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## **HUPPERT, REILLY, AND THE INCREASING FUTILITY OF RELYING ON THE FIRST AMENDMENT TO PROTECT EMPLOYEE SPEECH**

John Q. Mulligan\*

### INTRODUCTION

Advocates of expanded employee speech rights can be divided into two camps: those who have examined the issue as an employment law matter deserving a statutory solution,<sup>1</sup> and those who have focused on the constitutional implications.<sup>2</sup> The Supreme Court's ruling in *Garcetti v. Ceballos*,<sup>3</sup> has prompted a flood of commentary on the constitutional aspect of the problem. The Court's ruling that a prosecutor's speech was not protected by the First Amendment rested on the flawed proposition that when individuals speak pursuant to the duties of their employment, they are not speaking as citizens.<sup>4</sup> The problems inherent with the Court's line-drawing have been brought into acute relief by the attempts of lower courts to apply *Garcetti*'s "pursuant to duties" test, most noticeably in the current circuit court split over whether a police officer testifying before a grand jury is speaking in fulfillment of his duties as an officer or his duties as a citizen.<sup>5</sup>

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<sup>1</sup> See, e.g., Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237 (2009); Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543 (2004); David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1 (1998).

<sup>2</sup> See, e.g., Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115; Ruben Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22 (2008); Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691 (2009); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009).

<sup>3</sup> 547 U.S. 410 (2006).

<sup>4</sup> *Id.* at 421.

<sup>5</sup> Compare *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008) (holding that a police officer's grand jury testimony is protected because it is speech made pursuant to his duties as a citizen), with *Huppert v. City of Pittsburg*, 574 F.3d 696, 698 (9th Cir. 2009) (holding that a police officer's grand jury testimony was not protected because it was made pursuant to his duties as a public employee).

Critics of *Garcetti* have rightly derided the decision for reasons both philosophical<sup>6</sup> and policy-driven.<sup>7</sup> However, these reasons apply just as readily to private-sector employees, who have even less free speech rights at work than their public sector counterparts.<sup>8</sup> While many critics have proposed constitutional solutions for protecting public employee speech rights,<sup>9</sup> the Constitution is severely limited as a vehicle for protecting employee speech.<sup>10</sup>

This Note will argue that the complicated balancing of interests inherent in the employer-employee relationship could better be accomplished by a statutory scheme that would have the significant advantage of protecting the speech of all employees, not just those in the public sector. Part I of this Note will provide a brief history of the constitutional protections for public employee speech to demonstrate how case law arrived at its current point. It will culminate with a discussion of the circuit court split created by the Third Circuit Court of Appeals' decision in *Reilly v. City of Atlantic City*<sup>11</sup> and the decision of the Ninth Circuit Court of Appeals in *Huppert v. City of Pittsburg*.<sup>12</sup> In Part II, the Note will argue that the constitutional jurisprudence in this area has become untenable. It will go on to discuss all of the problems inherent with attempting to protect employee speech through constitutional means, paying particular attention to the exclusion of private employees from those protections. Part III will discuss the potential of current statutory and state common-law protections for both public and private employees to serve as a model for a comprehensive federal statute. Finally, in Part IV, the Note will propose, as a solution, a comprehensive federal statute to protect employee speech. Part IV will discuss some of the drawbacks to and counter arguments against comprehensive statutory protection for employee speech,

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<sup>6</sup> See, e.g., Julie A. Wenell, Note, *Garcetti v. Ceballos: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RTS. J. 623 (2007) (arguing public employees should not have to abandon their constitutional rights upon entering work).

<sup>7</sup> E.g., Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008) (arguing that failure to protect public employees' speech removes a valuable source of information about government corruption and malfeasance, and leaves public whistleblowers open to retaliation).

<sup>8</sup> BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* 63 (2007).

<sup>9</sup> See, e.g., Estlund, *supra* note 2 (arguing that employees should be protected from retaliation for their speech through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution); Garcia, *supra* note 2 (arguing that *Garcetti*'s holding could be narrowed to its facts); Wenell, *supra* note 6 (arguing that the bright-line tests in *Garcetti* and *Connick* should be replaced by a return to the *Pickering* balancing test).

<sup>10</sup> While many of the issues discussed in this Note are applicable to all types of employee speech, this Note will focus on the speech represented by the *Pickering* line of cases, involving employee speech that criticizes or exposes wrongs within the workplace. There are other examples, such as off-duty employee political or religious speech which the First Amendment may be better suited to protect.

<sup>11</sup> 532 F.3d 216 (3d Cir. 2008).

<sup>12</sup> 574 F.3d 696 (9th Cir. 2009).

but conclude that a federal statute offers the best hope for preserving speech rights within both the public and private workplace.

## I. FIRST AMENDMENT PROTECTIONS FOR EMPLOYEE SPEECH

### A. History of First Amendment Cases

For a long time, the speech of public employees was no more protected against employer retaliation than that of private-sector employees. The prevailing attitude of courts was most famously illustrated by Oliver Wendell Holmes's observation in *McAuliffe v. Mayor of New Bedford*,<sup>13</sup> that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>14</sup> That line of thinking first began to erode during the middle of the twentieth century. In response to McCarthy era anticommunist measures, the Court began to limit the government's ability to place restrictions on public employment.<sup>15</sup> Over a series of cases, the Court held that public employers could not force employees to swear oaths of loyalty<sup>16</sup> or deny employment because of prior political affiliations.<sup>17</sup>

*Pickering v. Board of Education*<sup>18</sup> was the first case to recognize that a public employer's retaliation against a public employee for making political statements was a violation of the employee's First Amendment rights.<sup>19</sup> In *Pickering*, a school teacher was fired for writing a letter to a local newspaper criticizing the school board and district superintendent.<sup>20</sup> The Supreme Court found the firing to be unconstitutional, equating dismissal from public employment with other forms of government speech restrictions.<sup>21</sup>

Justice Marshall, in *Pickering*, recognized that the issue depended in part on whether the teacher's speech was classified as that of an employee or a citizen.<sup>22</sup> He did not, however, indicate, as the Court later would in *Garcetti*, that the two roles were mutually exclusive. He wrote, "The problem in any case is to arrive at a balance

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<sup>13</sup> 29 N.E. 517 (Mass. 1892).

<sup>14</sup> *Id.*

<sup>15</sup> MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 174–75 (2005).

<sup>16</sup> *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>17</sup> *Cafeteria & Rest. Workers Union Local 473 v. McElroy*, 367 U.S. 886 (1961).

<sup>18</sup> 391 U.S. 563 (1968).

<sup>19</sup> *Id.* at 573–75.

<sup>20</sup> *Id.* at 564.

<sup>21</sup> *Id.* at 574. ("While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech . . . the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.")

<sup>22</sup> *Id.* ("[I]n a case . . . in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication . . . it is necessary to regard the teacher as the member of the general public he seeks to be.")

between the interests of the teacher, *as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>23</sup> This suggests a dual status in which employees retain their free speech rights as citizens, but subject those rights to some restrictions within the workplace.

Marshall’s language came to be known as the “*Pickering* balancing test.”<sup>24</sup> The test was used when deciding whether a public employer’s punishment of an employee’s speech constituted a violation of the employee’s First Amendment rights.<sup>25</sup> Certain factors favoring the employee’s right to make the speech in question were balanced against the employer’s need to exert control over the workplace.<sup>26</sup>

The Court first began to show discomfort with relying solely on the *Pickering* balancing test in *Connick v. Myers*.<sup>27</sup> That case concerned an Assistant District Attorney who was terminated for distributing a questionnaire to other district attorneys regarding policies in the office where she worked.<sup>28</sup> The Supreme Court, concerned that “government offices could not function if every employment decision became a constitutional matter,”<sup>29</sup> sought to draw a bright-line rule to keep such cases involving internal workplace disputes out of the courts. The Court held that in order for an employee’s speech to be protected and qualify for the balancing test described in *Pickering*, the speech had to be on a “matter[] of public concern.”<sup>30</sup> The Court made clear that it was concerned about keeping the judiciary out of the role of micromanaging employer-employee relationships by stating that “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”<sup>31</sup>

Though the Court supported its reasoning with practical considerations, the line drawn in *Connick* indicated a crucial departure from *Pickering*. Where *Pickering* held that the First Amendment applied to all employee speech subject to certain permissible restrictions, the Court in *Connick* cordoned off a certain type of employee speech—speech that did not involve matters of public concern—as unreachable by

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<sup>23</sup> *Id.* at 568 (emphasis added).

<sup>24</sup> *E.g.*, Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133, 135 (2008).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 135–36. Oluwole lists several factors including the speech’s impact on workplace harmony and discipline, whether the speech depended on inside information, and the employee’s interest in commenting on matters of public concern. The author also provides a helpful diagram of the *Pickering* factors. *Id.* at 176.

<sup>27</sup> 461 U.S. 138 (1983).

<sup>28</sup> *Id.* at 141.

<sup>29</sup> *Id.* at 143.

<sup>30</sup> *Id.* at 145.

<sup>31</sup> *Id.* at 146.

the First Amendment. The Court's line-drawing in *Connick* foreshadowed the even stricter threshold test that was to come.

### B. *Garcetti v. Ceballos*

*Garcetti v. Ceballos*<sup>32</sup> involved a deputy district attorney who wrote a memo that expressed concern over inaccuracies in an affidavit used to obtain a search warrant and recommended dismissal of the investigation.<sup>33</sup> When his supervisors decided to proceed with the case, he testified for the defense attorney regarding his concerns.<sup>34</sup> He was later reassigned, transferred, and passed over for promotion.<sup>35</sup> He sued, claiming that the subsequent employment actions were retaliation for his memorandum and testimony regarding the affidavit.<sup>36</sup> The Supreme Court held that Ceballos's memo was not protected speech because it was made "pursuant to [his] official duties."<sup>37</sup>

The Court's holding implied that a person's status as a citizen could be absorbed by his or her status as an employee and the legal rights that accompany citizenship could thus disappear. As Justice Kennedy wrote, "when public employees make statements pursuant to their official duties, the employees are not speaking *as citizens* for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>38</sup>

In finding as it did, the Court reiterated many of the same concerns that had motivated its decision in *Connick*.<sup>39</sup> The Court drew a line between the rights of a citizen and those of an employee in order to curb the degree to which the Constitution, and by extension, the judiciary, interferes with employers' right to manage their employees.<sup>40</sup> The "pursuant to duties" language was immediately interpreted as a bright-line rule that a plaintiff must satisfy before the *Pickering* factors could be considered.<sup>41</sup>

In creating this test, Justice Kennedy's opinion for the majority ignored the possibility that when public employees speak or act in the course of their employment, they might be motivated as much by their responsibilities to society as citizens as they are by their duties to their employer, a point Justice Souter raised in his dissent.<sup>42</sup>

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<sup>32</sup> 547 U.S. 410 (2006).

<sup>33</sup> *Id.* at 414.

<sup>34</sup> *Id.* at 414–15.

<sup>35</sup> *Id.* at 415.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 421.

<sup>38</sup> *Id.* (emphasis added).

<sup>39</sup> See *supra* notes 27–31 and accompanying text.

<sup>40</sup> *Garcetti*, 547 U.S. at 419, 422–23.

<sup>41</sup> See, e.g., Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 123 (2008).

<sup>42</sup> *Garcetti*, 547 U.S. at 432 (Souter, J., dissenting) ("[T]he very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks

Government employees in particular purport to serve both their employers and the general public.<sup>43</sup> This duality of purpose has led one author, Richard R. Carlson, to begin referring to such individuals as “citizen employees,” and to suggest they be considered a separate class of employee, possessing rights deserving of protection.<sup>44</sup> The overlap between the role of a citizen and the role of an employee, and the dichotomy of *Garcetti*’s “pursuant to duties” test imposed on those roles, became a critical issue in two subsequent cases.

### C. *Post-Garcetti Jurisprudence*

One of the major criticisms<sup>45</sup> of *Garcetti* is that, despite introducing a new test, the Court left significant latitude as to the application of that test by failing to define what it meant by “pursuant to his official duties.”<sup>46</sup> Ceballos did not dispute that he wrote his memo pursuant to his official duties.<sup>47</sup> This allowed the Court to avoid having “to articulate a comprehensive framework for defining the scope of an employee’s duties . . . where there is room for serious debate.”<sup>48</sup> The Court did, however, indicate that a written description of the employee’s job duties would not be dispositive and that a “practical” inquiry by the fact finder would be required.<sup>49</sup> This lack of definition has led to confusion in the lower courts, as well as in public-sector workplaces, as to when an employee is speaking as a citizen and when he or she is speaking as an employee. This confusion is best highlighted by the split between the Third and Ninth Circuits regarding whether testifying before a grand jury is pursuant to a police officer’s duties.<sup>50</sup>

In *Reilly v. City of Atlantic City*,<sup>51</sup> Officer Reilly of the Atlantic City Police Department testified against another officer in a police corruption trial. When he was later forced into retirement through threat of demotion, he sued, claiming he had been retaliated against for his testimony.<sup>52</sup> The Third Circuit implied that Officer Reilly’s

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of public service include those who share the poet’s ‘object . . . to unite [m]y avocation and my vocation.’”).

<sup>43</sup> *Id.* at 431–32.

<sup>44</sup> Richard R. Carlson, *Citizen Employees and Anti-Retaliation Law*, in *RETALIATION AND WHISTLEBLOWERS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 60TH ANNUAL CONFERENCE ON LABOR 653* (Paul Secunda & Samuel Estreicher eds., 2009).

<sup>45</sup> Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick’s Unworkable Employee/Citizen Speech Partition*, 8 J.L. SOC’Y 45, 66 (2007).

<sup>46</sup> *Garcetti*, 547 U.S. at 421.

<sup>47</sup> *Id.* at 424.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Compare *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), with *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009).

<sup>51</sup> 532 F.3d 216.

<sup>52</sup> *Id.* at 220–23.

trial testimony could be accurately categorized as both pursuant to his official job duties, and as the act of a citizen.<sup>53</sup> Despite the fact that Officer Reilly's trial testimony resulted from his official duties related to the corruption investigation, the court determined that his testimony was protected speech. It stated that "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee."<sup>54</sup> The court reasoned that declaring truthful testimony to be protected employee speech adheres to the "principles discussed in *Garcetti*" by advancing "individual and societal interests."<sup>55</sup>

The *Reilly* case serves as a perfect example of the overlap between citizen speech and employee speech, in part because the Third Circuit's depiction of truthful testimony as a duty belonging to any citizen, not just a police officer, was seemingly inescapable. Characterizing certain speech as employee speech and not citizen speech is a matter of semantics. The overlap the Third Circuit recognized in *Reilly* could easily be found in most employee speech cases. However, in *Reilly*, the court found it significant that the specific type of speech at issue (grand jury testimony) was required of citizens.<sup>56</sup> The court could not blindly follow *Garcetti*'s description of employee and citizen speech as two separate classes in the face of such obvious evidence to the contrary. The court extricated itself from this difficult predicament the best it could by suggesting that when a public employee has a duty to speak both as a citizen and as an employee, the speech no longer "owes its existence to a public employee's professional responsibilities,"<sup>57</sup> and thus, falls under the protective umbrella of the First Amendment.<sup>58</sup> When an individual has a social responsibility to speak regardless of his or her job duties, it cannot be said with certainty that the speech was caused by his or her employment. The facts of *Reilly* expose the most significant flaw with *Garcetti*'s distinction between employee speech and citizen speech: in the cases most likely to come before the courts, such as those involving whistleblowing, an employee who speaks out against his or her government employer is likely to be acting simultaneously as an employee and a citizen.

Despite the seeming inescapability of the Third Circuit's conclusion in *Reilly*, the Ninth Circuit, given a nearly identical set of facts, managed to come to the opposite

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<sup>53</sup> *Id.* at 228–31.

<sup>54</sup> *Id.* at 231.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 228 ("It is axiomatic that '[e]very citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law.'" (quoting *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961))).

<sup>57</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>58</sup> *Reilly*, 532 F.3d at 231 ("When a government employee testifies truthfully, s/he is not simply performing his or her job duties, rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence." (internal quotation marks omitted) (quoting *Garcetti*, 547 U.S. at 423)).

conclusion in *Huppert v. City of Pittsburg*.<sup>59</sup> The Ninth Circuit expressly declined to follow *Reilly*.<sup>60</sup> The court cited a California appellate court decision which listed the act of testifying about facts that will incriminate any person as among a police officer's duties in California.<sup>61</sup> In so holding, the Ninth Circuit seemingly misstated the Third Circuit's holding by claiming the Third Circuit "took a swift turn to conclude that truthful testimony is never part of a police officer's duties."<sup>62</sup>

The Ninth Circuit's dismissal of *Reilly* ignored the Third Circuit's nuanced observation that truthful testimony is a duty that exists both inside and outside of public employment, and is therefore not predicated on public employment. In its favor, the Ninth Circuit's application of the *Garcetti* test appears to be the more literal and clear cut of the two Circuit opinions. It is clear that testifying in the corruption cases was pursuant to the officer's duties in both cases and for the Ninth Circuit that is where the analysis ended.<sup>63</sup>

## II. PROBLEMS WITH RELYING ON THE FIRST AMENDMENT TO PROTECT EMPLOYEE SPEECH

The *Reilly* and *Huppert* decisions illustrate the logical flaws, applicability problems, and unfair results that have led many to call for the overturn of the *Garcetti* standard,<sup>64</sup> and even have inspired legislation to that effect.<sup>65</sup> However, the *Garcetti* decision is merely symptomatic of the real problem: relying on the Constitution to solve this important and complicated employment law issue, which is much better suited for a legislative solution.

Perhaps because speech is protected by the First Amendment,<sup>66</sup> and because the notion of "free speech" is arguably our most widely known and revered constitutional right,<sup>67</sup> it is assumed that any infringement on speech has to be constitutional. The

<sup>59</sup> 574 F.3d 696 (9th Cir. 2009).

<sup>60</sup> *Id.* at 708.

<sup>61</sup> *Id.* at 707 (citing *Christal v. Police Comm'n of S.F.*, 92 P.2d 416, 419 (Cal. Dist. Ct. App. 1939)).

<sup>62</sup> *Id.* at 708.

<sup>63</sup> *Id.* (arguing that the Third Circuit's determination that testifying was pursuant to *Reilly*'s duties should have been dispositive, but that "[b]y first finding that *Reilly*'s speech was pursuant to his job duties, but subsequently concluding that it was protected by the First Amendment, the *Reilly* court impermissibly began chipping away at the plain holding in *Ceballos*").

<sup>64</sup> See *Secunda*, *supra* note 41, at 143–44.

<sup>65</sup> Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1767 n.66 (2007) ("Senate Bill 494 was passed as an amendment to the 2007 National Defense Authorization Act, 96-0 on June 22, 2006. The Senate bill was passed to overturn the Supreme Court decision of *Garcetti v. Ceballos*").

<sup>66</sup> U.S. CONST. amend. I.

<sup>67</sup> See, e.g., *Searcey v. Crim*, 681 F. Supp. 821, 826 (N.D. Ga. 1988); Sean Hannity, *Foreword* to BRIAN JENNINGS, *CENSORSHIP: THE THREAT TO SILENCE TALK RADIO*, at xv

notion that speech would be better protected through any other means is anathema to those who hold the notion of free speech as a sacred right held on a pedestal high above the rights secured by mere statute.<sup>68</sup> But sentiment aside, *Garcetti* exposes some of the inherent difficulties in relying on the First Amendment to protect speech inside the workplace. An inadequate bright-line test, such as the one created in *Garcetti*, was the inevitable result of applying the broad language of the First Amendment to the thorny problem of employee speech. In Part II, this Note will argue that the rights-based approach of First Amendment litigation is flawed as a framework for employee speech protections because of *Garcetti*, the Court's concerns about managerial imperative and docket control, and the lack of protections the First Amendment affords private employees.

#### *A. Untenability of the Garcetti Standard*

Through its strict interpretation of the "pursuant to duties" test,<sup>69</sup> the *Huppert* decision clearly demonstrates the logical fallacy underpinning *Garcetti*'s distinction between speech made as a citizen and speech made as an employee. In just four years, it has become increasingly untenable for the Court to continue to pretend that public employees are never acting as citizens when they are performing their work duties.

Some authors have advocated that the Supreme Court solve the contradiction apparent in *Huppert* and *Reilly* by creating a rule that trial testimony always be considered protected speech.<sup>70</sup> While this solution would remedy the specific issue causing the current circuit split, it ignores the greater problem that *Huppert* and *Reilly* symbolize: the faulty premise on which the "pursuant to duties" test is based.

The split between the Ninth and Third Circuits demonstrates that the "pursuant to duties" test is not just logically inconsistent, it is difficult to apply. It also illustrates some of the main problems with the "pursuant to official duties" test's ability to achieve the goals behind the First Amendment's protections. The Supreme Court admitted in *Garcetti* that those goals extended beyond mere protection of an individual's right of expression, to include protection of the public's interest in hearing certain types of information.<sup>71</sup> Corruption in public agencies and other forms of government malfeasance would ostensibly be a clear example of the types of information the public has an interest in hearing. However, when prosecuting public corruption is essentially part of an officer's job duties as the Ninth Circuit ruled, then the *Garcetti* test

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(2009); Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 344 (2008).

<sup>68</sup> See Garcia, *supra* note 2, at 27 (describing constitutional rights as "rights that transcend the domestic legislative sphere").

<sup>69</sup> *Huppert v. City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009).

<sup>70</sup> E.g., Scott E. Michael, "Lie or Lose Your Job!" *Protecting A Public Employee's Rights to Testify Truthfully*, 29 HAMLIN L. REV. 411 (2006).

<sup>71</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2005).

does not accomplish the goals of protecting the kind of public whistleblowing most valuable to society.<sup>72</sup>

The ambiguity in a narrow interpretation might hold that speech only owes its existence to a public employee's responsibilities when that speech is mandated by those responsibilities. This allows for more nuanced opinions, like that of *Reilly*, where the police officer's speech was protected because he would have had a duty to testify as a citizen regardless of whether he was a public employee.<sup>73</sup> By contrast, a broad interpretation, such as the one the Ninth Circuit seemingly uses in *Huppert*, suggests that speech owes its existence to a public employee's responsibilities whenever the situation or subject matter that occasioned the speech was initiated by the speaker's employment. Such an interpretation reasons that, regardless of any duty to testify Officer Huppert may have had as a citizen, he never would have been in a position to testify on the matter if it were not for his employment as an officer. One can see how this application of the *Garcetti* test has the potential to nearly swallow the First Amendment protections whole, as the overwhelming majority of cases will involve public employees speaking on matters in some way connected to their employment, about which they would likely be uninformed were it not for their position.<sup>74</sup>

Additionally, the Ninth Circuit's ruling places public employees in untenable positions. Police officers in Huppert's position are forced into the unfortunate Catch-22 of having to choose between testifying before a grand jury and being retaliated against or refusing to testify and being held in contempt.<sup>75</sup> Other public employees face a similar paradox in seeking ways to express their concerns in a way that is outside of their duties, and thus protected, and yet not so detrimental to their employer as to damage their chances of winning on the *Pickering* balancing test.<sup>76</sup> Commentators have been quick to pick up on the fact that despite the Supreme Court's suggestion that internal mechanisms can be created for employees to voice protected concerns outside of their official duties, the majority of case law since *Garcetti* has led to the conclusion that complaints made to public bodies outside of the employer such as newspapers or congressmen are more likely to be considered protected speech than complaints made to persons within one's employer.<sup>77</sup> This has created what some have dubbed a "perverse incentive" for public employees to report any concerns they have directly to outside agents such as the press, instead of to superiors or internal compliance officers, to ensure that their speech will be protected and that they will not be retaliated against.<sup>78</sup> Some have even pointed out that public employees who complain to outside sources

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<sup>72</sup> *Id.* at 434 (Souter, J., dissenting).

<sup>73</sup> *See supra* notes 51–55 and accompanying text.

<sup>74</sup> Raj Chohan, *Tenth Circuit Interpretations of Garcetti: Limits on First Amendment Protections for Whistle-Blowers*, 85 DENV. U. L. REV. 573, 588–89 (2008).

<sup>75</sup> *Huppert v. City of Pittsburgh*, 574 F.3d 696, 722 (9th Cir. 2009) (Fletcher, J., dissenting).

<sup>76</sup> *See Oluwole, supra* note 24, at 135.

<sup>77</sup> *See Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007).

<sup>78</sup> Chohan, *supra* note 74, at 595.

may succeed in meeting the *Garcetti* test and ensure that their speech is protected; however, they might ultimately have a harder time of succeeding on the *Pickering* balancing test because such public criticisms are more damaging and disruptive to a public employer's business, and the public employer arguably has a greater interest in preventing that kind of employee speech and a stronger argument for retaliation.<sup>79</sup>

### *B. Managerial Imperative and Docket Control*

The Supreme Court expressed two primary motivations behind its decisions to limit the category of speech by public employees eligible for protection. Both reflect the Court's wariness about extending constitutional rights within the work place. The Court's first concern was that to subject every instance in which an employee is disciplined for a comment made at work to the *Pickering* balancing test would result in endless litigation by essentially "constitutionaliz[ing] . . . employee grievance[s]."<sup>80</sup> The Court's second, and more significant, concern was that the judiciary should not be interfering with the management role of the government employer in relation to its employee.<sup>81</sup>

The Court's concern about the potential for employee speech cases to suddenly overwhelm the judicial docket appears overstated. As Justice Souter predicted in his dissent,<sup>82</sup> and subsequent case law attests,<sup>83</sup> the *Garcetti* rule has hardly lessened the burden on courts in adjudicating employee speech cases. Instead of simply analyzing cases under the *Pickering* balancing test, courts are now forced to perform a "practical inquiry" to determine the scope of an employee's official duties, and then may still have to apply the *Pickering* test in the end.<sup>84</sup> The circuit split between *Reilly* and *Huppert* demonstrates how complicated such a "practical inquiry" can be, and how courts can come to different conclusions applying the test to almost identical facts.<sup>85</sup> This uncertainty leads to increased litigation as lower courts, unsure of how to apply the legal standard, refuse to grant summary judgment and allow the parties to litigate the question of what constitute an employee's official duties.<sup>86</sup> Uncertainty over the

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<sup>79</sup> Bice, *supra* note 45, at 51, 81–83.

<sup>80</sup> *Connick v. Myers*, 461 U.S. 138, 154 (1983).

<sup>81</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) ("To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.").

<sup>82</sup> *Id.* at 435–36 (Souter, J., dissenting).

<sup>83</sup> *See, e.g., Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007) (remanding plaintiff's First Amendment claim for reconsideration in light of the *Garcetti* decision).

<sup>84</sup> *Garcetti*, 547 U.S. at 424 (arguing that "[t]he proper inquiry [into an employee's duties] is a practical one").

<sup>85</sup> *See supra* Part I.C.

<sup>86</sup> Nahmod, *supra* note 7, at 580–81.

“pursuant to duties” test also has the potential to chill valued employee speech, as employees have less certainty that their remarks will be protected.<sup>87</sup>

Concerns about courts interfering with government employers’ managerial functions may not be as easily disposed of. Though some view the “pursuant to duties” test as nothing more than the current Court’s preference for line-drawing,<sup>88</sup> Lawrence Rosenthal has persuasively made the case that the Supreme Court’s purpose in *Garcetti* was to carve out a new class of speech built on the notion of “managerial prerogative.”<sup>89</sup> This new class of speech would not be subject to strict First Amendment scrutiny.<sup>90</sup> If this is the case, attempts to chip away at *Garcetti*’s edges may end up being rebuked by further line-drawing from a Supreme Court wishing to clarify and solidify its *Garcetti* holding.

Another interpretation of the Court’s rationale in *Garcetti* is that a public employer has a right to control its employees’ “work product.”<sup>91</sup> According to the Court, Ceballos would not have written his memo had it not been his official duty to write such memos, and therefore the memo does not constitute protected speech.<sup>92</sup> This would fit Rosenthal’s “managerial prerogative” narrative<sup>93</sup> and highlights a major problem with constitutional solutions. The uniqueness of the employer’s interest in controlling employee speech conflicts starkly with traditional notions of First Amendment rights. Rather than create a false scenario where employees are not citizens or acting as citizens when at work, the Court should recognize that the workplace is a situation where employer’s interests counteract that of employees such that standard First Amendment considerations do not apply.

### C. Failure to Protect Private Employees

Though *Garcetti*’s bright-line test has numerous flaws, the biggest problem with a constitutional solution cannot be attributed to the *Garcetti* decision at all: First Amendment protections do not apply to private employees. The First Amendment

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<sup>87</sup> BARRY, *supra* note 8, at 100.

<sup>88</sup> See Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1202 (2007) (“All of this leads to the conclusion that *Garcetti* adopted a prophylactic rule in a situation in which the individualized circumstances supporting rule-based adjudication were missing. . . . [T]he decision can only be justified under a meta-preference for rules over standards.”).

<sup>89</sup> Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008).

<sup>90</sup> *Id.* at 89.

<sup>91</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (“Refusing to recognize First Amendment claims based on government employees’ work product does not prevent them from participating in public debate.”).

<sup>92</sup> *Id.* at 421–22 (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”).

<sup>93</sup> Rosenthal, *supra* note 89.

explicitly prohibits the federal government and, via incorporation through the Fourteenth Amendment,<sup>94</sup> state governments from interfering with citizens' free speech rights.<sup>95</sup> It does not, however, prohibit private citizens from interfering with the speech rights of other citizens.<sup>96</sup> This distinction is known as the state action doctrine.<sup>97</sup> As such, private-sector employers can restrict the speech of their employees without running afoul of the First Amendment.<sup>98</sup>

Most private employees are at-will employees, meaning they can be fired at any time without cause.<sup>99</sup> Private employees are entirely reliant on statutes, such as Sarbanes-Oxley<sup>100</sup> or Title VII of the Civil Rights Act,<sup>101</sup> and state common law<sup>102</sup> for protection from their employers.<sup>103</sup>

Some commentators have suggested that the state action doctrine has become obsolete, and should be abolished.<sup>104</sup> The reasoning is that constitutional rights should not be viewed as protections merely from government, but rights that cannot be abrogated by fellow citizens as well.<sup>105</sup> As Bruce Barry writes, "[t]he division between private action and state action is built on a kind of myth. . . . [T]o say that there is no state action in my private behavior is to ignore how government makes it possible for me to pursue my private behavior."<sup>106</sup> Criticisms of the state action doctrine have become especially relevant over the last few decades as federal and state agencies have trended toward privatizing traditionally public functions, such as services related to tax collection, welfare, public works, education, corrections, national defense and even government litigation.<sup>107</sup>

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<sup>94</sup> U.S. CONST. amend. XIV, § 1.

<sup>95</sup> *Id.* amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); *id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

<sup>96</sup> BARRY, *supra* note 8, at 31.

<sup>97</sup> *Id.* at 27.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 97.

<sup>100</sup> Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.).

<sup>101</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §2000(e) *et seq.* (2006)).

<sup>102</sup> *See infra* Part III.B.

<sup>103</sup> BARRY, *supra* note 8, at 100–01.

<sup>104</sup> *Id.* at 39–40.

<sup>105</sup> *Id.* at 39.

<sup>106</sup> *Id.*

<sup>107</sup> *See* Nina Bernstein, *Giant Companies Entering Race To Run State Welfare Programs*, N.Y. TIMES, Sept. 15, 1996, at A1; David Cay Johnston, *I.R.S. Enlists Outside Help in Collecting Delinquent Taxes, Despite the Higher Costs*, N.Y. TIMES, Aug. 20, 2006, at A12; Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at A10; Nate Schweber, *Latest Plan for Corzine to Consider: Private Lanes on the Turnpike*, N.Y. TIMES, July 9, 2008, at B2; Jennifer Steinhauer, *Arizona May Put All State Prisons in Private Hands*, N.Y. TIMES, Oct. 24, 2009, at A1.

However, the state action doctrine is such an ingrained part of constitutional jurisprudence that overturning it would have countless ramifications and would likely increase litigation to such an extent that its repeal is highly unlikely in the near future. Assuming the state action doctrine remains in effect, there is no way for the employee speech rights at issue in *Huppert*, *Reilly* or *Garcetti* to be extended to private employees. This is a major drawback to relying on the Constitution to advance employee speech rights. Private sector employees make up eighty-four percent of the workforce, compared to the approximately sixteen percent represented by the public sector.<sup>108</sup> As a result, private employers exert tremendous influence over Americans' everyday lives, are central to the national economy, and play a large role in shaping public policy.<sup>109</sup>

If the purpose of the First Amendment is, as Thomas Emerson said, "to assure an effective system of freedom of expression in a democratic society,"<sup>110</sup> then how can that system be effective if freedom of expression is not assured within both the public and the private workplace? The workplace has increasingly become the place 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."<sup>111</sup> The drafters of the First Amendment concerned themselves primarily with protecting citizens from the threat of a large, powerful, oppressive government. At the time, they did not contemplate the similar dangers that might be posed by private entities that would grow to equal the government in size and control over the everyday lives of citizens. In seeking to repair the damage to First Amendment protections caused by *Garcetti*, it would be unfair to ignore the lack of protections offered to private employees. Extending protections to both public and private-sector employees requires looking beyond the Constitution for solutions.

### III. CURRENT STATUTORY PROTECTIONS FOR PUBLIC EMPLOYEES

Much of the criticism surrounding *Garcetti* has focused on the "pursuant to duties" test's implications for governmental whistleblowers.<sup>112</sup> Critics fear that not only will civic-minded employees face unfair penalties for speaking out against government malfeasance, but the public will be denied access to valuable information.<sup>113</sup> Justice

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<sup>108</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-10-1212, THE EMPLOYMENT SITUATION—AUGUST 2010, at 19 (2010).

<sup>109</sup> CHRISTINA KEINERT, CORPORATE SOCIAL RESPONSIBILITY AS AN INTERNATIONAL STRATEGY 24 (2008).

<sup>110</sup> BARRY, *supra* note 8, at 15 (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970)).

<sup>111</sup> *Id.* at 8.

<sup>112</sup> See, e.g., Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531 (2008).

<sup>113</sup> *Id.* at 1546.

Kennedy attempted to address this concern by suggesting such employees could rely on the existing statutory protections.<sup>114</sup> Part III will survey current whistleblower statutes and consider whether they might offer a viable model for protecting employee speech without relying on the First Amendment.

#### A. Federal Protections

Federal employees who speak critically of their employers are partially protected through the Whistleblower Protection Act of 1989 (WPA),<sup>115</sup> in conjunction with the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act).<sup>116</sup> The WPA protects public employees and applicants for employment against reprisal for reporting: “(A) a violation of any law, rule, or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>117</sup> The Act created the Office of Special Counsel specifically to investigate claims brought under the Act.<sup>118</sup> The No FEAR Act adopts the same language and strengthens the preventative effect of the WPA, by forcing individual government agencies to pay for any judgments awarded employees who bring successful antiretaliation claims out of the agencies’ own budgets.<sup>119</sup>

Federal protections for private employees consist mostly of provisions attached to separate legislative acts.<sup>120</sup> Examples include the Occupational Safety and Health Act<sup>121</sup> and Title VII of the Civil Rights Act.<sup>122</sup> These provisions typically prohibit retaliation against employees who report the particular types of violations made illegal by the statute they are attached to.<sup>123</sup> This has created precisely the kind of piecemeal protections Justice Souter and others criticized in regards to the *Garcetti* decision.<sup>124</sup> In order to expand these existing protections beyond their narrow scope, reformers need to focus their attention on a comprehensive federal statute.

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<sup>114</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 425–26 (2006) (“[L]egislative enactments—such as whistle-blower protection laws and labor codes . . . as well as . . . other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.”).

<sup>115</sup> Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.).

<sup>116</sup> Pub. L. No. 107-174, 11 Stat. 566 (2006) (codified at 5 U.S.C. § 2301 *et seq.* (2006)).

<sup>117</sup> 5 U.S.C. § 1213(a)(1) (2006).

<sup>118</sup> *Id.* § 1211.

<sup>119</sup> Daniel S. Jacobs, *The Role of the Federal Government in Defending Public Interest Litigation*, 44 SANTA CLARA L. REV. 1, 49 n.241 (2003).

<sup>120</sup> Carlson, *supra* note 44, at 655 (“A typical antiretaliation provision is associated with a law that is mainly for some other regulatory purpose . . .”).

<sup>121</sup> Pub. L. No. 91-596, 84 Stat. 1602 (1970) (codified as amended at 29 U.S.C. §§ 651–78 (2006)).

<sup>122</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000(e) *et seq.* (2006)).

<sup>123</sup> *See, e.g.*, 29 U.S.C. § 660(c) (2006); 42 U.S.C. § 2000(e)-3a (2006).

<sup>124</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 440 (Souter, J., dissenting).

That attention started to come in the wake of the Enron scandal, which caused great harm to shareholders, employee pensions and the economy as a whole.<sup>125</sup> Congress recognized how damaging corporate malfeasance could be and how much harm would have been avoided had an employee informed the public of Enron's fraudulent activities earlier. As a direct result, the first federal statute passed specifically in response to a recognized need to encourage whistleblowing within a particular private industry was the Sarbanes-Oxley Act of 2002 (SOX).<sup>126</sup> SOX protects employees of publicly held corporations against retaliation for cooperating or providing information to a federal agent or internal investigator regarding violations of federal securities law.<sup>127</sup> In that way, SOX is often looked to as a starting point for potential future comprehensive private employee protections. As with the WPA, SOX has been criticized for its narrow definitions of whistleblowing.<sup>128</sup> However, it has served as a valuable example of what effect such a statute can have, and provided insight into how it can be improved upon.<sup>129</sup>

### B. State Employee Speech Protections

In a 2007 article,<sup>130</sup> Richard Carlson broke state whistleblower protections down into three types: those with fairly comprehensive common-law protections for whistleblowers, those with comprehensive statutory protections, and those (the majority) with neither. States with strong common-law protections include California and Ohio,<sup>131</sup> where an employee may state a cause of action for wrongful retaliation if:

- (1) [T]here is a *clear* public policy manifested in a state or federal constitution, statute or administrative regulation, or in the common law;
- (2) The employer discharged the employee under circumstances that jeopardize the public policy;
- (3) The employer was motivated by conduct related to the public policy; and
- (4) The employer lacked overriding legitimate business justification for the dismissal.<sup>132</sup>

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<sup>125</sup> Paul M. Healy and Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSP. 3 (2003).

<sup>126</sup> Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.).

<sup>127</sup> *Id.*

<sup>128</sup> Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 201 (2007) (“[T]he Act does not protect whistleblowers providing information to state or local authorities, co-workers who are not supervisors nor charged with authority to investigate the misconduct, or the press.” (citations omitted)).

<sup>129</sup> *Id.* at 214–15.

<sup>130</sup> Carlson, *supra* note 44, at 674.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (internal quotation marks omitted) (citing *Collins v. Rizkana*, 652 N.E.2d 653 (1995)).

This prohibition against employers who fire employees under circumstances related to and motivated by public policy violations has great potential as a model for statutory protections for employee speech. If we want to protect all employee speech that the public might find beneficial as opposed to the narrow categories of speech protected by whistleblower statutes such as the WPA,<sup>133</sup> then it makes sense to define the subject matter of the speech being protected more broadly by using a term such as “public policy.” Here, an employee would not have to be reporting a violation of the law for his or her speech to be protected. Any speech by an employee that called attention to an employer’s violation of public policy would presumably be protected. Unfortunately, one of the drawbacks of the broad language is that courts have narrowed “public policy” in application to primarily apply to statutory violations.<sup>134</sup> However, a statutory construction of this common-law rule would not have to share the same problem, as Congress could make it clear how broadly it wished the protections to apply, and courts would presumably defer to that legislative intent when applying the statutes.<sup>135</sup>

The other interesting aspect of Ohio and California’s common-law rules is the consideration given to the employer’s motivation.<sup>136</sup> This is in contrast to the Supreme Court’s *Garcetti* and *Connick* decisions, which focused on the employee’s motivation in making the speech.<sup>137</sup> This shift in emphasis offers an attractive alternative to the current Constitutional model. Were courts to conduct an investigation into what actually motivated the employee’s dismissal, they might find that the employee was disciplined to prevent the dissemination of information that would be beneficial to the public. In those cases, the argument for a free speech violation would seem stronger. Courts could bypass the complicated question of what caused the employee speech, and find that a First Amendment violation exists if the employer’s action was intended to thwart a First Amendment objective.

State whistleblower statutes vary widely. Eighteen states have statutes that cover both public and private employees.<sup>138</sup> Some states’ statutes apply only to public employees,<sup>139</sup> while other states still lack statutory protections of any kind.<sup>140</sup> The most comprehensive of the statutory protections can be found in New Jersey, Oregon and Montana.<sup>141</sup> New Jersey’s Conscientious Employee Protection Act<sup>142</sup> for example,

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<sup>133</sup> Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C.).

<sup>134</sup> Carlson, *supra* note 44, at 684–85.

<sup>135</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>136</sup> Carlson, *supra* note 44, at 683.

<sup>137</sup> *See supra* notes 27–44 and accompanying text.

<sup>138</sup> *State Whistleblower Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Nov. 2009), <http://www.ncsl.org/default.aspx?tabid=13390>; *see also* Courtney J. Anderson DaCosta, Note, *Stitching Together the Patchwork: Burlington Northern’s Lesson for State Whistleblower Law*, 96 GEO. L.J. 951, 955–56 (2008) (“[S]ome twenty state legislatures have enacted comprehensive whistleblower statutes . . .”).

<sup>139</sup> *State Whistleblower Laws*, *supra* note 138.

<sup>140</sup> *Id.*

<sup>141</sup> Carlson, *supra* note 44, at 674.

<sup>142</sup> N.J. STAT. ANN. § 34:19-3 (West 2010).

protects an employee's opposition to activity the employee reasonably believes (1) is in violation of a law or a rule or regulation promulgated pursuant to a law . . . , (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.<sup>143</sup>

#### IV. STATUTORY SOLUTION—COMPREHENSIVE FEDERAL EMPLOYEE SPEECH PROTECTIONS

Prohibiting persons from suffering unfair consequences from speech they have made, and protecting society's access to information of public interest, are interests the First Amendment was intended to serve.<sup>144</sup> Both of these interests could be protected by statute as, and arguably more, effectively than by reference to the First Amendment. The majority of other employee interests are protected by statute,<sup>145</sup> even if there are logical constitutional avenues. The most obvious and apt example is the Title VII anti-discrimination law.<sup>146</sup> Discrimination in employment could arguably be deemed unconstitutional under the Fourteenth Amendment's Equal Protection Clause.<sup>147</sup> However, Congress instead passed the Title VII anti-discrimination statute, and employees have effectively relied upon that statute for protection from and retaliation for workplace discrimination since its passage.<sup>148</sup> There is no reason to believe a national anti-retaliation statute, modeled after Title VII, and like Title VII, passed under Congress's Commerce Clause authority, could not be equally as effective.

##### *A. Advantages of Statutory Protections*

A comprehensive federal statute offers three advantages over First Amendment litigation as a means of protecting employee speech: incrementalism, flexibility and protection for private as well as public employees.

One of the foremost problems of protecting employee speech through the First Amendment is the slippery slope concept. Once the Court recognizes that any action taken by a government employer to curtail the speech of its employees is a First Amendment infringement, where does it draw the line? How does the Court extract

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<sup>143</sup> Carlson *supra* note 44, at 674–75 (citing New Jersey Conscientious Employee Protection Act § 34:19-3).

<sup>144</sup> See generally Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

<sup>145</sup> BARRY, *supra* note 8, at 31.

<sup>146</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §2000(e) *et seq.* (2006)).

<sup>147</sup> See, e.g., K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525, 528 (2001) (discussing the Equal Protection Clause and employment discrimination).

<sup>148</sup> BARRY, *supra* note 8, at 34.

from the language of the First Amendment what speech public employees have a “right” to and when that “right” is subordinate to their employers’ interest in maintaining control over the work place? In *Garcetti* the majority professed sympathy for the need to protect employees that expose government corruption,<sup>149</sup> but was noticeably spooked by the hypothetical impact expansion of First Amendment rights could have on the balance of power between employees and employers.<sup>150</sup> A federal employee speech statute could draw a line between whistleblower protections, which all employees should be entitled to, and the more nebulous ramifications of the First Amendment in the workplace that so concerned the majority in *Garcetti*.<sup>151</sup> A comprehensive statute could clearly define the exact types and instances of speech deserving protection so that courts could apply the statute without having to worry about finding a constitutional right that grants employees too much freedom and that would be difficult to undo later.

Setting aside the concern over exposing corruption and illegality, the *Garcetti* decision becomes much less problematic because the stakes are much lower. Employee rights advocates will frame the issue as whether public employees are being forced to surrender their rights to criticize the government upon taking public employment.<sup>152</sup> Proponents of limiting the amount of protected speech will contend that a government employee has no greater right to criticize his or her employer than a private employee.<sup>153</sup> Regardless, the issue can be argued without carrying the extra burden of protecting the social good that comes when insiders expose government malfeasance.

The second advantage of a statutory scheme is that it offers the ability to tailor statutory protections to best accomplish the purposes of whistleblower laws. Treating protections against retaliatory measures for employee speech as a First Amendment

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<sup>149</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 425 (“Exposing governmental inefficiency and misconduct is a matter of considerable significance.”).

<sup>150</sup> *Id.* at 423 (“Ceballos’ proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.”).

<sup>151</sup> *See supra* Part I.B.

<sup>152</sup> Wenell, *supra* note 6, at 647 (“Simply because an employee enters the doors of a government employer, to serve the people of this country, does not mean that the employee relinquishes his or her rights as a citizen.” (citing *What Price Free Speech? Whistleblowers and the Ceballos Decision: Hearing Before the H. Comm. on Gov’t Reform*, 109th Cong. 26 (2006) (prepared statement of Richard Ceballos, Deputy District Attorney, County of Los Angeles, California))).

<sup>153</sup> Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLAL. REV. 1635, 1649–50 (2007). Moss argues that one of the arguments against public employee speech rights contained in *Garcetti* rests on what he calls the “waiver doctrine.” *Id.* at 1649. As he explains it, the doctrine holds that it is justifiable to deny speech rights to public employees because they consent to surrender those rights by accepting the employment. *Id.* The argument is similar to the primary justification given for “at-will” employment in the public sector.

issue requires viewing the issue through what Orly Lobel has called a “rights-based lens.”<sup>154</sup> Rights-based approaches are less accommodating of exceptions and nuance, as supporters of the right are hard-pressed to explain why whistleblowing can be a fundamental right in some instances, but not others.<sup>155</sup> A statutory scheme offers the chance to start from scratch. Instead of deciding what protections are most in keeping with the Constitution, lawmakers can decide what should be protected and simply write it in. Cases so far have shown that protecting whistleblowers is a complex issue, involving questions about what types of complaints should be protected, whether internal or external whistleblowing should be protected, and what types of employer responses should be punished.<sup>156</sup> Crafting a statutory scheme will offer the chance to discuss all of the facets of employee speech, and design protections based not on what the constitutional framers intended or past case law dictates, but based solely on what would be most effective and desirable to society.

The ability to tailor an employee speech statute to meet specific policy objectives is perhaps best illustrated by the ongoing debate over incentives for whistleblowers.<sup>157</sup> Multiple scholars have advocated for incentives in future whistleblower statutes because studies suggest incentives are more successful than protections in persuading whistleblowers to come forward with valuable public information.<sup>158</sup> Similarly creative solutions to complicated employee speech issues are not available through First Amendment litigation.

The final advantage to a statutory scheme is that, unlike the First Amendment, statutory protections can protect private employees.<sup>159</sup> The passage of Sarbanes-Oxley amounted to an admission by Congress that private whistleblowers could be as important to the national welfare and as deserving of protection as their public counterparts. Most advocates of constitutional protections for public employees are presumably also in favor of statutory protections for private employees, and would suggest that protections are not an either-or proposition. It makes little sense to devote the time and resources to fight for employee rights on behalf of the 21 million public sector

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<sup>154</sup> Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 456 (2009).

<sup>155</sup> *Id.* at 457. (“A second limitation of the rights framework is its inability to explain why some forms of resistance to illegal behavior should not receive protection. The absolute nature of rights has obscured the administrative and managerial concerns when balancing multiple loyalties.”).

<sup>156</sup> Carlson, *supra* note 1, at 292–305.

<sup>157</sup> See, e.g., Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91 (2007).

<sup>158</sup> Dworkin, *supra* note 65, at 1757 (“Recommended revisions include significantly rewarding whistleblowers that come forward with novel and relevant information. Experience with the False Claims Act and equivalent state statutes show such incentive legislation to be the only truly effective legislative model.”).

<sup>159</sup> See *supra* note 98 and accompanying text.

employees<sup>160</sup> while ignoring the approximately 108 million employees who work in the private sector.<sup>161</sup>

Kennedy's opinion in *Garcetti* suggests that he intended to separate the issue of whistleblowing from that of free speech.<sup>162</sup> If private and public whistleblowing are of equivalent importance, both types of employees should receive equivalent protection through a unified statutory scheme. This approach would ideally avoid cases like *Huppert* and *Reilly* because both officers could rely on statutory protections, turning their cases into employment law disputes and not constitutional issues. The Court seems to acknowledge that protection of whistleblowing is a social good, but one that should be accomplished as most social goods are, through legislation.<sup>163</sup>

### B. Problems with a Statutory Solution

Despite the advantages discussed in the preceding section, not every employee speech advocate believes a statutory solution is the quickest or most realistic path to success.<sup>164</sup> Proponents of the judicial approach are skeptical about the likelihood of achieving meaningful protections for employees through statute. Chief among their concerns are the inadequacies of current whistleblower laws,<sup>165</sup> a lack of confidence in the legislature to pass a meaningful bill,<sup>166</sup> and the idea that a statutory solution lacks the permanence or moral authority of a constitutional, rights-based approach.<sup>167</sup>

The most widespread criticism of reliance on statutory protections is that the current patchwork of statutes is riddled with holes that leave many private and public employees unprotected.<sup>168</sup> Critics have persuasively argued that existing whistleblower statutes are not having their intended effect.<sup>169</sup> Existing statutes have been criticized for being too narrow.<sup>170</sup> Many current statutes only protect speech made to certain

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<sup>160</sup> BUREAU OF LABOR STATISTICS, *supra* note 108.

<sup>161</sup> *Id.*

<sup>162</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 425–26 (2006).

<sup>163</sup> *Id.*

<sup>164</sup> *See Garcia*, *supra* note 2.

<sup>165</sup> *Id.* at 25. (“[S]tatutes are prone to leave gaps in protection, and workers may fall through the cracks.”).

<sup>166</sup> *Id.* at 44. (“[L]egislative activity can be an enormous investment of resources, particularly in the current political climate, where corporations will use lobbyists to prevent the passage of statutes that interfere with their ability to control the workplace.”).

<sup>167</sup> *Id.* at 25. (arguing that *Garcetti* “takes rights outside the realm of fundamental constitutional rights and makes them subject to the political process”).

<sup>168</sup> *Id.*

<sup>169</sup> *See id.* at 42–43; Dworkin, *supra* note 65, at 1764 (“Despite the intended promotion and use of whistleblowing to help enforce Sarbanes-Oxley and deter wrongdoing in the securities market, the statutory scheme gives the illusion of protection without truly meaningful opportunities or remedies for achieving it.”(citation omitted)).

<sup>170</sup> Ramirez, *supra* note 128, at 201.

authorities.<sup>171</sup> Employees who complain to the wrong person may learn far too late that there are no legal protections available to them.<sup>172</sup> Some statutes restrict whistleblowing to complaints made to governmental or other external authorities, without providing any protection for internal complaints.<sup>173</sup> Problematically, this creates an incentive for whistleblowers to publicly report some activities that could be taken care of internally at less harm to the company.<sup>174</sup>

Others have pointed out that many whistleblower complaints suffer from time-consuming procedural hurdles.<sup>175</sup> Problems for private whistleblowers include statutes of limitations that are too short, complex procedures for bringing a claim, and inadequate remedies.<sup>176</sup> These procedural obstacles are even greater for federal employees than for state and local government officials.<sup>177</sup> The numerous gaps in the current statutes make protections for most employees illusory. In some cases even the illusion of protection is missing, as scholars have noted that SOX, for example, has been largely ineffective in increasing the number of whistleblower anti-retaliation claims.<sup>178</sup>

Despite the inadequacy of current statutory protections, there is no reason to believe that a comprehensive federal employee speech statute would be unable to improve on the existing statutory framework. The flaws in the existing statutory models arguably support the use of statutory protections. Existing statutes have provided valuable information as to which provisions are most effective and what additional issues are

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<sup>171</sup> *Id.* (noting about SOX, for example, “the Act does not protect whistleblowers providing information to state or local authorities, co-workers who are not supervisors nor charged with authority to investigate the misconduct, or the press”(citation omitted)).

<sup>172</sup> *Id.* (“Unless an employee has taken the unusual precaution of reviewing the statutory language, the employee is unlikely to realize the limits of its protection.”).

<sup>173</sup> *Id.* at 201 n.104.

<sup>174</sup> Lobel, *supra* note 154, at 447.

<sup>175</sup> See Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 944 (2009) (“[W]histleblower-retaliation complainants are often bogged down in administrative proceedings and may never have a timely opportunity to argue their cases before an independent administrator or the judiciary.”); Dworkin, *supra* note 65, at 1765; Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1102–03 (2008) (attributing the lack of successful First Amendment claims by federal employees against their agencies to the “convoluted process” mandated by the Civil Service Reform Act of 1978).

<sup>176</sup> Dworkin, *supra* note 65, at 1765.

<sup>177</sup> Secunda, *supra* note 175, at 1102–03 (noting that because of *Bush v. Lucas*, 462 U.S. 367 (1983), federal employees, unlike state and local government employees, are not entitled to a direct cause of action for First Amendment claims under the Constitution).

<sup>178</sup> See, e.g., Dworkin, *supra* note 65, at 1764–65 (noting that only two percent of the SOX cases that went before an administrative law judge resulted in a decision for the employee); Secunda, *supra* note 175, at 1103 (noting that no federal employee has succeeded on the merits in a First Amendment claim against a federal agency before either the administrative board or the federal appellate court).

raised. The legislative process will allow the current models to be thoroughly studied in order to combine the best elements in a comprehensive bill. A statute can also be amended as needed in an ongoing attempt to improve employee speech protections. The difficulties of the issue counsel a trial and error approach better suited for statutory rather than constitutional solutions.

The difficulty of passing comprehensive legislation to protect employee speech poses a second argument against forgoing First Amendment protections for a statutory solution. One of the main purposes of such a law would be to protect those employees who speak out against government corruption and increase transparency in government decision making.<sup>179</sup> This invites the inherent paradox present whenever a governmental body is asked to regulate itself.<sup>180</sup> Some critics lack faith that truly effective statutory schemes can ever be passed due to this conflict of interests, and believe that is precisely what makes the courts a better check on the power of government employers.<sup>181</sup> However, considering federal employees are the only population currently protected by a comprehensive whistleblower statute,<sup>182</sup> this conflict of interest does not appear to have been an obstacle to legislation to this point.

A more serious concern is whether legislators will have the fortitude to pass meaningful protections for private employees over the certain protests and lobbying of private employers. This concern can be partly mitigated by the ability to focus legislation on the social need for whistleblowing as opposed to the broader concept of employee speech rights in general. Though corporate interests will assuredly be motivated to limit employee protections, there is evidence that such protections can overcome employer objections through broad public support. SOX, despite its flaws, demonstrated that Congress is willing to stand up to a powerful industry—in that case the securities industry—on behalf of whistleblowers.<sup>183</sup> Though some may claim that SOX was a one-time event enabled by the fallout from the Enron and WorldCom scandals,<sup>184</sup> the current economic collapse, including such corporate malfeasance as the Bernie Madoff scandal,<sup>185</sup> and the current employment market should provide a public mood that is similarly receptive to broader protections for employees. Despite what could be described as favorable social conditions for whistleblower legislation, there will always be those who argue that it is easier to gain the vote of five justices than the majority of representatives and senators required to pass comprehensive statutory reform.

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<sup>179</sup> Coglianese, *supra* note 175, at 944.

<sup>180</sup> Garcia, *supra* note 2, at 47.

<sup>181</sup> *See id.* at 25.

<sup>182</sup> *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1986) (codified in scattered sections of 5 U.S.C.).

<sup>183</sup> Richard A. Oppel, Jr., *Negotiators Agree on Broad Changes in Business Laws*, N.Y. TIMES, July 25, 2002, at A1.

<sup>184</sup> *See* Stephen Labaton, *Will Reforms With Few Teeth Be Able to Bite?*, N.Y. TIMES, Sept. 22, 2002, at B4.

<sup>185</sup> *See generally* Alex Berenson & Diana B. Henriques, *S.E.C. Issues Mea Culpa On Madoff*, N.Y. TIMES, Dec. 17, 2008, at B1 (describing the Madoff scandal).

Finally, a statutory solution lacks the permanence of constitutional protections,<sup>186</sup> and leaves unsettled the question of how a citizen's rights change while at work. There are many critics who are concerned not only with policy objective of protecting whistleblowers, but with the proper reach of the First Amendment.<sup>187</sup> A statutory system would protect whistleblowers and other employees from retaliation, but it would not untangle the confusion *Garcetti*, *Reilly* and *Huppert* have imposed on public employees' constitutional rights.<sup>188</sup> Further, some argue that treating speech as a right to be protected by statute detracts from its status as a fundamental right that deserves the added layer of protection the Constitution provides.<sup>189</sup>

There are also critics who will argue, as Justice Souter did in his *Garcetti* dissent, that statutory protections for whistleblowers should not affect the Court's determinations of what types of speech are protected because "[t]he applicability of a provision of the constitution has never depended on the vagaries of state or federal law."<sup>190</sup> This argument fails to recognize that the Court has done so in other First Amendment cases<sup>191</sup> and "when courts' institutional limitations, or the costs associated with judicial review, militate against judicial interpretation or enforcement, the fact that other governmental actors and the broader polity have sought to interpret and enforce the First Amendment ought to be constitutionally relevant."<sup>192</sup>

#### CONCLUSION

As technological advances continue to erode the wall between citizens' work and private lives, new limits must be set as to how far an employer can extend its control over its employees' speech. Denying individuals constitutional rights at work because they are "employees" and not "citizens" during the workday becomes increasingly oppressive as the workday takes up increasing amounts of citizens' time, and the differences between when a person is at work and outside of work become more vague and malleable. As the law moves to expand constitutional protections to the workplace, it is important that these protections are applied to all employees and not limited to those in the public sector. The Court's decision in *Garcetti* only highlights the

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<sup>186</sup> Garcia, *supra* note 2, at 27 (arguing that the constitutional approach will render employee speech rights, "rights that transcend the blowing winds of political change").

<sup>187</sup> See, e.g., Wenell, *supra* note 6.

<sup>188</sup> See *supra* Part II.A.

<sup>189</sup> Garcia, *supra* note 2, at 47 (arguing that the use of legislative instead of constitutional protections for workers' rights to assemble and bargain collectively reduced those rights to "nothing more than a pet project of organized labor, rather than a fundamental human right").

<sup>190</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 439 (2006) (Souter, J., dissenting) (quoting *Board of Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996)).

<sup>191</sup> Lee, *supra* note 2, at 1770 (citing *Bush v. Lucas*, 462 U.S. 367 (1983), and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)).

<sup>192</sup> *Id.* at 1770.

problem faced by all employees. Relying solely on constitutional remedies to prevent oppression of employee speech will leave out the majority of the workforce.

The Supreme Court made clear in *Garcetti* its commitment to what is an unworkably firm demarcation between two spheres of life that frequently overlap, a problem exquisitely demonstrated by the split between the Third and Ninth Circuit Courts in *Reilly* and *Huppert*. Though the Supreme Court's reference to the network of state and federal statutory protections already in place may have contained a touch of wishful thinking, the inadequacies of existing statutory protections should not deter pursuit of a statutory solution. Creating federal statutory protections for employee speech would allow Congress to restore some of the protections public whistleblowers lost in *Garcetti* and clarify what employee speech is actually protected from retaliatory acts. A statutory scheme could also produce the significant added benefit of protecting private whistleblowers who arguably contribute as much to the public good as their public counterparts.