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# The Supreme Court's Anti-Retaliation Principle

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# The Supreme Court's Anti-Retaliation Principle

Richard Moberly\*

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## Abstract

*In five cases issued during the last five years, the Supreme Court interpreted statutory anti-retaliation provisions broadly to protect employees who report illegal employer conduct. These decisions conflict with the typical understanding of this Court as pro-employer and judicially conservative. In a sixth retaliation decision during this time, however, the Court interpreted constitutional anti-retaliation protection narrowly, which fits with the Court's pro-employer image but diverges from the anti-retaliation stance it appeared to take in the other five retaliation cases. This Article explains these seemingly anomalous results by examining the last fifty years of the Supreme Court's retaliation jurisprudence. In doing so, a persistent theme emerges: the "Anti-Retaliation Principle," which the Court uses to advance the notion that protecting employees from retaliation will enhance the enforcement of the nation's laws. The Court has used the Anti-Retaliation Principle for a half-century to strengthen statutory protection from employer retaliation. However, the Court also has demonstrated consistently that it considers the Principle to be primarily a statutory, rather than a constitutional, norm. The Anti-Retaliation Principle explains the recent cases and provides a reasoned and consistent standard against which they can be evaluated. Furthermore, the Supreme Court's Anti-Retaliation Principle provides important lessons for courts as they confront the need to prevent employers from retaliating against employees who report illegalities.*

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## Introduction

In each of five recent cases involving statutory retaliation claims by employees, the Supreme Court upheld the employee's claim and expanded protection from employer retaliation.<sup>1</sup> A sixth employment retaliation case in 2006 involved a First Amendment claim with a dramatically different result. In *Garcetti v. Ceballos*,<sup>2</sup> the Court found in favor of the employer and severely restricted constitutional anti-retaliation protection.<sup>3</sup>

Together these cases present a confusing and seemingly contradictory view of the Court's retaliation jurisprudence. On the one hand, the Court's holdings in the five statutory cases could indicate that the Court favors employees in retaliation cases—a conclusion that would strike many commentators as odd given the Court's decidedly mixed record of protecting employee rights in the past decade.<sup>4</sup> On the other hand, the

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<sup>1</sup> See *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852-53 (2009) (interpreting Title VII, 42 U.S.C. § 2000e-3); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951, 1961 (2008) (interpreting 42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. 474, 128 S. Ct. 1931, 1943 (2008) (interpreting 29 U.S.C. § 633a(a)); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56-57 (2006) (interpreting Title VII, 42 U.S.C. § 2000e-3); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (interpreting 20 U.S.C. § 1681(a)).

<sup>2</sup> 547 U.S. 410 (2006).

<sup>3</sup> See *id.* at 426 (finding that the First Amendment did not protect government employees who speak about matters of public concern if the employee speech was part of the employee's job duties).

<sup>4</sup> See, e.g., Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. R. & EMP. POL'Y J. 253, 288-89 (2009) (noting that the Roberts Court has issued several decisions that undercut an employee's ability to bring employment claims in federal court); Scott Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 *FORDHAM L. REV.* 981, 983 (2007) ("In employment discrimination, it is as if there are two Supreme Courts issuing conflicting rulings."); Anita Silvers, et al., *Disability and Employment Discrimination at the Rehnquist Court*, 75 *MISS. L.J.* 945, 946 (2006) (noting "[the] Court's general pattern of favoring

Court's *Garcetti* opinion significantly narrowed government employees' protection when they blow the whistle on employer misconduct,<sup>5</sup> perhaps indicating a deeper resistance to retaliation protection. Moreover, as explained in more detail below, taken together the Court opinions appear untethered to any consistent judicial philosophy, which has created difficulty for commentators trying to explain the Court's twists and turns.<sup>6</sup>

This Article attempts to bring consistency and cohesion to this morass by placing these recent retaliation cases in the context of a half-century of Supreme Court retaliation jurisprudence. This process illuminates the Court's underlying rationale in retaliation cases generally, which I label the "Anti-Retaliation Principle." The Anti-Retaliation Principle differs from other justifications for retaliation protection because it focuses on the notion that protecting employees from retaliation will enhance the enforcement of the nation's laws.<sup>7</sup> Moreover, it both explains the recent Supreme Court cases and provides a reasoned and consistent standard against which they can be evaluated. Importantly, the Court's use of the Principle also offers guidance for the way courts ought to approach the issue of employer retaliation in the future.

Part I of the Article demonstrates that the Supreme Court historically has approached retaliation cases differently than typical employment matters. In employment cases, the Court often balances the employer's

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plaintiffs in race and sex... discrimination cases, while being decidedly pro-defendant in ... disability-related claims"); Jonathan R. Harkavy, *Supreme Court of the United States: Employment Law Commentary: 2007 Term*, at 2 (noting that although employees "won" more cases than they lost in 2007, there was no "discernable shift in the Court's orientation as an employer-friendly forum") (manuscript on file with author); Marcia Coyle, *Term's Five Key Bias Decisions Were Mixed*, NAT'L L.J. (July 6, 2009), available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431973694&Terms\\_five\\_key\\_bias\\_decisions\\_were\\_mixed\\_&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431973694&Terms_five_key_bias_decisions_were_mixed_&slreturn=1) (quoting Professor Paul Secunda's statement that "[t]his Court tilts substantially towards pro-employer interests"). As Professor Scott Moss has noted, even though the Court has issued some rulings protecting employees in discrimination cases, the Court's "anti-litigation" policies "significantly harm" the Court's commitment to fighting discrimination. See Moss, *supra*, at 986; see also Harkavy, *supra*, at 37 ("[T]he unspoken, yet unmistakably apparent, agenda of the new majority is enhancement of employer prerogatives, recently focusing on protection of the at-will doctrine.").

<sup>5</sup> See *Garcetti*, 547 U.S. at 426.

<sup>6</sup> See discussion *infra* Part II.C.

<sup>7</sup> Commentators have provided numerous other rationales for anti-retaliation protection. See, e.g., Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405, 1434-35 (1967) (arguing that courts should adopt a tort of "abusive discharge" based on a fairness principle that employees are economically dependent on employers); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 21-22 (2005) (asserting that retaliation protection is another form of statutory prohibition on discrimination); Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 245-46 (2009) (arguing that retaliation protection should be provided to "citizen employees" who act in the public interest); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1945 (asserting that "the search for third-party effects is the driving force behind" the tort of wrongful discharge); Robert G. Vaughn, *How Differing Perceptions of Whistleblower Protection Influence the Character of Legal Standards*, at 1 available at [www.corrupcion.unam.mx/documentos/ponencias/C\\_Vaughn.pdf](http://www.corrupcion.unam.mx/documentos/ponencias/C_Vaughn.pdf) (describing four separate justifications for protecting whistleblowers).

interests against the employee's interests.<sup>8</sup> In retaliation cases, however, the Supreme Court uses the Anti-Retaliation Principle to also consider *society's* interest in effective enforcement of the laws—an interest the Court believes can be advanced through strong anti-retaliation protection for employees.<sup>9</sup> For the past fifty years, the Court has applied this Principle consistently in statutory retaliation cases, but taken a slightly more cautious approach in First Amendment cases.

Prior to this Article, the Supreme Court's extensive case law regarding retaliation has never been examined through the organizing lens of the Anti-Retaliation Principle. Rather, commentators often examine these cases in isolation, through principles developed for the specific statute or constitutional provision under which the retaliation claim arose. For example, commentators examine retaliation cases as involving discrete subject matters such as discrimination,<sup>10</sup> the First Amendment,<sup>11</sup> or preemption.<sup>12</sup> This first part of the Article steps back from the "trees" of individual substantive issues and explains the "forest" of retaliation cases.

Part II examines how the Court relied upon the Anti-Retaliation Principle, both explicitly and implicitly, in the six recent retaliation cases. Ultimately, the Principle explains the Court's current retaliation jurisprudence and provides a principled way to evaluate the Court's decisions: do these decisions advance the Court's own Anti-Retaliation

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<sup>8</sup> See, e.g., *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 128 S. Ct. 2146, 2152 (2008) (noting that a "main principle" in the Court's public employment cases is that "although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 793-808 (1998) (balancing various employer and employee interests in creating vicarious liability rule for supervisors under Title VII but also providing for employer affirmative defense); *UAW v. Johnson Controls*, 499 U.S. 187, 206-208 (1991) (narrowly interpreting Title VII's bona fide occupational qualification (BFOQ) defense based on balancing employee's rights against employer's business needs and rejecting test that also considered interests of a pregnant woman's unborn child); *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989) (noting the "delicate balance between employee and employer rights struck by Title VII"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (discussing Title VII's "balance between employee rights and employer prerogatives"); *O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987) ("In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945) (approving an administrative board's balance "between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments"). Cf. *Americans With Disabilities Act*, 42 U.S.C. § 12112(b)(5)(A) (balancing reasonable accommodation of an employee's disability against any undue hardship to the employer).

<sup>9</sup> See discussion *infra* Part I.

<sup>10</sup> See, e.g., *Brake*, *supra* note 7, at 21-22 (examining retaliation as a part of discrimination law).

<sup>11</sup> See, e.g., Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 COLO. L. REV. 1101, 1102-07 (2008) (examining First Amendment protection for federal employees).

<sup>12</sup> See, e.g., Geri J. Yonover, *Preemption of State Tort Remedies for Wrongful Discharge in the Aftermath of Lingle v. Norge: Wholly Independent or Inextricably Intertwined?*, 34 S. D. L. REV. 63, 89-98 (1989) (examining Supreme Court's analysis of federal preemption of state wrongful discharge claims under the Labor Management Relations Act).

Principle by enhancing the enforcement of law? As this Part explains, in the recent statutory cases the Court furthered the Anti-Retaliation Principle by privileging the Principle over other norms that may have seemed sacrosanct to this Court. By contrast, although the lone constitutional case explicitly references the Anti-Retaliation Principle, the rule adopted by the Court in *Garcetti* likely will undermine society's interest in law enforcement.

Identifying and explaining the Court's reliance on the Anti-Retaliation Principle has significant ramifications for the future of retaliation law, which I discuss in Part III. First, the Supreme Court granted *certiorari* for the 2010-11 Term in two cases that will test the boundaries of the Anti-Retaliation Principle. In *Kasten v. Saint-Gobain Performance Plastic Corp.*,<sup>13</sup> the Court will examine whether the Fair Labor Standards Act's anti-retaliation provision protects employees who file oral as well as written complaints.<sup>14</sup> Furthermore, *Thompson v. North American Stainless, LP*<sup>15</sup> presents the issue whether Title VII's anti-retaliation provision prohibits an employer from retaliating against a third-party who is associated with an employee who engaged in protected conduct.<sup>16</sup> The Court could use the Anti-Retaliation Principle to broaden anti-retaliation protections under these statutes, despite arguments that the statutory language at issue in each case seemingly excludes the employees' claims.<sup>17</sup>

Second, respecting the Court's view of the Anti-Retaliation Principle should cause lower courts to evaluate retaliation cases through this same lens. This perspective might impact a number of retaliation issues currently percolating. For example, courts have been struggling with the level of causation required by various retaliation statutes,<sup>18</sup> and the Anti-Retaliation Principle can help provide some guidance on this complicated issue.<sup>19</sup> Further, a focus on law enforcement would help courts interpret when a whistleblowing employee has a "reasonable belief" that an employer has violated the law, an issue that lower courts often have used to undermine statutory protection from retaliation.<sup>20</sup>

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<sup>13</sup> 130 S. Ct. 1890, No. 09-834 (March 22, 2010) (granting petition for writ of certiorari).

<sup>14</sup> See Pet. for Writ of Certiorari at i, *Kasten v. Saint-Gobain Performance Plastic Corp.*, No. 09-834, 2010 WL 146471 (U.S. Jan. 12, 2010).

<sup>15</sup> 130 S. Ct. 3542, No. 09-291 (June 29, 2010) (granting petition for writ of certiorari).

<sup>16</sup> See Pet. for Writ of Certiorari at i, *Thompson v. N. Am. Stainless, LP*, No. 09-291, 2009 WL 2876195 (U.S. Sept. 3, 2009).

<sup>17</sup> See discussion *infra* Part III.A.

<sup>18</sup> See discussion *infra* Part III.B.

<sup>19</sup> A recent non-retaliation Supreme Court case, *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), which dealt with the appropriate level of causation under the discrimination provision of the Age Discrimination in Employment Act, will enhance this struggle. See *id.* at 2350.

<sup>20</sup> See discussion *infra* Part III.B.

## I. The Past: The Supreme Court's Anti-Retaliation Principle

During the last fifty years of its retaliation jurisprudence, the Supreme Court has recognized that employees must be protected from retaliation in order to further the enforcement of society's civil and criminal laws. This "Anti-Retaliation Principle" allows the Court to examine anti-retaliation protection as a law enforcement tool that benefits society, rather than simply as extra protection for employees provided at a cost to employers. The Court makes three assumptions throughout its opinions to support the Principle: (1) employees are in the best position to know about illegal conduct by their employer or other employees; (2) employees will report this information if the law protects them from employer retaliation; and (3) employee reports about misconduct will improve law enforcement.

Significantly, the Court has applied the Principle in statutory cases differently than in First Amendment retaliation cases. In statutory cases, the Court broadly interpreted explicit anti-retaliation provisions and implied anti-retaliation protections even when no specific provision existed. The Court's First Amendment retaliation jurisprudence, however, provides an outer limit of the Principle. Although the Court recognized the Anti-Retaliation Principle's importance in these cases, the Court also suggested that statutes, rather than the Constitution, might be the better source for anti-retaliation protection.

### A. Statutory Protection

Professor Clyde Summers once noted that labor law's purpose always has been to address the imbalance in bargaining power between employees and employers.<sup>21</sup> From this perspective, statutory and judicial employment protections exist to protect employees' "primarily non-economic interests in fairness, personal dignity, privacy, and physical integrity."<sup>22</sup> These legal protections must be balanced against the employer's countervailing interest in the flexibility and efficiency provided by the at-will employment rule.<sup>23</sup> In non-retaliation labor and employment cases, the Supreme Court has recognized this balancing of legal protection for employees against the economic burden that protection places on employers.<sup>24</sup> Particularly in recent years, however,

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<sup>21</sup> Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 7 (1988).

<sup>22</sup> *Id.* at 15.

<sup>23</sup> See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951-69 (1984) (describing the efficiency of the at-will employment rule); Americans With Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (balancing reasonable accommodation of an employee's disability against any undue hardship to the employer).

<sup>24</sup> See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989) (noting the "delicate balance between employee and employer rights struck by Title VII"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (discussing Title VII's "balance between employee rights and employer

that balance seems to be weighted towards employer interests in many non-retaliation decisions.<sup>25</sup>

By contrast, the Court's use of the Anti-Retaliation Principle in statutory retaliation cases typically has led to enhanced employee protection compared to other types of employment law cases. In these retaliation cases, the Court often utilized the Anti-Retaliation Principle's "law enforcement" perspective to weigh a third interest: the interest of society in having the law enforced. As described below, the Court placed great weight on this societal interest because, in the Court's formulation, protecting employees from retaliation increases employees' willingness to provide information about illegal activity, which in turn advances societal law enforcement goals.

Several cases that demonstrate the Court's use of the Anti-Retaliation Principle involved statutes without explicit legislative history about the purpose of anti-retaliation legislation. This legislative silence often required the Supreme Court to explicate this purpose by utilizing the Anti-Retaliation Principle to justify a broad reading of a statutory anti-retaliation provision.<sup>26</sup> For example, in the Court's first modern case involving a statutory anti-retaliation provision, *Mitchell v. Robert De Mario Jewelry, Inc.*,<sup>27</sup> the Court examined Section 17 of the Fair Labor Standards

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prerogatives" by eliminating "certain bases for distinguishing among employees while otherwise preserving employer's freedom of choice); see also note 8, *supra*, (citing cases involving this balancing).

<sup>25</sup> See, e.g., *Gross v. FBL Fin. Servs., Inc.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2351-52 (2009) (requiring high burden of proof for plaintiffs regarding causation in ADEA cases); *Ricci v. DeStefano*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2658, 2664-65 (2009) (limiting ability of employer to consider impact of potential disparate impact claim when engaging in affirmative action); *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 2156-57 (2008) (restricting application of constitutional Equal Protection Clause to public employees); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 638-43 (2007) (limiting statute of limitations for discrimination cases).

<sup>26</sup> The National Labor Relations Act (NLRA) is the rare exception, and even that legislative history is sparse. Congress included an anti-retaliation provision in the NLRA, one of the first employment statutes it enacted, to protect employees who "file charge or given testimony" related to a violation of the NLRA. 29 U.S.C. § 158(a)(4); see also STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 93 (2001) ("Among the oldest statutes that protect employees (and supervisors) who engage in protected conduct, which under some circumstances can be classified as whistleblowing, is the National Labor Relations Act.") (citation omitted). Congress adopted this language from an earlier executive order issued under a predecessor statute explicitly so that employees would feel free to file charges when an employer violated the NLRA's substantive provisions. See Matthew W. Finkin, *Labor Law by Boz-A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 171 (1985); NAT'L LAB. REL. BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, VOL. I, Debate on S. 1958 in Senate, at 2401 (comments of Sen. Wagner) (noting that without an anti-retaliation provision "even though there might be flagrant violations of the provisions of this measure, an employee would not be free to file charges").

<sup>27</sup> 361 U.S. 288 (1960). Twenty-three years before *Mitchell*, the Supreme Court upheld a provision of the NLRA that prevents another form of retaliation. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court found constitutional Section 8 of the NLRA, 29 U.S.C. § 158, which prohibits employers from engaging in "unfair labor practices," such as interfering with employees who exercise their NLRA rights and discriminating against employees to discourage union membership. See *Jones & Laughlin*, 301 U.S. at 33-34.



Act (FLSA).<sup>28</sup> This provision explicitly gave federal courts jurisdiction to enjoin violations of the FLSA's anti-retaliation provision, but the case presented the question of whether the provision also permitted courts to order that an employer pay damages to employees who were retaliated against in violation of the Act.<sup>29</sup> Although the FLSA seemed to limit courts' powers to only injunctive relief,<sup>30</sup> the Supreme Court held that the judiciary's implicit, equitable powers in injunction cases included the power "to provide complete relief in the light of statutory purposes," including awarding back pay damages.<sup>31</sup> The Court based its holding explicitly on the Anti-Retaliation Principle:

[C]ongress chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. *Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.* This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary pursuant to § 17, *Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.*

In this context, the significance of reimbursement of lost wages becomes apparent. To an employee considering an attempt to secure his just wage deserts under the Act, the value of such an effort may pale when set against the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement. Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives,

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<sup>28</sup> 29 U.S.C. § 217.

<sup>29</sup> See *Mitchell*, 361 U.S. at 289.

<sup>30</sup> See 29 U.S.C. § 217 (giving district courts jurisdiction "for cause shown, to restrain violations of [the FLSA's anti-retaliation provision]. Provided, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action").

<sup>31</sup> *Mitchell*, 361 U.S. at 292.

employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.<sup>32</sup>

Thus, in *Mitchell*, the Court broadly interpreted a statutory anti-retaliation provision because it recognized that employees needed strong remedies in order to encourage them to come forward with information about violations of the law. Moreover, the Court asserted that Congress specifically intended for employee information to play a role in the statute's enforcement scheme.

After *Mitchell*, the Court consistently wove language supporting the Anti-Retaliation Principle into its interpretations of statutory anti-retaliation protections. In *NLRB v. Scrivener*,<sup>33</sup> the first Supreme Court case to use the term "retaliatory discharge,"<sup>34</sup> the Court found that the National Labor Relations Act protected employees who gave sworn statements to a National Labor Relations Board field examiner, even though the part of the Act's anti-retaliation provision at issue seemed to limit its protections to employees who file formal charges or testify at a formal hearing.<sup>35</sup> Limiting the statute's protections to a narrow reading of the provision's text, according to the Court, would undermine the Congressional purpose of the Act to encourage "all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board."<sup>36</sup> Employees need "complete freedom" to report in order "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses."<sup>37</sup> Yet again, the Court acknowledged the important role of employee information in enforcing the law.

*Scrivener* began a series of cases in which the Court found that express anti-retaliation statutory provisions should be interpreted broadly in order to support the Anti-Retaliation Principle.<sup>38</sup> For example, in *Brock v. Roadway Express, Inc.*,<sup>39</sup> the Court recognized the importance of employee reports to detect illegal safety violations in the transportation industry<sup>40</sup>

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<sup>32</sup> *Id.* at 292-93 (citation omitted) (emphasis added).

<sup>33</sup> 405 U.S. 117 (1972).

<sup>34</sup> See *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 408 (2007) (Easterbrook, J., dissenting in part) (citing *NLRB v. Scrivener*, 405 U.S. 117 (1972)).

<sup>35</sup> See *Scrivener*, 405 U.S. at 125. The Court interpreted Section 8(a)(4) of the NLRA, which provides that an employer may not "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4).

<sup>36</sup> See *id.* at 121.

<sup>37</sup> See *id.* at 122 (quoting *John Hancock Mut. Life. Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)) (internal quotation marks omitted).

<sup>38</sup> See *id.*

<sup>39</sup> 481 U.S. 252 (1987).

<sup>40</sup> See *id.* at 258.

and upheld a statutory scheme that permitted an administrative agency to temporarily reinstate a fired whistleblower because “the eventual recovery of backpay may not alone provide sufficient protection to encourage reports of safety violations.”<sup>41</sup> Mirroring the “Hobson’s choice” language from *Mitchell*,<sup>42</sup> the *Brock* Court accepted Congress’ rationale for the whistleblower protections:

Section 405 was enacted in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. *Congress recognized that employees in the transportation industry are often best able to detect safety violations* and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.

...

Congress also recognized that the employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review. The longer a discharged employee remains unemployed, the more devastating are the consequences to his personal financial condition and prospects for reemployment. Ensuring the eventual recovery of backpay may not alone provide sufficient protection to encourage reports of safety violations. Accordingly, § 405 incorporates additional protections, authorizing temporary reinstatement based on a preliminary finding of reasonable cause to believe that the employee has suffered a retaliatory discharge.<sup>43</sup>

Similarly, the Court paid particularly close attention to the role Title VII’s anti-retaliation provision plays in enforcing that law and advancing the Act’s goals, even though Title VII’s legislative history contains little insight into the purposes of its anti-retaliation provision. The primary purpose of Title VII’s anti-retaliation provision, according to the Court in *Robinson v. Shell Oil Co.*,<sup>44</sup> is to help enforce the law by “[m]aintaining unfettered access to statutory remedial mechanisms.”<sup>45</sup> In *Robinson*, the Court examined whether Title VII protected *former* employees from

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<sup>41</sup> *Id.* at 258-59.

<sup>42</sup> *See Mitchell*, 361 U.S. at 293.

<sup>43</sup> *Brock*, 481 U.S. at 258-59 (emphasis added).

<sup>44</sup> 519 U.S. 337 (1997).

<sup>45</sup> *Id.* at 346.

retaliation.<sup>46</sup> The Court admitted that, “at first blush” Title VII’s plain statutory language excluded former employees from protection because it applies only to “employees,” which “would seem to refer to those having an existing employment relationship with the employer in question.”<sup>47</sup> Yet, after scrutinizing the term in other parts of Title VII, the Court determined that its meaning was “ambiguous.”<sup>48</sup> To resolve this ambiguity, the Court relied on the Anti-Retaliation Principle, holding that former employees should be protected from retaliation because the Court did not want to undermine the effectiveness of the statute by “allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC.”<sup>49</sup>

The Court also applied the Anti-Retaliation Principle by permitting a statutory retaliation claim to proceed even though the statute at issue did not contain *any* anti-retaliation language. In *Sullivan v. Little Hunting Park, Inc.*,<sup>50</sup> the Court held that a statutory anti-discrimination provision, 42 U.S.C. § 1982, contained an *implied* cause of action for retaliation.<sup>51</sup> Section 1982 provides that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>52</sup> Despite the clear absence of any explicit protection from retaliation in the statutory language, the *Sullivan* Court upheld a retaliation claim by a white landowner who was retaliated against for leasing a house to a black man.<sup>53</sup> The Court concluded that if an individual could be “punished for trying to vindicate the rights of minorities protected by § 1982,” then “[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property.”<sup>54</sup> In other words, enforcing § 1982 meant providing additional protection from retaliation, even if the statute itself did not contain any explicit anti-retaliation protection.

The outcomes of retaliation cases also demonstrate the Court’s recognition of the Anti-Retaliation Principle’s importance as much as the opinions’ language, particularly in statutory cases. For example, during the last fifty years, the Court interpreted statutes to enable a broad range of individuals to bring retaliation claims, including third parties who

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<sup>46</sup> *See id.*

<sup>47</sup> *Id.* at 341.

<sup>48</sup> *Id.* at 343-44 (“Once it is established that the term ‘employees’ includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute.”).

<sup>49</sup> *Id.* at 346.

<sup>50</sup> 396 U.S. 229 (1969).

<sup>51</sup> *See id.* at 237.

<sup>52</sup> 42 U.S.C. § 1982.

<sup>53</sup> *See Sullivan*, 396 U.S. at 237.

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

report statutory violations,<sup>55</sup> former employees,<sup>56</sup> at-will employees,<sup>57</sup> elected union officials against their union,<sup>58</sup> and illegal aliens.<sup>59</sup> Moreover, the Court indicated that these statutes provide a wide range of remedies<sup>60</sup> to victims of a wide range of retaliatory actions by employers.<sup>61</sup> Significantly, the Court also recognized the importance of state retaliation remedies by not permitting federal statutory schemes with weak retaliation remedies to impliedly preempt potentially stronger state tort claims based on an employer's retaliation.<sup>62</sup>

A few counterexamples exist in which the Court did not recognize the Anti-Retaliation Principle and its primary goal of protecting society's interest in law enforcement. Instead, the Court utilized its typical "employment law" focus and concentrated only on balancing the interests of employers and employees. *Clark County School District v. Breeden*<sup>63</sup> presents an example of this type of case. In *Breeden*, the plaintiff alleged that she had been retaliated against for complaining about alleged sexual harassment and for filing a lawsuit based on the complaint.<sup>64</sup> In the case's primary holding, the Supreme Court found in favor of the employer

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<sup>55</sup> *Id.* (interpreting 42 U.S.C. § 1982).

<sup>56</sup> See *Robinson*, 519 U.S. at 346 (interpreting Title VII's anti-retaliation provision).

<sup>57</sup> See *Haddle v. Garrison*, 525 U.S. 121, 125 (1998) (holding that 42 U.S.C. § 1985(2), which prevents "intimidation or retaliation against witnesses in federal-court proceedings," includes protection for at-will employees).

<sup>58</sup> See *Sheet Metal Workers' Intern'l v. Lynn*, 488 U.S. 347, 355 (1989) (interpreting Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412).

<sup>59</sup> See *Sure-Tan v. NLRB*, 467 U.S. 883, 895-96 (1984) (holding that reporting undocumented aliens employees to law enforcement authorities was an unfair labor practice under the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) & (3), when done in retaliation for participating in union activities).

<sup>60</sup> See *Brock*, 481 U.S. at 258-59 (approving an administrative agency's power to order temporary reinstatement as a remedy for retaliation); *Mitchell*, 361 U.S. at 296 (finding that FLSA gave courts power to award back-pay damages in addition to ordering injunctive relief). *But see Sure-Tan*, 467 U.S. at 902-03 (restricting the backpay and reinstatement remedies for illegal aliens).

<sup>61</sup> See *Burlington Northern*, 548 U.S. 53, 126 S. Ct. at 2412-15 (holding that Title VII's anti-retaliation provision applies outside of the workplace and prohibits any employer action that "could well dissuade a reasonable employees from protected conduct"); *Haddle*, 525 U.S. at 125 (preventing companies from firing at-will worker in retaliation for testifying in federal trial); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983) (permitting courts to enjoin an employer from filing a "baseless" lawsuit to retaliate against an employee in violation of the National Labor Relations Act).

<sup>62</sup> See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994) (holding that the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, does not preempt state public policy tort and whistleblower claims); *English v. General Electric Co.*, 496 U.S. 72, 90 (1990) (holding that Section 210(a) of the Energy Reorganization Act, 42 U.S.C. § 5851(a) does not preempt employee's intentional infliction of emotional distress claim); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412-13 (1988) (holding that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not preempt employee's tort remedy for wrongful discharge). *But see Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (holding that Section 510 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140, expressly preempted employees state common law claim of wrongful discharge).

<sup>63</sup> 532 U.S. 268 (2001).

<sup>64</sup> See *id.* at 269-70.

because it found that the plaintiff did not engage in protected activity.<sup>65</sup> According to the Court, no reasonable person could have believed that the alleged sexual harassment about which the plaintiff complained could have violated Title VII because it was a single instance of behavior that could not violate the law.<sup>66</sup> After *Breedon*, courts consistently adopted a standard that an employee must have a “reasonable belief” in the illegality of an employer’s action in order to be protected from retaliation.<sup>67</sup>

As applied by the Court in *Breedon*, this standard may not fully advance the goals of the Anti-Retaliation Principle. Indeed, the *Breedon* Court never mentioned the importance of retaliation protection for enforcing Title VII. Instead, the Court cited almost exclusively to its sexual harassment jurisprudence to demonstrate that the activity about which the plaintiff complained could not be considered sexual harassment because it was a single incident that was not “extreme” enough to be considered “extremely serious”.<sup>68</sup> This sexual harassment jurisprudence requires “severe or pervasive” employer action that alters the terms and conditions of employment,<sup>69</sup> a standard derived from the Court’s previous balancing of employer and employee interests.<sup>70</sup> Unlike the other retaliation cases mentioned above, the Court in *Breedon* never discussed whether its holding would promote better compliance with the law.<sup>71</sup>

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<sup>65</sup> See *id.* at 270-72.

<sup>66</sup> See *id.* at 271. The Court also found that the plaintiff could not prove causation—that any protected activity caused an adverse employment action. See *id.* at 272-73. In doing so, the Court relied exclusively on various factual showing regarding the timing of the alleged protected activity and the adverse action. See *id.* The Court did not discuss, or even mention, the appropriate legal standard for causation in a retaliation case, nor did the Court attempt to explain any policy rationale for the decision.

<sup>67</sup> See Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities under Title VII’s Anti-retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1129 n.7 (2007) (stating that all United States Circuit Courts adopted the objectively reasonable standard after *Breedon*) (citing cases). Courts also use the reasonable belief standards for other statutes, such as Title IX and Title VI, that do not specify the standard to be utilized. See Brake, *supra* note 7, at 83 (citing cases).

<sup>68</sup> See *id.* at 270-71 (citing to *Faragher v. Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

<sup>69</sup> See, e.g., *Meritor Savings Bank*, 477 U.S. at 67.

<sup>70</sup> See, e.g., *Faragher*, 524 U.S. at 793-808 (balancing various employer and employee interests in creating vicarious liability rule for supervisors under Title VII but also providing for employer affirmative defense); *Oncale*, 523 U.S. at 80-82 (asserting the reasons why permitting same-sex sexual harassment claims would not turn Title VII into a “general civility code” and stating that “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive”); *Harris*, 510 U.S. at 21 (noting that the Court’s sexual harassment standard “takes a middle path”).

<sup>71</sup> The case likely does not represent a serious deviation from the Anti-Retaliation Principle. One group of commentators states that *Breedon* “may simply be a case of unsympathetic plaintiffs making ‘bad law,’” rather than a “signal of the Supreme Court’s hostility to retaliation cases in general.” See MARK A. ROTHSTEIN, ET AL., *EMPLOYMENT LAW* 160 (3<sup>rd</sup> ed. 2005).

To be fair, though, the “reasonable belief” standard adopted by the Court seems more generous to employees than requiring the employee to report an actual illegality, another viable option at the time because the statute’s language supports providing protection only if an employee opposes employment practices that are “made . . . unlawful” by Title VII.<sup>72</sup> In other words, the Court could have justified a standard requiring the reporting employee to prove actual employer illegality instead of only a reasonable belief that conduct was illegal.<sup>73</sup> Moreover, several “employee-friendly” retaliation statutes explicitly adopt the “reasonable belief” standard articulated in *Breedon* and many would consider that to be a sensible requirement for protection from retaliation, assuming it is applied appropriately.<sup>74</sup> In *Breedon*, however, the Court adopted this standard without examining its effect on the goal of anti-retaliation protection: to increase compliance with the law. Moreover, the application of the standard in *Breedon* may have encouraged subsequent courts to inappropriately scrutinize an employee’s whistleblowing complaint by placing itself in the position of the employee and assuming too much legal knowledge.<sup>75</sup> In Part III, *infra*, this Article addresses how the Anti-Retaliation Principle could better inform the application of *Breedon*’s reasonable person standard.

The Court also has read other anti-retaliation statutory provisions more narrowly than the Anti-Retaliation Principle might have required. In *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*,<sup>76</sup> for example, the Court held that the statute of limitations for the retaliation provision of the False Claims Act (FCA)<sup>77</sup> should be based upon the most closely analogous state limitations period rather than the likely longer six-year statute of limitations that applies to the other provisions of the Act.<sup>78</sup> The Court recognized that the limitations provision was “ambiguous,” but ignored the Anti-Retaliation Principle.<sup>79</sup> Instead, the Court based its holding on the application of several different principles of statutory construction rather than a consideration of whether various statutes of limitations would encourage or discourage employees to report illegal

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<sup>72</sup> 42 U.S.C. § 2000e-3(a). *See also* Rosenthal, *supra* note 67, at 1133 (“[T]he statutory language indicates that the activity the employee opposes must violate Title VII.”).

<sup>73</sup> *See* EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 306 (M.D. Ga. 1975); Rosenthal, *supra* note 67, at 1140-41 (“[T]he Court’s language [in *Breedon*] suggested that perhaps it would require an actual violation, as the statute’s language requires.”)

<sup>74</sup> *See, e.g.*, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a)(1); Consumer Product Safety Improvement Act 2008, 15 U.S.C. § 2087(a)(1); *see also* discussion *infra* Part III.B.

<sup>75</sup> *See* discussion *infra* Part III.B (providing examples of lower courts inappropriately applying *Breedon*’s reasonable belief standard).

<sup>76</sup> 545 U.S. 409 (2005).

<sup>77</sup> 31 U.S.C. § 3730(h).

<sup>78</sup> *See Graham Cty.*, 545 U.S. at 422.

<sup>79</sup> *See id.* at 415-17.

conduct.<sup>80</sup> As the dissent in that case noted, the Court's holding would likely undermine the Anti-Retaliation Principle by leaving some whistleblowers at the mercy of state statute of limitations that likely are shorter than the FCA's six year limitations period.<sup>81</sup> Privileging the Anti-Retaliation Principle over other canons of statutory construction, as the Court did in the five recent statutory retaliation cases,<sup>82</sup> would have likely led to stronger retaliation protection—the outcome advocated by the dissent.<sup>83</sup>

More recently, the Court undermined *qui tam* whistleblower rights under the False Claims Act by finding that whistleblowers could not rely on disclosures made in state and local administrative reports.<sup>84</sup> Although this case did not address the FCA's retaliation provision, it likely will reduce the number of whistleblowers potentially protected from retaliation simply because it narrows the scope of an employee's "protected activity" that triggers anti-retaliation protection.<sup>85</sup> That said, the Court's opinion focused more on the balancing necessary in a *qui tam* case rather than on the balancing retaliation cases require.<sup>86</sup> Moreover, even in this case, to some extent the Court actually reinforced the core law enforcement tenet of the Anti-Retaliation Principle. The Court defended its holding by noting that it would not give state and local governments a way to immunize themselves from a *qui tam* lawsuit, thereby increasing illegal fraud.<sup>87</sup> If state and local governments disclosed fraud in an administrative report, then the United States and the "most deserving" whistleblowers could still bring a *qui tam* action to ensure the law is enforced.<sup>88</sup>

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<sup>80</sup> See *id.* at 418-19.

<sup>81</sup> See *id.* at 427-28 (Breyer, J., dissenting).

<sup>82</sup> See discussion *infra* Part II.C.

<sup>83</sup> See *Graham Cty.*, 545 U.S. at 427-28 (Breyer, J., dissenting). The Court also narrowly read the Foreign Sovereign Immunities Act to exclude a whistleblower's retaliation claim; however, the Court never examined or mentioned the Anti-Retaliation Principle. See *Saudia Arabia v. Nelson*, 507 U.S. 349, 362-63 (1993). Instead of focusing on whistleblower issues, the Court's analysis focused on whether the alleged retaliatory action was "commercial" or conducted pursuant to the police power of a foreign sovereign nation. See *id.* at 360-63.

<sup>84</sup> See *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1396, 1400 (2010).

<sup>85</sup> See, e.g., *McAllan v. Von Essen*, 517 F. Supp.2d 672, 685-86 (S.D.N.Y. 2007) (finding that plaintiff did not engage in protected conduct by filing a *qui tam* action because his complaint was based on publicly-available information, and therefore was not "in furtherance" of an FCA case, as required by the FCA's retaliation provision, 31 U.S.C. § 3730(h)).

<sup>86</sup> The Court described the goal of the *qui tam* provision as "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham County*, 130 S. Ct. at 1406 (quoting *United States ex rel. Springfield Terminal R. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (internal quotation marks omitted)).

<sup>87</sup> See *id.* at 1410-11.

<sup>88</sup> *Id.* at 1410. The Court called identified whistleblowers who were the original source of the information about fraud as the "most deserving" whistleblowers who would not be hurt by the rule. See *id.*



Taken together, these few “limiting” cases may nibble around the edges of the Anti-Retaliation Principle. However, they do not undermine the Principle’s power when explaining the balance of Supreme Court retaliation jurisprudence and its broad recognition of the importance of anti-retaliation protection. During the last fifty years, the Court’s retaliation jurisprudence involving statutory cases sends a clear message: employees comprise an important part of enforcing statutory laws and the Court will provide employees broad protection from retaliation in order to enhance enforcement of those laws.

## B. First Amendment Protection

The Court’s First Amendment retaliation jurisprudence provides a slightly more nuanced application of the Anti-Retaliation Principle. Although the Anti-Retaliation Principle informs the Court’s jurisprudence regarding First Amendment protections for government employees who disclose illegal conduct, it does not drive the decisions in the same way as with statutory claims.

Beginning with *Pickering v. Bd. of Educ. of Township High School Dist. 205*,<sup>89</sup> the Court has held that the First Amendment can prohibit the government from retaliating against employees who speak out as citizens regarding matters of public concern.<sup>90</sup> As recently put by the Court, “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”<sup>91</sup> This “public concern” test provides potentially broader protection than the Anti-Retaliation Principle’s “law enforcement” focus because protected employee speech may involve a matter of public concern but not any violation of the law.<sup>92</sup> As a result, the Court’s incorporation of the Principle in its First Amendment case law requires a more nuanced examination of the cases.

First, in accordance with the Anti-Retaliation Principle, the Court repeatedly has emphasized that the First Amendment must protect government employees because these employees often have knowledge the public would want to know about government operations. For example, in the seminal *Pickering* case, the Court prohibited the discharge of a teacher for speaking about school funding.<sup>93</sup> The Court protected the

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<sup>89</sup> 391 U.S. 563 (1968).

<sup>90</sup> See *id.* at 568.

<sup>91</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

<sup>92</sup> See *Pickering*, 391 U.S. at 574 (noting that the First Amendment protected a teacher who spoke about school budget issues because the topic was a matter of public concern).

<sup>93</sup> See *id.* (“[A] teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”).

teacher from retaliation, in part, because “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”<sup>94</sup> Similarly, in *Waters v. Churchill*,<sup>95</sup> the Court recognized that government employees “are often in the best position to know what ails the agencies for which they work.”<sup>96</sup> The Court’s use of the Anti-Retaliation Principle in First Amendment cases recognizes employees’ special knowledge and protects them from retaliation in order to encourage making this information public.

Second, the Court’s First Amendment test considers not just the balance between the employee’s and employer’s rights, but also asserts that courts must balance society’s right to information as well. For example, in *Pickering*, the Court upheld a First Amendment retaliation claim in order to protect the “public interest in having free and unhindered debate on matters of public importance.”<sup>97</sup> Later cases noted the Court’s concern for retaliation protection in this area because the fear of discharge could “chill” employee participation in public affairs, which would damage larger societal interests.<sup>98</sup> As put most explicitly by the Court in *San Diego v. Roe*,<sup>99</sup>

[u]nderlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to

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<sup>94</sup> *Id.* at 572; see also *Garcetti*, 547 U.S. at 421 (noting that “many other categories of public employees” in addition to teachers also will have “informed and definite” opinions about issues related to their job).

<sup>95</sup> 511 U.S. 661 (1994).

<sup>96</sup> See *id.* at 674; see also *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (noting that public employees have “informed opinions on important public issues”).

<sup>97</sup> *Pickering*, 391 U.S. at 574.

<sup>98</sup> See, e.g., *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (noting that an independent contractor relationship with the government “provides a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, “are often in the best position to know what ails the agencies for which they work” (quoting *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)); *Connick v. Myers*, 461 U.S. 138, 144-45 (1983) (“In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or ‘chilled’ by the fear of discharge from joining political parties and other associations that certain public officials might find ‘subversive.’”); cf. *Sheet Metal Workers’ Intern’l v. Lynn*, 488 U.S. 347, 355 (1989) (noting the “chilling effect” of speech retaliation, which the “free speech” provision of the Labor Management Reporting and Disclosure Act aimed to prevent).

<sup>99</sup> 543 U.S. 77 (2004) (per curiam) (citation omitted).

speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.<sup>100</sup>

The “public concern” doctrinal requirement acknowledges that more is at stake than simply the employer-employee relationship. The government is an employer, but it cannot restrict speech in which society might be interested. Consistent with the Anti-Retaliation Principle, this constitutional test differs from the Court’s typical focus in *non*-retaliation employment cases by considering society’s interest in protecting employees with important information.

Third, the Court has recognized that much of this First Amendment-protected speech will necessarily relate to employee reports regarding violations of the law.<sup>101</sup> In *Givhan v. Western Line Consolidated School District*,<sup>102</sup> an employee informed her principal that the school district’s policies were discriminatory, which the Court later recognized as “clear[ly]” involving a matter of public concern.<sup>103</sup> The Court provided even more insight in *Connick v. Myers*,<sup>104</sup> a case in which the Court found that an employee’s behavior was, for the most part, *not* protected because the employee was not speaking about a matter of public concern.<sup>105</sup> The Court contrasted the non-protected speech in *Connick* with examples of speech that would be protected, such as “bring[ing] to light actual or potential wrongdoing or breach of public trust” on the part of other government employees.<sup>106</sup> Thus, although the “public concern” test is not solely about law enforcement, the Court certainly has supported the Anti-Retaliation Principle by providing First Amendment protection to government employees who bring illegalities to light.<sup>107</sup>

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<sup>100</sup> *Id.* at 82.

<sup>101</sup> By protecting speech related to a “public concern,” the Court certainly has a purpose broader than solely enhancing law enforcement—the Court encourages debate related to a wide-range of topics. However, as described in the following text, protected topics of “public concern” often relate to employee reports of illegal conduct.

<sup>102</sup> 439 U.S. 410 (1979).

<sup>103</sup> See *Connick*, 461 U.S. at 146 (citing to *Givhan* and stating that “[a]lthough the subject-matter of Mrs. Givhan’s statements were not the issue before the Court, it is clear that her statements concerning the school district’s allegedly racially discriminatory policies involved a matter of public concern”); see *id.* at 148 n.8 (noting that the *Givhan* plaintiff’s protest regarding racial discrimination was “a matter inherently of public concern”).

<sup>104</sup> 461 U.S. 138 (1983).

<sup>105</sup> See *id.* at 147-49.

<sup>106</sup> *Id.* at 148.

<sup>107</sup> This conclusion must be tempered somewhat by the Court’s decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), in which the Court held that the First Amendment did not protect an employee who reported misconduct if that report was made as part of the employee’s job duties. See *id.* at 421 (“We hold that 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

In constitutional cases in particular, the Principle does not mean that employees always win. In several constitutional cases after *Pickering*, the Court determined that the First Amendment did not protect the employee who brought a claim. None of these cases, however, involved an employee who claimed protection because the employee identified violations of the law. Instead, losing employees claimed protection based on speech unrelated to illegal conduct, including complaints about a school dress code,<sup>108</sup> criticisms of an agency,<sup>109</sup> threats to patient care,<sup>110</sup> and personnel matters.<sup>111</sup> Indeed, before *Garcetti*, whether the Court granted First Amendment protection to employee speech is precisely correlated with whether the speech related to reports of illegality. An employee reported a violation of law in each of the only two cases since *Pickering* in which the Court upheld a First Amendment claim. In *Givhan*, the employee made an internal report about potential violations of discrimination laws.<sup>112</sup> In *Bd. of County Comm'rs v. Umbehr*,<sup>113</sup> the Court extended First Amendment protection to an independent contractor (as opposed to an employee) who made critical statements about a county government, including an accusation that the county had violated the law.<sup>114</sup>

As with statutory violations, some Supreme Court First Amendment decisions actually seem to undermine retaliation protection. For example, the Court's decision in *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*<sup>115</sup> provides employers an affirmative defense in First Amendment retaliation cases if the employer can demonstrate that it would have made the same employment decision even in the absence of the employee's protected conduct<sup>116</sup>—a defense that Congress subsequently adopted in several

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not insulate their communications from employer discipline.”). I discuss this case and explain this discrepancy in more detail *infra* Parts II.B. & II.C.

<sup>108</sup> See *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977).

<sup>109</sup> See *Bush v. Lucas*, 462 U.S. 367, 369 (1983).

<sup>110</sup> See *Waters v. Churchill*, 511 U.S. 661, 665-66 (1994). In *Waters*, the parties disputed the precise speech involved, but the Court found that, even if the employee's version was true, she conducted the speech in a disruptive manner, making it unprotected. See *id.* at 680-81.

<sup>111</sup> See *Connick v. Myers*, 461 U.S. 138, 147-148 (1983). One part of *Connick* presents a close question regarding whether the Court upheld retaliation against an employee reporting illegality. In *Connick*, the Court found that one question on a questionnaire an employee distributed to fellow employees did involve a matter of public concern: whether employees ever felt pressure to work on political campaigns on behalf of candidates supported by the government employer. See *id.* at 149. The Court found that this question involved “coercion of belief in violation of fundamental constitutional rights.” *Id.* The Court held, however, that the *Pickering* balancing of interests did not support permitting a constitutional retaliation claim because the questionnaire disrupted the office and involved a matter of public concern “in only a most limited sense.” See *id.* at 151-54.

<sup>112</sup> See *Givhan*, 439 U.S. at 413.

<sup>113</sup> 518 U.S. 668 (1996).

<sup>114</sup> See *id.* at 671.

<sup>115</sup> 429 U.S. 274 (1977).

<sup>116</sup> See *id.* at 287.

whistleblower statutes<sup>117</sup> and that courts often incorporate when construing other anti-retaliation protections.<sup>118</sup> Although this decision provides less protection to employees, it does not necessarily do so at the expense of the Principle. In fact, the Court implicitly considered the Principle when it reached this result, finding that the “constitutional principle at stake is sufficiently vindicated” when employers are still able to make an employment decision based upon an employee’s non-protected conduct.<sup>119</sup> According to the Court, for all of the good that government employees can do when they bring misconduct to public light, they should not be able to put themselves in a “better position” as a result of their disclosure than they would have been had they remained quiet.<sup>120</sup> Consistent with the Anti-Retaliation Principle, government employees who engage in constitutionally protected speech will be protected in the first instance. *Mt. Healthy* affirms that Principle, even if it makes clear that protected speech will not inoculate an employee from disciplinary action based on other conduct.<sup>121</sup>

Yet, despite incorporating and identifying aspects of the Anti-Retaliation Principle in its constitutional retaliation cases, the Court has indicated at least one substantive limit even when employees report potential violations of the law. Statutes, not the Constitution, should drive the Principle. In *Bush v. Lucas*,<sup>122</sup> the Court prohibited a federal employee from bringing a First Amendment retaliation case for damages against a retaliatory supervisor.<sup>123</sup> In that case, the Court recognized the Anti-Retaliation Principle, but thought that existing statutory protections under the Civil Service Reform Act sufficiently protected the Principle: “In the past [Congress] has demonstrated its awareness that lower-level government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates’

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<sup>117</sup> See, e.g., Aviation Investment and Reform Act for the 21<sup>st</sup> Century, 49 U.S.C. § 42121(b)(2)(B)(ii); Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(2)(C) (adopting procedures of 49 U.S.C. § 42121(b)). However, in these statutes Congress required employers to prove this affirmative defense by “clear and convincing” evidence. See *id.*

<sup>118</sup> See DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 234-35 & 235 n.42 (2d ed. 2004) (citing cases).

<sup>119</sup> See *Mt. Healthy*, 429 U.S. at 286.

<sup>120</sup> See *id.* at 285.

<sup>121</sup> Of course, fact-finders may have an extremely difficult time applying these standard in reality, as it requires a relatively difficult inquiry into employer motives. The point here is that the Court upheld the core tenet of the Principle even as it was finding against a whistleblowing employee in this particular case.

<sup>122</sup> 462 U.S. 367 (1983).

<sup>123</sup> See *id.* at 385-90. Although the employee in *Bush* did not report a violation of the law, the Court’s holding was broad enough to prohibit constitutional damages even to federal employees who reported illegalities. See *id.* at 369-72 (noting that the employee alleged retaliation based on the employee’s criticism of a government agency and assuming that the government supervisor had violated the employee’s First Amendment rights by demoting him because of this protected speech).

freedom of expression.”<sup>124</sup> Given the presence of the Civil Service Reform Act protections, the Court determined that it should not second-guess Congress’ conclusion regarding the extent to which the Principle should be protected.<sup>125</sup>

Thus, for the most part, prior to 2006 the Court’s First Amendment retaliation cases recognized and advanced the Anti-Retaliation Principle. Because society has an important interest in learning about the valuable information known by government employees, the Constitution protects government employees who reported violations of the law. However, the Court did impose a limitation on the Principle based on the Court’s understanding that statutes, not the Constitution, should drive anti-retaliation protection if statutes addressed the issue.

## II. The Present: Six Retaliation Cases in Five Years

The Supreme Court’s six recent retaliation cases build upon this extensive jurisprudence and reflect the Court’s historical recognition of the Anti-Retaliation Principle. Five decisions related to the extent to which various federal statutes prohibited retaliation in employment, including three that involved *implied* protection from retaliation in three different statutes without an express anti-retaliation provision.<sup>126</sup> The other two, one in 2006<sup>127</sup> and one most recently in 2009,<sup>128</sup> analyzed the express anti-retaliation provision of Title VII of the Civil Rights Act of 1964.<sup>129</sup> As explained below, the Court provided broad retaliation protection in all five statutory cases, often with explicit reference to the Principle, despite traditional statutory interpretation and policy rationales that might argue for more narrow holdings. In *Garcetti v. Ceballos*,<sup>130</sup> the lone constitutional case among the six recent decisions, the Court explicitly recognized the Principle, but also continued its more limited view of retaliation protections in constitutional cases based on the Court’s preference for statutory coverage.<sup>131</sup>

The first two sub-parts that follow briefly describe these six recent cases and summarize the Court’s decisions. The third sub-part analyzes the cases in light of the Court’s historic use of the Anti-Retaliation Principle.

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<sup>124</sup> *Id.* at 389.

<sup>125</sup> *See id.*

<sup>126</sup> *See* *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951, 1954 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474, 128 S. Ct. 1931, 1935 (2008); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005)

<sup>127</sup> *See* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

<sup>128</sup> *See* *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

<sup>129</sup> 42 U.S.C. § 2000e-3(a).

<sup>130</sup> 547 U.S. 410 (2006).

<sup>131</sup> *See* discussion *infra* Part II.B & II.C.

## A. Statutory Protection

Statutory anti-retaliation protection can be either express or implied. Express provisions provide the most common form of protection: over thirty-five federal statutes contain an explicit provision protecting employees from retaliation for undertaking various protected activities.<sup>132</sup> These statutes often detail the type of employees and employers covered by the provision, the type of activity in which employees must engage to be protected, and the type of remedy available to employees.<sup>133</sup> More rarely, a court will find that a statute that does not provide explicit protection still contains anti-retaliation protections implicitly.<sup>134</sup> Because of a general judicial reluctance to imply statutory remedies, the Court only upheld one implied retaliation claim prior to 2005—*Sullivan v. Little Hunting Park, Inc.*,<sup>135</sup> discussed above<sup>136</sup>—and that case did not involve an employee.<sup>137</sup> Beginning in 2005, however, the Court upheld implied retaliation claims by employees in three separate cases involving three separate statutes.

### 1. Implied Retaliation Protection

The first of these three cases, *Jackson v. Birmingham Bd. of Educ.*,<sup>138</sup> involved the claim by a high school teacher and basketball coach that the Birmingham Board of Education retaliated against him because he complained about sex discrimination in his school's athletic program.<sup>139</sup> The plaintiff asserted his claim of retaliation under Title IX of the Education Amendments of 1972,<sup>140</sup> which generally prohibits discrimination "on the basis of sex" in federally funded education programs.<sup>141</sup>

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<sup>132</sup> See WESTMAN & MODESITT, *supra* note 118, at 319-20 (listing statutes).

<sup>133</sup> See Richard E. Moberly, *Contract Protection for Whistleblowers*, 79 COLO. L. REV. 975, 981-83 (2008).

<sup>134</sup> See KOHN, *supra* note 26, at 87-88.

<sup>135</sup> 396 U.S. 229 (1969).

<sup>136</sup> See discussion *supra* Part I.A.

<sup>137</sup> Recall that in *Sullivan*, the Court held that a white property owner stated a claim under 42 U.S.C. § 1982 when he alleged that a home owner's association retaliated against him for leasing his house to a black man. See *Sullivan*, 396 U.S. at 237.

<sup>138</sup> 544 U.S. 167 (2005).

<sup>139</sup> See *id.* at 171. The plaintiff had complained that the girls' basketball team received unequal funding and had unequal access to athletic equipment and facilities. See *id.* After his complaints, the plaintiff received negative evaluations and the school removed him as the girls' basketball coach, both of which the plaintiff claimed were retaliation for his earlier complaints. See *id.* at 172.

<sup>140</sup> Pub. L. 92-318, 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.*

<sup>141</sup> The provision's language states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Eleventh Circuit Court of Appeals held that Title IX does not provide a private right of action for retaliation because the statutory language does not include a specific provision prohibiting retaliation.<sup>142</sup> By contrast, Title VII of the Civil Rights Act of 1964, passed only eight years before Title IX, contains a very specific anti-retaliation provision that serves as the model for many modern retaliation protections.<sup>143</sup> According to the Birmingham Board of Education, Title VII demonstrated that Congress knew how to write a specific anti-retaliation provision.<sup>144</sup> The absence of such a specific provision in Title IX meant that Congress must have purposefully excluded retaliation protection from Title IX.<sup>145</sup>

In a 5-4 decision, the Supreme Court disagreed, reversed the Eleventh Circuit, and found an implied claim for retaliation in Title IX.<sup>146</sup> The Court used three arguments to overcome the problem presented by Title IX's silence regarding retaliation. First, the Court asserted that "discrimination" should be construed broadly to cover "a wide range of intentional unequal treatment."<sup>147</sup> In other words, the Court found that retaliation *is* discrimination "'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."<sup>148</sup>

Second, in an interesting twist on the defendant's argument regarding statutory silence, the Court noted that Title VII "is a vastly different statute from Title IX," because Title IX contains a general prohibition on discrimination, while Title VII provides very specific examples of conduct that constitutes unlawful discrimination.<sup>149</sup> Thus, "[b]ecause Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell [the Court] anything about whether it intended that practice to be covered."<sup>150</sup>

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<sup>142</sup> See *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344, 1346 (11<sup>th</sup> Cir. 2002). The Court of Appeals also found that a Department of Education regulation prohibiting retaliation could not create, on its own, a private right of action. See *id.* at 1346.

<sup>143</sup> Title VII prohibits retaliation against an employee who has "opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." Title VII of the Civil Rights Act of 1964 § 704, 78 Stat. 257, as amended, 86 Stat. 109, as codified at 42 U.S.C. § 2000e-3(a). Other anti-discrimination statutes provide anti-retaliation protection with similar provisions based upon the language in Title VII. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 623(d); Americans With Disabilities Act, 42 U.S.C. § 12203.

<sup>144</sup> See *Jackson*, 544 U.S. at 175 (noting defendant's argument).

<sup>145</sup> See *id.*; see also *id.* at 190 (Thomas, J., dissenting) (comparing Title IX to Title VII's explicit anti-retaliation provision and asserting that the absence of a specific retaliation provision is "significant").

<sup>146</sup> See *Jackson*, 544 U.S. at 171. Justice O'Connor authored the majority opinion. Justice Thomas filed a dissenting opinion, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy. See *id.* at 184 (Thomas, J., dissenting).

<sup>147</sup> *Jackson*, 544 U.S. at 175.

<sup>148</sup> *Id.* at 174.

<sup>149</sup> *Id.* at 175.

<sup>150</sup> *Id.* at 175.



Third, the Court relied upon *Sullivan*,<sup>151</sup> an almost forty year-old case, as precedent for interpreting a general prohibition on discrimination to include a claim for retaliation.<sup>152</sup> Although Justice Thomas, in a dissent joined by three other Justices, claimed that *Sullivan* was a standing case that merely permitted the white property owner to assert the claim of the black tenant,<sup>153</sup> the majority found that “*Sullivan*’s holding was not so limited.”<sup>154</sup> Rather, for the *Jackson* majority, *Sullivan* “plainly held that the white owner could maintain his *own* private cause of action under § 1982 if he could show that he was ‘punished for trying to vindicate the rights of minorities.’”<sup>155</sup> Because the Court viewed *Sullivan*’s holding as implying a claim of retaliation in a general discrimination statute, the Court found that Congress likely intended the same interpretation for Title IX, which was passed only three years after the Court decided *Sullivan*.<sup>156</sup> Moreover, not only did the Court hold that Title IX includes an implied claim of retaliation, but also it relied upon *Sullivan* to find that the retaliation claim protected both the original victims of discrimination as well as a third-party (like Coach Jackson) who complains about the original discrimination.<sup>157</sup> As Justice Thomas in dissent put it, the majority created “an entirely new cause of action for a secondary rights holder, beyond the claim of the original rights holder.”<sup>158</sup>

In two cases decided in 2008, the Court returned to the issue presented by *Jackson*: whether a general anti-discrimination provision also provides an implied claim of retaliation. The first case, *CBOCS West, Inc. v. Humphries*<sup>159</sup> examined 42 U.S.C. § 1981 to determine if it “encompasses a complaint of retaliation against a person who has complained about a violation of another person’s contract-related ‘right.’”<sup>160</sup> Like Section 1982 in *Sullivan* and Title IX in *Jackson*, Section 1981 does not include an explicit anti-retaliation provision; rather, the statute generally prohibits discrimination on the basis of race in “mak[ing] and enforc[ing] contracts.”<sup>161</sup> Nevertheless, as in *Sullivan* and *Jackson*, the Supreme Court

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<sup>151</sup> 396 U.S. 229 (1969).

<sup>152</sup> See *Jackson*, 544 U.S. at 176 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)).

<sup>153</sup> See *id.* at 194-95 (Thomas, J., dissenting) (noting that *Sullivan* cited to a standing case and stated that there was “no question but that *Sullivan* has standing to maintain this action” (citing *Sullivan*, 396 U.S. at 237)).

<sup>154</sup> *Jackson*, 544 U.S. at 176 n.1.

<sup>155</sup> *Id.* (quoting *Sullivan*, 396 U.S. at 237).

<sup>156</sup> See *id.* at 176.

<sup>157</sup> See *id.* at 179-80 (noting that *Sullivan* “made clear that retaliation claims extend to those who oppose discrimination against others”).

<sup>158</sup> See *Jackson*, 544 U.S. at 194 (Thomas, J., dissenting).

<sup>159</sup> 553 U.S. 442, 128 S. Ct. 1951 (2008).

<sup>160</sup> *Id.* at 1954. The employee in *CBOCS West* reported alleged discrimination against a co-worker. See *id.*

<sup>161</sup> 42 U.S.C. § 1981(a).

in *CBOCS West* found an implied claim of retaliation contained in this general language.<sup>162</sup>

This time, unlike in *Jackson*, the Court did not debate the meaning of *Sullivan* or whether a general anti-discrimination statute could include specific protection from retaliation.<sup>163</sup> Rather, the Court found that *Jackson* definitively resolved those issues and, therefore, the *CBOCS West* holding rested “in significant part upon the principles of *stare decisis*.”<sup>164</sup> The fact that the Court previously interpreted Section 1981 similarly to Section 1982 (at issue in *Sullivan*) only added to the *stare decisis* rationale.<sup>165</sup>

In some respects, *CBOCS West* represents even stronger support for implied retaliation claims than *Jackson*. Chief Justice Roberts and Justice Alito joined the Court between the *Jackson* and *CBOCS West* decisions, which many commentators predicted would make the Court more employer-oriented than the *Jackson* Court.<sup>166</sup> Yet, despite these changes to the Court’s composition, the Court decided *CBOCS West* with a seven-justice majority that included Roberts and Alito,<sup>167</sup> more than signed on to the 5-4 *Jackson* decision.<sup>168</sup>

Moreover, in at least one way, the *CBOCS West* employee-plaintiff had to overcome a stronger argument based on the statutory language of

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<sup>162</sup> See *CBOCS West*, 128 S. Ct. at 1954.

<sup>163</sup> The Court accepted *Jackson*’s interpretation that *Sullivan* permitted a retaliation claim under Section 1982. See *id.* at 1955. To overcome the defendant’s argument that the text of Section 1981 did not explicitly include protection from retaliation, the Court also relied on *Jackson*’s interpretation that Title IX encompassed retaliation claims even though it does not use the word “retaliation.” See *id.* at 1958-59.

<sup>164</sup> *Id.* at 1955.

<sup>165</sup> See *id.* at 1955-56 (“While the *Sullivan* decision interpreted § 1982, our precedents have long construed §§ 1981 and 1982 similarly.”).

<sup>166</sup> See, e.g., *Editorial: Judge Alito’s Radical Views*, N.Y. TIMES, (Jan. 23, 2006), available at <http://www.nytimes.com/2006/01/23/opinion/23mon1.html> (“Judge Alito has consistently shown a bias in favor of those in power over those who need the law to protect them. Women, racial minorities, the elderly and workers who come to court seeking justice should expect little sympathy.”); National Women’s Law Center, *Judge Alito Has Taken Positions That Would Undermine Critical Anti-Discrimination Protections For Women*, available at [www.nwlc.org/pdf/010306\\_JudgeAlitoSexDiscrimination.pdf](http://www.nwlc.org/pdf/010306_JudgeAlitoSexDiscrimination.pdf) (“[Alito] would act to weaken the federal laws against discrimination in the workplace.”); John Kroger, *Bench Brawl*, SALON.COM (Oct. 31, 2005), available at [http://www.salon.com/news/opinion/feature/2005/10/31/alito\\_reax](http://www.salon.com/news/opinion/feature/2005/10/31/alito_reax) (noting Alito’s conservative record in employment cases); *More Groups Announce Opposition to Roberts* (Sept. 21, 2005), available at [http://www.nominationwatch.org/judge\\_john\\_roberts/](http://www.nominationwatch.org/judge_john_roberts/) (noting labor and union group opposition to Roberts); Michael Scherer, *Why Big Business Hearts John Roberts*, SALON.COM (Aug. 11, 2005), available at [http://www.salon.com/news/feature/2005/08/11/roberts\\_business](http://www.salon.com/news/feature/2005/08/11/roberts_business); Alliance for Justice, *Report on the Nomination of John G. Roberts to the United States Supreme Court*, at 3, available at [www.afj.org/afj\\_roberts\\_prehearing\\_report.pdf](http://www.afj.org/afj_roberts_prehearing_report.pdf) (“Judge Roberts’ apparent view of Congress’ authority potentially threatens a wide swath of legislation rooted in the Commerce Clause, including civil rights safeguards, minimum wage and maximum hours laws, clean air, clean water, and workplace safety protections.”).

<sup>167</sup> Justice Breyer wrote the majority opinion, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito. See *CBOCS West*, 128 S. Ct. at 1954. Justice Thomas wrote a dissenting opinion that was joined by Justice Scalia. See *id.*

<sup>168</sup> See *Jackson*, 544 U.S. at 170.

Section 1981 than the *Jackson* plaintiff had to address under Title IX. Recent Congressional amendments to Section 1981 gave support to those who argued that the statute did not protect employees from retaliation because the amendments failed to address retaliation specifically. In 1989, the Court held in *Patterson v. McLean Credit Union*<sup>169</sup> that the anti-discriminatory language of Section 1981 (“to make and enforce contracts”) did not apply to “conduct by the employer *after* the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.”<sup>170</sup> Although *Patterson* did not specifically involve a retaliation claim, Courts of Appeals interpreted *Patterson* to preclude retaliation claims under Section 1981, because most retaliation victims will have opposed discriminatory conduct after the formation of the contract, thus taking whistleblowing employees out of Section 1981’s protective scope.<sup>171</sup> Two years after *Patterson*, Congress passed Section 101 of the Civil Rights Act of 1991<sup>172</sup> to explicitly overrule the case by adding a new subsection (b) to Section 1981: “For purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”<sup>173</sup> Notably, the amended provision did not explicitly provide anti-retaliation protection.

The absence of anti-retaliation language in the 1991 amendments presented more difficulty for the *CBOCS West* plaintiff than the statutory silence in Title IX at issue in *Jackson*, for two reasons. First, immediately before and after the 1991 Civil Rights Act, Congress enacted several very specific anti-retaliation provisions in other employment statutes, such as the 1990 Americans with Disabilities Act,<sup>174</sup> the 1993 Family and Medical Leave Act,<sup>175</sup> and the 1994 Uniformed Services Employment and Reemployment Act.<sup>176</sup> Also, in 1994 Congress amended the Surface Transportation Assistance Act of 1982 to include explicit anti-retaliation protection.<sup>177</sup> In other words, Congress clearly knew how to enact an explicit anti-retaliation provision and how to amend an older statute to include one. However, Congress chose not to include a specific anti-retaliation provision in its amendment of Section 1981, which could

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<sup>169</sup> 491 U.S. 164 (1989).

<sup>170</sup> *Id.* at 177 (emphasis added).

<sup>171</sup> See *CBOCS West*, 128 S. Ct. at 1956-57 (listing Courts of Appeals cases barring retaliation claims under Section 1981)

<sup>172</sup> 105 Stat. 1071.

<sup>173</sup> 42 U.S.C. § 1981(b).

<sup>174</sup> See 42 U.S.C. § 12203(a) & (b).

<sup>175</sup> See 29 U.S.C. § 2615.

<sup>176</sup> See 38 U.S.C. § 4311(b).

<sup>177</sup> See 49 U.S.C. § 31105.

indicate a specific intent to exclude retaliation claims from Section 1981's coverage.

Second, by 1991, the Supreme Court had begun requiring courts to construe statutory language strictly when determining whether an implied right of action existed—a change from the judicial atmosphere in 1972 when Congress passed Title IX. Most immediately, two years before Congress passed the 1991 Civil Rights Act that amended Section 1981, *Patterson* required such a narrow textual reading of Section 1981 specifically.<sup>178</sup> More broadly, since 1975 in *Cort v. Ash*,<sup>179</sup> the Court made clear that it would focus its statutory interpretation efforts on legislative intent, rather than the more permissive pre-*Cort* emphasis on legislative purpose.<sup>180</sup> Thus, even if Congress could have had *Sullivan's* purportedly broad reading of Section 1982 on its mind when it passed Title IX in 1972, as *Jackson* concluded,<sup>181</sup> Congress would have been under no illusion in 1991 that it needed to include in its statutes explicit language regarding protection from retaliation.<sup>182</sup> Thus, the primary statutory interpretation argument utilized by the Court in *Jackson* held much less power when the CBOCS West evaluated the changes the 1991 Civil Rights Act made to Section 1981.

The Court dismissed these arguments, however, by pointing to the 1991 Act's legislative history. A House Report indicated that the amended provision would provide protection from a long list of employment actions, including retaliation.<sup>183</sup> Moreover, a footnote in the same Report noted that the legislation would restore the right to sue for retaliation that courts assumed *Patterson* had eliminated.<sup>184</sup> Therefore, because the purpose of the 1991 Act was to nullify *Patterson*, the Court concluded that Congress also must have intended to “embrace pre-*Patterson* law,” including *Sullivan*.<sup>185</sup>

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<sup>178</sup> See *Patterson*, 491 U.S. at 180-81 (noting that Section 1981 is “limited to the enumerated rights within its express protection”).

<sup>179</sup> 422 U.S. 66 (1975).

<sup>180</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 1131 (4th ed. 2007) (noting that *Cort v. Ash* “marks a watershed in the jurisprudence of implied causes of action. Before *Cort*, private causes of action were usually implied; after *Cort*, usually not”); see also *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 410 (7th Cir. 2007) (Easterbrook, J., dissenting in part) (“[S]ince the 1970s the Court has lashed interpretation more closely to statutory text.”).

<sup>181</sup> See *Jackson*, 544 U.S. at 176.

<sup>182</sup> As Judge Easterbrook noted in dissent in the 7th Circuit case that led to the Supreme Court's *CBOCS West* decision: “There has been a sea change in interpretative method between *Sullivan* and today—and *Patterson* not only exemplifies the change but also applies it to § 1981. . . . [W]hen § 1981 was amended in 1991, decisions such as *Cort* and *Rodriguez* and *Patterson* had announced a textual approach.” See *Humphries*, 474 F.3d at 411 (Easterbrook, J., dissenting in part).

<sup>183</sup> See *CBOCS West*, 128 S. Ct. at 1957 (citing H.R.Rep. No. 102-40, pt. 1, p. 92 (1991)).

<sup>184</sup> See *id.* (citing H.R.Rep. No. 102-40, pt. 1, pp. 92-93, n. 92 (1991)).

<sup>185</sup> *Id.* at 1959. Adding to the anomalous nature of this conclusion, the Court recently held that when Congress passed part of the 1991 Civil Rights Act to overturn another Court case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Congress did *not* adopt the law regarding burden of

The Supreme Court's second implied retaliation case in 2008, *Gomez-Perez v. Potter*,<sup>186</sup> involved a provision of the Age Discrimination in Employment Act of 1967 (ADEA)<sup>187</sup> that addresses age discrimination against federal employees (as opposed to private-sector employees).<sup>188</sup> Section 15(a) of the ADEA, 29 U.S.C. § 633a(a), states that all employment decisions affecting federal employees or applicants who are at least 40 years of age "shall be made free from any discrimination based on age."<sup>189</sup> As with the other implied retaliation cases addressed so far, the Court decided that this general prohibition on discrimination included a claim for retaliation.<sup>190</sup> The *Gomez-Perez* majority conducted a relatively cursory analysis: the ADEA contained general language banning discrimination based on age; age is a similar protected category to race and sex; the Court already implied retaliation claims from general language banning discrimination based on race and sex (in *Sullivan* and *Jackson*, respectively); therefore, an implied retaliation claim should be implied from the ADEA's general anti-discriminatory language.<sup>191</sup>

The majority's quick syllogistic analysis and easy reliance on precedent belie a deeper problem with a claim for retaliation under §633a(a). This problem somewhat revisits the same issue the Section 1981 retaliation claim in *CBOCS West* confronted regarding the 1991 Civil Rights Act. That is, how should the Court interpret Congressional silence at a time when Congress included clear anti-retaliation provisions in other statutes?<sup>192</sup> In *Gomez-Perez*, however, the circumstances surrounding Congressional passage of the federal government sections of the ADEA presented an

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proof in ADEA cases that existed prior to *Price Waterhouse*. See *Gross v. FBL Fin. Servs., Inc.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2343, 2349 (2009).

<sup>186</sup> 128 S. Ct. 1931 (2008).

<sup>187</sup> 29 U.S.C. § 621, *et seq.*

<sup>188</sup> See 29 U.S.C. § 633a.

<sup>189</sup> 29 U.S.C. § 633a(a).

<sup>190</sup> See *Gomez-Perez*, 128 S. Ct. at 1936. The plaintiff claimed that her employer retaliated against her for filing an age discrimination complaint. See *id.* at 1935.

<sup>191</sup> See *id.* at 1937. Justice Alito wrote the 6-3 decision. Chief Justice Roberts wrote a dissenting opinion joined in part by Justices Thomas and Scalia, see *id.* at 1943 (Roberts, C.J., dissenting), and Justice Thomas wrote a dissenting opinion joined by Justice Scalia, see *id.* at 1951 (Thomas, J., dissenting). The Court stated:

Following the reasoning of *Sullivan* and *Jackson*, we interpret the ADEA federal-sector provision's prohibition of "discrimination based on age" as likewise proscribing retaliation. The statutory language at issue here ("discrimination based on age") is not materially different from the language at issue in *Jackson* ("discrimination ' " 'on the basis of sex' ") and is the functional equivalent of the language at issue in *Sullivan*, see *Jackson*, *supra*, at 177, 125 S.Ct. 1497 (describing *Sullivan* as involving "discrimination on the basis of race"). And the context in which the statutory language appears is the same in all three cases; that is, all three cases involve remedial provisions aimed at prohibiting discrimination.

*Id.*

<sup>192</sup> See *supra* text accompanying notes 172-80.

even greater challenge to finding an implied claim for retaliation than the Court faced in either *Jackson* or *CBOCS West*.<sup>193</sup>

When the ADEA originally passed in 1967, the Act applied only to the private sector and included both an anti-discrimination provision and a separate anti-retaliation provision.<sup>194</sup> Seven years later, Congress passed the Fair Labor Standards Amendments of 1974,<sup>195</sup> which added 29 U.S.C. § 633a to the ADEA to prevent age discrimination against most Executive Branch employees.<sup>196</sup> However, Congress did not include a specific anti-retaliation provision in the amendment covering federal workers—a distinct difference between the amendment and the original ADEA applicable to the private sector. Moreover, Congress clearly was aware of the ADEA's original provisions protecting private-sector employees from discrimination and, separately, retaliation. As Chief Justice Roberts noted in dissent,<sup>197</sup> the amendments made these separate private-sector provisions applicable to States and their political subdivisions, but Congress enacted the separate section 633a (without a distinct anti-retaliation provision) to apply to the federal government.<sup>198</sup> A further piece of evidence from the FLSA Amendments suggests that Congress deliberately chose not to include a separate anti-retaliation provision in the section of the ADEA applicable to federal employees. As part of the Amendments, Congress amended the Fair Labor Standards Act of 1938 to extend the FLSA, including its anti-retaliation provision, to federal

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<sup>193</sup> See Charles Shanor, *Employment Cases from the 2007-2008 Supreme Court Term*, 24 LAB. LAW. 147, 155-56 (2008) (noting that *Gomez-Perez* was a "harder retaliation case" than *CBOCS West* because the ADEA private-sector provision had an anti-retaliation provision and because the case presented a "weaker *stare decisis* argument").

<sup>194</sup> See Age Discrimination in Employment Act of 1967, 81 Stat. 602. Section 4(a)(1) of the Act, 29 U.S.C. § 623(a)(1), made it unlawful for an employer to "discriminate against any individual . . . because of such individual's age." Section 4(d), 29 U.S.C. § 623(d), prevented retaliation against any employee or applicant who "has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under" the ADEA.

<sup>195</sup> 88 Stat. 74.

<sup>196</sup> See *Gomez-Perez*, 128 S. Ct. at 1944 (Roberts, C.J., dissenting).

<sup>197</sup> See *id.* at 1946 ("Congress obviously had the private-sector ADEA provision prominently before it when it enacted § 633a, because the same bill that included § 633a also amended the private-sector provision.") (citing §28(a)(2), 88 Stat. 74, which broadened the definition of "employer" in 29 U.S.C. § 630(b)).

<sup>198</sup> See *id.* at 1947. As the Chief Justice stated:

Congress specifically chose in the FLSA Amendments to treat States and the Federal Government differently with respect to the ADEA itself. It subjected the former to the ADEA's private-sector provision—including the express prohibition against retaliation in § 623(d)—while creating § 633a as a stand-alone prohibition against discrimination in federal employment, without an antiretaliation provision. This decision evinces a deliberate legislative choice *not* to extend those portions of the ADEA's private-sector provisions that are not expressly included in § 633a . . . .

*Id.* at 1947-48 (citations omitted).

employees.<sup>199</sup> Again as Chief Justice Roberts argued in dissent, “Congress did *not* similarly subject the Federal Government to the express antiretaliation provision in the ADEA, strongly suggesting that this was a conscious choice.”<sup>200</sup>

The majority, however, disagreed with Chief Justice Roberts regarding the meaning of the dissimilar structure utilized by the private-sector and the federal-sector provisions. In response to his criticism, the majority again relied heavily on *Sullivan*, as it did in *CBOCS West*. The majority claimed that when Congress enacted a “broad, general ban” on age discrimination, “Congress was presumably familiar with *Sullivan* and had reason to expect that this ban would be interpreted ‘in conformity’ with that precedent.”<sup>201</sup> Therefore, the fact that separate provisions of the ADEA addressed retaliation differently “does not provide a sufficient reason to depart from the reasoning of *Sullivan* and *Jackson*.”<sup>202</sup>

## 2. Explicit Protection: Title VII of the Civil Rights Act of 1964

The year after *Jackson*, the Supreme Court turned to the explicit anti-retaliation provision of Title VII. *Burlington Northern & Santa Fe Railway Co. v. White*<sup>203</sup> required the Court to determine the type of adverse action that qualifies as retaliation by an employer against an employee.<sup>204</sup> In many ways, the case provided a mirror image of *Jackson*. While *Jackson* required the Court to find retaliation protection as an implicit part of a broad anti-discrimination provision,<sup>205</sup> *Burlington Northern* emphasized that protection from discrimination *differs* from protection from retaliation.<sup>206</sup> For *Jackson*, retaliation was part of discrimination; for *Burlington Northern*, retaliation required a separate analysis. Yet, in both cases, the Court found in favor of protecting employees from retaliation.

The plaintiff in *Burlington Northern* claimed that her employer had retaliated against her for complaining about gender discrimination by taking two actions: first reassigning her to a position with less prestige and more arduous responsibilities, and then later suspending her without pay for 37 days (although the company later reinstated her with back pay).<sup>207</sup> To determine whether these actions violated Title VII’s anti-

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<sup>199</sup> See *id.* at 1947 (citing to FLSA Amendments, § 6(a)(2), 88 Stat. 58, which “explicitly subjected federal employers to the FLSA’s express antiretaliation provision, 29 U.S.C. § 215(a)(3)”).

<sup>200</sup> *Id.*

<sup>201</sup> See *Gomez-Perez*, 128 S. Ct. at 1941; see also *id.* at 1942 n.6 (using same rationale to address the argument related to Congress’ amendment of the Fair Labor Standards Act to include an explicit anti-retaliation provision applicable to federal employees).

<sup>202</sup> See *id.* at 1941.

<sup>203</sup> 548 U.S. 53 (2006).

<sup>204</sup> See *id.* at 59.

<sup>205</sup> See *Jackson*, 544 U.S. at 174.

<sup>206</sup> See *Burlington Northern*, 548 U.S. at 62-63.

<sup>207</sup> See *id.* at 59, 71-72.

retaliation provision, the Court had to determine the scope of the statute's provision barring an employer from "discriminat[ing] against" an employee for opposing any practice made unlawful by Title VII or for participating in a Title VII proceeding or investigation.<sup>208</sup>

Several Courts of Appeals had determined that Title VII's anti-retaliation provision should be read to prohibit only adverse actions related to employment, which would be the same standard that courts apply to actions that may violate Title VII's anti-discrimination provision.<sup>209</sup> Others had taken an even more restrictive approach by limiting actionable retaliation to "ultimate employment actions," such as "hiring, granting leave, discharging promoting, and compensating."<sup>210</sup> The Supreme Court, however, determined that Title VII required a broader interpretation to prohibit not only employment-related retaliation, but also actions unrelated to employment that could have an impact on an employee's willingness to report discrimination.<sup>211</sup>

The Court based its holding on the language and the purpose of Title VII's anti-retaliation provision.<sup>212</sup> First, the language of Title VII's anti-retaliation provision differs from the statute's anti-discrimination provision. Title VII prohibits discrimination by prohibiting specific actions related to employment: failing or refusing to hire or discharge, discriminating with respect to an employee's compensation, terms, conditions or privileges of employment, or limiting employment opportunities.<sup>213</sup> The anti-retaliation provision, however, does not have such limiting language. It prohibits an employer generally from "discriminat[ing]" against employees or applicants in retaliation.<sup>214</sup>

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<sup>208</sup> See *id.* at 56-57.

<sup>209</sup> See *id.* at 60 (citing *Burlington N. & Santa Fe Ry., Co. v. White*, 364 F.3d 789 (6<sup>th</sup> Cir. 2004); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4<sup>th</sup> Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3<sup>rd</sup> Cir. 1997)).

<sup>210</sup> *Id.* (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5<sup>th</sup> Cir. 1997) (internal quotation marks omitted) and citing *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8<sup>th</sup> Cir. 1997)).

<sup>211</sup> *Id.* at 57; see also *id.* at 67. The Court decided in favor of the employee with a 9-0 vote. Justice Breyer wrote the majority opinion joined by seven other Justices. Justice Alito filed an opinion concurring in the judgment only. See *id.* at 73 (Alito, J. concurring).

<sup>212</sup> See *id.* at 62-63.

<sup>213</sup> 42 U.S.C. § 2000e-2(a). The provision reads:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.* (emphasis added).

<sup>214</sup> 42 U.S.C. § 2000e-3(a). The provision reads:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has



Second, the Court found that Congress intended these linguistic differences to make a “legal difference” because the two provisions have different purposes as well.<sup>215</sup> Because the “substantive” anti-discrimination provision seeks to prevent discrimination in the workplace, Congress needed only to prohibit acts related to employment. However, the anti-retaliation provision aims to prevent discrimination by blocking an employer from interfering with an employee’s effort to enforce the statute’s substantive anti-discrimination objectives.<sup>216</sup> To support this objective, Title VII necessarily must prevent a broader range of employer actions because of the various non-employment ways in which an employer could deter employees from “[m]aintaining unfettered access to statutory remedial mechanisms.”<sup>217</sup>

Finally, the Court noted that, although the actionable retaliatory conduct was broader than discriminatory conduct, it was not limitless. The Court said that “it is important to separate significant from trivial harms.”<sup>218</sup> Thus, Title VII’s anti-retaliation provision covers all employer actions “that would have been materially adverse to a reasonable employee or job applicant.”<sup>219</sup> By “materially adverse,” the Court meant that the employer action “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>220</sup> This objective standard recognizes that “petty slights, minor annoyances, and simple lack of good manners” would not be actionable because they would be unlikely to deter employees from complaining to the EEOC about discrimination.<sup>221</sup>

Using this standard, the Court found that both the retaliatory reassignment and the unpaid suspension imposed by the employer in this case violated Title VII because these actions would likely dissuade an employee from bringing a charge of discrimination.<sup>222</sup> Interestingly, as Justice Alito noted in his concurrence, the Court might not have had to issue as broad a holding in order to find that the employer’s conduct in this specific case violated Title VII.<sup>223</sup> Even Courts of Appeals that limited the anti-retaliation protection to employment-related action likely would

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opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

*Id.* (emphasis added).

<sup>215</sup> See *Burlington Northern*, 544 U.S. at 62-63.

<sup>216</sup> See *id.* at 63.

<sup>217</sup> *Id.* at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (internal quotation marks omitted).

<sup>218</sup> *Id.* at 68.

<sup>219</sup> *Id.* at 57; see also *id.* at 67.

<sup>220</sup> *Id.* at 57.

<sup>221</sup> *Id.* at 68.

<sup>222</sup> *Id.* at 70-73.

<sup>223</sup> *Id.* at 79-80 (Alito, J., concurring).

have found that the employer action in this case satisfied that standard.<sup>224</sup> Nevertheless, in the face of significant differences among the Circuits as to the scope of this provision, the Court decided to clarify the issue by requiring a standard more protective of employees.

The Supreme Court's most recent retaliation opinion, issued in 2009, returned the Court to Title VII and its explicit anti-retaliation provision. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*<sup>225</sup> considered whether Title VII's retaliation provision protected an employee who participated in an employer's internal investigation of a sexual harassment complaint.<sup>226</sup> The employee had answered her employer's questions and identified several alleged instances of harassment that she had witnessed.<sup>227</sup>

Title VII's anti-retaliation provision protects two types of conduct. First, it prohibits retaliation against an employee who "has opposed" violations of Title VII.<sup>228</sup> Second, the statute protects an employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII.<sup>229</sup> The *Crawford* plaintiff argued that both Title VII's "opposition" clause as well as its "participation" clause prohibited retaliation against her based on her conduct during her employer's internal investigation.<sup>230</sup>

The Court evaluated the claim only under the opposition clause and determined that the employee's actions during the investigation constituted protected conduct.<sup>231</sup> The Sixth Circuit had viewed the plaintiff's conduct as insufficient because it believed Title VII required "active, consistent 'opposing' activities to warrant . . . protection against retaliation."<sup>232</sup> Relying primarily on the "ordinary" meaning of the term "oppose" found in the dictionary, however, the Supreme Court disagreed.<sup>233</sup> As with the Court's other recent retaliation cases, this conclusion is debatable; for example, the Circuit Courts of Appeal had issued conflicting opinions regarding the extent to which Title VII's anti-retaliation provision requires "active" opposition.<sup>234</sup> Moreover, the Court

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<sup>224</sup> See *id.*

<sup>225</sup> 129 S. Ct. 846 (2009).

<sup>226</sup> See *id.* at 849.

<sup>227</sup> See *id.*

<sup>228</sup> 42 U.S.C. § 2000e-3(a).

<sup>229</sup> *Id.*

<sup>230</sup> See *Crawford*, 129 S. Ct. at 850.

<sup>231</sup> See *id.* at 853.

<sup>232</sup> See *id.* at 851 (quoting *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 Fed. Appx. 373, 376 (6<sup>th</sup> Cir. 2006) (quoting *Bell v. Safety Grooving & Grinding, LP*, 107 Fed. Appx. 607, 610 (6<sup>th</sup> Cir. 2004)) (internal quotation marks omitted).

<sup>233</sup> See *id.* at 850 (citing Webster's New International Dictionary 1710 (2d ed. 1958) for the proposition that "RESIST frequently implies more active striving than OPPOSE").

<sup>234</sup> Compare *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 Fed. Appx. 373, 376 (6<sup>th</sup> Cir. 2006) and *McNorton v. Ga. Dep't of Transp.*, 2007 WL 4481431, at \*14 (N.D. Ga. 2007) (holding that an employee's cooperation with internal investigation did not constitute

could have chosen numerous other definitions of “oppose” that seem to require much more active and overt resistance.<sup>235</sup>

Ultimately, the Court reasoned that not protecting employees like the plaintiff would undermine the effectiveness of the scheme the Court had implemented in *Burlington Industries, Inc. v. Ellerth*<sup>236</sup> and *Faragher v. Boca Raton*,<sup>237</sup> which encouraged employer internal investigations of sexual harassment claims.<sup>238</sup> Thus, according to the Court, Title VII’s opposition clause goes beyond active opposition to protect any form of communication to the employer in which the employee communicates a belief that the employer has violated Title VII.<sup>239</sup>

## B. First Amendment Protection

In the midst of this series of cases addressing statutory anti-retaliation protection, the Court also addressed the breadth of protection the First Amendment provides to government employees. In *Garcetti v. Ceballos*,<sup>240</sup> the Court significantly limited the circumstances in which an employee may claim protection from retaliation. The 5-4 *Garcetti* majority held that the First Amendment does not protect employees from discipline related to speech that was a part of an employee’s official duties.<sup>241</sup>

The *Garcetti* plaintiff, a deputy district attorney, informed his supervisors in a memo that a sheriff’s affidavit being relied upon in a criminal case contained “serious misrepresentations.”<sup>242</sup> After a “heated” meeting between the plaintiff and his supervisors about the plaintiff’s conclusions, the supervisors decided to proceed with the prosecution despite the plaintiff’s protests.<sup>243</sup> Ultimately, the criminal defendant called the plaintiff as a witness, and he reiterated his misgivings about the sheriff’s affidavit.<sup>244</sup> After the hearing, the plaintiff claimed the district attorney’s office violated the First Amendment by retaliating against him because of his memo.<sup>245</sup>

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opposition conduct) *with* McDonnell v. Cisneros, 84 F.3d 256, 262 (7<sup>th</sup> Cir. 1996) (upholding protection of employee’s “passive” opposition to discrimination).

<sup>235</sup> See, e.g., *McNorton*, 2007 WL 4481431, at \*13 (noting recent dictionary definitions that define oppose with active terms); Br. for Resp., *Crawford* (No. 06-1595), available at 2008 WL 2066116, at \*27 (same).

<sup>236</sup> 524 U.S. 742 (1998).

<sup>237</sup> 524 U.S. 775 (1998).

<sup>238</sup> See, e.g., *Ellerth*, 524 U.S. at 765.

<sup>239</sup> See *Crawford*, 129 S. Ct. at 851.

<sup>240</sup> 547 U.S. 410 (2006).

<sup>241</sup> See *id.* at 421. Justice Kennedy wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Stevens and Justice Breyer each filed a dissent, and Justice Souter filed a third dissent joined by Justices Stevens and Ginsburg.

<sup>242</sup> *Id.* at 414.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.* at 414-15.

<sup>245</sup> See *id.* at 415.

In addressing the claim, the Court initially provided an exhaustive review of its First Amendment jurisprudence and reiterated that it required a delicate balancing of the employee's interest in speaking out as a citizen and the government employer's interest in operational efficiency.<sup>246</sup> Importantly, the Court also identified a third interest that must be balanced: the "public's interest in receiving the well-informed views of government employees engaging in civic discussion."<sup>247</sup> As summarized by the Court, its decisions "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."<sup>248</sup>

Within this framework, the Court found that the employee in *Garcetti* acted pursuant to his job duties, which the Court interpreted to mean that he was speaking as an employee rather than as a citizen.<sup>249</sup> According to the Court, this distinction meant that the government employer had more discretion to control his speech and to discipline him if the employer found the speech to be too disruptive or inaccurate.<sup>250</sup> When the "employee is simply performing his or her job duties," the Constitution does not require the same "delicate balancing" necessary when a government employee speaks as a citizen on a matter of public concern.<sup>251</sup>

The Court seemed attuned to at least one likely consequence of its holding: that government employees will report misconduct less frequently. Yet, despite recognizing that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," the Court ultimately asserted that encouraging employees to blow the whistle was not necessarily the Constitution's job.<sup>252</sup> Instead, the Court pointed to other potential safeguards, such as an employer's "internal policies and procedures that are receptive to employee criticism," a "powerful network of legislative enactments-such as whistle-blower protection laws and labor codes-available to those who seek to expose wrongdoing," and attorney rules of conduct.<sup>253</sup>

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<sup>246</sup> See *id.* at 417-19.

<sup>247</sup> *Id.* at 419; see also *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); *United States v. Treasury Employees*, 513 U.S., 454, 470 (1995) ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.").

<sup>248</sup> *Garcetti*, 547 U.S. at 419-20 (citations omitted) (citing *Pickering*, 391 U.S. at 572-73).

<sup>249</sup> See *id.* at 421.

<sup>250</sup> See *id.* at 422-23.

<sup>251</sup> *Id.* at 423.

<sup>252</sup> See *id.* at 426 ("Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.").

<sup>253</sup> *Id.* at 425.

Four justices dissented, writing three separate dissenting opinions. Justices Stevens and Ginsburg joined Justice Souter's dissent, which argued for a different sort of balancing that placed more emphasis on society's interest in government employee speech. Although Justice Souter recognized a government employer's need to manage its work force, he asserted that society's interest "in addressing official wrongdoing and threats to health and safety can outweigh the government [employer]'s stake in the efficient implementation of policy."<sup>254</sup> Thus, when an employee speaks on a matter of "unusual importance and satisfies high standards of responsibility in the way he does it," the fact that the speech related to the employee's job duties should not automatically exclude protection.<sup>255</sup> Justice Souter defined matters of "unusual importance" to include "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety."<sup>256</sup> Justice Stevens wrote a separate dissent in which he called the majority's views "misguided" because constitutional protection should not turn on whether an employee's words fell within the employee's job description.<sup>257</sup> Finally, Justice Breyer's dissent argued that the majority's "job duty" rule was too categorical, and that some limited First Amendment protection should still be provided to speech arising out of an employee's professional and constitutional obligations.<sup>258</sup> Justice Breyer, however, labeled as "too broad" Justice Souter's exception for employee speech on "matters of unusual importance," and declared that the exception caused too much judicial interference in government employment matters.<sup>259</sup>

### C. The Anti-Retaliation Principle and the Recent Cases

Taken together, the six recent Court opinions dealing with retaliation appear untethered to any consistent judicial philosophy. In *Jackson*, the Court asserted that protection from retaliation was part of a statute's general anti-discrimination protection,<sup>260</sup> while in *Burlington Northern* the Court upheld broad retaliation protection because it was *different* than a statute's discrimination protection.<sup>261</sup> The importance of *stare decisis* controlled the outcome of *CBOCS West* and *Gomez-Perez*,<sup>262</sup> while in

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<sup>254</sup> *Id.* at 428 (Souter, J., dissenting).

<sup>255</sup> *Id.* at 435.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 427 (Stevens, J., dissenting).

<sup>258</sup> *Id.* at 446-47 (Breyer, J., dissenting).

<sup>259</sup> *See id.* at 448-49.

<sup>260</sup> *See Jackson*, 544 U.S. at 174.

<sup>261</sup> *See Burlington Northern*, 548 U.S. at 62-63.

<sup>262</sup> *See CBOCS West*, 128 S. Ct. at 1955; *Gomez-Perez*, 128 S. Ct. at 1937.

*Jackson* the Court ignored important precedent.<sup>263</sup> The Court implied broad retaliation protection when statutes were silent,<sup>264</sup> yet refused to imply narrower protection when examining the First Amendment.<sup>265</sup> Although the Court typically emphasizes strict statutory interpretation and Congressional intent, it broadly interpreted anti-retaliation statutory provisions and examined Congressional purpose in *Crawford* and *Burlington Northern*.<sup>266</sup> In *Crawford*, the Court generously construed the definition of the word “oppose,”<sup>267</sup> while in *Burlington Northern* the Court interpreted the phrase “discriminate against” to include actions taken against employees that are unrelated to employment.<sup>268</sup> Most fundamentally, of course, the Court expanded retaliation protection in the five statutory cases and greatly restricted it in the constitutional case.

The recent cases also present numerous surprises when viewed more broadly against the Court’s non-retaliation cases. First, the employee won five of the six retaliation cases, a rarity for this Court that often narrowly construes employee protections in other contexts. For example, most recently, the Court held that the Age Discrimination in Employment Act of 1967<sup>269</sup> required a substantially higher causation standard than previously had been thought to apply.<sup>270</sup> Additionally, in the last few years, the Court severely limited the statute of limitations for discrimination cases,<sup>271</sup> restricted the application of the constitutional Equal Protection Clause to public employees,<sup>272</sup> and undermined Title VII’s protection from disparate impact discrimination.<sup>273</sup> Although numbers do not tell the whole story,<sup>274</sup> the win-loss record for employees

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<sup>263</sup> See generally *Jackson*, 544 U.S. at 171-84 (implying a right of action for Title IX, but not mentioning *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court’s seminal case on implied rights of action); *id.* at 177-78 (distinguishing *Alexander v. Sandoval*, 532 U.S. 275 (2001), the case in which the Court decided not to imply a disparate impact right of action under Title VI of the Civil Rights Act of 1964, 78 Stat. 252, a sister statute to Title IX, see *id.* at 281).

<sup>264</sup> See *CBOCS West*, 128 S. Ct. at 1954 (interpreting 42 U.S.C. § 1981); *Gomez-Perez*, 128 S. Ct. at 1935 (interpreting 29 U.S.C. § 633a(a)); *Jackson*, 544 U.S. at 173 (interpreting 20 U.S.C. § 1681(a)).

<sup>265</sup> See *Garcetti*, 547 U.S. at 421.

<sup>266</sup> See *Crawford*, 129 S. Ct. at 850 (interpreting Title VII, 42 U.S.C. § 2000e-3); *Burlington Northern*, 548 U.S. at 56-57 (interpreting Title VII, 42 U.S.C. § 2000e-3).

<sup>267</sup> See *Crawford*, 129 S. Ct. at 850.

<sup>268</sup> See *Burlington Northern*, 548 U.S. at 56-57.

<sup>269</sup> 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*

<sup>270</sup> See *Gross v. FBL Fin. Servs., Inc.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2343, 2351-52 (2009).

<sup>271</sup> See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 638-43 (2007). Congress statutorily overturned this decision immediately after President Obama’s inauguration. See *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5 (2009).

<sup>272</sup> See *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 2156-57 (2008).

<sup>273</sup> See *Ricci v. DeStefano*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2658, 2664-65 (2009).

<sup>274</sup> See *Harkavy*, *supra* note 4, at 2 (“For those who insist on keeping a scorecard, employees appeared at first blush to fare better this [2007] term than last.... [H]owever, w]hen viewed more analytically than anecdotally, there was actually no such discernible shift in the Court’s orientation as an employer-friendly forum.”); *Shanor*, *supra* note 193, at 154 (“If this is a more conservative Court, it did not show it in [*CBOCS West*].”).

in retaliation cases conflicts with the conventional wisdom that this Court generally favors business interests in employment cases.<sup>275</sup>

Second, many of the recent retaliation cases undermine long-standing Supreme Court precedent. In particular, the implied retaliation cases ignore the Court's traditional reluctance to imply a right of action when a statute does not explicitly provide for one. In the last few decades, the Supreme Court has limited the ability of federal courts to imply private rights of action by abandoning inquiry into a statute's purpose.<sup>276</sup> Rather, federal courts must utilize basic statutory interpretation tools to examine whether Congress specifically intended to create a right of action.<sup>277</sup>

Yet, in the face of this precedent, the Court went out of its way to permit three claims for retaliation when no anti-retaliation provision existed.<sup>278</sup> As mentioned above, although the reliance on *Sullivan* may have been appropriate in *Jackson* to discern Congressional intent when it enacted Title IX, this rationale loses its force when applied to Section 1981 in *CBOCS West* and the ADEA in *Gomez-Perez*. Congress created the statutory language at issue in both of these later cases during a period when it also enacted numerous statutes with very specific anti-retaliation provisions. It is unlikely that Congress relied on *Sullivan's* vague holding in 1974 when it enacted the ADEA or in 1991 when it amended the Civil Rights Act, because Congress also included specific anti-retaliation language in other legislation during that time. Moreover, when it enacted the ADEA and the 1991 Amendments' anti-discriminatory language of

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<sup>275</sup> See, e.g., Christine Cooper, *Employment Cases from the 2006-2007 Supreme Court Term*, 23 LAB. LAW. 223, 224 (2008) ("Of course the Court has tilted to the right"); Michael Selmi, *The Supreme Court's 2006-2007 Term Employment Law Cases: A Quiet But Revealing Term*, 11 EMP. R. & EMP. POL'Y J. 219, 220 (2007) ("The other patently obvious lesson this [2006-2007] term provided is that this is a tough time for plaintiffs in the employment context."); Ramona Paetzold, *Supreme Court's 2005-2006 Term Employment Law Cases: Do New Justices Imply New Direction?*, 10 EMP. R. & EMP. POL'Y J. 303, at 348 (2006) (noting that after the 2005-2006 term, "preliminary indicia of a new conservatism do exist"); Linda Greenhouse, *Justices Express Skepticism in a Discrimination Case*, N.Y. TIMES, Dec. 4, 2007, at A26; see also Robert Barnes, *Decisions Indicate Supreme Court Moved Rightward This Term*, WASH. POST (July 1, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/30/AR2009063004170.html?nav=emailpage> (noting after the 2008-2009 term that the "path" of the Court is "clear: a patient and steady move to the right led by Chief Justice John G. Roberts").

<sup>276</sup> See *Cort v. Ash*, 422 U.S. 66 (1975).

<sup>277</sup> See *id.*; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear." (citation omitted)); *Karahalios v. Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989) ("Congress undoubtedly was aware from our cases such as *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), that the Court had departed from its prior standard for resolving a claim urging that an implied statutory cause of action should be recognized, and that such issues were being resolved by a straightforward inquiry into whether Congress intended to provide a private cause of action.").

<sup>278</sup> See, e.g., Lynn Ridgeway Zehrt, *Retaliation's Changing Landscape*, 20 GEO. MASON UNIV. CIVIL R. J. 143, 179-80 (2010).

Section 1981, Congress certainly was aware that the Court required specific language in order to recognize a private cause of action.<sup>279</sup> This legislative reality significantly undermines the Court's conclusion that Congress actually constructed a general anti-discrimination provision without an anti-retaliation clause because it was relying on the Court's *Sullivan* opinion released years before.<sup>280</sup> At a minimum, the fact that the Court's arguments present substantial problems should make commentators question why the Court worked so hard to imply rights of action for retaliation after years of reluctance to do so in any other case.

Third, for a Supreme Court that prides itself on closely adhering to statutory language when interpreting the law,<sup>281</sup> the recent Title VII retaliation cases demonstrate the Court's willingness to examine Congressional purpose in addition to statutory language. For example, Title VII itself gives little indication what exactly it prevents employers from doing in retaliation: the statute prohibits only "discrimination."<sup>282</sup> Before *Burlington Northern*, many lower courts had held that this provision should be read *in pari materia* with Title VII's anti-discrimination provision; in other words that they both address the same type of employer action taken towards employees in the employment setting.<sup>283</sup> The Supreme Court, however, refused to accept this standard canon of statutory interpretation. After a cursory look at the differences between the specific language in the anti-discrimination provision and the general language in the anti-retaliation provision, the Court argued that Congress' *purpose* when it enacted the anti-retaliation provision should guide the interpretation of the statute.<sup>284</sup> Similarly, Title VII's use of the term "oppose" does not have any inherent meaning as to the level of action required to "oppose" unlawful conduct. The Court's majority and concurrence presented dueling dictionary definitions to support their respective positions,<sup>285</sup> but ultimately each had to fall back on their own

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<sup>279</sup> See *Karahalios*, 489 U.S. at 536.

<sup>280</sup> *Accord* Harkavy, *supra* note 4, at 10 (noting in *Gomez-Perez* the "undeniable anomaly that Congress provided an express remedy for retaliation against private employees, but did not do so in similar terms for federal employees").

<sup>281</sup> See *Arlington Central School District v. Murphy*, 548 U.S. 291, 303-04 (2006); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 567-71 (2005); *Dodd v. United States*, 545 U.S. 353, 359-60 (2005); see also *Humphries v. CBOCS West, Inc.*, 474 F.3d, 410 (7<sup>th</sup> Cir. 2007) (Easterbrook, J., dissenting in part) (noting that these cases indicate the Supreme Court "insists that statutory language be followed even if inconvenient or jarring").

<sup>282</sup> See Title VII, 42 U.S.C. § 2000e-3(a).

<sup>283</sup> See, e.g., *White v. Burlington N. & Santa Fe Ry., Co.*, 364 F.3d 789, 799-800 (6<sup>th</sup> Cir. 2004); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4<sup>th</sup> Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3<sup>rd</sup> Cir. 1997)).

<sup>284</sup> See *Burlington Northern*, 548 U.S. at 62-64 ("[P]urpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.")

<sup>285</sup> See *Crawford*, 129 S. Ct. at 850; *id.* at 853-54 (Alito, J., concurring in the judgment).



view of the provision's *purpose* as well as the practical consequences of the various interpretations of the word presented by each side.<sup>286</sup>

Commentators have had difficulty following the twists and turns. Some commentators assert that the Court has returned to an earlier era in which its goal is to divine Congressional intent and advance Congress' purposes through the Court's interpretation of statutes.<sup>287</sup> Others highlight and analyze the Court's use of various canons of statutory interpretation and judicially-created legal fictions.<sup>288</sup> In a thoughtful article after the *Jackson* opinion in 2005, Professor Deborah Brake provided a well-reasoned argument that protection from retaliation was an implied part of protection from discrimination.<sup>289</sup>

Other commentators view the decisions as little more than outcome-driven policy determinations in favor of retaliation protection; however, they cannot agree on the meaning of the outcomes.<sup>290</sup> For example, Professor Richard Carlson has argued that the Court's recent statutory retaliation cases do not necessarily "signal a consistently sympathetic judicial view" regarding retaliation against employees, in large part because they all hue closely to specific statutory language.<sup>291</sup> Indeed, he dismissed these cases as "episodic expressions of support" that "belie a persistent ambivalence" towards employees who suffer retaliation when they advance the interest of the larger public good.<sup>292</sup> In contrast, Daniel Westman, a prominent practitioner and author,<sup>293</sup> asserted that the Court has been pro-employee in retaliation cases because "[j]udges do not like the idea that witnesses are going to be intimidated and that translates into the workplace."<sup>294</sup>

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<sup>286</sup> See *Crawford*, 129 S. Ct. at 852-53; *id.* at 854-55 (Alito, J., concurring in the judgment).

<sup>287</sup> See Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 394-95 (2008) (citing to *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)); *cf.* Shanor, *supra* note 193, at 172 (noting that the Court in *CBOCS West* and *Gomez-Perez* "moved away from textual statutory construction to more contextual or pragmatist approaches to statutory interpretation").

<sup>288</sup> See Leading Cases, *Retaliation*, 122 HARV. L. REV. 445, 451-55 (2008) (asserting that the opinions in *Gomez-Perez* use rhetoric that appears to examine legislative intent but that in reality utilize judicially-created legal fictions); Zehrt, *supra* note 278, at 153 (analyzing the three recent implied retaliation cases and arguing that the court "has eschewed any reliance on public policy and has chosen instead to base its decisions solely on statutory construction").

<sup>289</sup> See Brake, *supra* note 7, at 21-22.

<sup>290</sup> See Leading Cases, *Retaliation as Sex Discrimination*, 119 HARV. L. REV. 357, 365-66 (2005) (discussing *Jackson* and noting that "[t]o an optimist, *Jackson* is a valiant attempt by the judiciary to patch an unfortunate statutory hole. To a pessimist, the case is a contemptible example of tenuous reasoning chasing a desired policy outcome").

<sup>291</sup> See Carlson, *supra* note 7, at 244. Moreover, Professor Carlson contrasts the decisions in *Jackson* and *Burlington Northern* with *Garcetti*. See *id.*

<sup>292</sup> *Id.* at 240.

<sup>293</sup> See generally WESTMAN & MODESITT, *supra* note 118.

<sup>294</sup> Marcia Coyle, *Term's Five Key Bias Decisions Were Mixed*, NAT'L L.J. (July 6, 2009), available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431973694&Terms\\_five\\_key\\_bias\\_decisions\\_were\\_mixed\\_&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431973694&Terms_five_key_bias_decisions_were_mixed_&slreturn=1) (quoting Westman). Of course, Westman's conclusion does not

Perhaps these decisions simply present examples of the Court deciding the narrow issues of the cases before it: whether statutory language contains an implied right of action or covers certain actions. Admittedly, in each decision, the Court engaged in a discreet and nuanced examination of the specific statutory language and structure involved in each individual case. Indeed, to some the cases required only “careful scrutiny of the particular provision in question,”<sup>295</sup> which would keep with the Court’s historic view limiting the instances in which it would read a statutory provision broadly or to include an implied right of action.

However, a more comprehensive explanation is possible. Placing these cases in the context of the Court’s other retaliation jurisprudence provides a perspective that brings consistency and a sense of order to these seemingly counter-intuitive results. When placed in this context, one common theme can be discerned throughout the recent retaliation cases: the Anti-Retaliation Principle. The Court recognized that enforcing the law requires encouraging employees to provide information about corporate misconduct. Anti-retaliation protection means enhanced law enforcement, which the Court for fifty years has valued more than other competing concerns. Indeed, in several ways, the recent retaliation cases exemplify the Court’s long-standing acceptance of and adherence to the same Anti-Retaliation Principle that the Court has utilized consistently in the past.

As an initial matter, the implied retaliation cases rely heavily on the holding of *Sullivan v. Little Hunting Park, Inc.*,<sup>296</sup> a case that, as mentioned above, relies upon the Anti-Retaliation Principle to support its holding that Section 1982 incorporates an implied right of action for retaliation.<sup>297</sup> Indeed, all three of the recent implied retaliation cases pay homage to *Sullivan*’s reference to the Principle.<sup>298</sup>

But, more than simply adopting *Sullivan*, the Court reinvigorated the Anti-Retaliation Principle through these recent cases. Again, the Anti-Retaliation Principle recognizes that law enforcement depends upon employees blowing the whistle on illegal conduct—even if those employees are not the victims of that conduct. In order to encourage them to come forward, the law must protect them from retaliation. Notably, like *Sullivan*, two of the three recent implied retaliation cases—*Jackson* and

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explain the *Garcetti* Court’s reluctance to protect a person who was both an employee and a witness.

<sup>295</sup> *Gomez-Perez*, 128 S. Ct. at 1951 (Roberts, C.J., dissenting); see also *id.* at 1939 (Alito, J.) (“*Jackson* did not hold that Title IX prohibits retaliation because the Court concluded as a policy matter that such claims are important. Instead, the holding in *Jackson* was based on an interpretation of the ‘text of Title IX.’” (quoting *Jackson*, 544 U.S., at 178)).

<sup>296</sup> 396 U.S. 229 (1969).

<sup>297</sup> See discussion *supra* Part I; see also *Sullivan*, 396 U.S. at 237 (finding that if an individual could be “punished for trying to vindicate the rights of minorities protected by § 1982,” then “[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property”).

<sup>298</sup> See *Jackson*, 544 U.S. at 180; *CBOCS West*, 128 S. Ct. at 1955; *Gomez-Perez*, 128 S. Ct. at 1936.

*CBOCS West*—involved third-party reporters of illegal discrimination.<sup>299</sup> The *Jackson* plaintiff reported inequities in the girls' basketball program<sup>300</sup> and the *CBOCS West* plaintiff reported alleged discrimination against a co-worker.<sup>301</sup> The *Jackson* Court made it clear that the victim of retaliation can be (and often would be) different than the victim of the underlying discrimination.<sup>302</sup> For Title IX specifically, the Court found that Title IX's enforcement depended upon complaints, particularly from insiders with first-hand knowledge about violations, such as teachers and coaches.<sup>303</sup>

Thus, the *Jackson* Court explicitly adopted the Anti-Retaliation Principle:

If recipients [of federal education funds] were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result. . . . Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. . . . Without protection from retaliation, individuals who witness discrimination would likely not report it, . . . and the underlying discrimination would go unremedied."<sup>304</sup>

This adoption paved the way for the subsequent implied retaliation cases to do the same for similar reasons. The *CBOCS West* Court upheld a retaliation claim for Section 1981 in part because its sister statute, Section 1982, was held by *Sullivan* to provide "protection from retaliation for reasons related to the enforcement of the express statutory right."<sup>305</sup> Although the Anti-Retaliation Principle is not as explicit in *Gomez-Perez*,<sup>306</sup> the Court did reject the government employer's argument that protection

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<sup>299</sup> See *Jackson*, 544 U.S. at 171; *CBOCS West*, 128 S. Ct. at 1954; *Sullivan*, 396 U.S. at 237.

<sup>300</sup> See *Jackson*, 544 U.S. at 171.

<sup>301</sup> See *CBOCS West*, 129 S. Ct. at 1954.

<sup>302</sup> See *Jackson*, 544 U.S. at 179-80.

<sup>303</sup> See *id.* at 181 ("[T]eachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are "'the only effective adversar[ies]'" of discrimination in schools.") (quoting *Sullivan*, 396 U.S. at 237 (citing *Barrows v. Jackson*, 346 U.S. 249, 259 (1953))).

<sup>304</sup> *Id.* at 180-81.

<sup>305</sup> *CBOCS West*, 129 S. Ct. at 1958 (emphasis in original).

<sup>306</sup> The Court actually denied that it was making any policy-oriented determination in *Jackson* when it mentioned the important role of teachers and students in reporting illegal discrimination. See *Gomez-Perez*, 128 S. Ct. at 1939. The Court claimed it was merely responding to an argument made in *Jackson* that "even if even if Title IX was held to permit some retaliation claims, only a 'victim of the discrimination'-and not third parties-should be allowed to assert such a claim." See *id.* (quoting *Jackson*, 544 U.S. at 179-82).

from retaliation is not necessary because third parties are not necessary to identify age discrimination and report it.<sup>307</sup>

The Title VII cases also adopted the Anti-Retaliation Principle by broadly interpreting the statute's express anti-retaliation provision. First, in *Burlington Northern*, the Court reiterated that the provision prevents employers "from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."<sup>308</sup> In short, the "primary purpose" of the provision is to maintain "unfettered access to statutory remedial mechanisms."<sup>309</sup> Because of this purpose, the Court held that the provision should be interpreted broadly so that employers would be deterred from retaliating against employees who might report wrongdoing.<sup>310</sup> Citing back to the Court's first expression of the Anti-Retaliation Principle in *Mitchell*, the Court in *Burlington Northern* explicitly relied upon the Principle again:

Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.<sup>311</sup>

Even when the Court declined to consider "petty slights, minor annoyances, and simple lack of good manners" to be actionable retaliation, the Anti-Retaliation Principle guided the Court's rationale. Allowing such *de minimus* harms would not prevent "unfettered access" to Title VII's remedial mechanisms because those trivial acts would not reasonably deter an employee from reporting discrimination.<sup>312</sup> By focusing on the Anti-Retaliation Principle—i.e., enhancing law enforcement by encouraging employees to blow the whistle on illegalities—the Court limited actionable retaliatory acts to those that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."<sup>313</sup>

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<sup>307</sup> See *id.* at 1938-39.

<sup>308</sup> *Burlington N.*, 548 U.S. at 63.

<sup>309</sup> *Id.* at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (internal quotation marks omitted).

<sup>310</sup> See *id.*

<sup>311</sup> *Id.* at 67 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)) (citation omitted).

<sup>312</sup> *Id.* at 68.

<sup>313</sup> *Id.* at 57; see also *id.* at 68.

The Court even modified its seemingly objective perspective on which actions would be “material.” By permitting some attention to be paid to whether an action would dissuade a reasonable person “in the plaintiff’s position,”<sup>314</sup> the Court allowed for the introduction of individualized factors that might dissuade one type of person but not another from reporting. This permissible subjectivity highlights the importance of encouraging employees to report misconduct. Ultimately, although the Court wanted to “screen out trivial conduct,” its focus was on the Anti-Retaliation Principle: preventing “those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.”<sup>315</sup>

The second Title VII case, *Crawford*, also emphasized the importance of the Anti-Retaliation Principle because of the Court’s recognition of the important role employee whistleblowers play in enforcing Title VII. As in *Sullivan, Jackson, and CBOCS West*, the plaintiff in *Crawford* was more of a reporter of discrimination than a victim asserting her own rights.<sup>316</sup> Indeed, the Court made explicit its understanding that employees who report discrimination *against others* may face retaliation even when the whistleblower was not personally discriminated against.<sup>317</sup>

As important, after its discussion of various dictionary meanings of the word “oppose,” the *Crawford* Court focused on the primary policy justification for protecting employees who participate in internal corporate investigations. This policy rationale involved yet another restatement of the Anti-Retaliation Principle:

If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”<sup>318</sup>

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<sup>314</sup> *Id.* at 69-70.

<sup>315</sup> *Id.* at 70.

<sup>316</sup> See *Crawford*, 129 S. Ct. at 849. The plaintiff actually suffered as a victim of sexual harassment, but reported her supervisor’s illegal conduct only during an investigation of unspecified rumors regarding sexual harassment by the supervisor. See *id.*

<sup>317</sup> See *id.* at 853 n.3 (“[E]mployees will often face retaliation not for opposing discrimination they themselves face, but for reporting discrimination suffered by others. Thus, they are not ‘victims’ of anything until they are retaliated against. . .”).

<sup>318</sup> *Id.* at 852 (quoting Brake, *supra* note 7, at 20).

Therefore, the five recent statutory retaliation cases reflect the same three premises supporting the Anti-Retaliation Principle that the Court has utilized for almost fifty years. First, the Court recognized that employees often have the best information about wrongdoing committed by an employer—a fact underscored by the plaintiffs in these cases, two of whom reported illegal conduct that was not directed at them.<sup>319</sup> Second, as *Crawford*, *Burlington Northern*, and *Jackson* all recognized explicitly, employees will only come forward with this inside information if they are protected from retaliation.<sup>320</sup> Third, as *Jackson*, *Burlington Northern*, and *Crawford* made clear, effective law enforcement requires employees to report illegal conduct.<sup>321</sup>

This explanation explains these five recent statutory cases better than focusing solely on an argument that retaliation is another form of discrimination.<sup>322</sup> Granted, language in the implied retaliation cases supports this position, particularly in *Jackson* in which the majority makes this “retaliation equals discrimination” argument explicitly.<sup>323</sup> However, this rationale does not explain Congress’ frequent practice of providing separate protection from retaliation in anti-discrimination laws.<sup>324</sup> Nor does it provide insight for interpreting anti-retaliation provisions in laws addressing problems other than discrimination.<sup>325</sup> Perhaps another way to say the same thing (but in not as limited a fashion) is to assert that a law preventing discrimination must, by definition, also prevent retaliation for reporting discrimination. In other words, for a law to be enforced, retaliation against those who report violations of it must be prevented. Framed in this manner, retaliation law is not limited by its association with discrimination; rather, discrimination law is merely one area in which anti-retaliation protection is needed in order to enforce the law. Viewed from this perspective, *Jackson*, *CBOCS West*, and *Gomez-Perez* do not mean that the Court will imply retaliation protection only in discrimination cases. Instead, they could mean that discrimination claims present only one example of the types of claims that also need anti-retaliation protection in order to be enforced effectively. Of course, the

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<sup>319</sup> See *CBOCS West*, 128 S. Ct. at 1954; *Jackson*, 544 U.S. at 181. Moreover, a third employee, *Crawford*, was a victim of discrimination but reported the discrimination during her employer’s investigation of her supervisor’s actions more generally. See *Crawford*, 129 S. Ct. at 849.

<sup>320</sup> See *Crawford*, 129 S. Ct. at 852; *Burlington N.*, 548 U.S. at 67; *Jackson*, 544 U.S. at 180-81.

<sup>321</sup> See *Crawford*, 129 S. Ct. at 852; *Jackson*, 544 U.S. at 180-81; *Burlington N.*, 548 U.S. at 68.

<sup>322</sup> Cf. *Brake*, *supra* note 7, at 21-22.

<sup>323</sup> See *Jackson*, 544 U.S. at 174; cf. *CBOCS West*, 128 S. Ct. at 1960-61 (rejecting the dissent’s argument that retaliation and discrimination are distinct); *Gomez-Perez*, 128 S. Ct. at 1937 (noting that argument that retaliation and discrimination are conceptually different “did not prevail” in *Jackson*).

<sup>324</sup> See Equal Employment Opportunity Act (Title VII), 42 U.S.C. § 2000e-3(a); Americans With Disability Act, 42 U.S.C. § 12203(a); Age Discrimination in Employment Act, 29 U.S.C. § 623(d).

<sup>325</sup> See Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

Court's further focus on retaliation in the Title VII discrimination context merely provides another example of a law in which retaliation protection is needed in order for the law to be enforced. In those cases, however, the protection was explicit rather than implicit, and the issues involved how broadly to read that protection.

Moreover, in the context of the Court's other retaliation jurisprudence, the Court's recent statements related to the broader Anti-Retaliation Principle become meaningful. Over the course of the last fifty years, the Court has made these same types of statements in cases involving a variety of topics in addition to discrimination. As noted above, the Court utilized the Principle by upholding broad retaliation protection in cases involving the First Amendment,<sup>326</sup> wage claims,<sup>327</sup> labor relations,<sup>328</sup> environmental regulations,<sup>329</sup> transportation industry rules,<sup>330</sup> and witness testimony.<sup>331</sup> The Court's protection of whistleblowers goes well beyond those who report only discrimination. In each of those instances, the Court's rationale relates to the importance of these employees' reports for law enforcement efforts more generally.

In seeming juxtaposition to the approach the Court took in the statutory cases, the result in the lone First Amendment decision substantially narrowed retaliation protection. Indeed, the Court's 2006 decision in *Garcetti v. Ceballos*<sup>332</sup> provided the first example of the Court denying First Amendment protection to an employee who complained about arguably illegal conduct.<sup>333</sup> As noted above, although the employee's speech (the complaint about illegal behavior) related to a "matter of public concern" (illegal conduct), the Court held that the First Amendment did not protect the employee from retaliation because the speech was part of the employee's job duties.<sup>334</sup>

To a limited degree, however, *Garcetti* provides yet another example of the Court explaining anti-retaliation protection through the lens of the Anti-Retaliation Principle. At the same time that the Court implemented a rule that undermined the Principle, the *Garcetti* Court also made explicit statements in support of the Principle. For example, the Court identified

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<sup>326</sup> See, e.g., *Pickering v. Bd. of Educ. of Township High School Dist.* 205, 391 U.S. 563, 572 (1968).

<sup>327</sup> See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292-93 (1960).

<sup>328</sup> See *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983); *Sure-Tan v. NLRB*, 467 U.S. 883, 895-96 (1984).

<sup>329</sup> See *English v. General Electric Co.*, 496 U.S. 72, 90 (1990).

<sup>330</sup> See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258-59 (1987).

<sup>331</sup> See *Haddle v. Garrison*, 525 U.S. 121, 125 (1998).

<sup>332</sup> 547 U.S. 410 (2006).

<sup>333</sup> The employee in *Garcetti* reported "government misconduct" that included alleged perjury in the form of an affidavit the employee believed to contain "serious misrepresentations." See *id.* at 414-16.

<sup>334</sup> See *id.* at 421-23.

the importance of balancing the employee and employer interests with the “public's interest in receiving the well-informed views of government employees engaging in civic discussion.”<sup>335</sup>

That said, the Court seems to have strayed from the Anti-Retaliation Principle in this case because, despite giving lip service to consideration of society's interest in employee speech,<sup>336</sup> it weighed heavily the employer's need for managerial control over its workforce and provided no actual discussion of the weight to be given to society's specific interest in law enforcement.<sup>337</sup> The Anti-Retaliation Principle normally would call for the protection of an employee who reports illegal conduct, even if that reporting was part of the employee's job duties. Job duties would make no doctrinal difference if the Court truly focused on the Anti-Retaliation Principle in the decision. A rule more consistent with the Principle articulated in the rest of the Court's retaliation jurisprudence would recognize that speech related to illegal government conduct lies at the heart of First Amendment protection. Society's interest in knowing about the government's unlawful behavior should be weighed heavily in favor of protection from retaliation, particularly because, like the other contexts discussed above, government employees have unique access to information about illegalities.

In his dissent in *Garcetti*, Justice Souter set out a rule that more appropriately incorporates the Anti-Retaliation Principle into the Court's *Pickering* balancing. Justice Souter argued that “private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government [employer's] stake in effective implementation of policy.”<sup>338</sup> When employee speech relates to job duties, typically the government's need for managerial authority would outweigh the First Amendment interests at stake.<sup>339</sup> However, according to Justice Souter, when the employee “speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it,” the employee should be protected.<sup>340</sup> Justice Souter defined “a matter of

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<sup>335</sup> *Id.* at 419; *see also id.* at 419-20 (stating that its decisions “have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions”) (citations omitted) (citing *Pickering*, 391 U.S. at 572-73); *cf.* *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (“Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it” (citation omitted)); *United States v. Treasury Employees*, 513 U.S., 454, 470 (1995) (“The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said”).

<sup>336</sup> *See Garcetti*, 547 U.S. at 419-20.

<sup>337</sup> *See id.* at 422-23.

<sup>338</sup> *Id.* at 428 (Souter, J., dissenting).

<sup>339</sup> *Id.* at 435.

<sup>340</sup> *Id.*



unusual importance” to include speech related to “official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.”<sup>341</sup> His examples of such speech relate to reports of illegal conduct, including when “a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior’s order to violate constitutional rights he is sworn to protect.”<sup>342</sup> In other words, Justice Souter agreed with the job duty rule generally, but understood it should be limited because of the Anti-Retaliation Principle’s protection of speech related to law enforcement, even if the speech was part of one’s job duty. Justice Souter’s exception for employee reports of illegal government behavior would better comply with the Court’s long history of support for the Anti-Retaliation Principle.

Importantly, *Garcetti* ultimately confirms the Court’s belief that the Anti-Retaliation Principle should be implemented by Congress, not by the Court through constitutional interpretation. One of the reasons the Court offered to support its *Garcetti* holding was that there existed a “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.”<sup>343</sup> Indeed, the Court has used a similar justification for reduced First Amendment protection in the employment setting. In *Waters v. Churchill*,<sup>344</sup> the Court noted that legislatures<sup>345</sup> could create stronger anti-retaliation protections “beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system.”<sup>345</sup> Also, in *Bush v. Lucas*,<sup>346</sup> the Court specifically denied a First Amendment damages claim to federal employees because Congress had created statutory protections from retaliation under the Civil Service Reform Act.<sup>347</sup> Thus, the constitutional cases linguistically support the Anti-Retaliation Principle, but also they often demonstrate the Court’s understanding that it is primarily a statutory, not a constitutional, principle.

In sum, all the recent retaliation cases demonstrate that the Supreme Court’s retaliation jurisprudence is about law enforcement. Employees must be protected from retaliation so that they will report illegal conduct.

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<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 434.

<sup>343</sup> *Garcetti*, 547 U.S. at 425.

<sup>344</sup> 511 U.S. 661 (1994).

<sup>345</sup> *Id.* at 674 (1994).

<sup>346</sup> 462 U.S. 367 (1983).

<sup>347</sup> *See id.* at 389 (“In the past [Congress] has demonstrated its awareness that lower-level government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates’ freedom of expression.”)

These employee reports will themselves aid law enforcement by alerting authorities to wrongdoing. As important, the *threat* of possible employee reports will deter violations of the law in the first place. That being said, the *Garcetti* opinion seems to confirm the Court's long-standing view that this anti-retaliation protection more appropriately arises out of statutory, rather than constitutional, law.

### III. The Future

Identifying and explaining the Supreme Court's rationale in retaliation cases should impact how the Supreme Court and lower courts approach retaliation law in the future.

#### A. The Supreme Court

First, and most immediately, the Supreme Court appears interested in continuing its recent examination of retaliation law. The Court recently granted *certiorari* in two more statutory retaliation cases: *Kasten v. Saint-Gobain Performance Plastic Corp.*<sup>348</sup> and *Thompson v. North American Stainless, LP.*<sup>349</sup> The Anti-Retaliation Principle could directly influence the outcome of these important cases.

*Kasten* involves the question of whether the Fair Labor Standard Act's anti-retaliation provision protects an employee who files an oral complaint that an employer violated the FLSA.<sup>350</sup> In the lower courts, the issue turned on how to interpret the FLSA's protection of an employee who "has filed any complaint."<sup>351</sup> Both the District Court and the Seventh Circuit Court of Appeals found that this statutory language protects only a written complaint, not an oral complaint.<sup>352</sup> However, decisions by several other circuit courts have protected employees who made oral complaints about FLSA violations.<sup>353</sup>

*Thompson* examines whether Title VII prohibits retaliation against an employee by "inflicting reprisals" on a third-party who is closely related to the employee.<sup>354</sup> In this case, the plaintiff alleges that he was fired

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<sup>348</sup> 130 S. Ct. 1890, No. 09-834 (March 22, 2010) (granting petition for writ of certiorari).

<sup>349</sup> 130 S. Ct. 3542, No. 09-291 (June 29, 2010) (granting petition for writ of certiorari).

<sup>350</sup> See Pet. for Writ of Certiorari at i, *Kasten v. Saint-Gobain Performance Plastic Corp.*, No. 09-834, 2010 WL 146471 (U.S. Jan. 12, 2010).

<sup>351</sup> 29 U.S.C. § 215(a)(3); see also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 837-40 (7th Cir. 2009); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 619 F. Supp.2d 608, 611-12 (W.D. Wis. 2008).

<sup>352</sup> See *Kasten*, 570 F.3d at 840; *Kasten*, 619 F. Supp.2d at 613.

<sup>353</sup> See, e.g., *EEOC v. Romeo Community Schools*, 976 F.2d 985, 989-90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 125 (8th Cir. 1987).

<sup>354</sup> Pet. for Writ of Certiorari at i, *Thompson v. N. Am. Stainless, LP*, No. 09-291, 2009 WL 2876195 (U.S. Sept. 3, 2009).

because his fiancé engaged in conduct protected by Title VII's anti-retaliation provision.<sup>355</sup> The District Court for the Eastern District of Kentucky entered summary judgment in favor of the employer, concluding that Title VII "does not permit third-party claims."<sup>356</sup> A Sixth Circuit panel reversed the District Court,<sup>357</sup> but then a divided *en banc* Circuit over-turned the panel's decision.<sup>358</sup> The majority pointed out that Title VII's retaliation provision prohibits discrimination against an employee "because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>359</sup> Relying on what it viewed to be the "plain and unambiguous statutory text" of Title VII's retaliation provision, the court found that Title VII protects only individuals who themselves engaged in protected conduct.<sup>360</sup> Because Thompson did not engage in the protected conduct himself, he could not bring a retaliation claim based on his own discharge.<sup>361</sup>

At first glance, both cases present relatively pedestrian statutory interpretation issues. In *Kasten*, the Court must decide between competing interpretations of the statutory terms "file" and "complaint." In their briefs, the two sides each offered several examples of various dictionary definitions of the terms to support their arguments.<sup>362</sup> Moreover, each side presented the Court with language from numerous other statutes that lead to one conclusion or the other about the scope of the provision's protection.<sup>363</sup>

Similarly, *Thompson* ostensibly presents two competing interpretative views of Title VII's language. As the Sixth Circuit and other circuits have found, the Title VII's retaliation provision focuses on discrimination against the person ("he") who has opposed unlawful activity or

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<sup>355</sup> See *id.* at 3 (alleging that Plaintiff's fiancé filed a charge of discrimination with the Equal Employment Opportunity Commission).

<sup>356</sup> *Thompson v. N. Am. Stainless, LP*, 435 F. Supp.2d 633, 639 (E.D. Ky. 2006).

<sup>357</sup> See *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 650 (6th Cir. 2008), *vacated by Thompson v. N. Am. Stainless, LP*, No. 07-5040, 2008 WL 6191996 (6th Cir. July 28, 2008).

<sup>358</sup> See *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009). Nine judges joined in the majority opinion, one judge delivered a separate concurrence, and six judges filed a total of three dissenting opinions. See *id.*; *id.* at 816 (Rogers, J., concurring); *id.* at 818 (Martin, J., dissenting); *id.* at 820 (Moore, J., dissenting); *id.* at 826 (White, J., dissenting).

<sup>359</sup> See *Thompson*, 567 F.3d at 807 (quoting 42 U.S.C. § 2000e-3(a) (emphasis added)) (internal quotation marks omitted).

<sup>360</sup> *Id.* at 805.

<sup>361</sup> See *id.* at 807-08.

<sup>362</sup> Petitioner's Brief, at 22 & 22 n.10; 22 n.11, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 130 S. Ct. 1890 (2010) (No. 09-834); Brief in Opposition to Petition for Writ of Certiorari, at 6, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 130 S. Ct. 1890 (2010) (No. 09-834).

<sup>363</sup> Petitioner's Brief, at 24-30, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 130 S. Ct. 1890 (2010) (No. 09-834); Brief in Opposition to Petition for Writ of Certiorari, at 6, *Kasten v. Saint-Gobain Performance Plastics Corp.*, at 8-9, 130 S. Ct. 1890 (2010) (No. 09-834).

participated in Title VII activities.<sup>364</sup> However, another interpretation of Title VII's "plain language" could lead to a dramatically different result. In her dissenting opinion in *Thompson*, Judge White noted that the anti-retaliation provision merely describes an "unlawful employment practice."<sup>365</sup> It does not identify who receives protection from such practices.<sup>366</sup> Instead, Title VII answers that second question in a different section, 42 U.S.C. § 2000e-5(b), which provides that any person who claims to be "aggrieved" by an employer's unlawful employment practice can file a claim with the EEOC.<sup>367</sup> Additionally, 42 U.S.C. § 2000e-5(f)(1) permits lawsuits to be filed "by the person claiming to be aggrieved."<sup>368</sup> Thus, under White's analysis of the statutory text, North American Stainless committed an unlawful employment practice by retaliating against Thompson's fiancé through its firing of Thompson.<sup>369</sup> Because Thompson was "aggrieved" by this act, §2000e-5 permits Thompson to file a claim against North American Stainless.<sup>370</sup> In his Supreme Court briefing, Thompson has adopted this statutory argument as his primary rationale for overturning the Sixth Circuit's decision.<sup>371</sup>

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<sup>364</sup> See *Thompson*, 567 F.3d at 807-08; *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3d Cir. 2002) (analyzing similar language in the ADA and ADEA, and concluding that "[r]ead literally, the statutes are unambiguous-indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity"); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (looking to "plain language" of Title VII to resolve issue); *Holt v. JTM Indus.*, 89 F.3d 1224, 1226 (5th Cir. 1996) (examining the "plain language" of the ADEA).

<sup>365</sup> See *Thompson*, 567 F.3d at 827 (White, J., dissenting) (examining 42 U.S.C. § 2000e-3 and § 2000e-5(b)).

<sup>366</sup> See *id.*

<sup>367</sup> See 42 U.S.C. § 2000e-5(b); *Thompson*, 567 F.3d at 827. Interestingly, Judge Rogers' concurrence reached a similar conclusion about the relationship between § 2000e-3 and § 2000e-5(b), except Rogers interpreted § 2000e-5(b) to permit only "persons who are the intended beneficiaries" of Title VII to bring claims, which he stated would not include third-parties. *Id.* at 817 (Rogers, J., concurring).

<sup>368</sup> 42 U.S.C. § 2000e-5(f)(1).

<sup>369</sup> See *Thompson*, 567 F.3d at 828 (White, J., dissenting).

<sup>370</sup> See *id.*

<sup>371</sup> See Petitioner's Brief, at 7-9, *Thompson v. N. Am. Stainless, LP*, No. 09-291, 2010 WL 3501186 (U.S. Sept. 3, 2010). Interestingly, the courts that have upheld third-party claims prior to *Thompson* typically have ignored this statutory argument and relied on an analysis of the broad purpose of anti-retaliation provisions. See, e.g., *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) ("[A] literal interpretation [of the Title VII § 704(a)] would leave a gaping hole in the protection."); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989) (upholding third-party claim under ERISA because a more narrow construction "clashes with the congressional intent of protecting . . . the exercise of rights under an ERISA plan"); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-89 (7th Cir. 1987) (finding that the NLRA prohibited retaliation against third-parties because otherwise protected employees will not exercise their rights for "fear that if they do the company will try to get back at them in any way it can, including firing their relatives"); *De Medina v. Reinhardt*, 444 F. Supp. 573, 580-81 (D.D.C. 1978) (noting that not protecting a third-party under Title VII would produce "absurd results"); see also John J. Feeney, *An Inevitable Progression in the Scope of Title VII's Anti-retaliation Provision: Third-Party Retaliation Claims*, 38 CAP. U. L. REV. 643, 655 (2010).

In short, as with the other recent retaliation cases, both *Kasten* and *Thompson* will require the Court to choose between strong linguistic and statutory interpretation arguments on either side.<sup>372</sup> Despite the claims of judges and advocates on either side of these debates, the “plain language” of the FLSA and Title VII simply do not answer the questions these cases present. Ultimately, then, the Anti-Retaliation Principle may tip the balance, as it did in *Jackson*, *Burlington Northern*, *CBOCS West*, *Gomez-Perez*, and *Crawford*, in which similarly strong interpretative arguments could be made regarding the applicability of retaliation protection. As in those cases, older retaliation precedent examining the purpose of anti-retaliation protections should loom large.

With regard to *Kasten*, fifty years ago, the Supreme Court stated that, consistent with the Anti-Retaliation Principle, the purpose of the FLSA anti-retaliation provision was to encourage employees to report violations of the law:

For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. . . . By the proscription of retaliatory acts . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.”<sup>373</sup>

Enforcement of the law relies upon employees to report FLSA violations, which requires broad anti-retaliation protection.<sup>374</sup> Moreover, in *NLRB v. Scrivener*,<sup>375</sup> decided almost forty years ago, the Court relied upon the Principle to interpret a similar provision of the National Labor Relations Act to protect employees who gave informal statements to an investigator, even though the NLRA’s plain language seemed to limit protection to an employee who “has filed charges or given testimony.”<sup>376</sup> The *Scrivener* Court decided to do exactly what the employee in *Kasten* asks the Court to do now: understand the importance of protecting employees during all phases of the enforcement process, including the initial report of illegality, and therefore look beyond the statute’s plain, but limited, language.<sup>377</sup>

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<sup>372</sup> See discussion *supra* Part II.A.

<sup>373</sup> *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

<sup>374</sup> See *id.*

<sup>375</sup> 405 U.S. 117 (1972).

<sup>376</sup> See *id.* at 121 (interpreting 29 U.S.C. § 158(a)(4)).

<sup>377</sup> See *id.* at 124.

Additionally, failing to protect oral complaints could significantly impact the effectiveness of a decade-long attempt to encourage employees to report illegal conduct through the use of employee hotlines.<sup>378</sup> This recent trend involves employers providing employees a consistent way to make internal complaints about illegal behavior.<sup>379</sup> As two prominent academics have noted, "if internal disclosures are not protected, reporting of wrongdoing would be reduced as unaddressed retaliation deters potential whistleblowers and leads to the laws not being as effectively enforced."<sup>380</sup> Indeed, protecting oral internal reports makes sense if the goal is to increase reporting. Social science studies, for example, suggest that most reports of wrongdoing begin as internal reports.<sup>381</sup> The Supreme Court has been protective of internal reports as well. In addition to *Crawford*, which focused on the issue,<sup>382</sup> the Court has noted in the constitutional context that the First Amendment will protect internal reports as well as external whistleblowing.<sup>383</sup> In fact, federal courts and the Secretary of Labor have interpreted other statutes to protect internal whistleblowers, even when the statute's language appears to protect only external whistleblowers.<sup>384</sup>

More specifically, providing methods to *orally* report wrongdoing has become part of the law enforcement landscape that encourages internal reporting of wrongdoing.<sup>385</sup> Congress and administrative agencies have required companies to provide employees a means to report illegal conduct.<sup>386</sup> Indeed, most companies, spurred by these laws and court rulings, provide telephone hotlines for employees to orally report a broad range of wrongdoing, including both illegal and unethical conduct.<sup>387</sup> Thus, it no longer makes sense (if it ever did) to think only about protecting the formal initiation of a complaint directly with a law

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<sup>378</sup> See Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1138-41.

<sup>379</sup> See *id.*; Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 281 (1991) (noting that courts protect internal whistleblowers because "employees who uncover potential health and safety problems are likely first to call these to the attention of management.").

<sup>380</sup> Dworkin & Callahan, *supra* note 379, at 281.

<sup>381</sup> See *id.* at 299; Moberly, *supra* note 378, at 1142.

<sup>382</sup> See *Crawford*, 129 S. Ct. at 849.

<sup>383</sup> See *Garcetti*, 547 U.S. at 420 ("Employees in some cases may receive First Amendment protection for expressions made at work."); *Givhan v. Western Line Consol. Sch. Dist.*, 429 U.S. 410, 414 (1979) (protecting employee who complained to supervisor about discrimination).

<sup>384</sup> See, e.g., *Passaic Valley Sewerage Commissioners v. U.S. Dep't of Labor*, 992 F.2d 474, 478-479 (3<sup>rd</sup> Cir. 1993) (interpreting the Clean Water Act's protection of employees who participate in a "proceeding" to protect employees who make internal complaints to their corporate employer); KOHN, *supra* note 26, at 251 (noting that the Secretary of Labor "adheres to its longstanding doctrine that internal whistleblowing is fully protected" in environmental and nuclear whistleblowers cases).

<sup>385</sup> See Moberly, *supra* note 378, at 1138-41, 1151.

<sup>386</sup> See Moberly, *supra* note 133, at 988-95.

<sup>387</sup> See *id.*

enforcement agency. In fact, the Seventh Circuit itself recognized this reality in *Kasten* by noting that, despite the FLSA's language, *written* complaints to an employer (as opposed to just to the government) would be protected conduct.<sup>388</sup> The circuit court did not draw a distinction between internal and external complaints; rather, the court distinguished between written and oral complaints to an employer.

However, the Supreme Court has never been interested in such nuanced and nitpicky distinctions when evaluating anti-retaliation provisions, particularly in older retaliation statutes, because such distinctions undermine enforcement of the law.<sup>389</sup> Given the increased importance of internal reporting, and the encouragement of oral internal reporting through the pervasive use of employee hotlines, failing in *Kasten* to protect employees who make oral reports of wrongdoing would severely hamper FLSA law enforcement efforts. The FLSA, in particular, relies upon employee reports for its enforcement,<sup>390</sup> and an employee can play an essential part in the Act's enforcement through oral as well as written action.<sup>391</sup> For example, the Department of Labor advertises a phone number for employees to call with concerns about FLSA violations, explicitly encouraging oral reports and complaints.<sup>392</sup>

The Sixth Circuit's cramped reading of Title VII in *Thompson* also will undermine law enforcement (and thus the Supreme Court's Anti-Retaliation Principle). During the past half-century, the Court consistently has permitted a wide range of plaintiffs to bring retaliation lawsuits because the Court recognized the devastating deterrent effect retaliation can have on a person's willingness to report illegal conduct. Most

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<sup>388</sup> See *Kasten*, 570 F.3d at 837-38.

<sup>389</sup> As the Court noted in *Scrivener*:

An employee who participates in a Board investigation may not be called formally to testify or may be discharged before any hearing at which he could testify. His contribution might be merely cumulative or the case may be settled or dismissed before hearing. Which employees receive statutory protection should not turn on the vagaries of the selection process or on other events that have no relation to the need for protection. It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time. This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety.

*Scrivener*, 405 U.S. at 123-24; see also *Crawford*, 129 S. Ct. at 851 (broadly construing the opposition clause of Title VII to include participating in an internal investigation).

<sup>390</sup> See *Mitchell*, 361 U.S. at 292.

<sup>391</sup> *Kasten*, 585 F.3d 310, 317 (7<sup>th</sup> Cir. 2009) (Rovner, J., dissenting) ("Oral inquiries, protests, and information supplied to an agency representative play no less an important role in the statutory scheme than do letters, e-mails, and sworn statements. They must be protected as well.").

<sup>392</sup> The Wage and Hour Division call center phone number is displayed at [http://www.dol.gov/whd/contact\\_us.htm](http://www.dol.gov/whd/contact_us.htm) and on posters that the law requires to be displayed in workplaces. See Dep't of Labor Wage and Hour Division, FLSA Minimum Wage Poster, <http://www.dol.gov/whd/regs/compliance/posters/flsa.htm>.

obviously, as noted above,<sup>393</sup> the Supreme Court in *Robinson v. Shell Oil*<sup>394</sup> relied on the purpose of Title VII's retaliation provision to conclude that the statute protected *former* employees as well as current employees.<sup>395</sup> Without this protection, the Supreme Court recognized that victims of discrimination would be deterred from complaining to the EEOC.<sup>396</sup> In fact, many retaliation statutes contain vague language about the scope of the individuals they protect, and the Court has interpreted them to enable a broad range of individuals to bring retaliation claims, including third parties who report statutory violations,<sup>397</sup> at-will employees,<sup>398</sup> elected union officials against their union,<sup>399</sup> and illegal aliens.<sup>400</sup> In each instance, the Court's holding demonstrated its understanding that enforcing these laws depended upon providing anti-retaliation protection to a broad range of individuals.

It is not a far leap from protecting individuals who might report misconduct to protecting the relatives and friends of those who report. Indeed, courts seem to understand that an effective way to chill reporting would be for employers to retaliate against people close to those reporting. As noted by the Seventh Circuit—and often repeated by others<sup>401</sup>—“[t]o retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.”<sup>402</sup> Even courts that ultimately dismiss third-party claims based on Title VII's “plain language” have accepted this reality. For example, after rejecting a third-party ADEA claim, the Third Circuit noted that

[t]he anti-retaliation provisions recognize that enforcement of anti-discrimination laws depends in large part on employees to initiate administrative and judicial

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<sup>393</sup> See *supra* text accompanying notes 44-49.

<sup>394</sup> 519 U.S. 337 (1997).

<sup>395</sup> See *id.* at 345-46 (noting “a primary purpose of anti-retaliation provisions” is “[m]aintaining unfettered access to statutory remedial mechanisms”).

<sup>396</sup> See *id.* at 346.

<sup>397</sup> See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (interpreting 42 U.S.C. § 1982).

<sup>398</sup> See *Haddle v. Garrison*, 525 U.S. 121, 125 (1998) (holding that 42 U.S.C. § 1985(2), which prevents “intimidation or retaliation against witnesses in federal-court proceedings,” includes protection for at-will employees).

<sup>399</sup> See *Sheet Metal Workers' Intern'l v. Lynn*, 488 U.S. 347, 355 (1989) (interpreting Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412).

<sup>400</sup> See *Sure-Tan v. NLRB*, 467 U.S. 883, 895-96 (1984) (holding that reporting undocumented aliens employees to law enforcement authorities was an unfair labor practice under the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) & (3), when done in retaliation for participating in union activities).

<sup>401</sup> See, e.g., *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568-69 (3d Cir. 2002); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 410 (3d Cir. 1990); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 932 (2007).

<sup>402</sup> *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987).



proceedings. There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights. . . . Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace.<sup>403</sup>

Protecting third-party victims of retaliation would follow easily from the Court's Anti-Retaliation Principle, particularly as the Court applied the Principle in *Burlington Northern* and in *Robinson*. The Supreme Court already recognized in *Burlington Northern* that retaliation can take many forms, and thus that the law should prohibit a wide range of retaliatory activity.<sup>404</sup> Moreover, *Robinson* recognized that Title VII's anti-retaliation provision must protect people other than "employees" in order to be effective.<sup>405</sup>

*Kasten* and *Thompson* will give the Court further opportunities to apply the Anti-Retaliation Principle and to enhance employee law enforcement efforts. Moreover, the Supreme Court's decisions in these cases could have broad implications because several federal laws contain anti-retaliation provisions with similar language to the FLSA and Title VII.<sup>406</sup> If the Supreme Court continues its historic and recent reliance on the Anti-Retaliation Principle, then it should reverse the lower courts' limited views of retaliation protection because their decisions weaken law enforcement efforts.

## B. Lower Courts

The Anti-Retaliation Principle can serve a second important role, directed at lower courts. The Principle's emphasis on law enforcement provides lower courts the proper perspective from which to evaluate

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<sup>403</sup> *Fogleman*, 283 F.3d at 569. *But see* *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8<sup>th</sup> Cir. 1998) (finding that protecting third-parties who did not engage in protected activity is not necessary to advance goals of anti-retaliation provision).

<sup>404</sup> *See Burlington N.*, 548 U.S. at 57.

<sup>405</sup> *See Robinson*,

<sup>406</sup> For statutes with language similar to the FLSA language at issue in *Kasten*, see Federal Sector Labor Management Relations Program, 5 U.S.C. § 7116(a)(4); Foreign Service Labor-Management Relations, 22 U.S.C. § 4115(a)(4); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a); Employee Polygraph Protection Act, 29 U.S.C. § 2002(4)(A); Workforce Investment Act, 29 U.S.C. § 2934(f); Railway Labor Act, 49 U.S.C. § 20109(a)(3); Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1)(A)(i). For statutes with language similar to the Title VII language at issue in *Thompson*, see Employee Retirement Income Security Act, 29 U.S.C. § 1140; Americans With Disabilities Act, 42 U.S.C. § 12203(b); Age Discrimination in Employment Act, 29 U.S.C. § 623(d).

retaliation cases. Rather than view retaliation cases as a one-on-one battle of an employee versus an employer, the Principle invites and requires consideration of society's broader interest in law enforcement. The Principle also explicitly recognizes the role that employees can play in providing information that enhances the enforcement of society's laws.

Thus, when courts examine an employee's retaliation claim, they should consider explicitly whether protecting the employee from retaliation would encourage other employees to come forward with information about illegal conduct, and whether that information actually would help law enforcement efforts. This perspective might affect several different areas of retaliation law that courts currently debate when examining statutory anti-retaliation provisions as well as the common law of wrongful discharge in violation of public policy. I will address two such areas in this section.

*Causation.* First, in recent years, courts increasingly have scrutinized the level of causation required for a plaintiff to prove that an employer's retaliation was caused by an employee's protected conduct. The typical retaliation case requires the plaintiff to prove three primary elements: (1) protected conduct; (2) an adverse action; and (3) that the protected conduct caused the adverse action.<sup>407</sup> As explained below, "but for" causation could be required, or perhaps some lower standard is applicable, such as requiring that protected conduct be a "motivating" or "substantial" factor in the adverse employment action.

As a result of this ambiguity, courts have examined and disagreed about the level of causation required in retaliation cases.<sup>408</sup> Many older anti-retaliation provisions express this causation standard by prohibiting retaliation "because of" various protected conduct.<sup>409</sup> Although one reading of this language would suggest that "but for" causation is required, a 1977 Supreme Court decision, *Mt. Healthy City Sch. Dist. Bd. Educ. v. Doyle*,<sup>410</sup> stated that the proper standard in a First Amendment retaliation case was whether the protected conduct was a "motivating" or "substantial" factor in the employer's decision to take an adverse

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<sup>407</sup> See WESTMAN & MODESITT, *supra* note 118, at 230; Rosenthal, *supra* note 67, at 1133 (Title VII). Other elements are sometimes included, such as employer knowledge of protected activity. See WESTMAN & MODESITT, *supra* note 118, at 230.

<sup>408</sup> Compare *Smith v. Xerox Corp.*, 602 F.3d 320, 334 (5<sup>th</sup> Cir. 2010) (using "motivating factor" causation standard for Title VII retaliation claim) with *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1343 (11<sup>th</sup> Cir. 2000) (using "but for" standard for FLSA retaliation claim) and with *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 590 (11<sup>th</sup> Cir. 2000) (finding that FLSA protected conduct must not be "wholly unrelated"); cf. *Kodish v. Oakbrook Terrace Fire Protection Dist.*, 604 F.3d 490, 501 (7<sup>th</sup> Cir. 2010) (asserting that the Supreme Court's *Gross* opinion "clarified that unless a federal statute provides otherwise, the plaintiff bears the burden of demonstrating but-for causation in suits brought under federal law").

<sup>409</sup> See, e.g., Title VII, 42 U.S.C. § 2000e-3; Age Discrimination in Employment Act, 29 U.S.C. § 623(d); Americans With Disabilities Act, 42 U.S.C. § 12203; Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); False Claims Act, 31 U.S.C. § 3730(h); National Labor Relations Act, 29 U.S.C. § 158(a)(4).

<sup>410</sup> 429 U.S. 274 (1977).

employment action—a lower standard of proof for the employee than “but for” causation.<sup>411</sup> As the Court noted, “[a] borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct.”<sup>412</sup>

Although *Mt. Healthy* was a constitutional case, the Supreme Court has examined causation language in employment statutes as well. In *Price Waterhouse v. Hopkins*,<sup>413</sup> a majority of the Court held that Title VII mixed-motive discrimination cases required the plaintiff to prove only that an employee’s protected status was a motivating factor in the employer’s decision.<sup>414</sup> In other words, the Court interpreted the “because of” language in Title VII to mean “was a motivating factor in.” After the plaintiff satisfied this “motivating factor” burden, the burden of persuasion shifted to the defendant to demonstrate that the employer would have taken the same adverse employment action even if it had not considered the prohibited factor (such as race or gender)<sup>415</sup> – a similar affirmative defense to the one set forth in *Mt. Healthy* for First Amendment retaliation cases.<sup>416</sup> Satisfying this burden provided the employer a complete affirmative defense to the employee’s discrimination claim.<sup>417</sup> In the 1991 Civil Rights Act, Congress enshrined this mixed-motive analysis, and its accompanying “motivating factor” causation standard, in Title VII’s statutory language regarding discrimination.<sup>418</sup> Subsequently, Congress lowered even further the employee’s causation burden in whistleblower anti-retaliation provisions passed in the last decade by adopting a “contributing factor” standard,<sup>419</sup> indicating a substantial Congressional preference for this lower burden of proof.

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<sup>411</sup> See *id.* at 287.

<sup>412</sup> *Id.* at 286. The Court also held that the employer should have an affirmative defense if the employer would have reached the same employment decision in the absence of the protected conduct. See *id.* at 287.

<sup>413</sup> 490 U.S. 228 (1989).

<sup>414</sup> A “mixed motive” discrimination case involves an allegation that an employer took an adverse employment action against an employee because of both permissible and impermissible considerations. See *id.* at 232, 244-247. Although *Price Waterhouse* did not result in a single majority opinion, six justices agreed that the “motivating” or “substantial” factor standard was the proper standard. See *id.* at 258 (plurality opinion); *id.* at 259-60 (opinion of White, J.); *id.* at 276 (opinion of O’Connor, J.). See also *Gross v. FBL Fin. Servs., Inc.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2343, 2347 (2009) (reiterating the holdings of the various opinions in *Price Waterhouse*).

<sup>415</sup> See *Price Waterhouse*, 490 U.S. at 258.

<sup>416</sup> See *Mt. Healthy*, 429 U.S. at 287.

<sup>417</sup> See *Price Waterhouse*, 490 U.S. at 258.

<sup>418</sup> See 42 U.S.C. § 2000e-2(m), Pub. L. 102-166, Title I, § 107(a), 105 Stat. 1075 (Nov. 21, 1991). The Act also adopted the affirmative defense set forth in *Price Waterhouse*, but only permitted the defense to relieve the employer of liability for certain damages claims. See § 2000e-5(g)(2)(B). Congress utilized this same language in a provision prohibiting retaliation against employees who take leave from employment to serve in the military. See 38 U.S.C. § 4311(c).

<sup>419</sup> A whistleblower must prove that his protected conduct was a “contributing factor” in the adverse employment action taken against him. See, e.g., *Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR-21)*, 49 U.S.C. § 42121(b)(2)(B); *Pipeline Safety Improvement*

However, the 1991 Civil Rights Act did not resolve the debate around the meaning of “because of” language because it applies only to Title VII’s discrimination section (not the anti-retaliation provision). Older anti-retaliation provisions still utilize the “because of” language, and lower courts have struggled with the level of causation required by these older anti-retaliation statutes, including Title VII, the Age Discrimination in Employment Act, and the False Claims Act. Some courts, relying on *Mt. Healthy* or *Price Waterhouse*, interpreted the statutes to adopt implicitly the “motivating factor” standard (and also the complete affirmative defense for employers set forth in *Price Waterhouse*).<sup>420</sup>

Complicating matters further, in a surprising 2009 decision in *Gross v. FBL Financial Services, Inc.*,<sup>421</sup> the Supreme Court held that the “because of” language in the Age Discrimination in Employment Act (ADEA) required a “but for” standard for its discrimination claims (the Court did not address retaliation claims explicitly).<sup>422</sup> Despite the fact that the ADEA was patterned after Title VII and the two statutes have typically been interpreted similarly, the Court’s rationale was that the 1991 Civil Rights Act applied the “motivating factor” language only to Title VII’s discrimination provision.<sup>423</sup> Because Congress did not also amend the ADEA with this language, the more traditional “but for” standard should apply to the ADEA’s “because of” language.<sup>424</sup> In other words, the Court seemed to say that a statute’s use of the term “because of” should be interpreted to mean “but for” causation.<sup>425</sup>

The *Gross* opinion seemed to close the door to any argument that “because of” language could mean “motivating factor” rather than the “but for” standard for retaliation claims under Title VII, the ADEA, and other older statutes.<sup>426</sup> Indeed, some Circuit Courts have interpreted *Gross* to apply “but for” causation to any federal statute that does not explicitly utilize some other standard.<sup>427</sup> However, in March 2010, the Fifth Circuit

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Act of 2002, 49 U.S.C. § 60129(b)(2)(B). Other statutes have explicitly adopted AIR-21’s burden of proof standard. *See, e.g.*, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b)(2)(C).

<sup>420</sup> *See, e.g.*, Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11<sup>th</sup> Cir. 2001) (assuming the *Price Waterhouse* mixed-motive scheme applies to Title VII retaliation claims); Norbeck v. Basin Elec. Power Coop., 215 F.3d 848, 850-51 (8<sup>th</sup> Cir. 2000) (finding that the *Price Waterhouse* scheme applies to the False Claims Act); Kubicko v. Ogden Logistics Servs., 181 F.3d 544 (4<sup>th</sup> Cir. 1999) (Title VII retaliation claim).

<sup>421</sup> 129 S. Ct. 2343 (2009).

<sup>422</sup> *See id.* at 2350-51.

<sup>423</sup> *Id.* at 2349.

<sup>424</sup> *See id.*

<sup>425</sup> *See id.* at 2350-51.

<sup>426</sup> *See* Title VII, 42 U.S.C. § 2000e-3; Age Discrimination in Employment Act, 29 U.S.C. § 623(d); Americans With Disabilities Act, 42 U.S.C. § 12203; Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); False Claims Act, 31 U.S.C. § 3730(h); National Labor Relations Act, 29 U.S.C. § 158(a)(4).

<sup>427</sup> *See, e.g.*, Fairley v. Andrews, 578 F.3d 518, 525-26 (7<sup>th</sup> Cir. 2009) (“[*Gross*] holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff’s burden in all suits under federal law.”); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961-62 (7<sup>th</sup> Cir. 2010); *see also* Warshaw v. Concentra Health Servs., Civil Action

issued an unexpected opinion in *Smith v. Xerox Corp.*,<sup>428</sup> finding that Title VII's retaliation provision permitted a mixed motive theory and its accompanying "motivating factor" language from *Price Waterhouse*.<sup>429</sup> The employer argued to the Circuit Court that the *Gross* reasoning should apply to Title VII retaliation cases because the 1991 Civil Rights Act did not amend the retaliation provision of Title VII to include the "motivating factor" language.<sup>430</sup> Therefore, according to the employer, Congress must have meant to keep the "but for" standard implied by the provisions "because of" language.<sup>431</sup> However, the court maintained that *Gross* required courts to interpret Title VII and the ADEA differently, and that *Price Waterhouse* should still apply to Title VII retaliation cases.<sup>432</sup> Because of *Price Waterhouse's* application, the court concluded that a Title VII retaliation plaintiff could satisfy its burden of proof by demonstrating that the plaintiff's protected conduct was a "motivating factor" in an adverse employment action.<sup>433</sup>

To the extent *Gross* can be limited in this manner—to apply only to age discrimination claims—lower courts should utilize the Anti-Retaliation Principle to interpret retaliation statutes under the "motivating factor" standard. Retaliation cases almost always involve difficult decisions regarding mixed motives and retaliation, and a "but for" causation standard would be devastating to employees who blow the whistle on illegal conduct. Whistleblowers often are outspoken employees that can be perceived as troublemakers—in large part that makes them whistleblowers—and requiring that an employee prove that protected conduct is the *only* factor in a disciplinary action will be enormously difficult. Even under statutes that require only a "motivating factor" standard (or the lower "contributing factor" standard), some empirical

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No. 07-1994, \_\_\_ F. Supp.2d \_\_\_, 2010 WL 2470881, at \*14 (E.D. Pa. June 14, 2010) (applying "but for" standard to ADA retaliation claim). In light of *Gross*, the lower courts appear to be re-considering precedent that automatically applied Title VII's burden-shifting schemes to other employment statutes by closing examining various statute's language to determine causation. Compare *Hunter v. Valley View Local Schools*, 579 F.3d 688, 691-92 (6<sup>th</sup> Cir. 2009) (finding that the FMLA permitted a "mixed-motive" analysis based on the statute's use of the term "interfered with" and the Department of Labor's interpretation of that term) with *Rasic v. City of Northlake*, No. 08 C 104, 2009 WL 3150428, at \*17 (N.D. Ill. Sept.25, 2009) (finding that the FMLA's use of "for opposing" is not distinguishable from the ADEA's use of "because of" and finding that "but for" causation is appropriate).

<sup>428</sup> 602 F.3d 320 (5<sup>th</sup> Cir. 2010).

<sup>429</sup> See *id.* at 330.

<sup>430</sup> See *id.* at 328.

<sup>431</sup> See *id.*

<sup>432</sup> See *id.* at 330 (noting that the Supreme Court in *Gross* concluded that the ADEA and Title VII were "materially different with respect to the relevant burden of persuasion" (quoting *Gross*, 129 S. Ct. at 2348)).

<sup>433</sup> See *id.* at 326-30. The Fifth Circuit also overruled its own precedent to find that a Title VII plaintiff could satisfy the motivating factor burden with either direct or circumstantial evidence. See *id.* at 331-32; compare with *Fierros v. Tex. Dep't of Health*, 274 F.3d 187 (5<sup>th</sup> Cir. 2001) (holding that direct evidence was required for a mixed motive retaliation case).

evidence demonstrates that causation is notoriously difficult to prove.<sup>434</sup> If lower courts take the Court's Anti-Retaliation Principle seriously, then they will look for ways to distinguish *Gross* and continue to apply the "motivating factor" language from the Court's *Price Waterhouse* decision in retaliation cases.

*Reasonable Belief.* The Anti-Retaliation Principle also could influence lower courts when they determine whether a whistleblower had a "reasonable belief" that the conduct the employee reports is illegal. The issue revolves around the "protected conduct" element of most retaliation and wrongful discharge claims. This element requires the employee to have engaged in specifically protected conduct, which often involves reporting or opposing "any practice made . . . unlawful" by the statute containing the anti-retaliation provision.<sup>435</sup> Courts could interpret this language to mean the employee must report actual illegal conduct to be protected.<sup>436</sup> In other words, if the employer's actions were legal, the law would not protect an employee from retaliation for reporting the conduct under the mistaken, but reasonable, belief that the conduct was actually illegal.<sup>437</sup> Additionally, several common law courts require an employee to report actual illegalities in order to state a claim for wrongful discharge in violation of public policy.<sup>438</sup>

Nevertheless, despite this potentially narrow protected conduct requirement, other courts have required employees only to demonstrate a "reasonable belief" that employer conduct is illegal.<sup>439</sup> The most well-known example of this standard stems from the Supreme Court's 2001 decision in *Clark County School District v. Breeden*.<sup>440</sup> In that case, the Court assumed (without deciding) that the reasonable belief standard applied to Title VII retaliation cases,<sup>441</sup> a decision that paved the way for courts uniformly to adopt the reasonable belief standard for a broad range of

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<sup>434</sup> See Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 120-28 (2007).

<sup>435</sup> See Title VII, 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against an employee who "opposed any practice made an unlawful employment practice by this subchapter"); ADEA, 29 U.S.C. § 623(d) (same language); ADA, 42 U.S.C. § 12203(a) (same); FMLA, 29 U.S.C. § 2615(a)(2) (same).

<sup>436</sup> Some state courts have interpreted state statutory protection to require a report of actual illegality. See WESTMAN & MODESITT, *supra* note 118, at 82 (citing *Bordell v. General Elec. Co.*, 667 N.E.2d 922 (N.Y. 1996) and *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000)).

<sup>437</sup> Compare *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5<sup>th</sup> Cir. 2000) (using subjective and objective test) with *EEOC v. C & D. Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975) (finding that protected conduct involved only opposition to an actual unlawful employment practice); cf. *Rosenthal*, *supra* note 67, at 1140-41 (arguing that, in *Clark County School District v. Breeden*, 532 U.S. 268 (2001), "the Court's language suggested that perhaps it would require an actual violation, as the statute's language requires).

<sup>438</sup> See, e.g., *Barker v. State Ins. Fund*, 40 P.3d 463 (Okla. 2001).

<sup>439</sup> See *Brake*, *supra* note 7, at 79 (citing cases).

<sup>440</sup> 532 U.S. 268 (2001).

<sup>441</sup> See *id.* at 270.

statutes.<sup>442</sup> This requirement involves both a subjective and objective component.<sup>443</sup> The employee must subjectively believe the conduct is illegal, and the employee's belief must be objectively reasonable. The employee could be wrong about the legality of the employer's actions, but as long as the employee's belief was reasonable, the law would still protect the employee from retaliation. Recently-passed federal laws specifically require the employee to have a "reasonable belief" that the employer action the employee reports or opposes is illegal.<sup>444</sup>

The reasonable belief standard seems to comport with the Anti-Retaliation Principle, particularly when compared with the potential that courts could interpret some statutory language to protect only reports of actual violations.<sup>445</sup> However, despite this seemingly employee-friendly standard, lower courts often have applied the reasonable belief requirement to *narrow*, rather than broaden, retaliation protection.<sup>446</sup> In many cases, lower courts have turned *Breeden's* "reasonable belief" standard into an implicit requirement that an employee report *actual* violations of the law.<sup>447</sup> These courts have required employees to know

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<sup>442</sup> See Rosenthal, *supra* note 67, at 1129 n.7 (stating that all United States Circuit Courts adopted the objectively reasonable standard after *Breeden*) (citing cases). Courts also use the reasonable belief standards for other statutes, such as Title IX and Title VI, that do not specify the standard to be utilized. See Brake, *supra* note 7, at 83 (citing cases).

<sup>443</sup> See Rosenthal, *supra* note 67, at 1134.

<sup>444</sup> See, e.g., Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A.

<sup>445</sup> Some commentators have reviewed this landscape and suggested that an even more lenient standard might better encourage employees to come forward with information of potential wrongdoing. For example, Professor Lawrence Rosenthal argues that a "good faith" standard would comport with an appropriately broad reading of Title VII's anti-retaliation provision to encourage employees to report violations of the statute. See Rosenthal, *supra* note 67, at 1131. In his view, the law should protect employees who make reports about employer illegal conduct in good faith, even if the employee is wrong and even if the employee's belief about the conduct is unreasonable. In the case of Title VII, at least, Professor Rosenthal acknowledges that courts likely would reject a purely subjective good faith standard given the statutory language and courts' interpretation of the language after *Breeden*, as well as EEOC interpretations that support a "reasonable belief" requirement. See *id.* at 1130-31; see also Brake, *supra* note 7, at 81 n.215. More broadly, the statutory language of more recently-enacted anti-retaliation provisions explicitly utilize the "reasonable belief" standard, which would seem to preclude courts using the good faith standard. See, e.g., Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A; American Recovery and Reinvestment Act of 2009, P.L. 111-5, § 1553(b)(1)(B).

<sup>446</sup> See Brake, *supra* note 7, at 76 ("One of the most problematic limits [of retaliation doctrine] is the requirement that the challenger have a reasonable belief that the challenged conduct amounts to unlawful discrimination. Through this doctrine, courts have reinforced selective and narrow interpretations of discrimination, while labeling broader conceptions as unreasonable."); Brianne J. Gorod, *Rejecting Reasonableness*, 56 AM. UNIV. L. REV. 1469, 1472-73 (2007) (arguing that courts should reject the reasonableness standard and instead hold that "a plaintiff's complaint would be protected unless the defendant could establish that the plaintiff was acting in bad faith at the time she made the complaint").

<sup>447</sup> See Moberly, *supra* note 133, at 1003 & n.161; Rosenthal, *supra* note 67, at 1162-63 n. 231 ("[M]any courts . . . do not seem to be taking into account the "limited knowledge" most Title VII plaintiffs have about the contours of Title VII, and the courts have consistently ruled against employees after concluding that their belief of a Title VII violation was not objectively reasonable."); see *id.* at 1174-75 (citing *Fogelman v. Greater Hazelton Health Alliance*, 122 F. App'x 581, 584 (3<sup>rd</sup> Cir. 2004) and *Amos v. Tyson Foods, Inc.*, 153 F. App'x 637, 645-46 (11<sup>th</sup> Cir. 2005)).

the subtle intricacies of the substantive law allegedly being violated by their employer in order to conclude that an employee had a reasonable belief that an illegality occurred.<sup>448</sup> For example, in *Jordan v. Alternative Resources Corp.*,<sup>449</sup> the Fourth Circuit held that an employee who reported a co-employee's use of a racial slur was not protected from retaliation, because no employee could have reasonably thought that a one-time use of a racial epitaph violated Title VII.<sup>450</sup> However, the *Jordan* court seemed more intent on examining whether the incident could have amounted to harassment rather than on whether the employee could have reasonably believed that it violated the law.<sup>451</sup>

The Anti-Retaliation Principle could affect courts' thinking about how to interpret the reasonable belief standard to incorporate more fully the Principle's law enforcement goals. The *Jordan* court's narrow construction underestimates the chilling effect of retaliation and fails to consider that employees typically do not have legal expertise. Broader construction of the "protected activity" requirement might better support society's interest in law enforcement because employees will feel more free to report conduct that *might* violate the law in situations in which a lay person would not be sure about the conduct's illegality. Society would be better off with knowledgeable decision makers determining whether disclosed conduct violates the law *after* an employee's report, instead of lay employees trying to determine legality *before* they report. This broader protection should cause a court to be less interested in whether the employee's report precisely identified an explicit violation of law, and more interested in the employer's response to that report.

Moreover, other Supreme Court retaliation precedent supports a more nuanced view of an employee's background when considering whether the employee objectively acted reasonably. In *Burlington Northern*, the Court examined what type of employer action might be deemed

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<sup>448</sup> See, e.g., *George v. Leavitt*, 407 F.3d 405, 416 (D.C. Cir. 2005) (holding that the reasonableness of a report of illegality would be judged by whether reasonable juror would find the conduct illegal); *Peters v. Jenney*, 327 F.3d 307, 319-21 (4th Cir. 2003) (failing to protect employee who complained about disparate impact under Title VI because the court found such practices did not violate Title VI as a matter of law); *Hamner v. St. Vincent Hosp. & Health Care Center, Inc.*, 224 F.3d 701, 707-08 (7th Cir. 2000) (finding employee was not protected from retaliation because he complained about sexual harassment based on his sexual orientation, which is not covered by Title VII); *Little v. United Techs. Carrier Transcold Div.*, 103 F.3d 956, 959-61 (11th Cir. 1997) (refusing to protect from retaliation an employee who reported a single racially offensive comment); *Holmes v. Long Island R.R. Co.*, No. 96 V 6196 (NG), 2001 WL 797951, at \*6 (E.D.N.Y. June 4, 2001) (dismissing retaliation claim based upon reporting sexual comments because the comments were too isolated for the employee to reasonably believe that the comments created a hostile environment); see also *Brake*, *supra* note 7, at 86-98 (discussing cases).

<sup>449</sup> 458 F.3d 332 (4th Cir. 2007).

<sup>450</sup> See *id.* at 339-40. Title VII requires "severe and pervasive" harassment, a standard typically not met by the single use of offensive language. See *id.* (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). See also *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (holding that one incident typically cannot create a hostile environment unless the incident is sufficiently severe).

<sup>451</sup> See *Jordan*, 458 F.3d at 341-43.



sufficiently adverse to be “retaliation.”<sup>452</sup> As noted above, the Court concluded that retaliation occurred if the employer action “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>453</sup> Later in the opinion, the Court stated that when courts consider the “reasonable employee,” courts should take into account the specific employee’s individual circumstances: “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.”<sup>454</sup>

In the same way, lower courts could fix the problems caused by narrow interpretations of the “reasonable belief” standard by explicating what the law expects from an employee when reporting misconduct. Retaliation law should protect only “reasonable” reports, but that standard should consider the education level and expertise of the employee making the report, as well as the employee’s own employment experiences with the employer.<sup>455</sup> In-house counsel may be expected to know the intricate details of sexual harassment law, but perhaps a blue-collar worker with a high school education should not.<sup>456</sup> Accountants may be expected to understand whether the securities regulations have been violated, but should be given leeway when a law’s language can lead to different reasonable interpretations.<sup>457</sup>

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<sup>452</sup> See *Burlington N.*, 548 U.S. at 57.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* at 69. As Professor Deborah Brake has pointed out, the Ninth Circuit in *Breedon* adopted a similarly nuanced standard that the Supreme Court ignored in its *Breedon* opinion:

[T]he Ninth Circuit’s opinion in *Breedon* exhibited a more appropriate measure of caution, emphasizing the need to take into account ‘the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims.’” The Ninth Circuit evaluated reasonableness from the perspective of a Title VII plaintiff. The Supreme Court’s cursory discussion of reasonableness clouded the question of perspective and implicitly adopted the Court’s own perspective, shaped by the limits of existing case law.

Brake, *supra* note 7, at 82-83 (citations omitted).

<sup>455</sup> See *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1178-79 (2<sup>nd</sup> Cir. 1996) (specifically noting that the employee’s employment context and history, should be considered when examining whether the employee reasonably believed she was a victim of harassment and therefore engaged in protected conduct when she reported the alleged harassment) *Cf.* Brake, *supra* note 7, at 103 (suggesting that courts adopt a standard that asks “whether the plaintiff can make a reasoned case that the practices opposed interfere with the goals and objectives of discrimination law” and arguing that the “perspective from which reasonableness is measured should not be that of the judge reading and selecting the dominant legal precedents, but the reasonable employee, student, or person in the organization who wishes to further the goals of discrimination law: dismantling unjust privilege and promoting the conditions necessary for equal citizenship”).

<sup>456</sup> Compare *Nuskey v. Hochberg*, 657 f. Supp.2d 47, 61 (D.D.C. 2009) (“If plaintiff relied on an EEO training to conclude that Title VII had been violated, her belief was in good faith and was not unreasonable—even if her conclusion ultimately proved to be incorrect.”) with *Henderson v. Waffle House, Inc.*, 238 Fed. Appx. 499 (11<sup>th</sup> Cir. 2007) (finding that waitress’s claim of sexual harassment based on isolated jokes and comments were not sufficient for objectively reasonable basis for retaliation)

<sup>457</sup> *Cf.* *Allen v. Stewart Enterp.*, No. 06-081, at 14 (ARB July 27, 2006) (finding that a “reasonable belief” that a statute has been violated means a high certainty that the law has been broken). In *Allen*, the employee alleged that she examined “internal consolidated financial statements” and

Lower courts can best support the Anti-Retaliation Principle by recognizing that employees typically are not lawyers and therefore should not be required to evaluate numerous legal nuances before reporting misconduct. Law enforcement experts and supervisors should be charged with determining whether the law is being violated, not employees. The law should simply encourage employees to come forward with information that a reasonable person with their knowledge and educational experience would believe to be a violation of the law. The easiest way to encourage that process is to protect a broad range of activity and then closely evaluate the employer's response. In other words, the Anti-Retaliation Principle best protects society's interest when the scrutiny in retaliation cases is directed towards the employer's response to whistleblowing, rather than the employee's actions when blowing the whistle. Lower courts would help achieve this result by loosening the "reasonable belief" standard to permit the protection of more reports of potentially illegal conduct.

## Conclusion

In Supreme Court retaliation cases, despite the Court's employer-friendly outlook and conservative judicial philosophy, it has protected employees who act to enforce society's laws. The lesson from the Court's use of the Anti-Retaliation Principle over the last fifty years and, in particular, during the last five years, is that the Court rightly values retaliation protection. Protecting employees from retaliation when they disclose an employer's illegal behavior advances society's goal of strong law enforcement. The Supreme Court and lower courts should work to further the Anti-Retaliation Principle by strengthening the protections available to whistleblowers who report illegal corporate behavior.

Although this Article has detailed the ways the Anti-Retaliation Principle can provide lessons to courts in retaliation cases, Congress could learn from the Principle as well. In a subsequent article, I will detail how Congress can better utilize employees for law enforcement purposes. For example, at a minimum, Congress could update older statutes to explicitly provide employees strong anti-retaliation protection, which would relieve the Supreme Court of having to perform substantial jurisprudential

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that these statements indicated that the company violated an SEC rule. *See id.* The ARB, however, found that her disclosure of this potential SEC rule violation was not protected because these internal reports did not have to be filed with the SEC, and therefore could not have violated the rule. *See id.* Based on this nuance, the ARB found that the employee could not have "reasonably believed" that a violation of the rule occurred. *See id.*; *see also* Jason M. Zuckerman, *SOX's Whistleblower Provision: Promise Unfulfilled*, 4 SECURITIES LIT. REPORTER 14, 16-17 (July/Aug. 2007); *cf.* Gorod, *supra* note 446, at 1484-96 (criticizing the "reasonable belief" standard because courts may use it to improperly reject retaliation claims under the opposition clause of Title VII).

gymnastics in order to satisfy the Anti-Retaliation Principle.<sup>458</sup> Furthermore, the Court's Anti-Retaliation Principle teaches that Congress may be a better hope for protecting government employees from retaliation than relying upon First Amendment protections. Accordingly, Congress could encourage reporting illegal conduct in the government by improving the statutory whistleblower protections for federal employees.

In fact, identifying the Supreme Court's use of the Anti-Retaliation Principle helps focus attention on the fact that the Court itself often answers questions that might be answered best by Congress: Which laws should be enforced by relying, at least in part, upon employee disclosures? Which employees should be protected from retaliation if they disclose illegalities? To whom should employees be required to disclose misconduct in order to be protected? What type of retaliation should be prohibited? In its recent retaliation cases, the Supreme Court had to answer these questions because Congress did not. Democratic norms suggest that the legislature as well as the courts should broadly implement the Anti-Retaliation Principle and balance employer and employee interests with society's interest in law enforcement. Until Congress addresses these questions more consistently, however, it appears that the Supreme Court is willing to step into the breach to protect employees who report illegal conduct.

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<sup>458</sup> See discussion *supra* Part II.C. (discussing difficulties of finding implied retaliation protection in Title IX, Section 1981, and the federal sector provision of the ADEA).