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AGAINST LEGISLATION: GARCETTI V. CEBALLOS AND THE PARADOX OF STATUTORY PROTECTION FOR PUBLIC EMPLOYEES

RUBEN J. GARCIA *

ABSTRACT

In Garcetti v. Ceballos, the Supreme Court denied constitutional protection to a deputy prosecutor named Richard Ceballos. In reaching its decision, the Court pointed to the plethora of statutory protections that were available to government whistleblowers. A closer examination of these statutory alternatives reveals that they will not protect Ceballos. This is the paradox of statutory protection in labor and employment law—more sometimes is less for vulnerable workers.

This Article places the Garcetti case in the historical trajectory of worker protection—from no protection to statutory protection. This Article argues for a move toward constitutional and international protection rather than statutory protection for several reasons. First, as shown by the Garcetti case, courts can sometimes use the existence of statutory protections as a reason to deny protection in a particular case. Second, the statutory rights that have been provided in the past have

* Associate Professor, California Western School of Law, San Diego. This Article was presented at the Symposium, *Garcetti v. Ceballos and Public Employee Rights*, in Chapel Hill, North Carolina on February 22, 2008. I would like to thank everyone involved in the Symposium, and in particular the Editors of the *First Amendment Law Review*. Alison Dearden and Laura Biddle provided excellent research assistance. Tracy Jones provided excellent research and writing as well, particularly on the section evaluating Richard Ceballos' statutory whistleblower options. I also wish to thank the participants in the Southern California Junior Faculty Workshop, where this Article was presented on July 22, 2008.

failed to adequately protect whistleblowers, as shown by several recent studies. Finally, legislation to protect government whistleblowers is inherently limited by the fact that the very people creating the legislation are likely to be the targets of the whistleblowing. Thus, there is a built-in incentive to weaken statutory protection for whistleblowers.

After decisions like Garcetti, it may seem hard to argue for a greater reliance on constitutional rights to protect whistleblowers. This Article argues for constitutional rights because of the importance they hold in our legal system, and because whistleblowing is the kind of core political speech that the First Amendment is supposed to protect. Thus, this Article applies progressive constitutionalist ideas to both Garcetti and the protection of whistleblowers generally, as a way to break down the distinctions between employees that the Court's decision creates.

In this Article, I argue, for several reasons, that even in the face of a decision like Garcetti courts should not be dismissed as a strategy for protecting whistleblowers. First, the Garcetti decision can be limited to its unique facts through further litigation. Second, I argue for judicial protection of whistleblowers because there is nothing in the Constitution that suggests whistleblowers should not be covered. Finally, while whistleblowing is still protected for most employees, it is important to maintain constitutional protection for public employees because of the important political values that government whistleblowing embodies.

I. INTRODUCTION

The United States Supreme Court decision in *Garcetti v. Ceballos*¹ is a blow to the constitutional rights of public employee whistleblowers.² The after-effects of *Garcetti* have already been felt in

1. 547 U.S. 410 (2006).

2. See Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 116-117 (2007) (discussing the significance of the *Garcetti* decision); Bruce A. Green, *Prosecutors' Professional Independence: Reflections on Garcetti v. Ceballos*, CRIM. JUST., Summer 2007, at 4, 6; Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?* (Marquette Law School Legal Studies Paper No. 08-10)], available at <http://ssrn.com/abstract=1010243>. But see Elizabeth Dale, *Employee Speech and Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 175 (2008) (arguing that *Garcetti* actually benefits

the lower courts and may continue to be felt for years to come.³ The Court narrowed the scope of the First Amendment protections that public employees had enjoyed for decades.⁴ After *Garcetti*, if a public employee speaks about possible wrongdoing at work, the employee will not be constitutionally protected for “speech made pursuant to the employee’s official duties.”⁵

public employee speech rights); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative* (Chapman Univ. Sch. of Law, Paper No. 08-07, 2008), available at <http://ssrn.com/abstract=1087693> (refuting the claim that *Garcetti* affected rights of whistleblowers by stating that the case did not concern whistleblowers at all).

3. Indeed, the effects have already begun. See *Campbell v. Galloway*, 483 F.3d 258, 266-72 (4th Cir. 2007); *Spiegla v. Hull*, 481 F.3d 961, 967 (7th Cir. 2007); *Haynes v. City of Circeville*, 474 F.3d 357, 362-65 (6th Cir. 2007); *Andrew v. Clark*, 472 F. Supp. 2d 659, 661-63 (D. Md. 2007); *Franklin v. Clark*, 454 F. Supp.2d 356, 359-61 (D. Md. 2006) (mem.); *DePrado v. City of Miami*, 446 F. Supp. 2d 1344, 1345-47 (S.D. Fla. 2006), *aff’d per curiam*, 264 F. App’x 769 (2008); *Brewster v. City of Poughkeepsie*, 434 F. Supp. 2d 155, 156-57 (S.D.N.Y. 2006). But see, *Williams v. Riley*, 275 F. App’x 385, 388-90 (5th Cir. 2008) (*per curiam*) (finding against dismissal of jailers’ First Amendment claims because of uncertainty as to whether reporting misconduct was their official duty under *Garcetti*); *Morales v. Jones*, 494 F. 3d 590, 598 (7th Cir. 2007) (finding deposition testimony protected under *Garcetti*); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F. 3d 1192, 1203-05 (10th Cir. 2007) (finding elements of teachers’ speech protectable under *Garcetti* because not part of their official duties); *Lindsey v. City of Orrick*, 491 F.3d 892, 897-98 (8th Cir. 2007) (holding public works director’s speech regarding violation of sunshine law protectable as citizen speech); *Walters v. County of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 WL 2456173, at *14 (D. Ariz. Aug. 22, 2006) (finding police sergeant’s whistleblowing protected under framework of *Garcetti* because not a duty of employment).

4. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987) (public employer recognized as a government entity operating under the constraints of the First Amendment); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (employee must show that he or she is speaking out on a matter of public concern); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (employee must show his or her First Amendment interests as a citizen outweigh the government interest in running an efficient government service for the public); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (employee must prove by a preponderance of the evidence that engaging in the protected speech was a substantial or motivating factor for the adverse employment action the employee suffered).

5. *Garcetti*, 547 U.S. at 413 (holding that plaintiff’s expressions were made in connection with official responsibilities and thus were not protected by the First Amendment).

One response to the decision has been to argue for greater statutory protections for public employees.⁶ In fact, amendments to the Whistleblower Protection Act⁷ are currently pending in Congress.⁸ These amendments aim to ameliorate the effects of *Garcetti* as they relate to federal employees.⁹ While there does not seem to be a parallel movement in the states to fortify whistleblower protections, most states have statutes that aim to protect government employees who report wrongdoing.¹⁰ Public employee unions and whistleblower groups have also been active in advancing the cause of whistleblowers.¹¹

Despite the good intentions of these statutory efforts, they are unlikely to fully protect public employee whistleblowers. In this Article, I argue that statutory protection for whistleblowers can be ineffective and sometimes counterproductive for public employees in several ways. First, statutes are prone to leave gaps in protection, and workers may fall through the cracks. Second, as shown by *Garcetti*, courts may use the existence of statutory protection to deny constitutional protection to vulnerable workers. Finally, taking constitutional protection away from public employees takes away their rights as citizens, ironically, just as their political power and ability is ascendant. The Court's decision takes rights outside the realm of fundamental constitutional rights and makes them subject to the political process.

This Article uses the *Garcetti* case to express skepticism about statutory efforts to protect whistleblowers—the paradox of statutory protection, or the idea that more statutory protection is not necessarily better for employees. In *Garcetti*, the Supreme Court has justified the

6. Yolanda Woodlee, *Former D.C. Workers Say Law Doesn't Prevent Retaliation: Employees Say They Were Fired After Filing Complaints, Despite Whistle-blower Act*, WASH. POST, Apr. 28, 2008, at B01 (discussing the stories of several employees fired for status as whistleblowers).

7. 5 U.S.C. § 1201 (2006).

8. Stephen Barr, *Pressing for Stronger Protections for Whistleblowers*, WASH. POST, June 6, 2008, at D03 (discussing efforts by organizations to push legislation through Congress).

9. H.R. 985, 110th Cong. § 2 (2007).

10. See C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* (2001).

11. See, e.g., *Colorado Silences Health Care Workers Who See Errors*, UNA ACTION, Summer 2006, <http://www.afscme.org/publications/10965.cfm>.

denial of legal protection by referring to federal and state *statutory* protections that already exist for whistleblowers. “The dictates of sound judgment,” Justice Kennedy wrote for the Court majority, “are reinforced by the powerful network of legislative enactments—such as whistleblower statutes and labor codes—available to those who seek to expose wrongdoing.”¹²

In dissent, Justice Souter correctly pointed out that the Court majority’s advice to “rest easy” because of the availability of statutory protection for workers like Ceballos “fails on its own terms.”¹³ After explaining why the various whistleblower statutes would not protect Ceballos, Justice Souter explained:

My point is not to disparage particular statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state or federal jurisdictions that happened to employ them.¹⁴

Justice Souter’s dissenting opinion also correctly pointed out that many of the statutes that the Court majority cited are not alternatives for whistleblowers like Ceballos.¹⁵

The point of this Article is to question whether whistleblower statutes can adequately protect public sector employees. This Article begins in Part II by placing *Garcetti* in the context of public employee rights. In Part III, I describe the paradox of statutory protection, alluding to examples in the labor and employment area in which the proliferation of protective legislation has failed to adequately protect workers. Part IV applies this paradox to the *Garcetti* case, by showing how few statutory alternatives Richard Ceballos, the plaintiff deputy district attorney, had besides the constitutional claim that he asserted in the case. While

12. *Garcetti*, 547 U.S. at 425 (citing 5 U.S.C. § 2302(b)(8) (2006)).

13. *Id.* at 439 (Souter, J., dissenting).

14. *Id.* at 441 (Souter, J., dissenting).

15. *Id.* at 439-41 (Souter, J., dissenting).

statutory protections are useful tools for worker advocates, I argue that legislation should not be the main focus of litigation or lobbying efforts. Part V argues that advocates on behalf of public employee whistleblowers should consider arguing for rights that transcend the blowing winds of political change, and instead continue to press the fundamental and even international aspects of worker rights. Further, in Part VI I explain why international and constitutional rights are more universal and make public employees less likely to be subject to the interest group politics that befall statutory change. In this way, public employees can reclaim their rights as citizens, which should not be lightly waived simply by taking public employment. In the end, I argue for rights that transcend the domestic legislative sphere.

II. THE CONTEXT OF THE *GARCETTI* CASE AND PUBLIC EMPLOYEE RIGHTS

As Professor Joseph Slater writes in his seminal work on public workers: “[u]ntil the late 1960s, judges repeatedly rejected claims that constitutional rights to association, speech, due process, or equal protection trumped bans on labor affiliation in public employment.”¹⁶ Indeed, it was not until Wisconsin passed the first public sector labor laws in 1959 and 1962 that any state protected the right to organize by statute.¹⁷ The precursors to these statutory protections for public employees were important Supreme Court decisions that recognized the constitutional rights to reject loyalty oaths¹⁸ and mandatory disclosures of organizational affiliations.¹⁹ These decisions laid the groundwork for the Supreme Court’s decision in *Pickering v. Board of Education*²⁰ in 1968. In *Pickering*, the Court affirmed the rights of public employees to speak on matters of public concern under the First Amendment. The *Pickering* test became the standard for protecting public workers, so long

16. JOSEPH E. SLATER, PUBLIC WORKERS 80 (2004).

17. *Id.* at 158-59.

18. *See Shelton v. Tucker*, 364 U.S. 479, 485-90 (1960).

19. *See Wieman v. Updegraff*, 344 U.S. 183, 184-91 (1952).

20. 391 U.S. 563 (1968).

as the speech did not impair the efficiency of the government organization.²¹

Subsequent cases institutionalized the *Pickering* two-step test. First, determine whether or not the public employee's speech concerns a matter of public concern. Second, balance the speech against the impact it has on the effectiveness of the government agency.²² In some cases, the employee did not make it past the "public concern" prong. In *Connick v. Myers*,²³ for example, the speech of a deputy district attorney about complaints in the office did not, for the most part, warrant the public's concern in the Court's view. In *Rankin v. McPherson*,²⁴ the attempted assassination of President Ronald Reagan and his policies on welfare and the urban poor were matters of public concern, which caused plaintiff McPherson, a deputy constable, to say to a coworker: "[s]hoot, if they go for him [Reagan] again, I hope they get him." Upon application of the *Pickering* test, the Court deemed the speech to be protected by the First Amendment, since it did not interfere with the functioning of her office.²⁵

These cases show that the *Pickering* test, while subject to some judicial discretion, still recognized the basic idea that public employees do not shed all of their constitutional rights at the workplace door. Thus, when the court agreed to hear the Ninth Circuit's decision in *Ceballos v. Garcetti*,²⁶ advocates argued that the application of the *Pickering* test would make Ceballos' speech protected.²⁷ In order to evaluate that claim, let us turn to the facts of *Garcetti*.

21. *Id.* at 568.

22. *See Rankin v. McPherson*, 483 U.S. 378, 384-88 (1987) (holding that speech made in the course of conversation about the President's policies was a public concern); *see also Connick v. Myers*, 461 U.S. 138, 149-50 (1983) (holding that a segment of a questionnaire inquiring about whether district attorneys were pressured to work in political campaigns was a matter of public interest).

23. 461 U.S. at 148.

24. 483 U.S. at 381.

25. *Id.* at 388-89. *But see City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (holding a police officer's pornographic video is not a matter of public concern).

26. 361 F.3d 1168, 1180 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006) (holding that Ceballos' speech was protected by the First Amendment).

27. *See, e.g.,* Brief for Respondent at 17-18, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1801035 ("Since this Court's decisions in *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983), expression by a public employee that

In February 2000, Richard Ceballos was a supervising calendar deputy in the Los Angeles County District Attorney's Office, then headed by Gil Garcetti. Ceballos' immediate supervisors were Carol Najera and Frank Sunstedt. Ceballos had concerns about a search warrant in a prosecution for an auto parts theft. The defense attorney told Ceballos that the search warrant that was used to procure evidence of the defendant's guilt had fatal flaws in it. After confronting the sheriff's deputy who gave the affidavit and examining the subject property himself, Ceballos decided that the affidavit was faulty and notified the defense. After the judge hearing the matter denied the defense motion to dismiss the case based on the faulty search warrant, the defendant was convicted on all counts.²⁸

After the disagreement that Ceballos had with his superiors over the search warrant affidavit, he was transferred to a far-flung post in Pomona, which he deemed a demotion. In response, Ceballos filed a First Amendment lawsuit against the district attorney and his superiors, alleging that they had retaliated against him for his speech on a matter of public concern. The district court dismissed the case based on the fact that Ceballos was not speaking as a citizen, but instead pursuant to his "employment duties."²⁹ The Ninth Circuit Court of Appeals challenged

relates 'to any matter of political, social, or other concern to the community' is presumptively protected under the First Amendment. Of particular relevance here, the Court has acknowledged that speech 'seek[ing] to bring to light actual or potential wrongdoing or breach of public trust' or other fundamental governmental misdeeds is especially deserving of constitutional protection."); Brief for the Nat'l Treasury Employees Union as Amicus Curiae Supporting Respondent at 17-18, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1749167 ("Moreover, because *Pickering's* balancing test provides ample protection to legitimate government interests, petitioners err in claiming that a limit on the scope of constitutionally protected speech is necessary to avoid disruption of government operations. There is, in short, no reason to disturb the long-standing framework under which both work-related speech and work-required speech on matters of public concern are weighed under the *Pickering* balance, in order to protect the interests of all: the public, the employee, and the government employer.").

28. *Garcetti*, 547 U.S. at 415. See also Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 537-38 (2008) (discussing the fact-pattern in *Garcetti*).

29. *Garcetti*, 547 U.S. at 415.

this dichotomy, reversing the district court's decision and holding that Ceballos' lawsuit was not precluded by his official duties.³⁰

The Supreme Court disagreed, holding that Ceballos' official duties meant that his speech about the search warrant affidavit had no First Amendment protection. He was a supervising calendar deputy, who apparently had responsibility to press the office's case regardless of retaliation that he might have suffered for raising problems with the prosecution. In the majority opinion, Justice Kennedy favored the official duties exception because of the need for employee speech to be accurate, "demonstrate sound judgment, and promote the employer's mission."³¹ A contrary rule, according to the Court, would "commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight."³²

Various questions remain about the scope of the official duties exception that will vitiate protection for whistleblowers. But the effects of *Garcetti* have already been felt. At least one circuit court decision has denied First Amendment protection to public employees as a result.³³ The full impact of the *Garcetti* decision remains to be seen, but it would be hard to argue that removing an entire category of workers from the protection of the First Amendment is an improvement on the protection available to whistleblowers.

III. MARGINAL PROTECTIONS FOR WORKERS: MORE IS NOT ALWAYS BETTER

American society saw a dramatic increase in the statutory protections afforded to workers throughout the twentieth century.³⁴ In the early 1900s, employers still had free reign to run the workplace, with common law employment at will essentially unmodified by any statutory

30. *Id.* at 415-16.

31. *Id.* at 423.

32. *Id.*

33. *See Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008) (holding that a public employee of the University of Texas system was not afforded protection).

34. *See generally* National Labor Relations Act of 1935, 29 U.S.C. §§ 141-69 (2000); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2000); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (2000).

protections for workers.³⁵ Minimum wage and overtime protections did not exist at the federal level, and workers could be fired for retaliatory and discriminatory reasons.³⁶ The New Deal brought a host of protective labor statutes, such as the National Labor Relations Act of 1935 (NLRA)³⁷ and the Fair Labor Standards Act of 1938.³⁸

The labor movement established a foothold in the private sector workplace with the help of the NLRA, but the efficacy of the law and whether the law actually “deradicalized” the labor movement have long been debated.³⁹ Regardless of the merits of these respective arguments, it is clear that the fortunes of the labor movement have waned from the high water mark for unionization in the 1950s, at approximately thirty-five percent of the work force.⁴⁰ There may be several causes for the decline of the labor movement, such as globalization and increased illegal employer resistance to unionization.⁴¹ While there have long been hopes, and efforts, to improve the NLRA, few in the labor movement believe that changes in the law alone will result in an increase in labor’s impact on the American workplace.⁴²

Similarly, minimum wage and overtime statutes, while important for establishing a floor under which no worker can fall, failed to establish

35. Scott A. Moss, *Where There’s At-Will, There are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 362 (2005-2006).

36. For a discussion of the American development of an employment at will rule, see Jay M. Feinman, *The Development Of The Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122-29 (1976).

37. 29 U.S.C. §§ 141-69 (2000); see also PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

38. 29 U.S.C. § 201-19 (2000).

39. For one view on NLRA deradicalization, see Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977-1978).

40. KIM MOODY, *U.S. LABOR IN TROUBLE AND TRANSITION: THE FAILURE OF REFORM FROM ABOVE, THE PROMISE OF REVIVAL BELOW* 100 (2007).

41. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001).

42. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 79-81 (2000-2001).

a “living wage.”⁴³ Numerous exemptions apply to take large portions of the workforce completely out of the coverage of either minimum wage or overtime law.⁴⁴ Complicated categories exempt professionals and other employees from overtime regulations.⁴⁵ Workers who have been cheated out of pay have flocked to large class actions, resulting in costly settlements.⁴⁶ At the same time, the buying power of American workers is not keeping pace with the high costs of modern society.⁴⁷

Finally, public employees have also seen an evolution in their protections at work against employer retaliation and collective bargaining. The first part of the twentieth century was marked by Justice Holmes’ aphorism that a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”⁴⁸ The right to unionize was first won for public employees in Wisconsin in the 1950s with the passage of the first collective bargaining statute.⁴⁹ Since then, public employees have won a number of protections at work, under state and federal statutes and the U.S. Constitution.⁵⁰ Nevertheless,

43. STEPHANIE LUCE & ROBERT POLLIN, *THE LIVING WAGE: BUILDING A FAIR ECONOMY* (2d ed. 2000).

44. Independent contractors, for example, are not considered “employees” under the Fair Labor Standards Act. *See, e.g.,* Reich v. Circle C. Investments, Inc., 998 F.2d 324, 327 (1993) (listing factors that determine whether a worker is an employee or contractor).

45. Under the Fair Labor Standards Act, for example, an employee’s salary and duties can exempt the worker from both minimum wage and overtime pay. 29 U.S.C. § 213(a) (2000).

46. *See* Claude Walbert, *Boston Market Settles Class Cases with 7,000 Employees*, L.A. DAILY JOURNAL, Nov. 17, 2006; Claude Walbert, *Workers Sue Restaurant Owner Over Breaks for Rest and Meals*, L.A. DAILY JOURNAL, July 7, 2006 at 1, 9.

47. Michael M. Grynbaum, *Living Costs Rising Fast, and Wages Trailing*, N.Y. TIMES, Aug. 15, 2008, at C1.; Jared Bernstein & Isaac Shapiro, *Buying Power of Minimum Wage at 51 Year Low: Congress Could Break Record For Longest Period Without an Increase*, CTR. ON BUDGET AND POLICY PRIORITIES, June 20, 2006, <http://www.cbpp.org/6-20-06mw.htm> (finding that value of minimum wage has fallen behind wages of other workers).

48. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

49. JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962*, 159-92 (2004).

50. *See, e.g.,* Le Pore v. Nat’l Tool & Mfg. Co., 115 N.J. 226 (N.J. 1989) (affirming the judgment in favor of respondent employee in his action against

public employees remain subject to a number of statutory restrictions to their freedom of association, right to strike, and right to earn overtime.⁵¹ In addition, federal pension protection does not apply to public employees.⁵² All the while, public employees are vilified in the popular press as being overpaid and underworked.⁵³

The foregoing examples provide an overview of the marginal protections that exist for many workers. There are many other examples to support that point. A more insidious form of marginalization occurs when workers are actually between the borders of different bodies of legal protection. This occurred with black workers who sought the protection of the NLRA but were informed that they should have made a claim under antidiscrimination law,⁵⁴ and where workers who claimed that “citizens-only” hiring policies discriminated against them based on

appellant employer because an employee covered by a collective-bargaining agreement could maintain an action for wrongful discharge for reporting workplace safety violations); *Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325 (7th Cir. 2003) (holding that federal common law created a cause of action by which a party to a collective-bargaining agreement that was otherwise covered by § 301 could enforce an arbitration subpoena against a non-signatory of the agreement as such suits were necessary to the purpose of enforcing the agreement to arbitrate); Paul M. Secunda, *Reflections on the Technicolor Right to Association in American Labor and Employment Law*, 96 KY. L.J. 343, 347-64 (2007-2008) (discussing constitutional right to associate for public employees); S. Barry Paisner & Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided To Public Employees*, 37 N.M. L. REV. 357, 360-69 (2007) (discussing federal and state statutory protection for public employees).

51. See Clyde W. Summers, *Public Sector Bargaining: A Different Kind of Animal*, 5 U. PA. J. LAB. & EMP. L. 441 (2003).

52. 29 U.S.C. § 1003(b)(1) (2000).

53. The City of San Diego, for example, has undergone a financial crisis, in which most of the blame has fallen on city employees and their pensions. See, e.g., Steve Schmidt & Danielle Cervantes, *City Caught in Payroll Vise*, S.D. UNION TRIBUNE, Dec. 11, 2005, at A1; see also Ed Mendel, *Vallejo Blames Bankruptcy on Contracts with Unions*, S.D. UNION TRIBUNE, June 9, 2008, at A1, A8. Secunda, *supra* note 50, at 347-64; S. Barry Paisner & Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided To Public Employees*, 37 N.M. L. REV. 357, 360-69 (2007) (discussing federal and state statutory protection for public employees).

54. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69-73 (1975).

their race and national origin were told they should have claimed that the employer's policy had a disparate impact on them, even though such a claim would not likely be more successful than their claim of disparate treatment.⁵⁵

In order to deal with the problems of the NLRA, labor has become interested in amending the law through the Employee Free Choice Act.⁵⁶ This bill, which passed the House in 2007, has stalled in the Senate. The bill aims to make it easier for workers to form unions through card check recognition, but it is unlikely to completely change the environment for union organizing.⁵⁷

As discussed above, Richard Ceballos, the plaintiff in *Garcetti*, also faced the statutory double bind—the plethora of statutory protections made it easier for the Court to deny him protection under the Constitution, in part because of the fear of “constitutionalizing” every dispute had by a public employee. As I argue below, many of these statutory avenues are dead ends for Ceballos and employees like him.

IV. BLIND ALLEYS: THE LACK OF PROMISE IN MANY WHISTLEBLOWER STATUTES

A. Why Richard Ceballos May Have Chosen the Constitutional Option

There are several statutes that Ceballos could have used as a basis for recovery, but each presents significant obstacles. These legislative protections do not provide adequate safeguards for those seeking to expose wrongdoing without risking employer retaliation. These statutory flaws probably made the First Amendment claim, rather than a whistleblower retaliation claim, more attractive for Ceballos.

55. *Espinoza v. Farah*, 414 U.S. 86, 92-93, 95 (1973).

56. H.R. 800, 100th Cong. (as passed by House, March 1, 2007); S. 1041, 100th Cong. (2007).

57. Liegia S. DiFazio, *Checks and Ballots: Union Recognition in the United States, Canada and the United Kingdom in Light of the Employee Free Choice Act*, 34 GA. J. INT'L & COMP. L. 689, 690-691 (2006).

1. Civil Service Reform Act

The Court in *Garcetti* cited the Civil Service Reform Act (CSRA) as an available option for Ceballos.⁵⁸ The CSRA prohibits personnel actions based on an employee's disclosure of "a violation of any law, rule, or regulation."⁵⁹ A "personnel action" includes promotions, transfers, and reassignments, such as the one that Ceballos alleged that he suffered.⁶⁰ First, it is debatable whether anyone involved in the prosecution Ceballos oversaw violated a law or regulation, as well as to whom Ceballos was required to disclose the violation. Moreover, and more importantly, Ceballos, as a supervising deputy district attorney, is not an employee of the federal government. Therefore, the CSRA is unavailable for his protection.

Even employees who are covered by the statute might find the CSRA to be an inadequate remedy, because the statute contains no private right of action.⁶¹ The statute requires that the plaintiff exhaust all administrative remedies before seeking judicial review.⁶² Furthermore, plaintiffs who file under the CSRA give up the right to file claims for wrongful termination, emotional distress, and breach of the covenant of good faith and fair dealing, because the CSRA preempts these claims.⁶³

2. California Whistleblower Protection Act

The second whistleblower protection relied upon by the Court was the California Whistleblower Protection Act (CWPA).⁶⁴ The CWPA was enacted to encourage the disclosure of "improper governmental

58. *Garcetti*, 547 U.S. at 425. See also 5 U.S.C. § 2302(b)(8) (2006).

59. 5 U.S.C. § 2302(b)(8)(A)(i) (2006).

60. 5 U.S.C. § 2302(a)(2) (2006).

61. See, e.g., *Braun v. U.S.*, 707 F.2d 922 (6th Cir. 1983); *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982); *Borrell v. U.S. Int'l Comm'n Agency*, 682 F.2d 981 (D.C. Cir. 1982).

62. *Ferry v. Hayden*, 954 F.2d 658, 660-61 (11th Cir. 1992).

63. *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005) (tort claims are barred by the CSRA).

64. CAL. GOV'T CODE § 8547 (2005).

activity.”⁶⁵ The Act provides a state administrative process to protect individuals reporting governmental misconduct.⁶⁶ Employers who retaliate against whistleblowers face a potential ten thousand dollar fine and possible jail time limited to one year, in addition to any applicable discipline for improper governmental activities.⁶⁷ Additionally, the statute authorizes civil damages, punitive damages, and reasonable attorney’s fees to a successful CWPA claimant.⁶⁸

In *Garcetti*, the Ninth Circuit determined that giving constitutional protection to Ceballos would render the CWPA obsolete.⁶⁹ The CSRA provides the most applicable and adequate protection for Ceballos, but it is not a flawless remedy. Like the CSRA, the CWPA has a mandatory, complex, and multi-tiered administrative procedure.⁷⁰ First, the applicant must file the complaint with the State Personnel Board (the Board).⁷¹ Following an investigation, the Board will issue findings as to the retaliation.⁷² The respondent then has an opportunity to call for a hearing before the Board to address the allegations.⁷³ Under the statute, there is no opportunity for a plaintiff who alleges a CWPA retaliation claim to have the claim heard in court.⁷⁴

Another obstacle to the remedies available under CWPA is that the plaintiff must have filed a written complaint with the employer before instituting proceedings. Here, Ceballos would not be penalized because he filed an internal grievance before suing. However, the written complaint requirement may preclude other plaintiffs from utilizing CWPA.⁷⁵ Furthermore, plaintiffs wishing to utilize CWPA have

65. CAL. GOV’T CODE § 8547.2 (2005); *see also* Braun v. Bureau of State Audits, 79 Cal. Rptr. 2d 791, 793 (Cal. Ct. App. 1998).

66. *See* CAL. GOV’T CODE § 8547.8 (2005).

67. CAL. GOV’T CODE § 8547.8(b) (2005).

68. CAL. GOV’T CODE § 8547.8(c) (2005).

69. Ceballos v. Garcetti, 361 F.3d 1168, 1192 (9th Cir. 2004) (O’Scannlain, J., specially concurring).

70. CAL. GOV’T CODE § 19683 (1995).

71. CAL. GOV’T CODE § 19683(a) (1995).

72. *Id.*

73. CAL. GOV’T CODE § 19683(b) (1995).

74. *Id.*

75. *See* Cornejo v. Regents of Univ. of Cal., No. C045753, 2005 WL 2189461 (Cal. App. 3 Dist. Sept. 12, 2005) (finding plaintiff was precluded from recovery

only one year from the time of the retaliation to file a claim with the Board.⁷⁶ This was not a problem for Ceballos, but might be for other plaintiffs in his position.

The exclusive administrative processes of CWPA might have made a CWPA claim unattractive to Ceballos. This would leave out many of the remedies that are most valuable to whistleblowers, such as attorneys' fees and injunctions under civil rights statutes.⁷⁷ Yet, next to his constitutional claim, the CWPA gives Ceballos the most adequate remedy of the three statutes in this Article.

3. Whistleblower Protection Statute

The final statute relied on by Justice Kennedy in *Garcetti* is the Whistleblower Protection Statute (WPS) in the California Labor Code.⁷⁸ Under the WPS, employees may not be prevented from or retaliated against for reporting state or federal violations of laws when they disclose the information to a government or law enforcement agency.⁷⁹ In a *prima facie* case under WPS, the plaintiff must prove (1) he engaged in a protected activity, (2) he suffered an adverse employment action, and (3) there is a causal link between the protected activity and the adverse employment action.⁸⁰

when she failed to file a written complaint with her employer before filing suit for claims of whistleblower retaliation).

76. CAL. GOV'T CODE § 8547.8(a) (2005).

77. 42 U.S.C. §§ 1983, 1988. Section 1983 authorizes courts to use legal and equitable remedies when civil rights are violated. Section 1988 provides for an award of reasonable attorneys fees to the prevailing party in Section 1983 litigation. See also OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

78. CAL. LAB. CODE § 1102.5 (2003); see also *Garcetti*, 547 U.S. at 425.

79. CAL. LAB. CODE § 1102.5 (2003).

80. See, e.g., *Soukup v. Law Offices of Herbert Hafif*, 46 Cal. Rptr. 3d 638, 659 (Cal. 2006) (citing *Morgan v. Regents Univ. of Cal.*, 88 Cal. App. 4th 52, 69 (Cal. App. 1 Dist. 2001)) ("To establish a *prima facie* case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two."); See also *Patten v. Grant Joint Union High Sch. Dist.*, 37 Cal. Rptr. 3d 113, 117 (Cal. App. 3 Dist. 2005) (to establish a *prima facie* case of retaliation "a plaintiff must show (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) there is a causal link between the two.").

The CWPA also leaves unresolved whether an employee of a government or law enforcement agency may simply report the violation to his superiors. In *Gardenshire v. Housing Authority*,⁸¹ the California Court of Appeal found that a high-ranking employee of the Los Angeles City Housing Authority could receive whistleblower protection under WPS when she reported an enforcement violation directly to her superior.⁸² The distinction made in *Gardenshire* was that the plaintiff would have no reason to expect that reporting to a higher authority was necessary.⁸³

On the other hand, in an unpublished California Court of Appeal opinion, *Penaflor v. City of San Diego*,⁸⁴ a low-level parking enforcement employee was not entitled to whistleblower protection when she reported widespread double billing to her supervisor, a co-worker, and an internal accounting official because these individuals were not the proper "government or law enforcement [authority]."⁸⁵

The facts in *Garcetti* indicate Ceballos disclosed the information to the court (testifying as a witness), his superiors and employees from the sheriff's office (reporting in a special meeting), and to the defense counsel (writing in a memo). These disclosures fall short of those in *Gardenshire*. In *Gardenshire*, the employee-plaintiff was head of a department within the Housing Authority.⁸⁶ Ceballos, as a calendaring deputy district attorney, was higher up than the low-level employee in *Penaflor*, but not nearly a department head like *Gardenshire*. In *Gardenshire*, the plaintiff informed the Housing Authority's commissioners, who are the highest echelons of the government body.⁸⁷ Among the people Ceballos informed were his immediate supervisor and the Head Deputy District Attorney.⁸⁸ The Head Deputy District Attorney supervised Ceballos' immediate supervisor. However, Ceballos could have informed the District Attorney. Yet, he did more than the plaintiff

81. 101 Cal. Rptr. 2d 893 (Cal. Ct. App. 2000).

82. *Id.* at 897-98.

83. *Id.* at 897.

84. No. D038726, 2003 WL 1020382, at *1 (Cal. App. 4 Dist. Mar. 11, 2003).

85. *Id.* at *9.

86. *Gardenshire*, 101 Cal. Rptr. 2d at 894.

87. *Id.* at 895.

88. *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006).

in *Penaflor*, where the highest level reporting was only to the plaintiff's immediate supervisor.⁸⁹

It comes down to a question of whether Ceballos would have reasonably expected that he needed to inform someone else. Ceballos could have reasonably been expected to inform the District Attorney, who was the highest supervisory authority in the relevant governmental organization. Ceballos probably did not inform a governmental or law enforcement agency under WPS when he informed two supervisory levels above his own position. Therefore, his whistleblowing is probably not protected activity under WPS.

Additionally, the inaccuracies in the warrant may not have been a violation of a governmental regulation or law under the statute. When warrants are issued under false circumstances, there are constitutional issues; however, there may not have been a governmental regulation or statute that might have been violated.⁹⁰

For example, the court suggested in *Penaflor* that an inaccuracy within the city's accounting that resulted in individuals paying their traffic citations twice was not a "violation of . . . federal statute or . . . regulation."⁹¹ Therefore, when she disclosed the billing mistake *Penaflor* was not making a protected disclosure. Inaccuracies are not within the scope of WPS protected disclosures.

Similarly, in *Garcetti*, there were "inaccuracies in an affidavit" used to obtain a search warrant.⁹² Ceballos believed that the sheriff's deputy made misrepresentations about tire tracks and a roadway designation.⁹³ Under WPS, Ceballos would have a difficult time proving that his reporting an inaccuracy in an affidavit to two supervisors, but not the District Attorney, is a protected disclosure. He would therefore not likely choose to pursue a claim under that cause of action.

None of these three statutory whistleblower protections provide the "powerful network of legislative enactments" to adequately protect

89. *Penaflor*, 2003 WL 1020382, at *2.

90. The sheriff deputy's affidavit may have been perjurious, but that would require a further inquiry into whether or not the officer knowingly testified falsely or simply made an error in judgment.

91. *Penaflor*, 2003 WL 1020382, at *9.

92. 547 U.S. at 413.

93. *Id.* at 414.

Ceballos or other whistleblowers.⁹⁴ Rather, as Justice Souter suggests in his dissenting opinion, whistleblower statutes should not be relied upon to preclude constitutional claims.⁹⁵ Only the CFWPA would apply to Ceballos' specific facts. Even then, his claim would be subject to a cumbersome administrative process that would provide only a limited remedy. These examples show the limits of statutory protections.

4. Professional Norms

While not technically a statutory protection, the Court also referred to the "rules of conduct and constitutional obligations apart from the First Amendment" upon which Ceballos might rely.⁹⁶ Although many lawyers would be guided by the principles of the American Bar Association Model Rules of Professional Conduct (ABA Model Rules), because Ceballos was a California lawyer, the California Rules of Professional Conduct apply.

The California Rules do not have whistleblower protection. Unlike some states, California has provided whistleblower protection to in-house attorneys who report wrongdoing by their employer.⁹⁷ In *General Dynamics v. Superior Court*,⁹⁸ the California Supreme Court held that an employee attorney of a corporation could bring an action to redress the retaliation he suffered when complaining to superiors about illegal activities at General Dynamics.⁹⁹ His lawsuit against his former employer was dismissed at the trial level because of the traditional

94. *Garcetti*, 547 U.S. at 425.

95. *Id.* at 428 (Souter, J., dissenting).

96. *Id.* at 412, 425.

97. The Illinois courts, for example, have rejected a cause of action for in-house lawyers who are whistleblowers. See *Balla v. Gambro, Inc.*, 145 Ill.2d 492, 584 N.E.2d 104 (1991); *Hoffman v. Baltimore Police Dept.*, 379 F. Supp. 2d 778, 784 (D. Md. 2005); *Wise v. Consul Edison Co. of N.Y.*, 723 N.Y.S. 2d 462 (N.Y. 2001); *Weider v. Skala*, 609 N.E.2d 105 (N.Y. 1992).

98. 32 Cal. Rptr. 2d 1 (Cal. 1994).

99. ABA Model Rule of Professional Responsibility 8.3(a) requires lawyers to report ethical violations. MODEL R. PROF'L CONDUCT R. 8.3(a) (2008). In California, the lawyer's only duty is not to "knowingly assist in, solicit, or induce any violation of [the rules]." CAL. R. PROF'L CONDUCT 1-120 (2008).

loyalty that exists between lawyer and client, even when the lawyer is also the client's employee.¹⁰⁰

The California Supreme Court reversed the dismissal of the claim, affirming the fact that lawyers have the right, as do other employees, to be free from retaliation. Because of the place of trust they hold, however, the employment rights of lawyers can be limited. If the attorney's lawsuit requires the disclosure of confidential information, the suit must be dismissed. The court recognized that there may be other ways to allow litigation by lawyers through *in camera* review or protective orders. In prior cases, the court held that the tort of wrongful discharge in California, as in most states, must be based on the employer's retaliation against the employee's upholding a public policy based on a statute or constitutional provision. For lawyers, however, the *General Dynamics* court stated that the lawyer must base their retaliation case on a mandatory duty of professional conduct.

The problem for a California lawyer like Ceballos is that whistleblowing is not a mandatory duty. Unlike the ABA Model Rules, a California lawyer is not required to report wrongdoing by another lawyer.¹⁰¹ Under both sets of rules, a public prosecutor has the duty to make sure that all prosecutions are brought with probable cause, which may have not been met in the prosecution that Ceballos questioned because of the faulty search warrant. Further, the problem with the search warrant in the prosecution may not have been enough at the beginning of the prosecution to vitiate probable cause.

It should be noted here that no provision of the law governing lawyers specifically prohibits retaliation against a subordinate for reporting misconduct to state bar authorities. In California, for example, the most analogous Rule of Professional Conduct is the one prohibiting bias and retaliation on the basis of race, gender, and other categories.¹⁰² This provision would clearly not apply in Ceballos' case, so his superiors would be unlikely to face any bar discipline even if they were found by a tribunal to have retaliated against him for his complaints.

100. *Id.* (holding that a retaliatory discharge claim will not proceed in circumstances where resolution cannot be met without breaching the attorney-client privilege).

101. See CAL. R. PROF'L CONDUCT 1-120 (2008).

102. CAL. R. PROF'L CONDUCT 2-400 (2008).

Thus, it appears that Ceballos had fewer statutory options to enforce the professional norms than the Court majority believed that he had. While the focus of this Article is to discuss Ceballos' lack of statutory options, it furthers the point that constitutional protection is necessary for whistleblowers.

B. Mixed Results: Studies on the (Lack of) Success of Whistleblowers

Even when public employees do take advantage of the statutory protections available to them, recent empirical scholarship has demonstrated that the availability of legal protection does not guarantee success for whistleblowers. A recent study of Merit Systems Protection Board (MSPB) cases by Professor Paul Secunda aptly demonstrates the low success rates of federal government employee whistleblowers.¹⁰³ Federal employees are not allowed to bring federal constitutional actions to vindicate whistleblowing rights and thus must press their claims through the MSPB. Professor Secunda analyzed the results of the MSPB decisions and found not a single First Amendment claim brought by public employees to be successful in the MSPB.¹⁰⁴ This further underscores the importance of the constitutional doctrine, even when it is not a federal court case.

Retaliation against whistleblowers is not limited to the public sector. In fact, most of the focus in recent years has been on how to protect private sector employees in corporations from retaliation for wrongdoing. The scandal surrounding the collapse of energy company Enron in 2001 led to the Sarbanes-Oxley (SOX) corporate reform legislation in 2002, which included a whistleblower statute provision.¹⁰⁵

Professor Richard Moberly has studied the results of the SOX whistleblower process and found whistleblowers to have difficulty winning their cases.¹⁰⁶ His important analysis found a low success rate

103. Secunda, *supra* note 2.

104. *Id.*

105. Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2008).

106. Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007).

for corporate whistleblowers.¹⁰⁷ Under the SOX regime, publicly traded companies are required to ensure that their financial practices comport with sound accounting principles.¹⁰⁸ Moberly found that administrative law judges in the Department of Labor (which hears the claims) rejected about 95.2% of whistleblower cases as a matter of law.¹⁰⁹ In the end, only 3.6% of those who brought claims under the statute got relief. These numbers suggest that the statute's exclusive remedy is no remedy at all for most whistleblowers.

Even when systems exist for whistleblowers to utilize, Professor Orly Lobel's detailed analysis shows that whistleblowers are unlikely to take advantage of statutory opportunities, but rather prefer internal grievance resolution.¹¹⁰ Further, internal reporting mechanisms, while useful in resolving some misunderstandings, may also prevent whistleblowers from taking advantage of the law. This may be for a number of reasons, but the difficulty in navigating legal requirements may be one major obstacle.

There may be a number of reasons for the lack of success of whistleblowers. Perhaps most of the claims simply represented the qualms of disgruntled employees. Or, the statutory systems perhaps represented traps for the unwary. In either case, reliance on statutory protections left many employees behind. Although the above examples include private whistleblowers, public employees are also subject to many of the same obstacles—administrative exhaustion, exemptions, and malleable statutory language.

107. See *Id.* at 65 (“[d]uring its first three years, only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process that adjudicates such claims, and only 6.5% of whistleblowers won appeals through the process.”).

108. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7261 (2008).

109. Moberly, *supra* note 106, at 71.

110. Yuval Feldman & Orly Lobel, *Behavioral versus Institutional Antecedents of Decentralized Enforcement in Organizations: An Experimental Approach* 15-16 (San Diego Legal Studies Research Paper Series, Paper No. 07-126, 2007), available at <http://ssrn.com/abstract=1031853>.

V. TRANSCENDING LEGISLATION:
FROM POLITICAL RIGHTS TO HUMAN RIGHTS

The legislative process is indeed an important vehicle to support workers' rights. As described above, many of the advances in the protection of workers by way of the legislative process have come through statutory protection. The gains that were made by workers' movements to protect collective and individual rights should not be underestimated.

At the same time, there are reasons to be wary of placing too much emphasis on statutory change to protect workers' rights. First, legislative activity can be an enormous investment of resources, particularly in the current political climate, where corporations will use lobbyists to prevent the passage of statutes that interfere with their ability to control the workplace.¹¹¹ Second, legislative activity may take years to complete. Finally, statutes often divide workers into categories offering differing levels of protection.

There are certainly tactical issues that must be worked out for a strategy that focuses primarily on the Constitution. Most obviously, the federal judiciary can be antagonistic toward workers' rights,¹¹² and there have been many instances where the Supreme Court has not protected employees.¹¹³ And certainly, there have been constitutional cases that

111. Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353, 2361-63 (2007) (corporate resources overwhelm the voice of ordinary citizens in the legislative process); U.S. Chamber of Commerce, About Us, <http://www.uschamber.com/about/default> (describing the U.S. Chamber's important role in national politics and its representation of more than 3 million businesses); Thomas J. Donohue, Business, The Elections, and You, USCHAMBER.comMAGAZINE, <http://www.uschamber.com/content/080902.htm>.

112. Richard Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1865 (1994); Christine Godsil Cooper, *Employment Discrimination Law and the Need for Reform*, 16 VT. L. REV. 183, 184 (1991).

113. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that arbitration clauses in employment contracts are enforceable, removing the right to sue for discrimination in court); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (changing the burden of proof in employment discrimination claims in ways to disadvantage plaintiff employees).

have resulted in the retrenchment of rights.¹¹⁴ But the debate about the best way to protect rights continues. For example, some have argued that the result in *Brown v. Board of Education*¹¹⁵ would have been accomplished even if the Supreme Court had not decided that “separate educational facilities are inherently unequal.”¹¹⁶ Professor Gerald Rosenberg has argued that the nation would have eventually come to this realization.¹¹⁷ Similarly, none other than Justice Ruth Bader Ginsburg has argued that protecting women’s right to choice as a matter of constitutional law blunted the movement in the states to protect the right to choose an abortion.¹¹⁸ The debate in constitutional law will continue, but the long trajectory of history means that there is no easy answer to the question of whether legislation or judicial action best preserves social change.

By contrast, the area of workers’ rights has always been presumed a matter, almost exclusively, of domestic statutory regulation.¹¹⁹ Indeed, in the early years of the labor movement, constitutional law was actually the enemy of the movement to recognize the rights of workers to organize in their interest. In *Coppage v. Kansas*,¹²⁰ the Supreme Court in 1915 held that “liberty of contract” in the due process clause prevented states from passing laws prohibiting “yellow-dog contracts,” or contracts that conditioned employment on the employee’s promise not to join a labor union.¹²¹ Other damaging Supreme Court cases, such as *Loewe v.*

114. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (allowing employers to require employees to use compensatory time absent a prior agreement permitting the employer to do so); *Circuit City Stores*, 532 U.S. at 109 (requiring non-transportation worker to arbitrate claim).

115. 347 U.S. 483 (1954).

116. *Id.* at 495.

117. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE?* 169 (1991).

118. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-1205, reprinted in *AMERICAN POLITICAL RHETORIC: A READER* 152, 152-54 (Peter A. Lawler & Robert M. Schaefer, eds., 5th ed. 2005).

119. See *Lochner v. New York*, 198 U.S. 45, 54 (1905).

120. 236 U.S. 1 (1915).

121. *Id.* at 26.

Lawlor (The Danbury Hatters Case),¹²² led to the passage of the Norris-La Guardia Act of 1932, exempting labor negotiations from antitrust liability and outlawing “yellow-dog contracts.”¹²³ Three years later, the NLRA enshrined the right to organize in federal statutory law.¹²⁴

This is not to say that the NLRA did not represent a sea change in the protection of workers’ right to organize, strike, and bargain with employers. It is important, however, to recognize the constitutional and human rights roots of these statutory advances. The right to assemble is guaranteed by the First Amendment, which underlies employees’ freedom of association under the NLRA and international law.¹²⁵ Supreme Court cases such as *Hague v. CIO*¹²⁶ and *NAACP v. Button*¹²⁷ were important in recognizing the rights of associations to assemble and to manage their own internal affairs.¹²⁸

Before the passage of the NLRA in 1935, there was also a movement to base the right to organize on the Thirteenth Amendment to the Constitution rather than on the Congressional power to regulate interstate commerce.¹²⁹ The Thirteenth Amendment¹³⁰ prohibits “involuntary servitude, other than punishment for the commission of a crime” and, unlike the First Amendment, applies to both state action and private conduct. Labor advocates argued that the lack of collective bargaining for workers put them in a condition of involuntary

122. See *Loewe v. Lawlor (The Danbury Hatters Case)*, 208 U.S. 274, 276 (1908) (holding that antitrust law prohibited members of labor unions from boycotting in an effort to force an industry to unionize).

123. The Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-110, 113-115 (2007)).

124. See National Labor Relations Act, 29 U.S.C. § 151 (2000).

125. See Int’l Labour Organisation (ILO), *Freedom of Association and Protection of the Right to Organize Convention*, 1948 (No. 87), Preamble (July 9, 1948), available at <http://www2.ohchr.org/english/law/association.htm>.

126. 307 U.S. 496 (1939).

127. 371 U.S. 415 (1963).

128. *Hague*, 307 U.S. at 512; *NAACP*, 371 U.S. at 428-29.

129. See James Gray Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 14-15 (2002); see generally Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855 (2007) (explaining interpretation of the Thirteenth Amendment as protecting workers’ rights).

130. U.S. CONST. amend. XIII.

servitude—unable to change the conditions of their work—in violation of the Thirteenth Amendment.¹³¹ The ultimate decision to base the right to organize on the Commerce Clause may have made legal sense, but it may have taken some of the moral force away from the fundamental nature of the right to organize.

In part, the shift to the Commerce Clause and domestic legislative protection has made the freedom of association and the right to bargain collectively nothing more than a pet project of organized labor, rather than a fundamental human right recognized in the Universal Declaration of Human Rights and the International Labor Organization (ILO) conventions.¹³²

Similarly, by taking constitutional rights away from public employees in the performance of their job duties, the *Garcetti* decision does two things. First, the decision puts the act of whistleblowing on the job into the political process, which often conflicts with adequate protection for whistleblowers. Why would public officials who might be the subject of a complaint by a public employee whistleblower have any incentive to fully protect those that might expose their wrongdoing? This means that public employees need to seek other avenues for redress. Second, as some have argued, the different categories of protection created by the *Garcetti* decision will mean different categories of workers may not be able to report wrongdoing.

Having argued that constitutional law is the preferred way to protect whistleblowers, there remains the question of what to do about the *Garcetti* decision. There should be no illusions that the decision will be easily reversed by subsequent constitutional cases. There may be, however, future litigation that limits the scope of the “official duties” exception. It is also possible, but not likely in the short term, that the Supreme Court could revisit the decision in *Garcetti*. And yet, the past shows that changes in constitutional law doctrine have resulted in positive changes.¹³³ This is not to say that statutory change cannot result

131. Pope, *supra* note 129, at 14.

132. See *Universal Declaration of Human Rights*, Article 20(1) (1948), available at <http://www.un.org/Overview/rights.html> (“Everyone has the right to freedom of peaceful assembly and association.”).

133. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (recognizing the right of consenting adults to engage in homosexual activity); *Roe v. Wade*, 410 U.S. 113

in positive change. At times, it has been court interpretation that positively changed statutes.

In his 1991 book, *The Hollow Hope: Can the Courts Produce Social Change?*, Professor Gerald Rosenberg argued that the Supreme Court was an ineffective institution for producing progressive social change.¹³⁴ He expertly made an argument that *Brown* and *Roe v. Wade* were not necessary to desegregated education or the right to choose an abortion, and indeed might have been counterproductive to those rights.

In labor and employment law, which is largely statutory and administrative, similar questions may be asked. Have statutes improved the lives of workers? Nevertheless, statutes can sometimes fill gaps, and in some cases can attempt to bring an integrated approach to the field. This is the aim of the Federal Free Association for Workers Act proposed by Professor Paul Secunda in his article for this Symposium.¹³⁵ The proposed federal statute would support greater associational freedoms for public employees in protecting their privacy interests in intimate and off-work association.¹³⁶

While the legislation proposed by Professor Secunda would undoubtedly plug many of the holes in current law, unanswered questions remain. For example, will there be a division between the associational rights of supervisors and managerial employees? Further, if the problems remain with the definition of who is an "employee," there will continue to be questions about the coverage that immigrants, undocumented or otherwise, will get.

As I argued above, constitutional and international law principles are not going to answer all of these questions either. But going back to the constitutional discourse reasserts the fundamental nature of these rights. As the Supreme Court has stated, the right of association is fundamental to a free society.¹³⁷ Because of the fundamental nature of

(1973) (recognizing a woman's right to choose whether to have an abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing the fundamental right to marry); *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) (rejecting the separate but equal doctrine in K-12 public education).

134. Rosenberg, *supra* note 117, at 35.

135. Secunda, *supra* note 50, at 367.

136. *Id.* at 365-66.

137. See *id.* at 343 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960), "It is not disputed that to compel a teacher to disclose his every associational tie is to

freedom of association, the right should be as free as possible from the political process.

Certainly, constitutional litigation will also leave gaps, but the question is how should those gaps be filled, with statutory rights or constitutional ones? Professor Cynthia Estlund has made a good argument for changing the discussion about *Garcetti* from free speech to due process protections.¹³⁸ She believes that the inquiry should be a process-oriented question of whether the action taken against the employee is consistent with just cause.¹³⁹

The labor movement has recently been more involved in an international strategy that emphasizes workers' rights as human rights. One of those efforts was to take the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*¹⁴⁰ to the Freedom of Association Committee of the International Labor Organization.¹⁴¹ In *Hoffman*, the Court held that undocumented workers are not entitled to the same remedies as other employees as victims of unfair labor practices.¹⁴² The ILO found that the Court's decision failed to adequately protect undocumented workers in light of ILO Convention 87's mandate to respect freedom of association "without any distinction whatsoever."¹⁴³

The AFL-CIO has advocated on behalf of public employees in international forums as well. In 2005, the labor federation filed an ILO complaint against the U.S. government for its withdrawal of bargaining rights for employees of the Transportation Security Administration,

impair that teacher's right of free association . . . , a right which, like free speech, lies at the foundation of a free society.").

138. See Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1464-65 (2007).

139. *Id.* at 1477-78.

140. 535 U.S. 137 (2002).

141. See ILO Committee on Freedom of Association, *Complaint Against the Government of the United States*, Case No. 2227 (2003), available at <http://white.oit.org.pe/sindi/english/casos/usa/usa200301.html>.

142. See *Hoffman*, 535 U.S. at 149-51.

143. ILO Committee on Freedom of Association, United States (Case No. 2227), Report No. 332, ¶¶ 559, 610 (2003), <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=1>.

charged with security screening at U.S. airports.¹⁴⁴ Labor unions have also filed petitions under the North American Free Trade Agreement, protesting the lack of bargaining rights for public employees under North Carolina law.¹⁴⁵ The cases have achieved some success in raising the international profile of domestic legal issues, even while legislative efforts continue.

Similar principles could be used in reaction to the rights taken from whistleblowers in *Garcetti*. The Universal Declaration of Human Rights also includes a free speech provision.¹⁴⁶ While the principles of international law sometimes contain exceptions, for example relating to public safety officers and national emergencies, these exceptions should not be taken lightly and should be policed, leaving fewer cracks for employees to fall through.

Of course, not all domestic rights are amenable to international forums. Advocates should exercise care in putting inordinate resources into these forums, but they can provide important grist for the movement. Some might question whether it is antidemocratic to place so much faith in the courts. This is a legitimate concern, but the state of the legislative process itself has become impermeable to many without power or influence. And further, courts can also interpret statutes to change their meaning. Thus, the counter-majoritarian thesis loses some of its force.

144. Statement by AFL-CIO President John Sweeney and AFGE President John Gage On the ILO's Recommendation to Give TSA Workers the Right to Organize, AFL-CIO, Press Releases, Speeches & Testimony, Nov. 15, 2006, <http://www.aflcio.org/mediacenter/prsptm/pr11152006.cfm>. See also Karen Rutzick, *UN Office: TSA screeners have collective bargaining rights*, GovernmentExecutive.com, Nov. 16, 2006, <http://www.govexec.com/dailyfed/1106/111606r1.htm>.

145. National Union of Public and General Employees, *Labour Groups Charge U.S. with Violating NAFTA Labour Standards*, Apr. 22, 2008, http://www.nupge.ca/news_2008/n22ap08c.htm.

146. *The Universal Declaration of Human Rights*, *supra* note 132, at Art. 19. ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

Professor Erwin Chemerinsky has criticized *Garcetti*.¹⁴⁷ Chemerinsky has also argued that judicial review is necessary for progressive constitutionalism.¹⁴⁸ In contrast to popular constitutional theorists who argue that judicial review should be diminished in favor of movements toward legislatures, Chemerinsky reminds that legislatures have not always taken into account the interests of minorities.¹⁴⁹

If the Court is to improve on *Garcetti* and all public employee speech cases, it must move away from treating public employee speech differently than other kinds of speech. Even the *Pickering* analysis that applied to all public employee cases treated some types of speech differently than others. If government officials are limiting speech because of its content, then they should be subjected to the same rules that apply to other content or viewpoint restrictions. Thus, whistleblowers could argue that their speech against supervisors was motivated by an effort to suppress the content or viewpoint of the speech, subjecting the decision maker who allegedly retaliated to justify their actions under strict scrutiny.

The courts may not seem hospitable to progressive constitutionalism at this point in history, but one must remember there was a time when conservative constitutionalism was also at a low ebb. For example, the accepted interpretation of the Second Amendment had for years been to include only a collective right to bear arms as part of a militia.¹⁵⁰ Years of conservative advocacy, and of course a number of new appointments to the Supreme Court, recently led the Court to hold that the Second Amendment also encompasses an individual right.¹⁵¹

147. See Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2d 335, 340-41 (2006); Erwin Chemerinsky, *The Rookie Year of the Roberts Court & A Look Ahead*, 34 PEPP. L. REV. 535, 538-9 (2007).

148. See Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, LAW & CONTEMP. PROBS., 53, 61-62 (2004).

149. *Id.*

150. See, e.g., Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 3-5 (2000).

151. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008).

This advocacy is the kind of work that needs to be done by progressive constitutionalists.¹⁵² As Professor Chemerinsky has argued, the methods of progressive and conservative constitutionalism are the same—the results are the only difference.¹⁵³ Textualist and Originalist interpretations of the Constitution reveal no real difference between the First Amendment as it applies to nonemployee speakers and public employees. The only difference is the vast expansion in the government workforce from 1789 that would at best call for reasonable time, place, and manner restrictions.

In sum, I argue that placing workers in different categories divides and conquers the workforce in ways that are not compelled by the Constitution. A move toward constitutionalism instead of legislation requires fewer categories and divisions than currently exist in statutes to more fully protect government whistleblowers.

VI. CONCLUSION

This Article suggests that the antidote for the problems with *Garcetti v. Ceballos* may not lie in the passage of a new statute. This is not a new idea, but it has not often been applied to labor and employment law, which is heavily statute based. The broad principles of constitutional and international law should be used to restore the debates about the free speech rights of public employee whistleblowers to a higher plane. The debate about protecting public employees through legislation inevitably leads to questions of whether government officials can be trusted to fully protect whistleblowers who may report their wrongdoing. In this way, the issue of whistleblower protection may present a classic public choice problem.¹⁵⁴

In the end, *Garcetti v. Ceballos* has some unique facts that take it out of the realm of a typical whistleblower case. Ceballos was a deputy district attorney, which brings with it certain other obligations to speak out. Perhaps a response from the organized bar is appropriate to deal

152. See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 285-89 (1994).

153. *Id.* at 59-60.

154. For more information on public choice problems, see DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

with issues that are unique to attorneys. In any case, the principles that underlie attorney ethics also contribute to the constitutional value of whistleblower speech, in that it is high value speech that challenges existing power structures. Appealing to the lawyer as a public citizen, this seems to be a matter where codes of professional conduct can deal with retaliation.¹⁵⁵

Despite the special case of lawyers and prosecutors, courts should get away from the categorical approach that marks *Garcetti v. Ceballos*. The decision carves out a particular category of public employees whose “official duties” take away their protection as constitutional persons under the First Amendment. Advocates for public employee rights thus should not place all their eggs in the statutory basket, because legislation offers hollow hope for the protection of public employee citizens who report wrongdoing.

155. It should be noted here that no provision of the law governing lawyers specifically prohibits retaliation against a subordinate for reporting misconduct to state bar authorities. In California, for example, the most analogous Rule of Professional Conduct is the one prohibiting bias and retaliation on the basis of race, gender, and other categories. See CAL. RULES OF PROF'L CONDUCT R. 2-400 (2008). This provision would clearly not apply in Ceballos' case, so his superiors would be unlikely to face any bar discipline even if they were found by a tribunal to have retaliated against him for his complaints.