



Speechless

The Erosion of Free Expression
in the American Workplace

Bruce Barry

An Excerpt From

***Speechless:
The Erosion of Free Expression in the American Workplace***

by Bruce Barry

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When Work and Speech Collide

If you want to be absolutely literal, all human life is speech. Every time a person goes to work all he does is speak. Or write. Or listen to other people speaking. Or eat lunch.

—Supreme Court Justice Stephen Breyer¹

THIS BOOK IS ABOUT FREEDOM OF EXPRESSION at work and after work—how expression is exercised by employees, regulated by law, and encouraged, punished, or censored by employers. The necessary place to begin is with a brief excursion into the meaning of “speech” and “expression.”

If I walk into your office carrying a cup of coffee and spill some of it on your new handmade Nepalese rug, you might see that as a careless act but probably not as an expressive act. But suppose I come to your office, notice your new Nepalese rug, and voice my disgust at the prevalence of child labor in Nepal’s hand-knotted rug industry.² I then state my intention to spill coffee on the rug to protest your consumer support for Nepal’s hand-knotted rug economy, and I proceed to spill as announced. Is the spill now an expressive act? Surely yes, because it is specifically intended to convey a viewpoint. (It wouldn’t, of course, be a legally protected act, since courts are unlikely to forgive the destruction of someone else’s property in the name of free speech.)

We can accept with little difficulty that “freedom of speech” (as the First Amendment phrases it) refers fundamentally to verbal communication—messages conveyed with words, whether oral or written. Expressive behavior doesn’t require words, however, and there are many ways to express an idea or a viewpoint nonverbally or symbolically. Justice Breyer’s (sarcastic) observation is one way to imagine the reach of symbolic expression: any action can potentially be perceived or understood as a form of communication, which means that everything we do has some conceivable form of expressive value. Although philosophically interesting, this approach to

“expression” is hardly practical: if any and every nonverbal action can be painted as a form of communication with free speech value, then we’ll have people claiming First Amendment protection for criminal behavior and courts trying to sort out whose expressive conduct is sincere and whose isn’t.³ Besides, as Stephen Breyer conceded in his next sentence, “The First Amendment cannot possibly allow you to run to the court with a First Amendment case every time you open your mouth.”⁴

Figuring out whether nonverbal conduct qualifies as “speech” or “expression” is an ongoing First Amendment dilemma. Courts have wrestled with the boundary between conduct (doing something that may have expressive value) and speech (expressive value that earns legal protection) for the better part of a century. The U.S. Supreme Court seems especially apt to involve itself in symbolic speech cases when people burn things, like draft cards and flags. The issue of “desecration” of the American flag, in particular, is one that seems to recycle politically every so often.⁵ Flag burning itself is obviously not a pressing issue in the arena of workplace expression, but expressive activity that amounts to symbolic protest is as relevant to work as to any other social setting. The legal history of symbolic speech is worth a quick digression because it sheds light on the meaning of speech and expression, and on the divide between verbal and symbolic expression.

That history is dominated by the flag. By the early 1900s, at the behest of veterans’ organizations and other patriotic lobby groups, most states had laws on the books making it illegal to mar, mutilate, deface, or alter any object that resembled the U.S. flag, or to use the flag for advertising purposes.⁶ A test of one of these laws—Nebraska’s—reached the U.S. Supreme Court in 1907 when the owners of a beer bottling company were convicted of a misdemeanor and fined fifty dollars for selling Stars and Stripes beer with a flag on the label. Ruling against them (and their beer), the Court said that a state is entitled to cultivate patriotism by regulating uses of the flag and that no “right of personal liberty is violated” when a state forbids the use of the flag as an advertisement on a bottle of beer.⁷

Eventually—it took over a half century—the Supreme Court came to treat the symbolic act of altering or destroying a flag, when done in the service of delivering a political message, as speech worthy of First Amendment protection. But that conclusion was embedded in a larger Court

struggle with the boundary between illegal “conduct” and legally protected “expression.” (The Court didn’t even view labor union picketing as a form of speech until the late 1930s.)⁸ In a famous Vietnam-era case, a man named David O’Brien burned his draft card—a violation of federal law—to convey an antiwar message and argued that the law he violated was unconstitutional because the act of burning his draft card is protected symbolic speech. O’Brien lost in the Supreme Court, which in 1968 rejected the notion that “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”⁹

But the Court in 1974 sided with a college student in Seattle who flew a U.S. flag upside down from his apartment window with a peace sign affixed to it in an effort, he said, to associate the flag with peace instead of war. The Court ruled that this kind of communication “through the use of symbols” with “intent to convey a particularized message” merits constitutional protection.¹⁰ Full recognition of the link between symbolic protest and free speech came in the case of a protestor at the 1984 Republican National Convention in Dallas who burned a flag and was prosecuted under a Texas law. Deciding for the protestor, the Supreme Court rejected the state of Texas’ claim that destroying a flag is not expressive conduct and asserted that it doesn’t matter whether legitimate expression takes a verbal or non-verbal form. The distinction between verbal and symbolic conduct, said the Court, “is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here.”¹¹

Having now made it clear that flag burning is protected free speech, the Court triggered numerous attempts to amend the U.S. Constitution to “protect” the flag—efforts that over the years have found lawmakers and others struggling with the tension between “conduct” and “speech.” In Senate floor debate on a flag amendment in 2006, Pennsylvania’s Arlen Specter asserted that “flag burning is a form of expression that is spiteful or vengeful. It is designed to hurt. It is not designed to persuade.”¹² Dianne Feinstein of California called burning a flag “conduct, not speech” because the flag is “the symbol of our democracy, our shared values, our commitment to justice, our remembrance to those who have sacrificed to defend

these principles.”¹³ You don’t have to be opinionated one way or the other about flag “desecration” to see the hair-splitting illogic in both senators’ comments. Each makes a tortured effort to differentiate flag burning from other types of symbolic political expression because of the kind of expression involved (it’s vengeful or spiteful or not designed to persuade or about shared values). Neither, however, succeeds in defeating the reality that flag burning in the service of political protest is inescapably expressive.

People may not be burning flags on the job, but they are engaging in other forms of symbolic expression that raise workplace speech concerns. And as with flag burning, sometimes the expression makes people uncomfortable. But is it protected free speech? Baltimore police officer Robert Berger put this question to the courts back in the 1980s when his employer (the city police department) tried to force him to cease his after-work activity: giving, at bars and taverns, musical performances that featured an Al Jolson impersonation in blackface makeup and a black wig. Berger argued that the police department’s actions violated his First Amendment rights to free speech. As we’ll see in more detail in Chapter 4, a government employee has free speech rights an employer cannot infringe, as long as the “speech” is on a matter of public interest (and is not disruptive to employer interests). A federal appeals court said Berger’s performances qualified as artistic expression that met the standard, being “of obvious public interest to those considerable segments of the community who willingly attended and sometimes paid to see and hear them.”¹⁴ Audiences may regard Berger’s performances as entertainment rather than as an expression of political or social views, said the court, but the First Amendment still applies.

A decade later, in the case of an Arkansas police officer named Kevin Tindle, who was suspended after wearing blackface makeup (and other racially provocative costume accoutrements) to a Halloween party, another appeals court reached the opposite conclusion. Artistic expression in front of a public audience and a costume worn to a private party are two very different things, said the court: “Here there were no public performances, and there is little in the record to suggest there was much entertainment value in Tindle’s appearance.”¹⁵ This distinction between public performance and private expression might seem reasonable at first glance as a benchmark for First Amendment protection, but applied to employee speech and em-

ployer punishment it feels arbitrary and illogical. A government employer must tolerate provocative expression after hours by a worker as long as it occurs in public before an audience, but the employer can punish that same expression with impunity when it occurs in private.

We'll see in later chapters that an individual's ability to express himself or herself without paying a price on the job depends in various ways on the content and context of speech. The specific details of the situations I have just described, where workers engaged in racially insensitive symbolic (non-verbal) expression, may not seem routine or commonplace, but they do raise typical—and difficult—questions about what we mean by “speech” and “expression,” and what kinds of expressive activity fall under the umbrella of “workplace expression,” which is my focus throughout the book. I will spend the rest of this chapter answering these questions and will say a few words about why the subject of workplace expression deserves a new and detailed examination now.

There is a temptation to use the words “speech” and “expression” interchangeably, and I find it convenient to do so at many points in the book,¹⁶ but it is worth taking a moment to distinguish them, at least at the outset. I start with the text of the First Amendment, which mentions “speech” but not “expression”:

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.

Thomas Emerson, one of the twentieth century's major theorists of the First Amendment, says “the root purpose of the First Amendment is to assure an effective system of freedom of expression in a democratic society.”¹⁷ The key word here is “system.” The First Amendment brings together a constellation of behaviors related to the cultivation and communication of ideas—religious belief and practice, speech, a free press, assembly and free association, and petition for redress—and taken as a package they form (in Emerson's usage) a system of freedom of expression.

Free speech, in this view, is not synonymous with free expression but is instead a piece of it. An act of “speech” might be regarded as the act of con-

veying to someone else an idea or an attitude, using communication methods that might be verbal or nonverbal, oral or written, published or unpublished. It can happen through an artistic performance rather than a straightforward message and can involve an overt act of communication or the absence of such an act. We have to be careful, however, with the assumption that “speech” necessarily involves communicating to an audience. C. Edwin Baker, another prominent free speech theorist, cautions that many uses of speech do not involve communicating ideas or attitudes to others. Baker calls them the “solitary” uses of speech—diary writing, prayer, self-direction, and creative self-expression, to name a few—that “contribute to self-fulfillment and often to individual or social change.”¹⁸

“Speech” covers a lot of territory but represents only part of the larger idea of “expression.” Freedom of *speech* is the freedom to say what one wishes to say in the form, and to an audience, of one’s choosing (including an audience of oneself only). Freedom of *expression* is the broader ability not just to speak freely but also to believe what one wishes, to associate with those of one’s choosing, and to live in a society where a free press and the right to petition government are guaranteed. The First Amendment, then, protects free speech and these other key freedoms as well, and taken as a whole it defines an overall system of free expression.

FREE SPEECH AND EXPRESSION IN THE WORKPLACE

Freedom of speech is fundamental to effective democracy and a healthy civil society. Work is where many adults develop and maintain the social ties that make up civil society. Work is also how people create for themselves economic independence—a necessity if social and political rights are to have much meaning. Yet the intersection between free speech and work has not been widely explored. Legal issues around employee speech—especially in public-sector jobs—have been percolating in courts and legislatures for many years. When the connection between work and speech does come up, the focus tends to be limited to speech *at work* or *about work*. For example, law professor Cynthia Estlund describes “freedom of speech in the workplace” as “the freedom to speak out *at or about the workplace* free from the threat of discharge or serious discipline.”¹⁹ Richard Lippke, a pro-

fessor of philosophy and religion, sees “work-related speech” as “speech that occurs within the workplace, but also speech which is sufficiently *about work* so that though it occurs outside the workplace, it is subject to employer sanction.”²⁰

I take a more expansive view. As some of the examples I mentioned in the Introduction make abundantly clear, speech with little or no connection to one’s job can still attract an employer’s attention and disapproval. My treatment of speech and work in this book, therefore, encompasses the full range of expressive acts that an employer might be inclined to discourage, punish, or regulate. Expression, as I suggested earlier, involves more than just the acts of verbal and symbolic communication that we think of as “speech.” Expression includes the larger set of principles that come together in the First Amendment: the freedom to believe, the freedom to speak, the freedom to publish, and the freedom to associate with like-minded others. To these freedoms to act, I hasten to add the freedom *not* to act—the ability to be free from compelled or coerced belief, speech, or association. Freedom of expression, then, includes discretion both to act and to not act in expressive ways.

My approach to *workplace* in relation to expression is also expansive. I am interested in expressive activity that happens both on and off an employers’ physical premises, that occurs both during and after normal working or business hours, and that involves communication with others both internal and external to the employer’s organization. In drawing a boundary around what is and isn’t workplace-related speech, it doesn’t really matter where, when, how, or why expression occurs. If it is expressive activity, and if it arouses the nontrivial attention of one’s employer leading to good, bad, or indifferent outcomes, then it qualifies as workplace-related expression.

Thus far I have been referring enigmatically to free speech in and around the workplace without being specific or precise about the kinds of expression involved. Here I wish to reduce this abstraction by describing some specific ways that expressive actions, topics, and contexts vary. With *expression* and *workplace* both framed in such broad terms, there is potentially a wide range of actions and situations that could be construed as workplace-related expression and that could give rise to infringements on freedom of

expression. To make sense of the possibilities, it will help first to impose some conceptual order—categories—on things. I suggest here six ways to imagine variations in workplace-related expressive activity.²¹

The first is *location*—drawing a distinction between expression that occurs at the physical site of the employer’s workplace and expression that occurs elsewhere. The boundary between workplace and off-site is not always clearly drawn; for many people the actual location of one’s place of work is not necessarily defined by concrete physical space falling within the property rights of an employer. Examples are many: the salesperson or consultant who spends time in the field with clients; the telecommuter who works from home; the police officer on patrol; the journalist covering a story; and the traveling executive who spends “working” time in airplanes, airports, and taxis. Communication technology blurs the distinction further: It can be hard to decide if the “location” where speech occurs is on-site or off-site when communication is electronic and possibly transmitted through employer-owned devices and networks. Is private expression contained in email sent from a coffeehouse using the company’s laptop off-work speech? Or a call made on a home phone to a colleague at the office?

Second is *time*—whether some particular expressive activity occurs during or after the “workday.” As with venue, there is plenty of room here for uncertainty, given that in many occupations the temporal boundaries of work are unclear. If, as an employed academic, I took a quick break between writing that last sentence and this one to send an email to my congressman to urge an upcoming vote, have I engaged in speech on or off the clock? What about the delivery person who happens upon a political rally in progress and pulls over and joins in for a while? Or the traveling employee who wears a campaign button on the flight to Cleveland?

The location and timing of speech are important because many would say that employers ought to be able to regulate expression at the workplace and/or during work hours but not otherwise. But given how hard it can be to figure out when and where work ends and life begins in the modern workplace, drawing the necessary boundaries is challenging as a practical matter. Location and time also matter because courts have seen fit to treat them as important. In a case where employees at a Wyoming newspaper lost their jobs after refusing to wear antiunion buttons, the court said, “Terminating an at-will employee for exercising his right to free speech by

refusing to follow a legal directive of an employer *on the employer's premises during working hours* does not violate public policy."²² Similarly, in a Tennessee case where an employee refused to wear company-issued garb opposing a takeover attempt, an appeals court said, "We do not think firing an at will employee for exercising his right to free speech *on his employer's premises during working hours* violates the public policy of this state."²³

Third, workplace expression varies by *topic*, and although that can mean any number of things, the distinction of interest here is between speech about the organization itself and speech about the world beyond it.²⁴ This, too, has its gray areas. A book editor can speak about how the publishing industry works or about how her publishing house handles manuscripts. A physician can talk about health insurance industry practices or about how his physician group handles insurance billing. Many employers prefer that workers avoid discussing their salaries,²⁵ but conversations about salary trends in an industry or profession are something else entirely. These complications aside, it makes sense to condition some judgments of the appropriateness of workplace speech, and the legitimacy of the law's reaction to it, on whether the expressive topic is specifically related to one's job, employer, or workplace.

Fourth, an effort to catalog forms of workplace expression should take into account *audience*, which I think of in two ways. One is, again, an inside/outside divide: is someone's expression directed at listeners inside the organization or at listeners who are not co-employed? Another is the distinction between expression directed at a narrow, confined audience of listeners (one-to-one or one-to-few) and expression that uses vehicles for expression that reach broader, unconstrained audiences (one-to-many channels or mass media).

Fifth, we can distinguish expressive activity that is freely offered by the speaker from expression that is *compelled* by employer mandate or coercion. The significance of compelled speech as a sinister counterweight to free expression goes back more than two centuries to Thomas Jefferson's assertion that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."²⁶ In the modern era of free speech law, it originates with Justice Robert H. Jackson's famous sentence in the landmark 1943 Supreme Court ruling that school-children cannot be forced to pledge allegiance to the flag:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.²⁷

Perhaps no public official can compel speech, but it's a different story for private employers. There have been many situations where a worker is punished or fired for refusing to participate in conveying an employer's preferred message. Employees have used the courts to try to escape compelled speech in situations where the coerced message was both workplace-related (for instance, newspaper employees refusing to wear antiunion buttons)²⁸ and unrelated to work (such as a factory worker wishing not to participate in an on-site Gulf War celebration).²⁹ In Chapter 9, I will discuss corporate participation in the political process through political action committees (PACs) that collect funds from employees and donate to campaigns. Donor participation in these efforts, as we will see, is typically pitched as voluntary but in practice is often perceived by workers as compulsory. Politics aside, employers commonly put words in employees' mouths regarding the firm, its culture, or its products and services and are free to punish nonconformity.

Finally, an inventory of expressive forms would be incomplete without a mention of situations where expression takes the form of *association* with some group or cause rather than specific communication. Questions involving freedom of association with political causes figured prominently in the development of free speech law during the twentieth century. Although freedom of association is not an explicit right spelled out in the Constitution, it is well accepted as falling within the protections of the First Amendment. The Supreme Court made this clear in 1984 when it said that freedom to speak, worship, and petition "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends" was also in place.³⁰ Rights to "expressive association" (as they are known when organizing is for the purpose of speech or worship) are protected in a variety of settings, but cases involving public-sector employees have produced mixed results, so the reach of associational rights to speech in the workplace remains uncertain.³¹

To recap, employee expression can occur at work or somewhere else. It can happen during work hours or at some other time. It can be about the job or workplace or not. It can be directed at an audience that is inside the

organization for which the speaker works or at an outside audience. Expression can serve communication aims that are intimate or can be conveyed through channels that reach mass audiences. It can be freely offered or coerced. And it can entail specific message-driven communication or mere association. I could—but I won't—combine these various characteristics of speech to create unique profiles of expressive behavior; there would be dozens of them, even allowing that several combinations are unlikely or uninteresting. (For example, employer-coerced mass communication that occurs after work and off the premises about matters unrelated to the job is something we probably don't need to worry about.) My aim is not to count up the different flavors of employee speech; it is to emphasize that the canvas here is a broad one and that particular expressive acts have a number of attributes that help to explain how employee speech works, both in law and in practice.

WHY CARE ABOUT WORKPLACE EXPRESSION? AND WHY NOW?

Free speech on and off the job has been a topic of some interest to attorneys, especially employment lawyers, who wrestle routinely with the legalities involved in circumstances where people are disciplined or fired for their actions. But the reality of freedom of expression at work is not just a matter of legalities; it is also about the discretionary choices that individual employers make about employee freedom, managerial discipline, and workplace culture.

As a management issue, free speech in the workplace drew some interest from writers on employment rights during the 1970s and 1980s, but little since then. An early and important account of rights at work was David Ewing's 1977 book *Freedom Inside the Organization*. Ewing observes that "a right to free speech is resisted more stubbornly by management than any other concession it can make to employees."³² Business ethicist Patricia Werhane proposes in her important 1985 book *Persons, Rights, and Corporations* that employee speech rights are necessary for moral equivalence between worker and employer.³³ If corporations have rights to free speech and due process, says Werhane, then moral consistency requires granting similar rights, including rights to free expression (within limits), in the workplace to individual employees. Ewing and Werhane both argue for

greater protections for employee whistleblowers and for freedom from employer interference with activities outside of work, including expressive activities.

The time is right to take a new look at free expression in the workplace for several reasons. First, the nature of work is changing in ways that render rights to expression both more threatened and more important.³⁴ Employment over the course a working lifetime is less stable and more transitional than in the past, which means less individual economic security and more workplace docility and self-censorship. Fearing the consequences (or even the loss of a job), employees develop survival instincts that make them more inclined to curry favor than to speak out about management or corporate practices.

Second, the precipitous drop in the size of the unionized workforce in the United States means fewer workers who can expect due-process protections when they speak out about workplace issues (or anything else).³⁵ Although unions have stepped up organizing efforts in recent years, the climate for organized labor and collective bargaining continues to deteriorate. In an important ruling in late 2006, the National Labor Relations Board decided that workers with merely occasional supervisory responsibilities are ineligible for union representation.³⁶ Critics see the ruling as undermining the rights of millions of workers to organize,³⁷ which means diminished opportunities for due process at work and more risks associated with expressive activity.

Third, we have seen in recent decades a marked increase in political partisanship by corporations, including involvement in hot-button issues that play to social, cultural, and political divisions in society. One result, as the Alabama factory worker with the political bumper sticker discovered, can be a chill on employee expression that departs from an employer's preferred point of view. As corporations expand their visibility as players in regional, national, and international politics, they are more apt to regard unregulated free speech by corporate employees as a threat to their economic and political interests.

Fourth, employee speech is implicated in the ascending priority that firms give to the value associated with their corporate brands.³⁸ Workers are increasingly called upon to buy in to that priority, avoiding words or deeds on or off the job that would undermine brand equity. As one brand

management consultant puts it, protecting the brand means engaging “the entire organization in reinforcing the brand’s promise through every action taken by the organization—internally and externally.”³⁹ The evolving mentality of “brand stewardship” creates new opportunities for conflict between management aims and employee expression.

Fifth, some of the most dramatic changes to work and to workplaces over the past generation have come from developments in information technology and digital networks—advances that alter the landscape for workplace expression in complex ways. Digital information technology can be said to promote free expression at work by making easy-to-use, low-cost communication networks widely available. The Internet allows individuals who are not professional pundits or journalists to reach large and diffuse audiences with little effort. As I will discuss at some length in Chapter 8, many employers are struggling to figure out how to cope with this changing digital terrain—blogs, wikis, listservs, instant messaging, and all the rest—while keeping control of operational efficiency, brand image, and the firm’s reputation.

It is important to keep in mind that the same technology giving workers new avenues for expression is giving employers new ways to police it. Improvements in information and biomedical technology will continue to create additional opportunities for employers to track the activities and conduct of workers. Electronic monitoring and other forms of surveillance are commonly treated as privacy issues,⁴⁰ but they raise free speech concerns to the extent that the content of monitored communications can be grounds for discipline or termination. “It is not a great leap,” observes employment law expert David Yamada of Suffolk University, “to conclude that electronic surveillance in the workplace severely chills employee free speech.”⁴¹

New attention to free speech at work is also warranted by changes we’ve seen in the study and practice of organizational management over the past couple of decades. Researchers and many managers are more attuned to employee involvement and self-direction, to team-based structures that de-emphasize hierarchy, and to the role of rank-and-file input into operational and strategic decision making. As management theory and practice have grown comfortable with flatter organizational designs, more worker involvement through group decision-making mechanisms, and more flexible

processes, structures, and reward systems, the importance of employee participation and by extension employee expression, inevitably grows. I will explore the connection between these management issues and free expression in Chapter 9.

Finally, people are simply spending more time at work than in the past.⁴² With less free time away from the job, people may forfeit opportunities to do expressive things outside the workplace. But the role of free speech here goes beyond just the sheer amount of time we spend at work. As we spend more of our waking hours interacting with work colleagues, the workplace takes on added importance as a place for developing citizenship and building community engagement.⁴³ When people spend more time at work, their conversations with co-workers increasingly represent opportunities to exchange personal, social, and political views on issues of the day. Close to half of all employed adults in a national poll a few years ago said that co-workers express fear or anxiety about national and world events in the workplace at least several times a week.⁴⁴

Work, in other words, is where civic discourse happens for many people.⁴⁵ The quantity and quality of that discourse gives meaning to the idea of citizenship in a free society and helps to define the success of democratic institutions. A key theme of this book, accordingly, is the link between expressive rights on the job and the health of a self-governing democratic society. Democracy isn't something that happens just at night and on weekends; work and democracy go hand in hand. As Yale professor Vicki Schultz observes, it's no accident that democracies are inevitably "employment societies." Paid work, she writes, is democracy's foundation, providing "one of the few arenas—perhaps the only one—in which diverse groups of people can come together and develop respect for each other through shared experience."⁴⁶ But there's more than mutual respect going on. For many people, work is where ideas and opinions are shared with other adults and where people make connections that build friendships and community. The workplace thus serves as a vital breeding ground for the development of social ties that give life to the idea of civil society.

Opportunities to speak freely without employer interference are therefore more than just managerial niceties that make the experience of work feel a little less tyrannical. Workplaces are important venues for shared experience and public discourse, so workplace speech rights matter for

advancing citizenship, community, and democracy in a free society. But if it's so important for people to be able to express themselves, what's stopping them? Employers in the United States have immense power to discourage or punish speech by employees and frequently are willing to do so, even when the speech involved has little or nothing to do with work.

Why do we grant so much control over the raw materials of democracy to employers? And why are employers eager to exercise that control? The answers to the first question are found in the American legal system—the system of constitutional law that governs free speech and the system of employment law that defines the American workplace. In the next two chapters I show how these strands of law give employers the power to silence employee speech. Later, in the book's final chapters, I'll come to the second question: how and why employers make repressive choices about employee speech and what can be done about it.

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