessen freedom for workers. And the unequal speech rights of employers and workers has material consequences for the activities of the state. Employer mobilization of employees has become an important mechanism of corporate influence in the U.S. political system. Employers use this mechanism in both inter- and intra-class conflicts – sometimes to pursue broad capitalist class advantages and sometimes to pursue narrower advantages for one firm over its competitors (Hertel-Fernandez 2018, pp.1-8).

Hertel-Fernandez points to the *Citizens United* decision as an unexpected inflection point in the trajectory of employer mobilization of workers. The dominant left critique of *Citizens United* was that it further opened the spigots for corporate spending on lobbying and PR produced by professional communicators-for-hire. Unexpectedly, the trajectory of corporate spending on professionally produced political speech did not really change. Instead, *Citizens United* emboldened employers to direct more

[4] In many cases the disciplined worker's speech is not particularly sympathetic – as when an employer tracks employees' social media accounts and penalizes or fires workers who engage in overtly racist, sexist, or other discriminatory speech that violates mainstream norms when said out loud and could create a reputational problem for the employer or create a hostile work environment for other employees.

political speech at their employees and pressure their employees to join their chorus. Business groups, particularly the Business-Industry Political Action Committee (BIPAC) accelerated businesses' responsiveness to the implications of *Citizens United* by "educating" employers about the new expansiveness of their coercive powers over employee political speech and building digital political mobilization platforms used by a large share of large employers to target political messages to workers and monitor their responses (Hertel-Fernandez 2018, pp.51-57, 114, 122-130).

Importantly, the political mobilization of workers that employers pursue differs markedly from the kind of political organizing that empowers communities and their members. Organizing builds relationships, commitments, and resources, and cultivates activists and leaders. Mobilization, whether by employers or others (unions and political parties have been known to do it, too), is transactional, activating participants for a specific purpose. "Unlike organizers, employers engaging their workers in politics do not usually grant them much autonomy or responsibility in the political process; workers are given very specific 'asks,' such as voting for particular candidates or contacting legislators about specific issues" (Hertel-Fernandez 2018, pp.26-27). Employer mobilization successfully elicits political actions (e.g. putting up lawn signs, volunteering for a campaign, donating to a campaign, and voting) from those exposed to the mobilization efforts at rates comparable to political party or union efforts. However, employer mobilization has very little effect on participants' degree of political knowledge, at least as assessed through a test of whether they knew the party affiliations of their state and federal representatives and whether they knew which political party had a majority in their state legislature (Hertel-Fernandez 2018, pp.152-154). Workers politically mobilized by employers may be politically active without exercising autonomy or agency. The most vulnerable workers are the ones most likely to engage in politics at their employer's behest.

The disempowering, non-capacity-building mobilization of workers to serve capital's political ends is enabled in part by the effective suppression of worker voice in governance of the workplace. Employers appropriated established union mobilization strategies while suppressing unions' exercise of those strategies on their own behalf. With a private sector unionization rate of only 6% and almost no substantive rights to speak about workplace governance in the absence of a union, workers are rarely able to muster any organized resistance to the political demands employers place on them (Hertel-Fernandez 2018, p.9-10). Employers are in a uniquely powerful position for making demands. No other political actor has all three of the levers that employers have for putting political pressure on workers: ability to monitor compliance, power to discipline or reward, and ability to make credible threats about income loss (Hertel-Fernandez 2018, p.26). As so many generations of critics of capitalism have argued, democracy in the society at large is always hollow when the workplace itself is autocratic and the autocrat wields the authority to exile (i.e. "let go," "make redundant," lay off, fire… banish workers to the reserve army of the unemployed).

A well-peopled reserve army of the unemployed strengthens employers' mobilization of workers in two major ways: (1) The degree of employee responsiveness to employers' political demands is highly correlated with the degree of employment insecurity. Employees who report a high level of doubt about their ability to find another job if they lose the one they have are more likely to accede to employers' political pressures than are employees who report that they have good job prospects beyond their current employment. These employment-insecure workers are, however, no more likely than any other group of workers to have started out in agreement with their employer's political positions (Hertel-Fernandez 2018, pp.140-151). (2) The degree of Congressional responsiveness to employer-mobilized

workers is strongly correlated with the unemployment rate in a representative's district. When employers mobilize their workers to call their representatives in Congress to request specific legislative action, the legislative aides who answer the phones are more likely to perceive the callers as indicative of broadly-shared constituent opinion than callers who identify an affiliation with a community group or who present themselves as individual constituents. And when unemployment rates in the district are high, legislators are more likely to take the action requested by workers following their employers' script (Hertel-Fernandez 2018, pp.165-172). Marx explained generations ago how employers depend on the existence of a reserve army of the unemployed to achieve their economic aim of raising the rate of exploitation – workers in fear of having no income at all will work harder and longer for less. The torment of labor and the misery of unemployment are conjoined twins. Under current U.S. institutional arrangements, employers are also *politically* empowered by a well-peopled reserve army of the unemployed. Ironically, capital's failure to deliver what the legitimating fiction promises – livelihoods for the masses – further strengthens capital's sway over the political process. With outsize sway over the political process, representatives of capital secure the conditions under which they can continue to fail to deliver on their promises.

## Conclusion

Freedom of speech is a rival right, at least to a degree. One person's exercise of free speech often interferes with another's. Attention is finite; one speaker can simply drown out another by consuming attention. Reception of a speaker's message is shaped by the context of past communications; a campaign of denigration diminishes the denigrated speaker's ability to communicate effectively. As in so many other domains, then, there is no possibility of complete negative liberty for all; some individuals and groups can only gain in freedom of speech when others are restrained. We face social choices about who may be restrained, to what extent, by what mechanism, and on what grounds. If there is no collective coordination of constraints, the most powerful actors can act individually to constrain the speech of the least powerful without the interference of the state and its laws – and then call on the state and its laws to intervene to further empower them. The state action doctrine's distinction between actions the government takes to restrict speech (which may violate the First Amendment) and actions that private actors take to restrict speech (which do not violate the First Amendment) dissolves into illogic when the state is so deeply implicated in granting speech-restrictive authority.

As things stand, First Amendment free speech rights are allocated in a wildly unequal distribution. After a moment during the Great Depression when the courts were inclined to differentiate personal liberties from liberty to use private property howsoever the owner may choose, the ruling interpretation of personal liberties reverted to the pre-New Deal conflation of personal actions with uses of property. In practice, this amounts to a prioritization of property over persons. The degree of liberty one enjoys is proportional to the amount of property one can command. The ascendance of the capitalist theory of free speech gives capital super-citizen status, with speech rights more expansive than those of ordinary citizens. Capital commands the resources to direct speakers and audiences. Workers, meanwhile, are demoted to something less than full citizens, without substantive speech rights. Workers are constrained in their speech in ways that people outside of a wage labor relationship are not. We don't always even know the ways in which the wage labor relationship limits speech rights. Anderson notes, "Because most employers exercise this off-hours authority irregularly, arbitrarily, and without warning, most workers are unaware of how sweeping it is. Most believe, for example, that their boss cannot fire

them for their off-hours Facebook postings, or for supporting a political candidate their boss opposes. Yet only about half of U.S. workers enjoy even partial protection of their off-duty speech from employer meddling. Far fewer enjoy legal protection of their speech on the job, except in narrowly defined circumstances" (Anderson 2017, pp.39-40). Hertel-Fernandez admits that he hadn't realized the extent of employer power over employee political activity; he had assumed that workers had greater First Amendment protections than they do (Hertel-Fernandez 2018, p.33).

For anyone without sufficient property to live on asset income, those for whom unemployment is a misery, the price of escaping that misery is more than the torment of labor. The price of escaping the misery of unemployment is the torment of labor *plus* the loss of democratic voice. When labor power is a commodity that can be alienated from its originator through a market exchange, free speech, too, becomes alienable. We hold these truths to be self-evident (under 21st century U.S. social relations): that all people of equal property are (roughly) equal (though the social-power-bestowing value of property may be discounted on the basis of race, gender, geography…) and are endowed with certain alienable rights, among these life (which may be sold to capital by the hour), liberty (which is implicitly included in the labor power sale), and the pursuit of happiness (as capital may direct the pursuits of those whose hours it purchases without deigning to consult on what those purposes should be).

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