

# Speechless

**THE EROSION OF FREE EXPRESSION  
IN THE AMERICAN WORKPLACE**

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<http://www.speechlessthebook.com>



**BK** BERRETT-KOEHLER PUBLISHERS, INC.  
San Francisco [www.bkcurrents.com](http://www.bkcurrents.com)

# Speechless at Work in America

**IMAGINE IT'S THE FALL OF 2004.** You arrive at the office building where you work and park in the parking lot. As you get out of your car and head to the building, you see your boss getting out of her car nearby and exchange a wave. Later that day she asks you to stop by her office, where she says, "Hey, I noticed when you pulled in this morning that Bush-for-President sticker on your car. I don't know anything about your politics, but frankly I can't cope with having someone work for me who thinks Bush should be reelected. I'm sorry it's come to this, but you're fired. I need you to clear out by the end of the day."

Is this restriction on freedom of speech legal? Ethical? Reasonable? Outrageous?

What it isn't is far-fetched. It happened, with some minor variations, to Lynne Gobbell, an Alabama factory worker.<sup>1</sup> Gobbell had a John Kerry bumper sticker. Her boss informed her that the owner of the factory, Phil Geddes, had demanded that she remove the sticker or be fired; he also told her "you could either work for him or John Kerry." Geddes had on a previous occasion inserted a flyer in employee paycheck envelopes pointing out the positive effects that Bush's policies as president were having on them. "It upset me and made me mad," said Gobbell, "that he could put a letter in my check expressing his political opinion, but I can't put something on my car expressing mine."

Lynne Gobbell's experience, although striking and lamentable, is uncommon. If it were an everyday occurrence, she probably wouldn't have received a sympathetic phone call a few days later from John Kerry and an offer of a paid position with the Kerry campaign.<sup>2</sup> Few people, even among those generally sympathetic to the management side of workplace issues, would likely view this as a great moment in the annals of employment or a

wise use of managerial discretion. Even fewer would see it as a highlight in the history of free speech and the First Amendment.

Americans take freedom of speech for granted. This attitude begins at an early age, in elementary and middle school, when students are first exposed to core principles of liberty embedded within the Constitution and the Bill of Rights. “Hey, it’s a free country,” we learn to say reflexively when others say or do harmlessly objectionable things. The term “free speech” becomes an easy defensive gambit when self-expression is challenged or silenced. After all, it’s not just any individual right; it’s at the heart of the *First* Amendment and the first of four “essential human freedoms” Franklin D. Roosevelt famously listed in his 1941 State of the Union speech.<sup>3</sup> Justice Benjamin Cardozo in a 1937 Supreme Court opinion called it “the matrix, the indispensable condition, of nearly every other form of freedom.”<sup>4</sup> Writing more recently (if with similar extravagance), constitutional scholar David Strauss of the University of Chicago dubbed the First Amendment “the most celebrated text in all of American law.”<sup>5</sup>

We don’t, for the most part, think much about why free speech matters, nor do we spend a lot of time thinking about the limits of free speech; we tend to leave that to lawyers and judges. Every so often, though, free speech comes center stage in the collective American mind for a while, usually when some national event or high-profile court case makes headlines. The aftermath of September 11, 2001, is a powerful example: A sudden onset of belligerence against a largely unseen “enemy” ignited a national conversation about the tension between liberty and security. Free speech is an important part of that conversation, as we learned painfully on September 26, 2001, shortly after 9/11. White House press secretary Ari Fleischer, near the end of his regular press briefing, was asked for a reaction to an acerbic statement that the liberal comedian and provocateur Bill Maher had made about terrorists and the U.S. military. With an apparently contemptuous sneer at the First Amendment, Fleischer characterized Maher’s comment as a reminder “to all Americans that they need to watch what they say, watch what they do. This is not a time for remarks like that; there never is.”<sup>6</sup>

The First Amendment does not, of course, generally require that people “watch what they say,” even in times of military engagement, and Fleischer’s comment was rightly pilloried. (So was the shabby attempt by

Fleischer's office to rewrite history by initially leaving the words "watch what they say" out of the White House's official briefing transcript.)<sup>7</sup> The reality, though, is that people frequently do watch what they say, not because the law requires it, but because life requires it. The great thing about our constitutional system of free speech is that personal expression is presumptively safe from government interference. But the flip side is that personal expression is safe *only* from government interference. Our system of constitutional law generally fails to protect civil liberties, including free speech, from actions that threaten or infringe upon them when those actions are committed by private parties. Employers in the private sector have no obligation to respect the expressive rights or impulses of those who work for them. Even in public-sector jobs, where government is the employer, the reach of the First Amendment is quite limited. At work, Fleischer's dictum is fully realized: we must watch what we say.

Although what happened to Lynne Gobbell—losing a job over a bumper sticker—may not be typical, it is one of the extreme cases that define the subject because they vividly illustrate the abundant power available to employers for controlling the expressive activities of employees. Extreme cases also establish the boundaries within which the middle ground—the everyday terrain of employee rights and denials of rights—plays out in workplaces and court cases. Measures that seem unusually severe, like punishing speech on a bumper sticker in an employee parking lot, make less extreme reactions by employers advancing their economic interests seem almost reasonable in comparison. It's hard to see how the interests of Phil Geddes and his firm were served by firing a factory worker because of a political message on her car, but there are plenty of situations where employers censor or punish employee speech because they do see strategic advantage in doing so.

Take the case of Edward Blum, who in the late 1990s was a stockbroker at Paine Webber in Houston. Blum's off-work "hobby" was political activism in opposition to affirmative action; he served in his spare time as president of a nonprofit organization devoted to this cause. In 1997 he led a campaign for a local ballot initiative that would have barred the city of Houston from hiring and contracting based on race and sex, an initiative strongly opposed by Houston's mayor at the time, Bob Lanier. Blum

resigned from his job in mid-1998, charging that Paine Webber, which did a lot of bond underwriting business for the city, had pressured him to curtail his off-work political activity. Blum said a senior city official intervened with Paine Webber to try to silence him and added that the firm told him it was losing city business because of his political activities.<sup>8</sup>

Mayor Lanier vehemently denied threatening Paine Webber with a loss of city contracts, but he did admit that he had complained about Blum to the firm in the run-up to the (unsuccessful) referendum on the initiative. Paine Webber, noting that Blum was not fired, said he was “asked to refrain from publishing articles with a point of view that reflected negatively on the firm’s reputation and led to client complaints and a loss of business.”<sup>9</sup> A few months earlier, Blum had been reprimanded by Paine Webber for submitting anti-affirmative action op-ed articles to business publications. The company had a policy requiring articles written by employees to be cleared in advance, and Blum was pointedly told that “the firm will not clear for publication articles or other press contacts in which you espouse an anti-affirmative action position.”<sup>10</sup> (After leaving Paine Webber, Blum managed to turn his “hobby” into a career, holding positions at various conservative organizations, including most recently the American Enterprise Institute, where he spent some of his time arguing that the Voting Rights Act has outlived its usefulness.<sup>11</sup> Paine Webber, incidentally, has since merged with and disappeared into the Swiss financial conglomerate UBS.)

Blum’s approach to racial politics in America may appeal to some people more than others, but Paine Webber’s approach to Blum comes off as an equal-opportunity affront to the very idea of free speech. Like the Alabama factory owner who fired Lynne Gobbell for her political bumper sticker, Paine Webber had a legal right to disapprove of its employees’ political activities and to leverage that disapproval with terms and conditions of employment. I hasten to add here, as we will see in more detail in Chapter 5, that some states have laws protecting political activity by employees working for private companies, although these laws typically balance the employee’s right to political speech against an employer’s right to conduct business without excessive interference. Under such a law, it’s hard to imagine that Gobbell wouldn’t prevail, while Blum’s situation seems to present more of an unpredictable collision between employee rights and employer interests.

Freedom of speech in the workplace doesn’t mean that a firm like Paine

Webber has to put up with any and all employee expression on any subject at any time. Nor does it mean that an employer must allow itself to be associated with speech that contradicts its business philosophy or strategy or that departs from key principles held by its leaders. This book is not motivated by a hidden desire to turn every workplace into a Hyde Park Speakers' Corner,<sup>12</sup> where those trying to run an enterprise must always yield to those within the organization trying to run their mouths.

This book is motivated by alarm that situations like those that Gobbell and Blum experienced can occur without meaningful recourse for those whose speech is silenced, and without significant consequences for employers doing the silencing. A toxic combination of law, conventional economic wisdom, and accepted managerial practice has created an American workplace where freedom of speech—that most crucial of civil liberties in a healthy democracy—is something you do after work, on your own time, and even then (for many), only if your employer approves. As we'll see throughout much of the book, the role of law is especially important: constitutional law erects formidable potential barriers to free speech in workplaces, while employment law gives employers wide latitude to use those barriers to suppress expressive activity with impunity. The law, however, doesn't account by itself for the repressive state of free expression in the American workplace. Our legal system gives employers a great deal of discretion to manage the workplace, including employee speech, as they see fit and imposes few limits on how that discretion is exercised.

That discretion is where conventional wisdom and customary practice come in. At the risk of a bit of overgeneralization (a liberty one can take in an introduction), the civil religion that underpins work and employment in the United States is the religion of markets. In other words, we view our lives at work—the relationship between employer and worker—through a lens of property rights and contracts. The system works well, by this view, when employers are given the right of “property” ownership over not just *what* they manage but *how* they manage. Employees, in the strict market view, either accept a given employer's conditions of work or move on in the marketplace for their labor to something preferable. U.S. law, as we'll see later, is more dedicated to the unbridled worship of market forces in employment, and less protective of employee rights, than the laws of other democracies with advanced economies.

But employers escape more than legal difficulties when they come down hard on employee speech; they appear just as likely to escape moral consequences. In the field of business ethics—undeniably a growth industry over the past decade—some argue that when corporations assert rights to economic autonomy in the way they do business, they incur commensurate obligations to act in moral ways toward employees and other stakeholders.<sup>13</sup> In other words, a “right” to do business as you see fit doesn’t operate in moral vacuum; it comes with an obligation to respect the rights of others as moral equals, including those who work for you.<sup>14</sup>

Americans may not generally agree with ethicists that rights are as important as markets. In a recent twenty-country poll of attitudes toward corporations and free markets, Americans endorsed the virtues of a free-market economy to a greater degree than respondents from all but two other countries in the poll (China and the Philippines). Americans in the poll were also less likely than those in most other countries to agree that a free market economy works best when accompanied by strong government regulation.<sup>15</sup> This belief doesn’t, however, translate into much confidence that employers act with moral integrity, at least as measured by attitudes toward business leaders. A Gallup poll in 2005 found only 16 percent of Americans willing to rate the honesty and ethical standards of business executives as “high” or “very high.”<sup>16</sup>

It all adds up to a kind of perfect storm for limiting free expression on or off the job. The law gives employers broad control and wide discretion. Prevailing market-focused attitudes about our economy and system of work leave employers free to be regarded as property owners who can (largely) make and enforce rules for workers as they see fit. Americans don’t think highly of the moral rectitude of those who run corporations, but they aren’t clamoring for more regulation to rein in the worst impulses of business leaders. (As we’ll see in Chapter 2, workers have a severely inflated sense of their existing workplace rights.) So, many employers hew to a default view that even mild infringements on operational efficiency and organizational harmony are to be frowned upon and, if necessary, halted with (economic and legal) force.

Employers, then, possess not just the legal ability to repress employee speech but also all too frequently a reflexive impulse to do so. Free speech that doesn’t in any serious way jeopardize the employer’s interests is viewed

as a potential threat, and these views are given far more weight than First Amendment rights. As an employer, I have the right to be free of even the slightest risk that your behavior will compromise my interests, even if your behavior happens to be the kind that would otherwise merit First Amendment protection.

This impulse to treat expressive behavior as threatening leads to many examples of employer overreaction, such as when DuPont fired an engineer who had sixteen years with the company for writing a book of satire about an imaginary corporation and its imaginary employees.<sup>17</sup> Or when the Nationwide Insurance Company fired an employee of fifteen years who preferred not to participate in the company's effort to lobby the state legislature for a bill that went against his personal beliefs.<sup>18</sup> Or when Goodwill Industries fired a sewing-machine operator because of his off-work activities as a member of the Socialist Workers Party.<sup>19</sup> Or when a defense contractor in Connecticut fired a worker who declined to participate cheerfully in a Gulf War celebration.<sup>20</sup> Or when the social networking firm Friendster fired a Web developer for mentioning her employer in writings posted to her personal blog.<sup>21</sup>

This overreaction to what is essentially harmless employee speech on or off the job hides the effect it has on everyone else—the chill that it puts on other forms of expression by employees. This book is peppered with cases where speech by employees at or outside of work has come under the scrutiny of their employers. I will not make the indefensible claim that there is a rampant movement afoot in the American workplace to silence and punish every outbreak of non-work-related speech. I do contend, however, that a generally inhospitable workplace climate for free expression by employees puts workers on notice and at risk of consequences for their speech.

Limits on free speech at work go hand in hand with an absence of due-process rights and just-cause protections in the American workplace. Unlike the systems of work in most advanced nations, ours gives employers near-absolute discretion to fire employees for just about any reason, or for no reason. A person disciplined or fired for her speech enjoys no assurance of a fair process (or, for that matter, any process) for challenging that outcome. Yes, many employers elect to tolerate a wide range of speech by their workers, but there is no obligation to do so, and the lack of an inherent

right to due process on the job inevitably chills employee free speech. As we will discover, workers punished for their expressive activity can in limited circumstances seek due process in the courts, but at high personal and financial cost and with little chance of success.

The natural (if frequently subconscious) apprehension that results diminishes not just our rights as employees but our effectiveness as citizens—as participants in the civic conversations that make democracy work. Work is where most adults devote significant portions of their waking lives, and where many forge the personal ties with other adults through which they construct their civic selves. Yet work in America is a place where civil liberties, including but not limited to freedom of speech, are significantly constrained, even when the exercise of those liberties poses little or no threat to the genuine interests of the employer.

Let me say a few words about the structure of the book. My purpose is to examine expressive activity in and around the workplace from legal, managerial, and moral perspectives. I include within the ambit of my analysis any and all speech that draws employer interest and disapproval, whether it occurs at work or away from work, happens during work hours or afterward, and addresses audiences inside or outside the firm. All employers, of course, restrict at least some speech in the sense that virtually none of them would allow absolutely any utterance or expressive act at any time. Certainly employers prefer to, and are entitled to, do something about expression that markedly disrupts workplace objectives or that places the firm at legitimate legal risk. However, even if we assume no inherent right to free expression at work, it is likely in practice that tolerance for expression varies significantly from employer to employer. It is this variation—arising from differences not just in policies but also in organizational cultures and customary practices—that stimulates my approach to this subject.

The first three chapters set the stage for the discussion of the specific legal and managerial status of workplace expression that follows. In Chapter 1, I explain what I mean by “expression” and “workplace expression,” describe the various forms that workplace expression can take, and discuss why the subject of speech at work is not just of enduring importance but of increasing importance. Chapters 2 and 3 each examine a crucial background piece of American law that is critical for understanding limits on

workplace expression. Chapter 2 looks at a key principle of constitutional law: the “state action” doctrine, which defines how constitutional rights, including freedom of speech, apply differently in public and private settings. Chapter 3 explores in depth the fundamental basis for U.S. employment law: the “employment-at-will” system, which gives employers vast control over expressive activity on and off the job.

With these key principles in place, I then tackle the central question of how much free speech actually exists by law in the American workplace, and I consider how that law squares with theoretical ideas of the meaning and value of free speech. The divide between public- and private-sector employment is basic to understanding the reach of individual rights at work, so this division guides my approach. Chapter 4 looks at the evolution and status of free expression at work in *government* employment, where rights are more expansive than in the private sector. Chapter 5 focuses on the *private-sector* workplace, where there are some (limited) rights to expression. I then turn to questions of how and when free speech matters, questions that have occupied the attention of legal and political theorists and philosophers for the better part of a century. In Chapter 6 I draw upon these theorists’ ideas about the value of free speech as a way to shed light on the opportunities and limitations of expression in the workplace.

The chapters that follow move beyond (although not entirely away from) the law, exploring specific ways that expression actually operates in and around contemporary workplaces. Some of the most contentious situations involving speech at work arise with matters of discrimination and harassment—the hot-button workplace issues of race, sex, religion, disability, national origin, and so forth. Chapter 7 examines this intersection between civil rights and workplace speech, focusing on how and when employers have to accommodate speech on these issues and examining the fine line that separates free speech from harassment. Chapter 8 takes on advances in information technology and their consequences for workplace expression, describing what these changes are and how they affect the issues that have been developed from a legal perspective in preceding chapters. I then turn in Chapter 9 to how employers handle issues of speech and expression in managerial terms. This discussion is fueled partly by social science research on behaviors and systems in organizations that bear on connections between expression and performance and partly by how cor-

porations themselves are setting policy on workplace issues that involve expressive activity.

In the Conclusion, I pull together the legal, managerial, and ethical issues that have been raised in earlier chapters in order to flesh out the argument that free expression on and off the job is overly constrained. I contend that an erosion of free expression at work isn't a problem just for workplace culture and individual liberty; it poses risks for the health of civil society and deliberative democracy.<sup>22</sup> I offer recommendations for changes to both law and management practice and suggest that the consequences of these changes would be far from dire for the employer's economic efficiency.

Pressed to come up with a list of critical issues facing the contemporary American workplace, one thinks quickly of job insecurity, stagnant wages, health care costs, downsizing, offshoring, workplace safety, and retirement worries. Freedom of expression for employees might seem less urgent than these issues, but it is precisely the freedom to speak about these and other issues at the intersection of work, economy, democracy, and society that is at stake. Thirty years ago, David Ewing of the Harvard Business School condemned the U.S. system of employment as a "black hole" in our civil liberties universe, "with rights so compacted, so imploded by the gravitational forces of legal tradition, that, like the giant black stars in the physical universe, light can scarcely escape."<sup>23</sup> Today, as we will see in the chapters to come, employers are controlling workers and their lives on and off the job just as much, if not more than, they did thirty years ago. The result for employees is an erosion of freedom to express themselves, an impairment of their ability to participate fully as citizens in our collective social and political enterprise.

# Notes

## INTRODUCTION

1. Clyde L. Stancil, “Moulton Woman Says She Lost Job for Sporting Kerry Sticker on Car,” *Decatur (AL) Daily*, September 12, 2004, <http://www.decaturdaily.com/decaturdaily/news/040912/sticker.shtml> (accessed July 7, 2005).

2. Associated Press, “Woman Fired for Kerry Sticker Hired by Democratic Campaign,” *Associated Press State & Local Wire*, September 15, 2004, <http://www.lexis-nexis.com/> (accessed July 1, 2006). See also Timothy Noah, “Bumper Sticker Insubordination,” *Slate*, September 14, 2004, <http://www.slate.com/id/2106714> (accessed July 7, 2006).

3. Free speech is protected in the *First* Amendment in the Bill of Rights that was ratified in 1791, but the Bill of Rights originally proposed in the First Congress had twelve amendments. Only the last ten of these were ratified; what we call the First Amendment was actually James Madison’s third. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998), 8–9. Franklin D. Roosevelt, *Annual Message to Congress*, January 6, 1941, The American Presidency Project at the University of California at Santa Barbara, <http://www.presidency.ucsb.edu/ws/index.php?pid=16092> (accessed May 11, 2006).

4. *Palko v. State of Connecticut*, 302 U.S. 319 (1937), 327.

5. David A. Strauss, “Freedom of Speech and the Common-Law Constitution,” in *Eternally Vigilant: Free Speech in the Modern Era*, ed. Lee C. Bollinger and Geoffrey Stone (Chicago: University of Chicago Press, 2002), 33.

6. *Press Briefing by Ari Fleischer*, Office of the Press Secretary, The White House, September 26, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html> (accessed June 30, 2006). In a 2004 letter to the editor of the *New York Times*, Fleischer said his comment was misunderstood; see Ari Fleischer, “A Briefing by the Former Press Secretary” (letter), *New York Times*, March 24, 2004, Late Edition, A20. His attempt to reinvent the controversial remark was less than persuasive; see Timothy Noah, “Ari Fleischer Rides

Again,” *Slate*, March 24, 2004, <http://www.slate.com/id/2097761/> (accessed September 13, 2006).

7. Jonah Bloom and Douglas Quenqua, “Fleischer Should Retract Comment,” *PR Week*, October 8, 2001, <http://www.lexis-nexis.com/> (accessed June 30, 2006).

8. Julie Mason, “Prop. A Leader Leaves Job, Says City Official Interfered,” *Houston Chronicle*, July 10, 1998, [http://www.chron.com/CDA/archives/archive.mpl?id=1998\\_3068252](http://www.chron.com/CDA/archives/archive.mpl?id=1998_3068252) (accessed July 1, 2006).

9. Steven A. Holmes, “Broker Asserts Political Views Drew Pressure,” *New York Times*, July 10, 1998, A10.

10. *Ibid.*

11. Edward Blum, “An Insulting Provision,” *National Review Online*, May 2, 2006, <http://www.nationalreview.com/> (accessed July 1, 2006).

12. See, for example, <http://www.speakerscorner.net/> (accessed July 3, 2006).

13. See, for example, Robert Phillips, R. Edward Freeman, and Andrew C. Wicks, “What Stakeholder Theory Is Not,” *Business Ethics Quarterly* 13 (2003): 479–482.

14. Patricia H. Werhane, *Persons, Rights, & Corporations* (Englewood Cliffs, NJ: Prentice-Hall, 1985), 61.

15. Program on International Policy Attitudes, “20 Nation Poll Finds Strong Global Consensus: Support for Free Market System, but Also More Regulation of Large Companies,” *World Public Opinion*, March 21, 2006, <http://www.worldpublicopinion.org/pipa/articles/btglobalizationtradera/154.php> (accessed July 3, 2006).

16. “Survey by Gallup Organization,” November 17–November 20, 2005, retrieved from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu> (accessed July 3, 2006).

17. Nicholas Wade, “Protection Sought for Satirists and Whistleblowers,” *Science* 182 (1973), 1002–1003.

18. *Novosel v. Nationwide Insurance Company*, 721 F.2d 894 (1983).

19. Timothy Noah, “Can Your Boss Fire You for Your Political Beliefs?” *Slate*, July 1, 2002, <http://www.slate.com/id/2067578/> (accessed July 3, 2006).

20. Associated Press, “Supreme Court Upholds Firing of Man Who Refused to Put Flag Up at Work,” Archives of Television Station WTNH, New Haven/Hartford, CT, October 4, 1999, <http://archivesearch.wtnh.com/news/1999/oct/10041999-flag.html> (accessed July 6, 2005).

21. Todd Wallack, “Beware If Your Blog Is Related to Work,” *San Francisco Chronicle*, January 24, 2005, C1. Park’s comments on her firing appeared on her Weblog at [http://troutgirl.com/blog/index.php?/archives/46\\_Shitcanned.html](http://troutgirl.com/blog/index.php?/archives/46_Shitcanned.html) and [http://troutgirl.com/blog/index.php?/archives/48\\_Consequences.html](http://troutgirl.com/blog/index.php?/archives/48_Consequences.html) (accessed February 21, 2005).

22. I will at various points in the book draw connections between free speech and the quality or health of our “democracy.” I do so aware that the American system of government literally takes the form of a republic rather than a pure-form democracy. As James Madison observed in *Federalist* No. 14, “in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region.” With electoral and legislative institutions designed to inject democratic processes into a republican system, the United States is (or strives to be) a democratic republic. My comments about the state or quality of “democracy” refer to the effectiveness of that enterprise, which emerges from the ability of citizens to safeguard liberties and advance policy interests through the instruments of public debate, free association, and deliberative government.

23. David W. Ewing, *Freedom Inside the Organization* (New York: E. P. Dutton, 1977), 5.