

“Free” Labor and Unequal Freedom of Expression

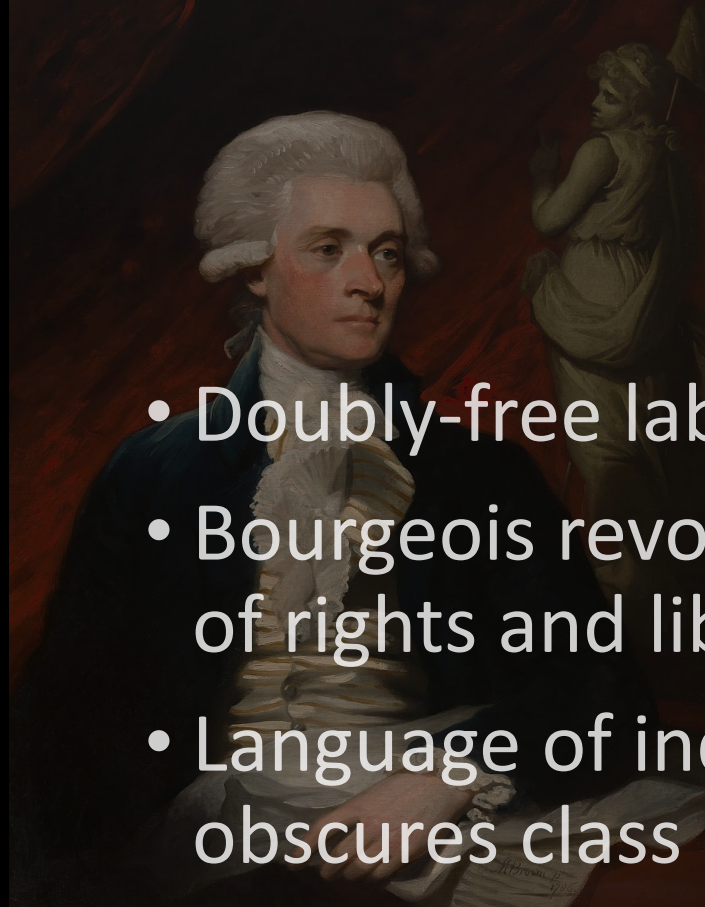
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Preview

- Can Workers Speak Freely? Can Capital?
- A Capitalist Theory of Free Speech
- Speaking About the Governance of the Workplace
- Speaking About the Governance of the State and Country
- (Provisional and Partial) Conclusion

Can
Workers
Speak
Freely? Can
Capital?



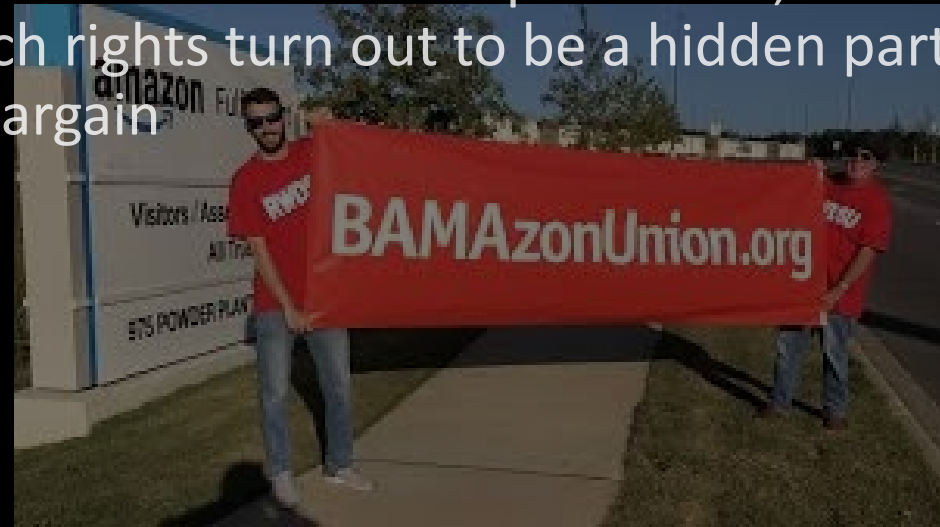
- Doubly-free labor
- Bourgeois revolutions and rhetoric of rights and liberties
- Language of individualistic rights obscures class



Can Workers Speak Freely? Can Capital?



- Capital can buy speech and audience – outsize share of voice
- Workers sell themselves piecemeal, and free speech rights turn out to be a hidden part of the bargain



A Capitalist Theory of Free Speech

- Jack Balkin assesses the “capitalist theory of free speech”:
 - “subordinates freedom of expression to the protection and defense of capital accumulation in the information economy”
 - “ties the right to speak ever more closely to ownership of capital”

A Capitalist Theory of Free Speech

- Because the capitalist theory of free speech protects liberty in the disposition of property more than liberty of personal action:
 - 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

A Capitalist Theory of Free Speech

- 20th century free speech theories held that the purpose of free speech was to inform the process of democratic deliberation.
 - Repression of dissent delegitimizes the political system.
 - Speech about governance is the most deserving of broad protection.
- 20th century labor radicals sought to expand the concept of free speech to encompass strikes, pickets, and boycotts



Elizabeth Gurley Flynn with
Paterson, NJ 1913 Silk Strike
leaders and Big Bill Haywood

Speaking About the Governance of the Workplace

- Elizabeth Anderson describes capitalist workplaces as sites of *private government*.
 - The public-private distinction is orthogonal to the state-nonstate distinction. What makes government private is the exclusion of those bound by decisions from the making of those decisions.
- The state action doctrine says that the First Amendment is only implicated when it is the government infringing on speech, not when one non-state actor interferes with another's speech.
 - "Congress shall make no law..."

The Bill of Rights

Ratified December 15, 1791

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Speaking About the Governance of the Workplace

- 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.
 - Spending money for the services of communications professionals and access to communications networks are granted First Amendment protections.
 - An entire sector of the communications-for-hire industry provides "union-avoidance" services.
 - 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."

- Capital also has property rights in employees' time.
- When faced with possible unionization, capital can require attendance at anti-union captive audience meetings. Workers can be penalized for skipping (even if they attend to their regular work duties instead), leaving early, speaking, or asking “disruptive” questions.

Speaking About the Governance of the Workplace



A group of workers in a nursery setting, working with plants in a greenhouse or covered walkway. The workers are wearing gloves and are focused on their tasks. The background shows rows of plants and a large structure, likely a greenhouse or covered walkway.

Speaking About the Governance of the Workplace

- Unions do not have comparable access to workers' time and attention.
- When free speech is treated as a property right, any requirement that employers allow speech that they do not like on their premises and/or during the hours they paid for from their workers is treated as coerced speech – or as a seizure of property – which is disallowed.



Speaking About the Governance of the Workplace

- Retaliation for speech employers do not like is widespread and racially biased – anti-union aggression is severe almost everywhere, and even more so when the workforce is less white.

Speaking About the Governance of the Workplace

- The zone of voicelessness within the workplace radiates outward to erode free speech rights beyond work.

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



- Since *Citizens United* in 2010, U.S. employers have been making increasing use of workers' time (sometimes paid time and sometimes even unpaid time) as a resource to be mobilized for political ends.
- Under current precedent, the state action doctrine neuters the First Amendment as a tool for protecting workers' speech rights when private employers are the ones restraining or coercing speech.

Romney
visits
Murray
Energy
Corp. in
2012

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

- The reserve army of labor also shapes capital's ability to coerce worker political speech
 - The degree of employee responsiveness to employers' political demands is highly correlated with the degree of employment insecurity
 - The degree of Congressional responsiveness to employer-mobilized workers is strongly correlated with the unemployment rate in a representative's district

Conclusion

- Freedom of speech is, at least to an extent, a rival right. There cannot be pure negative liberty for all – some people and groups can gain liberty only through the restraint of others.
- Without collective coordination of restraints on the most powerful actors, they constrain the liberty of the least powerful.
- The state action doctrine's distinction between actions the state takes to restrict speech (disallowed) and actions that private actors take to restrict speech (allowed) dissolves into illogic when the state is so implicated in granting speech-restrictive authority to capital.

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).

In CONGRESS, July 4, 1776.

DECLARATION

of the REPRESENTATIVES of the UNITED STATES OF AMERICA, In GENERAL CONGRESS Assembled.

WHEN in the course of human events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind require, that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes, and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new

For protecting them by a mock Trial, from punishment for any Murders which they have committed; for cutting off our Trade with all parts of the World; for depriving us in many Cases of the benefits of Trial by Jury; for transporting us beyond Seas to be tried for pretended Offences;

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments: For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all Cases whatsoever.

He has abdicated Government here, by declaring us out of his protection, and waging War against us.

He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the lives of our people.

He is at this time, transporting large Armies of foreign Mercenaries to complete the works of Death, Destruction and Tyranny, already begun, with circumstances of Cruelty