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The Supreme Court's Antiretaliation Principle

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ARTICLES

THE SUPREME COURT'S ANTIRETALIATION PRINCIPLE

Richard Moberly[†]

ABSTRACT

In five cases issued during the last five years, the Supreme Court interpreted statutory antiretaliation provisions broadly to protect employees who report illegal employer conduct. These decisions conflict with the common understanding of the Court as pro-employer and judicially conservative. In a sixth retaliation decision during this time, however, the Court interpreted constitutional antiretaliation protection narrowly; an act that fits with the Court's pro-employer image but diverges from the antiretaliation 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 "Antiretaliation Principle." This Principle advances the notion that protecting employees from retaliation will enhance the enforcement of the nation's laws. Interestingly, although the Court has used the Antiretaliation Principle for a half-century to strengthen statutory protections against employer retaliation, it also has demonstrated consistently that it considers the Antiretaliation Principle primarily a statutory, rather than constitutional, norm.

The Antiretaliation Principle explains the Court's recent cases and provides a reasoned and consistent standard against which they can

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be evaluated. Furthermore, the Supreme Court's Antiretaliation Principle provides important lessons for lower courts as they confront the need to protect whistleblowing employees from employer retaliation.

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INTRODUCTION

In each of five recent cases involving statutory-based employee retaliation claims, the Supreme Court has upheld the employee's claim and expanded protections against employer retaliation.¹ A sixth employment retaliation case, however, which was based on an alleged violation of an employee's First Amendment rights, reached a dramatically different result. In *Garcetti v. Ceballos*,² the Court found in favor of the employer and severely restricted constitutional antiretaliation protection.³

¹ See *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 852–53 (2009) (interpreting Title VII of the Civil Rights Act of 1964); *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (interpreting 42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1943 (2008) (interpreting the Age Discrimination in Employment Act of 1967); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56–57 (2006) (interpreting Title VII of the Civil Rights Act of 1964); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (interpreting Title IX of the Education Amendments of 1972).

² 547 U.S. 410 (2006).

³ See *id.* at 426 (holding that the First Amendment did not protect government employees who speak about matters of public concern if the employee's statements were made pursuant to

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 over the past decade.⁴ On the other hand, the Court's *Garcetti* opinion significantly narrowed government employees' protection when they blow the whistle on employer misconduct,⁵ perhaps indicating a deeper resistance to retaliation protection. Moreover, as explained in more detail below, taken together, the Court's opinions appear untethered to any consistent judicial philosophy, often confounding commentators.⁶

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 "Antiretaliation Principle." The Antiretaliation 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

his professional duties).

⁴ See, e.g., Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 283–84 (2009) (noting that the Roberts Court has issued several decisions undercutting an employee's ability to bring employment discrimination claims in federal court); Scott A. 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) ("[T]he Rehnquist Court[had a] general pattern of favoring plaintiffs in race and sex-based employment discrimination cases, while being decidedly pro-defendant in the parallel context of disability-related claims."); Jonathan R. Harkavy, *Supreme Court of the United States Employment Law Commentary 2007 Term*, at 2 (Oct. 12, 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282160 (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"); Marcia Coyle, *Term's Five Key Bias Decisions Were Mixed*, NAT'L L.J. (July 6, 2009), 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" (internal quotation marks omitted)). 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. 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.").

⁵ See *Garcetti*, 547 U.S. at 426 ("We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.").

⁶ See discussion *infra* Part II.C.

nation's laws.⁷ 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 interests against the employee's interests.⁸ In retaliation cases, however, the Supreme Court uses the Antiretaliation Principle to also consider *society's* interest in effective enforcement of the laws—an interest the Court believes can be advanced through strong antiretaliation protection for employees.⁹ For the past fifty years, the Court applied this Principle consistently in statutory

⁷ Commentators have provided numerous other rationales for antiretaliation 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 (1996) (“[T]he 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 (2006), www.corruption.unam.mx/documentos/ponencias/C_Vaughn.pdf (describing four separate justifications for protecting whistleblowers).

⁸ See, e.g., *Engquist v. Or. Dep't of Agric.*, 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, 793–809 (1998) (balancing various employer and employee interests in creating vicarious liability rules for supervisors under Title VII, but also providing for employer affirmative defenses); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206–07 (1991) (narrowly interpreting Title VII's bona fide occupational qualification defense using a test that balances only an employee's rights against an employer's business needs, and finding that the interests of a pregnant worker's unborn children are not business needs); *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989) (noting that Title VII strikes a “delicate balance between employee and employer rights”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) (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 the NLRB'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 of 1990 § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2006) (balancing reasonable accommodation of an employee's disability against any undue hardship to the employer).

⁹ See discussion *infra* Part I.

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 had never been examined through the organizing lens of the Antiretaliation 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,¹⁰ the First Amendment,¹¹ or preemption.¹² Part I 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 on the Antiretaliation 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 Antiretaliation Principle by enhancing the enforcement of law? As this Part explains, in the recent statutory cases, the Court furthered the Antiretaliation Principle by privileging it over other norms that many would have thought sacrosanct to this Court. By contrast, although the lone constitutional case explicitly references the Antiretaliation 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 Antiretaliation Principle has significant ramifications for the future of retaliation law, which I discuss in Part III. First, the Supreme Court granted certiorari in two cases for the 2010–11 Term that will test the boundaries of the Antiretaliation Principle. In *Kasten v. Saint-Gobain Performance Plastics Corp.*,¹³ the Court will examine whether the Fair Labor Standards Act's antiretaliation provision protects employees who file oral as well as written complaints.¹⁴ Furthermore,

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

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

¹² 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 the Supreme Court's analysis of federal preemption of state wrongful-discharge claims under the Labor Management Relations Act).

¹³ 570 F.3d 834 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010).

¹⁴ Petition for Writ of Certiorari at i, *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834 (Jan. 12, 2010), 2010 WL 146471.

*Thompson v. North American Stainless, LP*¹⁵ presents the issue of whether Title VII's antiretaliation provision prohibits an employer from retaliating against a third party who is associated with an employee who engaged in protected conduct.¹⁶ The Court could use the Antiretaliation Principle to broaden antiretaliation protections under these statutes, despite arguments that the statutory language at issue in each case seemingly excludes the employees' claims.¹⁷

Second, respecting the Court's view of the Antiretaliation 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,¹⁸ and the Antiretaliation Principle can help provide some guidance on this complicated issue.¹⁹ 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.²⁰

I. THE PAST: THE SUPREME COURT'S ANTIRETALIATION 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 "Antiretaliation Principle" allows the Court to examine antiretaliation 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.

¹⁵ 567 F.3d 804 (6th Cir. 2009), cert. granted, 130 S. Ct. 3542 (2010).

¹⁶ Petition for Writ of Certiorari at i, *Thompson v. N. Am. Stainless, LP*, No. 09-291 (Sept. 3, 2009), 2010 WL 3501186.

¹⁷ See discussion *infra* Part III.A.

¹⁸ See discussion *infra* Part III.B.

¹⁹ A recent nonretaliation 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 complicate this struggle. See *id.* at 2350 ("To establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision.").

²⁰ See discussion *infra* Part III.B.

Significantly, the Court has applied the Principle in statutory cases differently than it has in First Amendment retaliation cases. In statutory cases, the Court broadly interpreted explicit antiretaliation provisions and implied antiretaliation 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 Antiretaliation Principle's importance in these cases, the Court also suggested that statutes, rather than the Constitution, might be the better source for antiretaliation protection.

A. Statutory Protection

Professor Clyde Summers once noted that labor law's purpose has always been to address the imbalance in bargaining power between employees and employers.²¹ From this perspective, statutory and judicial employment protections exist to protect employees' "primarily non-economic interests in fairness, personal dignity, privacy, and physical integrity."²² These legal protections must be balanced against the employer's countervailing interest in the flexibility and efficiency provided by the at-will-employment rule.²³ In nonretaliation 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.²⁴ Particularly in recent years, however, that balance seems to be weighted towards employer interests in many nonretaliation decisions.²⁵

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

²² *Id.* at 15.

²³ See, e.g., Americans with Disabilities Act of 1990 § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2006) (balancing reasonable accommodation of an employee's disability against any undue hardship to the employer); 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).

²⁴ See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989) (noting that Title VII strikes a "delicate balance between employee and employer rights"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) (discussing how Title VII balances "employee rights and employer prerogatives" by eliminating "certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice"); see also *supra* note 8 (citing cases that discuss Title VII balancing).

²⁵ See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664–65 (2009) (prohibiting employers from engaging in affirmative action in most circumstances, even if the affirmative-action policies were promulgated to avoid disparate-impact lawsuits); *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009) (requiring that plaintiffs who bring disparate-treatment claims under the ADEA must prove, by a preponderance of the evidence, but-for causation); *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2156–57 (2008) (limiting the ability of public employees to invoke the Equal Protection Clause in certain employment discrimination claims);

By contrast, the Court's use of the Antiretaliation Principle in statutory retaliation cases typically has led to enhanced employee protection as compared to other types of employment-law cases. In these retaliation cases, the Court often utilized the Antiretaliation 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 Antiretaliation Principle involved statutes lacking explicit legislative history regarding the purpose of antiretaliation legislation. This legislative silence often required the Supreme Court to explicate this purpose by utilizing the Antiretaliation Principle to justify a broad reading of a statutory antiretaliation provision.²⁶ For example, in the Court's first modern case involving a statutory antiretaliation provision, *Mitchell v. Robert DeMario Jewelry, Inc.*,²⁷ the Court examined section 17 of the Fair Labor Standards Act (FLSA) of

Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2175–78 (2007) (limiting the statute of limitations for Title VII discrimination cases), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5(e)) ("The limitation imposed by the Court [in *Ledbetter*] on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.").

²⁶ The National Labor Relations Act (NLRA) is the rare exception, and even that legislative history is sparse. Congress included an antiretaliation provision in the NLRA, one of the first employment statutes it enacted, to protect employees who had "filed charges or given testimony" related to a violation of the NLRA. 29 U.S.C. § 158(a)(4) (2006); *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 (NLRA)." (footnote omitted)). Congress adopted this antiretaliation 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* 79 CONG. REC. S7676 (1935) (statement of Sen. Robert Wagner) (noting that without an NLRA antiretaliation provision "even though there might be flagrant violations of the provisions of this measure, an employee would not be free to file charges. He would know that the moment the charges were filed he would be discharged."); Matthew W. Finkin, Commentary, *Labor Law by Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155, 171 (1985) (noting that Congress relied on Executive Order 6711 when it adopted "the antiretaliation provision in the enumeration of unfair labor practices under the [NLRA]").

²⁷ 361 U.S. 288 (1960). Twenty-three years before *Robert DeMario Jewelry*, the Supreme Court upheld a provision of the NLRA that prevented another form of retaliation. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34 (1937), the Court upheld section 8 of the NLRA, 29 U.S.C. § 158 (1934), 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.

1938.²⁸ This provision explicitly gave federal courts jurisdiction to enjoin violations of the FLSA's antiretaliation 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.²⁹ Although the FLSA seemed to limit courts' powers to only injunctive relief,³⁰ 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 the statutory purposes," including awarding back pay damages.³¹ The Court based its holding explicitly on the Antiretaliation Principle:

[Congress] 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 [sic] 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.

²⁸ 29 U.S.C. § 217 (1958).

²⁹ Robert DeMario Jewelry, 361 U.S. at 289.

³⁰ See 29 U.S.C. § 217 (1952) (giving the district courts jurisdiction, "for cause shown," to restrain violations of the FLSA's antiretaliation 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").

³¹ Robert DeMario Jewelry, 361 U.S. at 292.

Faced with such alternatives, 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.³²

Thus, in *Robert DeMario Jewlery*, the Court broadly interpreted a statutory antiretaliation provision because it recognized that employees needed strong remedies 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 *Robert DeMario Jewlery*, the Court consistently wove language supporting the Antiretaliation Principle into its interpretations of statutory antiretaliation protections. In *NLRB v. Scrivener*,³³ the first Supreme Court case to use the term "retaliatory discharge,"³⁴ 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 antiretaliation provision at issue seemed to limit its protections to employees who file formal charges or testify at a formal hearing.³⁵ Limiting the statute's protections to a narrow reading of the provision's text, according to the Court, would undermine the Act's purpose of encouraging "all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board."³⁶ 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."³⁷ 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 antiretaliation statutory provisions should be interpreted

³² *Id.* at 292–93 (emphasis added) (citation omitted).

³³ 405 U.S. 117 (1972).

³⁴ See *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 408 (7th Cir. 2007) (Easterbrook, C.J., dissenting in part) (citing *Scrivener*, 405 U.S. 117).

³⁵ *Scrivener*, 405 U.S. at 125 ("We therefore conclude that an employer's discharge of an employee because the employee gave a written sworn statement to a Board field examiner investigating an unfair labor practice charge filed against the employer constitutes a violation of § 8(a)(4) of the National Labor Relations Act."). In *Scrivener*, 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) (2006).

³⁶ *Scrivener*, 405 U.S. at 121 (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967)) (internal quotation marks omitted).

³⁷ *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).

broadly to support the Antiretaliation Principle.³⁸ For example, in *Brock v. Roadway Express, Inc.*,³⁹ the Court recognized the importance of employee reports to detect illegal safety violations in the transportation industry⁴⁰ 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.”⁴¹ Mirroring the “Hobson’s choice” language from *Robert DeMario Jewelry*,⁴² the *Roadway Express* 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.⁴³

Similarly, the Court paid particularly close attention to the role Title VII’s antiretaliation provision plays in enforcing that law and advancing the Act’s goals, even though Title VII’s legislative history

³⁸ *See id.* (“[Section 8(a)(4)] can also be read more broadly. . . . This broad interpretation of § 8(a)(4) accords with the Labor Board’s view entertained for more than 35 years.”).

³⁹ 481 U.S. 252 (1987).

⁴⁰ *Id.* at 258.

⁴¹ *Id.* at 259.

⁴² *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1959).

⁴³ *Roadway Express*, 481 U.S. at 258–59 (emphasis added).

contains little insight into the purposes of its antiretaliation provision. The primary purpose of Title VII's antiretaliation provision, according to the Court in *Robinson v. Shell Oil Co.*,⁴⁴ is to help enforce the law by "[m]aintaining unfettered access to statutory remedial mechanisms."⁴⁵ In *Robinson*, the Court examined whether Title VII protected *former* employees from retaliation.⁴⁶ 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."⁴⁷ Yet, after scrutinizing the term in other parts of Title VII, the Court determined that its meaning was "ambiguous."⁴⁸ To resolve this ambiguity, the Court relied on the Antiretaliation Principle, holding that former employees should be protected from retaliation because the Court did not want to "undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC."⁴⁹

The Court also applied the Antiretaliation Principle by permitting a statutory retaliation claim to proceed even though the statute at issue did not contain *any* antiretaliation language. In *Sullivan v. Little Hunting Park, Inc.*,⁵⁰ the Court held that a statutory antidiscrimination provision, 42 U.S.C. § 1982, contained an *implied* cause of action for retaliation.⁵¹ Section 1982 still 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."⁵² 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.⁵³ 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

⁴⁴ 519 U.S. 337 (1997).

⁴⁵ *Id.* at 346.

⁴⁶ *Id.*

⁴⁷ *Id.* at 341.

⁴⁸ *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.").

⁴⁹ *Id.* at 346.

⁵⁰ 396 U.S. 229 (1969).

⁵¹ *Id.* at 237 ("A narrow construction of language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived.").

⁵² 42 U.S.C. § 1982 (2006).

⁵³ *See Sullivan*, 396 U.S. at 234–35, 237.

sanction would give impetus to the perpetuation of racial restrictions on property.”⁵⁴ In other words, the Court found that enforcing § 1982 meant providing additional protection from retaliation, even if the statute itself did not contain any explicit antiretaliation protection.

The outcomes of retaliation cases also demonstrate the Court’s recognition of the Antiretaliation 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 allow a broad range of individuals to bring retaliation claims, including third parties who report statutory violations,⁵⁵ former employees,⁵⁶ at-will employees,⁵⁷ elected union officials against their union,⁵⁸ and illegal aliens.⁵⁹ Moreover, the Court indicated that these statutes provide a wide range of remedies⁶⁰ to victims of a wide range of retaliatory actions by employers.⁶¹ 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.⁶²

⁵⁴ *Id.* at 237.

⁵⁵ *See id.* (holding that a third party enjoyed retaliation protection when reporting 42 U.S.C. § 1982 violations).

⁵⁶ *See* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that former employees were protected under Title VII’s antiretaliation provision).

⁵⁷ *See* *Haddle v. Garrison*, 525 U.S. 121, 125–27 (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).

⁵⁸ *See* *Sheet Metal Workers’ Int’l Ass’n v. Lynn*, 488 U.S. 347, 355 (1989) (interpreting the Labor-Management Reporting and Disclosure Act of 1959).

⁵⁹ *See* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895–96 (1984) (holding that an employer’s reporting of undocumented alien employees to law enforcement authorities was an unfair labor practice under the National Labor Relations Act when done in retaliation for the employees’ participation in union activities).

⁶⁰ *See* *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258–59 (1987) (approving the Department of Labor’s decision to order temporary reinstatement with backpay as a remedy for retaliation); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 296 (1960) (finding that the Fair Labor Standards Act of 1938 gave courts the power to award backpay damages in addition to ordering injunctive relief). *But see* *Sure-Tan*, 467 U.S. at 902–05 (restricting the backpay and reinstatement remedies for illegal aliens).

⁶¹ *See* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (holding that Title VII’s antiretaliation provision applies outside of the workplace and prohibits any employer action that “could well dissuade a reasonable worker from making or supporting a charge of discrimination”); *Haddle*, 525 U.S. at 125–27 (prohibiting employers from firing at-will employees in retaliation for their testifying in federal proceedings); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 744 (1983) (allowing courts to enjoin employers from prosecuting “baseless” lawsuits that are designed to retaliate against employees who are exercising their rights under the National Labor Relations Act).

⁶² *See* *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994) (holding that the Railway Labor Act does not preempt state wrongful-discharge torts); *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (holding that section 210(a) of the Energy Reorganization Act does not preempt an employee’s intentional infliction of emotional distress claim); *Lingle v. Norge Div.*

A few counterexamples exist in which the Court did not recognize the Antiretaliation 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*⁶³ 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 that complaint.⁶⁴ In the case's primary holding, the Supreme Court found in favor of the employer because the plaintiff did not engage in protected activity.⁶⁵ According to the Court, "no reasonable person" could have believed that the alleged sexual harassment about which the plaintiff complained violated Title VII because the conduct in question was a single instance of behavior that could not have violated the law.⁶⁶ After *Breeden*, courts consistently adopted the standard that an employee must have a "reasonable belief" in the illegality of an employer's action in order to be protected from retaliation.⁶⁷

As applied by the Court in *Breeden*, this standard may not fully advance the goals of the Antiretaliation Principle. Indeed, the *Breeden* 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 "extremely

of *Magic Chef, Inc.*, 486 U.S. 399, 412–13 (1988) (holding that section 301 of the Labor Management Relations Act of 1947 did not preempt an employee's state tort remedy for wrongful discharge). *But see* *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (holding that section 514(a) of the Employee Retirement Income Security Act of 1974 expressly preempted employees' state common-law claims of wrongful discharge).

⁶³ 532 U.S. 268 (2001) (per curiam).

⁶⁴ *Id.* at 269–70.

⁶⁵ *Id.* at 270–73.

⁶⁶ *Id.* at 271. The Court also found that the plaintiff could not prove causation—that any protected activity caused an adverse employment action. *Id.* at 272–73. In doing so, the Court relied exclusively on various factual showings regarding the timing of the alleged protected activity and the adverse action. 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 its decision. *Id.*

⁶⁷ 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 after *Breeden*, all of the U.S. Circuit Courts of Appeals have adopted the objectively reasonable standard when adjudicating Title VII antiretaliation cases). Courts also use the "reasonable belief" standard for other statutes, such as Title IX and Title VI, even though the origin of the objectively reasonable standard is rooted in Title VII's unique statutory language. See Brake, *supra* note 7, at 83.

serious.”⁶⁸ This sexual-harassment jurisprudence requires “severe or pervasive” employer action that alters the terms and conditions of employment,⁶⁹ a standard derived from the Court’s previous balancing of employer and employee interests.⁷⁰ Unlike the other retaliation cases mentioned above, the *Breedon* Court never discussed whether its holding would promote better compliance with the law.⁷¹

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. This alternate course is supported by Title VII’s language, which provides protection only if an employee opposes employment practices that are “made an unlawful employment practice by [Title VII.]”⁷² 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 the employer’s conduct was illegal.⁷³ Moreover, several “employee friendly” retaliation statutes have explicitly adopted the “reasonable belief” standard articulated in *Breedon*, and many would consider that to be a sensible requirement for protection from retaliation, assuming the standard is appropriately applied.⁷⁴ In *Breedon*, however, the Court adopted this standard without examining

⁶⁸ See *Breedon*, 532 U.S. at 270–71 (citing *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998)); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

⁶⁹ See, e.g., *Meritor Sav. Bank*, 477 U.S. at 67.

⁷⁰ See, e.g., *Faragher*, 524 U.S. at 793–808 (balancing various employer and employee interests to create a rule that makes an employer vicariously liable for a supervisor’s actionable discrimination, while still providing the employer with affirmative defenses); *Oncale*, 523 U.S. at 82 (asserting that same-sex sexual-harassment claims would not eviscerate Title VII because “[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 Title VII sexual-harassment standard “takes a middle path”).

⁷¹ *Breedon* likely does not represent a serious deviation from the Antiretaliation Principle. One group of commentators believe 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.” MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 160 (3d ed. 2005).

⁷² Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2006); see also Rosenthal, *supra* note 67, at 1133 (“[T]he statutory language indicates that the activity the employee opposes must violate Title VII . . .”).

⁷³ See, e.g., *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975) (requiring the plaintiff to show that the employer had engaged in an unlawful act under Title VII); Rosenthal, *supra* note 67, at 1140–41 (“[T]he Court’s language [in *Breedon*] suggested that perhaps it would require an actual [Title VII] violation, as the statute’s language requires.”).

⁷⁴ See, e.g., Consumer Product Safety Improvement Act of 2008 § 219, 15 U.S.C.A. § 2087(a)(1) (West 2009 & Supp. 2010); Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A(a)(1) (2006); see also discussion *infra* Part III.B.

its effect on the goal of antiretaliation protection: to increase compliance with the law. Moreover, the application of the standard in *Breeden* may have encouraged subsequent courts to place themselves in the position of the employee and assume too much legal knowledge, thereby inappropriately scrutinizing the employee's whistleblowing complaint.⁷⁵ In Part III, this Article addresses how the Antiretaliation Principle could better inform the application of *Breeden*'s reasonable person standard.

The Court also has read other statutory antiretaliation provisions more narrowly than the Antiretaliation Principle might have required. In *Graham County Soil and Water Conservation District v. United States ex rel. Wilson (Graham County I)*,⁷⁶ for example, the Court held that the statute of limitations for the retaliation provision of the False Claims Act⁷⁷ ("FCA") should be based on 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.⁷⁸

The Court recognized that the limitations provision was "ambiguous," but ignored the Antiretaliation Principle.⁷⁹ 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 conduct.⁸⁰ As the dissent noted, the Court's holding might undermine the Antiretaliation Principle by leaving some whistleblowers at the mercy of state statutes of limitations that likely are shorter than the FCA's six-year limitations period.⁸¹ Privileging the Antiretaliation Principle over other canons of statutory construction, as the Court did in the five recent statutory retaliation cases,⁸² could have led to stronger retaliation protection—the outcome advocated by the dissent.⁸³

⁷⁵ See discussion *infra* Part III.B (providing examples of lower courts inappropriately applying *Breeden*'s reasonable-belief standard).

⁷⁶ 545 U.S. 409 (2005).

⁷⁷ 31 U.S.C. § 3730(h) (2006).

⁷⁸ *Graham Cnty. I*, 545 U.S. at 422.

⁷⁹ *Id.* at 415–17.

⁸⁰ *Id.* at 418–19.

⁸¹ See *id.* at 427–28 (Breyer, J., dissenting).

⁸² See discussion *infra* Part II.C.

⁸³ See *Graham Cnty. I*, 545 U.S. at 427–28 (Breyer, J., dissenting) ("I would read the statute to do what the statute says Congress wanted: to provide a relatively long, single, uniform limitations period that, in practice, seems to protect the many real potential plaintiffs, such as relator, who will otherwise find themselves shut out of court."). Similarly, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Court narrowly read the Foreign Sovereign Immunities Act to exclude a whistleblower's retaliation claim. However, the Court never examined or mentioned the Antiretaliation Principle. *Id.* at 362–63. Instead of focusing on whistleblower issues, the

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.⁸⁴ Although *Graham County II* 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 antiretaliation protection.⁸⁵ 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.⁸⁶ Moreover, even in *Graham County II*, the Court actually reinforced the core law-enforcement tenet of the Antiretaliation 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, which would increase illegal fraud.⁸⁷ 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.⁸⁸

Taken together, these few "limiting" cases may nibble around the edges of the Antiretaliation Principle. They do not, however, undermine the Principle's power when explaining the balance of Supreme Court retaliation jurisprudence and its broad recognition of the importance of antiretaliation protection. During the last fifty years, the Court's retaliation jurisprudence involving statutory cases sends a clear message: employees play an important role in enforcing

Court's analysis focused on whether the alleged retaliatory action was "commercial" or conducted pursuant to the police power of a foreign sovereign nation. *Id.* at 360–63.

⁸⁴ See *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson (Graham County II)*, 130 S. Ct. 1396, 1400 (2010) ("The question before us is whether the reference to 'administrative' reports, audits, and investigations in that provision encompasses disclosures made in state and local sources as well as federal sources. We hold that it does.")

⁸⁵ See, e.g., *McAllan v. Von Essen*, 517 F. Supp. 2d 672, 685–86 (S.D.N.Y. 2007) (finding that the 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 action under the False Claims Act, as required by the FCA's retaliation provision).

⁸⁶ 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 II*, 130 S. Ct. at 1406 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)) (internal quotation marks omitted).

⁸⁷ *Id.* at 1410–11.

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

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 Antiretaliation Principle. Although the Antiretaliation 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. Board of Education*,⁸⁹ 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.⁹⁰ As recently put by the Court, "So 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."⁹¹ This "public concern" test provides potentially broader protection than the Antiretaliation Principle's "law enforcement" focus because protected employee speech may involve a matter of public concern, but not any violation of the law.⁹² 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 Antiretaliation 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 a school district from discharging a teacher for his public comments about school funding.⁹³ The Court protected the teacher from retaliation, in part, because

⁸⁹ 391 U.S. 563 (1968).

⁹⁰ *See id.* at 568 ("To the extent that the [lower court's] opinion may be read to suggest that [employees] may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of [their workplaces], it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.").

⁹¹ *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

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

⁹³ *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.").

[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 operation 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.⁹⁴

Similarly, in *Waters v. Churchill*,⁹⁵ the Court recognized that “[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”⁹⁶ The Court’s use of the Antiretaliation Principle in First Amendment cases recognizes employees’ special knowledge and protects them from retaliation in order to encourage their disclosure of this information.

Second, the Court’s First Amendment test considers not just the balance between the employee and employer’s rights, but also requires that courts balance society’s right to information as well. For example, in *Pickering*, the Court upheld a First Amendment retaliation claim to protect the “public interest in having free and unhindered debate on matters of public importance.”⁹⁷ In later cases, the Court expressed 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.⁹⁸ The Court’s most explicit articulation of this came in *City of San Diego v. Roe*⁹⁹:

⁹⁴ *Id.* at 572; see also *Garcetti*, 547 U.S. at 421 (noting that many other categories of public employees also have informed and definite opinions about issues related to their job).

⁹⁵ 511 U.S. 661 (1994) (plurality opinion).

⁹⁶ *Id.* at 674 (citing *Pickering*, 391 U.S. at 572); see also *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (noting that public employees have “informed opinions on important public issues”).

⁹⁷ *Pickering*, 391 U.S. at 573.

⁹⁸ See, e.g., *Bd. of Cnty. Comm’rs, Waubunsee Cnty., Kan. 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*, 511 U.S. at 674)); *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’ Int’l Ass’n v. Lynn*, 488 U.S. 347, 355 (1989) (noting the “chilling effect” speech-based retaliation had on nongovernment employees, which the “free speech” provision of the Labor Management Reporting and Disclosure Act aimed to prevent).

⁹⁹ 543 U.S. 77 (2004) (per curiam).

Underlying 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 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.¹⁰⁰

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 Antiretaliation Principle, this constitutional test differs from the Court's typical focus in *nonretaliation* 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 necessarily will relate to employee reports regarding violations of the law.¹⁰¹ In *Givhan v. Western Line Consolidated School District*,¹⁰² a teacher informed her principal in a series of private meetings that the school district's policies were discriminatory.¹⁰³ Because *Givhan* concerned the expression of opinion in private settings, the Court did not discuss the plaintiff's speech under the rubric of "public concern." Several years later, however, in *Connick v. Myers*,¹⁰⁴ the Court recognized that the subject matter of *Givhan*'s statements about illegality clearly involved a matter of public concern.¹⁰⁵

In *Connick*, the Court provided significant insight regarding its views on the First Amendment and retaliation. Specifically, the Court found that an employee's behavior was, for the most part, *not* protected activity because the employee had not spoken on a matter of

¹⁰⁰ *Id.* at 82 (citation omitted).

¹⁰¹ 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. As described in the following text, however, protected topics of "public concern" often relate to employee reports of illegal conduct.

¹⁰² 439 U.S. 410 (1979).

¹⁰³ *Id.* at 411–14.

¹⁰⁴ 461 U.S. 138 (1983).

¹⁰⁵ *Id.* at 146 ("Although the subject matter of Mrs. Givhan's statements were [sic] 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."); *id.* at 148 n.8 (noting that *Givhan*'s protest regarding the school's racially discriminatory policy was "a matter inherently of public concern").

public concern.¹⁰⁶ The Court contrasted the nonprotected speech in *Connick* with examples of speech that would be protected, such as “bring[ing] to light actual or potential wrongdoing or breach[ing the] public trust on the part of [other government employees].”¹⁰⁷ Thus, although the “public concern” test is not solely about law enforcement, the Court certainly has supported the Antiretaliation Principle by providing First Amendment protection to government employees who bring illegalities to light.¹⁰⁸

Particularly in constitutional cases, 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 he or she identified illegal employer conduct. Instead, losing employees claimed protection based on speech unrelated to illegal conduct, including complaints about a school’s teacher dress code,¹⁰⁹ public statements criticizing a federal agency,¹¹⁰ criticisms of a public hospital’s nurse-staffing policy,¹¹¹ and personnel matters.¹¹²

Indeed, before *Garcetti*, whether the Court granted First Amendment protection to employee speech correlated precisely with

¹⁰⁶ *Id.* at 147–49.

¹⁰⁷ *Id.* at 148.

¹⁰⁸ 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. *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 not insulate their communications from employer discipline.”). For a more detailed discussion of this case and explanation of this discrepancy, see *infra* Part II.B–C.

¹⁰⁹ See *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (concerning the petitioner’s divulgence of the substance of a dress code memorandum, which had been distributed by the principal to several teachers, to a local radio station).

¹¹⁰ See *Bush v. Lucas*, 462 U.S. 367, 369 (1983) (“[Petitioner] made a number of public statements, including two televised interviews, that were highly critical of [NASA].”).

¹¹¹ See *Waters v. Churchill*, 511 U.S. 661, 664–66 (1994) (plurality opinion). In *Waters*, the parties disputed the precise speech involved, but the Court found that even if the employee’s version was true, she had conducted the speech in a disruptive manner, thereby “outweigh[ing] whatever First Amendment value it might have had.” *Id.* at 680.

¹¹² See *Connick*, 461 U.S. at 147–48 (1983) (concerning an employee who claimed protection for discussing workplace grievances). One part of *Connick* presents a tough question: Did the Court uphold a retaliatory discharge against a person who had reported illegal conduct? The answer to that question, most likely, is “no.”

In *Connick*, the respondent had distributed a questionnaire to other employees, and the Court found that only one question involved a matter of public concern: whether employees ever felt pressure to work on political campaigns for candidates supported by the government employer. *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 touched upon matters of public concern in only a most limited sense.” *Id.* at 154.

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.¹¹³ In *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*,¹¹⁴ 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.¹¹⁵

As with statutory violations, some of the Supreme Court's First Amendment decisions actually seem to undermine retaliation protection. For example, the Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*¹¹⁶ provides employers with 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.¹¹⁷ Congress has subsequently adopted this affirmative defense in several whistleblower statutes¹¹⁸ and courts often incorporate it when construing other antiretaliation protections.¹¹⁹ 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

¹¹³ *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412–13 (1979).

¹¹⁴ 518 U.S. 668 (1996).

¹¹⁵ *See id.* at 671 (“Umbehr spoke at the Board’s meetings, and wrote critical letters and editorials in local newspapers regarding the County’s landfill user rates, the cost of obtaining official documents from the County, alleged violations by the Board of the Kansas Open Meetings Act, the County’s alleged mismanagement of taxpayers’ money, and other topics.”).

¹¹⁶ 429 U.S. 274 (1977).

¹¹⁷ *See id.* at 287 (“Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a ‘substantial factor’ . . . in the Board’s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.”).

¹¹⁸ *See, e.g.*, Wendell H. Ford Aviation Investment and Reform Act for the 21st Century § 519, 49 U.S.C. § 42121(b)(2)(B)(ii) (2006) (“Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.”); Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A(b)(2)(C) (2006) (adopting the legal burdens of proof in 49 U.S.C. § 42121(b)). Unlike the standard set forth in *Mt. Healthy*, which requires only a “preponderance of the evidence” for a successful affirmative defense, these statutes require employers to prove this affirmative defense by “clear and convincing evidence.”

¹¹⁹ *See* DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 234–35 & n.42 (2d ed. 2004) (discussing how *Mt. Healthy*’s “but-for” standard is applied in other cases involving different antiretaliation statutes).

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 on an employee’s nonprotected conduct.¹²⁰ 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 in had they remained silent.¹²¹ Consistent with the Antiretaliation 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.¹²²

Yet, despite incorporating and identifying aspects of the Antiretaliation 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*,¹²³ the Court prohibited a federal employee from bringing a First Amendment retaliation case for damages against a supervisor.¹²⁴ In that case, the Court recognized the Antiretaliation 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’ freedom of expression.”¹²⁵ 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.¹²⁶

¹²⁰ *Mt. Healthy*, 429 U.S. at 285.

¹²¹ See *id.*

¹²² Of course, fact finders may have an extremely difficult time applying this 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.

¹²³ 462 U.S. 367 (1983).

¹²⁴ *Id.* at 385–90. The Court also noted that the administrative and judicial procedures already in place provided appropriate avenues to redress improper conduct and bring constitutional challenges against agency action. *Id.* Although the employee in *Bush* did not report a violation of the law, the Court’s holding is broad enough that it could prohibit constitutional damages even in the case of federal employees who report illegalities. *Id.* at 388–90.

¹²⁵ *Id.* at 389.

¹²⁶ See *id.* (“In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil

Thus, for the most part, prior to 2006 the Court's First Amendment retaliation cases recognized and advanced the Antiretaliation 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. The Court did, however, impose a limitation on the Principle based on the Court's understanding that statutes, not the Constitution, should drive antiretaliation protection if statutes addressed the issue.

II. THE PRESENT: SIX RETALIATION CASES IN FIVE YEARS

The Supreme Court's six recent retaliation cases build on this extensive jurisprudence and reflect the Court's historical recognition of the Antiretaliation Principle. Five of these decisions explored the extent to which various federal statutes prohibited retaliation in the employment context. Three of these statutory cases involved *implied* protection from retaliation in three different statutes without an express antiretaliation provision.¹²⁷ The other two analyzed the express antiretaliation provision of Title VII of the Civil Rights Act of 1964.¹²⁸

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 support more narrow holdings. In *Garcetti v. Ceballos*, the lone constitutional case among the six recent decisions, the Court explicitly recognized the Principle, but also continued its

service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts. Nor is there any reason to discount Congress' ability to make an evenhanded assessment of the desirability of creating a new remedy for federal employees who have been demoted or discharged for expressing controversial views.”)

¹²⁷ See *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (recognizing implied protection from retaliation under 42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008) (recognizing implied protection from retaliation under the Age Discrimination in Employment Act); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (recognizing implied protection from retaliation under Title IX of the Education Amendments of 1972).

¹²⁸ See *Crawford v. Metro. Gov't*, 129 S. Ct. 846, 849 (2009) (holding that Title VII of the Civil Rights Act of 1964 retaliation protection extends to employees “who speak[] out about discrimination not on [their] own initiative, but in answering questions during an employer's internal investigation”); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (holding that the retaliation-protection provision of Title VII of the Civil Rights Act of 1964 covers all employer actions “that would [be] materially adverse to a reasonable employee or job applicant”).

more limited view of retaliation protections in constitutional cases based on the Court's preference for statutory coverage.¹²⁹

The first two Sections that follow briefly describe these six recent cases and summarize the Court's decisions. The third Section analyzes the cases in light of the Court's historic use of the Antiretaliation Principle.

A. Statutory Protection

Statutory antiretaliation 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.¹³⁰ 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.¹³¹ More rarely, a court will find a statute that does not provide explicit protection nevertheless contains implicit antiretaliation safeguards.¹³² Because of a general judicial reluctance to imply statutory remedies, the Court upheld only one implied retaliation claim prior to 2005—*Sullivan v. Little Hunting Park, Inc.*—and that case did not involve an employee.¹³³ 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 Board of Education*,¹³⁴ involved a claim by a high-school teacher and basketball coach. The plaintiff claimed he had received negative evaluations and was fired from his coaching position because he complained that the girls' basketball team was receiving unequal

¹²⁹ See discussion *infra* Part II.B–C.

¹³⁰ See WESTMAN & MODESITT, *supra* note 119, at 319–20 (compiling statutes with express antiretaliation protections).

¹³¹ See Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 981–83 (2008) (discussing some of the types of employers and employees, as well as the types of conduct, protected by various federal antiretaliation provisions).

¹³² See KOHN, *supra* note 26, at 87–88 (discussing the doctrine of “implied private cause of action” for establishing whistleblower protections in the absence of express statutory provisions).

¹³³ See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that a white property owner had standing to file a 42 U.S.C. § 1982 claim after a homeowners' association retaliated against him for leasing his house to a black man); see also discussion *supra* Part I.A.

¹³⁴ 544 U.S. 167 (2005).

treatment.¹³⁵ The plaintiff asserted his claim of retaliation under Title IX of the Education Amendments of 1972,¹³⁶ which generally prohibits discrimination “on the basis of sex” in federally funded education programs.¹³⁷

The Eleventh Circuit Court of Appeals held that Title IX did not provide a private right of action for retaliation because the statutory language failed to include an express antiretaliation provision.¹³⁸ By contrast, Title VII of the Civil Rights Act of 1964, passed only eight years before Title IX, contains a very specific antiretaliation provision that serves as the model for many modern retaliation protections.¹³⁹ According to the Birmingham Board of Education, Title VII demonstrated that Congress knew how to write a specific antiretaliation provision.¹⁴⁰ The Board further argued that the absence of such a specific provision in Title IX meant that Congress must have purposefully excluded retaliation protection from the statute.¹⁴¹

In a five-to-four decision, the Supreme Court disagreed with the Board, reversed the Eleventh Circuit, and found an implied claim for retaliation in Title IX.¹⁴² 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.”¹⁴³ In other words, the Court found that “retaliation *is* discrimination ‘on the

¹³⁵ *Id.* at 171–72.

¹³⁶ *Id.* at 171.

¹³⁷ 20 U.S.C. § 1681(a) (2006) (“No 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 . . .”).

¹³⁸ *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1338 (11th 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. *Id.* at 1346.

¹³⁹ *See* 42 U.S.C. § 2000e-3(a) (2006) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he 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].”). Other antidiscrimination statutes provide antiretaliation protection with similar provisions based on the language in Title VII. *See, e.g.*, Age Discrimination in Employment Act of 1967 § 4(d), 29 U.S.C. § 623(d) (2006) (using language identical to Title VII to prohibit retaliation against employees who oppose age discrimination); Americans with Disabilities Act of 1990 § 503, 42 U.S.C. § 12203 (2006) (using language identical to Title VII to prohibit retaliation against individuals who oppose discrimination against disabled persons).

¹⁴⁰ *See Jackson*, 544 U.S. at 175 (noting that the Board urged the Court to compare Title IX with Title VII).

¹⁴¹ *Id.*; *see also id.* at 189–90 (Thomas, J., dissenting) (comparing Title IX to Title VII’s explicit antiretaliation provision and asserting that the absence of a specific retaliation provision is “significant”).

¹⁴² *Id.* at 171 (majority opinion). Justice O’Connor authored the majority opinion. *Id.* Justice Thomas filed a dissenting opinion, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy. *Id.* at 184 (Thomas, J., dissenting).

¹⁴³ *Id.* at 175 (majority opinion).

basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."¹⁴⁴

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"¹⁴⁵ because Title IX contains a general prohibition on discrimination, while Title VII provides very specific examples of conduct that constitutes unlawful discrimination.¹⁴⁶ 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."¹⁴⁷

Third, the *Jackson* Court relied on *Sullivan v. Little Hunting Park, Inc.*,¹⁴⁸ a thirty-six-year-old case, as precedent for interpreting a general prohibition on discrimination to include a claim for retaliation.¹⁴⁹ 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,¹⁵⁰ the majority found that "*Sullivan*'s holding was not so limited."¹⁵¹ 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.'"¹⁵² 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*.¹⁵³ Moreover, not only did the Court hold that Title IX includes an implied claim of retaliation, but it also relied on *Sullivan* to find that the retaliation claim protects both the original victims of discrimination as well as a third party (like Coach Jackson) who complains about the original discrimination.¹⁵⁴ As Justice Thomas noted in his dissent, the majority had created "an

¹⁴⁴ *Id.* at 174 (emphasis added).

¹⁴⁵ *Id.* at 175 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283–84, 286–87 (1998)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 396 U.S. 229 (1969).

¹⁴⁹ *Jackson*, 544 U.S. at 176 (stating that because Congress enacted Title IX merely three years after *Sullivan*, that case provides a good context for interpreting the statute).

¹⁵⁰ *Id.* at 194–95 (Thomas, J., dissenting).

¹⁵¹ *Id.* at 176 n.1 (majority opinion).

¹⁵² *Id.* (quoting *Sullivan*, 396 U.S. at 237).

¹⁵³ *Id.* at 176.

¹⁵⁴ *Id.* at 179–80.

entirely new cause of action for a secondary rights holder, beyond the claim of the original rights holder.”¹⁵⁵

In two cases decided in 2008, the Court returned to the issue presented by *Jackson*: whether a general antidiscrimination provision also provides an implied claim of retaliation. The first case, *CBOCS West, Inc. v. Humphries*,¹⁵⁶ 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.’”¹⁵⁷ Like § 1982 in *Sullivan* and Title IX in *Jackson*, § 1981 does not include an explicit antiretaliation provision; rather, the statute generally prohibits discrimination on the basis of race in “mak[ing] and enforc[ing] contracts.”¹⁵⁸ Nevertheless, as in *Sullivan* and *Jackson*, the Supreme Court in *CBOCS West* found an implied claim of retaliation contained in this general language.¹⁵⁹

This time, unlike in *Jackson*, the Court did not debate the meaning of *Sullivan* or whether a general antidiscrimination statute could include specific protection from retaliation.¹⁶⁰ Rather, the Court found that *Jackson* definitively resolved those issues and, therefore, the *CBOCS West* holding rested “in significant part upon principles of *stare decisis*.”¹⁶¹ The fact that the Court previously interpreted § 1981 similarly to § 1982 (at issue in *Sullivan*) only added to the *stare decisis* rationale.¹⁶²

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.¹⁶³ Yet, despite

¹⁵⁵ *Id.* at 194 (Thomas, J., dissenting).

¹⁵⁶ 128 S. Ct. 1951 (2008).

¹⁵⁷ *Id.* at 1954. The employee in *CBOCS West* was dismissed because he had complained to managers that an assistant manager had fired a coworker on the basis of race. *Id.*

¹⁵⁸ 42 U.S.C. § 1981(a) (2006) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts” (emphasis added)).

¹⁵⁹ *CBOCS West*, 128 S. Ct. at 1954, 1959.

¹⁶⁰ The *CBOCS West* Court accepted *Jackson*’s interpretation that *Sullivan* permitted a retaliation claim under § 1982. *Id.* at 1955 (“[T]his Court has made clear that *Sullivan* stands for the proposition that § 1982 encompasses retaliation claims.” (citing *Jackson v. Birmingham Bd. of Educ.* 544 U.S. 167, 176 (2005))). To overcome the defendant’s argument that the text of § 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.” *Id.* at 1958 (“Despite the fact that Title IX does not use the word ‘retaliation,’ the Court held in *Jackson* that the statute’s language encompassed such a claim . . .”).

¹⁶¹ *Id.* at 1955.

¹⁶² See *id.* at 1955–56 (“While the *Sullivan* decision interpreted § 1982, our precedents have long construed §§ 1981 and 1982 similarly.”).

¹⁶³ See, e.g., ALLIANCE FOR JUSTICE, REPORT ON THE NOMINATION OF JOHN G. ROBERTS

these changes to the Court's composition, the Court decided *CBOCS West* with a seven-justice majority that included Roberts and Alito,¹⁶⁴ a larger margin than the five-to-four *Jackson* decision.¹⁶⁵

Moreover, in at least one way, the *CBOCS West* employee-plaintiff had to overcome a stronger argument based on the statutory language of § 1981 than the *Jackson* plaintiff had to address under Title IX. Recent congressional amendments to § 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*¹⁶⁶ that the antidiscrimination language of § 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.”¹⁶⁷ Although *Patterson* did not specifically involve a retaliation claim, various appellate courts have interpreted *Patterson* to preclude retaliation claims under § 1981 because most retaliation victims oppose discriminatory conduct after the formation of the contract, thus taking whistleblowing employees out of § 1981's protective scope.¹⁶⁸ Two years after *Patterson*, Congress passed the

TO THE UNITED STATES SUPREME COURT 3 (2005), available at 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 hour laws, clean air, clean water, and workplace safety protections.”); Editorial, *Judge Alito’s Radical Views*, N.Y. TIMES, Jan. 23, 2006, at A18 (“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.”); Press Release, National Women’s Law Center, Judge Alito’s Record Highly Troubling on Women’s Rights (Oct. 31, 2005), available at <http://www.nwlc.org/press-release/judge-alitos-record-highly-troubling-womens-rights> (“[Alito] has issued decisions making it harder for victims of race and sex discrimination to prove their cases.”); John R. Kroger, *Bench Brawl*, SALON.COM (Oct. 31, 2005, 1:24 PM), 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*, NOMINATIONWATCH.ORG (Sept. 21, 2005, 4:51 PM), http://www.nominationwatch.org/2005/09/more_groups_ann.html (noting labor and union group opposition to Roberts’ confirmation); Michael Scherer, *Why Big Business Hearts John Roberts*, SALON.COM (Aug. 11, 2005, 7:01 PM), http://www.salon.com/news/feature/2005/08/11/roberts_business (discussing that the nomination of John Roberts to the Supreme Court would support the interests of businesses and corporations).

¹⁶⁴ Justice Breyer wrote the majority opinion, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito. *CBOCS W.*, 128 S. Ct. at 1954. Justice Thomas wrote a dissenting opinion that was joined by Justice Scalia. *Id.*

¹⁶⁵ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 169 (2005).

¹⁶⁶ 491 U.S. 164 (1989).

¹⁶⁷ *Id.* at 177 (emphasis added).

¹⁶⁸ See *CBOCS W.*, 128 S. Ct. at 1956–57 (listing the circuit courts of appeals cases that barred retaliation claims under § 1981).

Civil Rights Act of 1991,¹⁶⁹ which explicitly overruled the case by adding a new subsection to § 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.”¹⁷⁰ Notably, the amended provision did not explicitly provide antiretaliation protection.

The absence of antiretaliation 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 Civil Rights Act of 1991, Congress enacted several very specific antiretaliation provisions in other employment statutes, such as the Americans with Disabilities Act of 1990,¹⁷¹ the Family and Medical Leave Act of 1993,¹⁷² and the Uniformed Services Employment and Reemployment Act of 1994.¹⁷³ Then, in 1994, Congress amended the Surface Transportation Assistance Act of 1982 to include explicit antiretaliation protection.¹⁷⁴ In other words, Congress clearly knew how to enact an explicit antiretaliation provision and how to amend an older statute to include one. Congress, however, chose not to include a specific antiretaliation provision in its amendment of § 1981, which could indicate a specific intent to exclude retaliation claims from § 1981’s coverage.

Second, by 1991, the Supreme Court had begun requiring that courts strictly construe statutory language when determining whether an implied right of action existed—a change from the judicial atmosphere in 1972 when Congress passed Title IX. Notably, two years before Congress passed the Civil Rights Act of 1991, which amended § 1981, *Patterson* required a narrow textual reading of § 1981 specifically.¹⁷⁵ More broadly, since 1975 in *Cort v. Ash*,¹⁷⁶ the Court has made it clear that it would focus its statutory interpretation efforts on the literal text, rather than the more permissive pre-*Cort* emphasis on legislative purpose.¹⁷⁷ Thus, even if Congress could have

¹⁶⁹ Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

¹⁷⁰ 42 U.S.C. § 1981(b) (2006).

¹⁷¹ Pub. L. No. 101-336, § 503, 104 Stat. 327, 370 (codified at 42 U.S.C. § 12203(a)–(b) (2006)).

¹⁷² Pub. L. No. 103-3, § 105, 107 Stat. 6, 14 (codified at 29 U.S.C. § 2615 (2006)).

¹⁷³ Pub. L. No. 103-353, § 2(a), 108 Stat. 3149, 3153 (codified at 38 U.S.C. § 4311(b) (2006)).

¹⁷⁴ Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 990 (codified at 49 U.S.C. § 31105 (2006)).

¹⁷⁵ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (noting that § 1981 is “limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts”).

¹⁷⁶ 422 U.S. 66 (1975).

¹⁷⁷ See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION:

had *Sullivan*'s purportedly broad reading of § 1982 on its mind when it passed Title IX in 1972, as the *Jackson* Court concluded,¹⁷⁸ Congress would have known in 1991 that it needed to include explicit language regarding protection from retaliation in its statutes.¹⁷⁹ Thus, the primary statutory-interpretation argument utilized by the Court in *Jackson* held much less power when the *CBOCS West* Court evaluated the changes the Civil Rights Act of 1991 made to § 1981.

The Court dismissed these arguments, however, by pointing to the 1991 Act's legislative history. The Court cited a House Report indicating that the amended provision would provide protection from a long list of employment actions, including retaliation.¹⁸⁰ Moreover, the Court put great emphasis on a footnote in that same Report, which noted that the legislation would restore the right to sue for retaliation. The courts previously had assumed that this right was eliminated under *Patterson*.¹⁸¹ 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*.¹⁸²

The Supreme Court's second implied retaliation case in 2008, *Gomez-Perez v. Potter*,¹⁸³ involved a provision of the Age Discrimination in Employment Act of 1967¹⁸⁴ (ADEA) that addresses age discrimination against federal employees (as opposed to private-sector employees).¹⁸⁵ Section 15(a) of the ADEA, codified at 29 U.S.C. § 633a(a), states that all employment decisions affecting

STATUTES AND THE CREATION OF PUBLIC POLICY 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 W., Inc.*, 474 F.3d 387, 410 (7th Cir. 2007) (Easterbrook, C.J., dissenting in part) ("[S]ince the 1970s the Court has lashed interpretation more closely to statutory text.").

¹⁷⁸ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176–77 (2005).

¹⁷⁹ As Chief Judge Easterbrook noted in his partial dissent in the Seventh 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." *CBOCS W.*, 474 F.3d at 411 (Easterbrook, C.J., dissenting in part).

¹⁸⁰ *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1957 (2008) (citing H.R. REP. NO. 102-40, pt. 1, at 92–93 (1991)).

¹⁸¹ *Id.* (citing H.R. REP. NO. 102-40, pt. 1, at 92 n.92 (1991)).

¹⁸² *Id.* at 1959. Adding to the anomalous nature of this conclusion, the Court recently held that, when Congress amended Title VII in the Civil Rights Act of 1991 to benefit plaintiffs—in an express effort to adjust the "burden of proof" standard that the Court had adopted for Title VII cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)—Congress intentionally did not amend the "burden of proof" standard for ADEA cases. *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2349 (2009).

¹⁸³ 128 S. Ct. 1931 (2008).

¹⁸⁴ 29 U.S.C. §§ 621–634 (2006).

¹⁸⁵ 29 U.S.C. § 633a.

federal employees or applicants who are at least forty years of age “shall be made free from any discrimination based on age.”¹⁸⁶ As with the other implied retaliation cases addressed thus far, the *Gomez-Perez* Court decided that this general prohibition on discrimination included a claim for retaliation.¹⁸⁷ The majority in *Gomez-Perez* conducted a relatively cursory analysis: the ADEA contains general language banning discrimination based on age; age is a protected category similar to race and sex; the Court has already implied retaliation claims from general language banning discrimination based on race and sex (in *Sullivan* and *Jackson*, respectively); therefore, a retaliation claim should be implied from the ADEA’s general antidiscriminatory language.¹⁸⁸

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 partially revisits the same issue the § 1981 retaliation claim in *CBOCS West* confronted regarding the Civil Rights Act of 1991. That is, how should the Court interpret congressional silence at a time when Congress included clear antiretaliation provisions in other statutes?¹⁸⁹ In *Gomez-Perez*, however, the circumstances surrounding congressional passage of the federal-government sections of the ADEA presented an even greater challenge to finding an implied claim for retaliation than the Court faced in either *Jackson* or *CBOCS West*.¹⁹⁰

When Congress passed the ADEA in 1967, the Act applied only to the private sector and included both an antidiscrimination provision and a separate antiretaliation provision.¹⁹¹ Seven years later, Congress

¹⁸⁶ 29 U.S.C. § 633a(a).

¹⁸⁷ *Gomez-Perez*, 128 S. Ct. at 1936. The plaintiff in *Gomez-Perez* claimed that her employer had retaliated against her for filing an age discrimination complaint. *Id.* at 1935.

¹⁸⁸ *Id.* at 1937 (“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* [(‘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.” (citation omitted)). Justice Alito wrote the six-to-three decision. *Id.* at 1934. Chief Justice Roberts wrote a dissenting opinion joined in part by Justices Thomas and Scalia. *Id.* at 1943 (Roberts, C.J., dissenting). Justice Thomas wrote a dissenting opinion joined by Justice Scalia. *Id.* at 1951 (Thomas, J., dissenting).

¹⁸⁹ See *supra* text accompanying notes 171–79.

¹⁹⁰ See Charles A. 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 antiretaliation provision and because *Gomez-Perez* presented a “weaker *stare decisis* argument”).

¹⁹¹ Pub. L. No. 90-202, § 4, 81 Stat. 602, 603 (codified as amended at 29 U.S.C. § 623 (2006)). Section 4(a)(1) made it unlawful for an employer to “discriminate against any

passed the Fair Labor Standards Amendments of 1974,¹⁹² which added § 633a to the ADEA to prevent age discrimination against most executive-branch employees.¹⁹³ Congress, however, did not include a specific antiretaliation provision in the amendment covering federal workers—a distinct difference between the amendment and the original ADEA applicable to the private sector. Moreover, Congress was clearly aware of the ADEA's original provisions protecting private-sector employees from discrimination and, separately, retaliation. As Chief Justice Roberts noted in his *Gomez-Perez* dissent,¹⁹⁴ the amendments made these separate private-sector provisions applicable to states and their political subdivisions, but Congress independently enacted § 633a (without a distinct antiretaliation provision) to apply to the federal government.¹⁹⁵ A further piece of evidence from the 1974 FLSA Amendments suggests that Congress deliberately chose not to include a separate antiretaliation 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 it, and its antiretaliation provision, to federal employees.¹⁹⁶ 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.”¹⁹⁷

The majority, however, disagreed with the Chief Justice regarding the meaning of the dissimilar structure utilized by the private-sector

individual . . . because of such individual's age.” *Id.* § 4(a)(1) (codified at 29 U.S.C. § 623(a)(1)). Section 4(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].” *Id.* § 4(d) (codified at 29 U.S.C. § 623(d)).

¹⁹² Pub. L. No. 93-259, § 15(a), 88 Stat. 55, 74–75 (codified at 29 U.S.C. § 633a (2006)).

¹⁹³ *Gomez-Perez*, 128 S. Ct. at 1944 (Roberts, C.J., dissenting).

¹⁹⁴ *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.”). The Chief Justice cited section 28(a)(4) of the Act, 29 U.S.C. § 630(b) (2006), which broadened the definition of “employer” to include states and their political subdivisions. *Id.*

¹⁹⁵ *Id.* at 1947. As Chief Justice Roberts 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).

¹⁹⁶ *Id.* at 1947.

¹⁹⁷ *Id.*

and the federal-sector provisions. In response to his criticism, the majority (as it did in *CBOCS West*) relied heavily on *Sullivan*. They 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.”¹⁹⁸ 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*.”¹⁹⁹

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

The year after *Jackson*, the Supreme Court turned to the explicit antiretaliation provision of Title VII. In *Burlington Northern & Santa Fe Railway Co. v. White*,²⁰⁰ the Court had to determine the types of adverse employment actions that qualify as employer retaliation.²⁰¹ 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 antidiscrimination provision,²⁰² *Burlington Northern* emphasized that protection from discrimination *differs* from protection from retaliation.²⁰³ 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. First, her employer reassigned her to a position with less prestige and more arduous responsibilities. Then, it suspended her without pay for thirty-seven days (although the company later reinstated her with back pay).²⁰⁴ To evaluate whether these actions

¹⁹⁸ *Id.* at 1941 (majority opinion); *see also id.* at 1942 n.6 (using the same rationale to discredit the Respondent’s argument that the explicit antiretaliation provision in the Fair Labor Standards Act of 1938 prohibited the existence of an implicit antiretaliation provision in the ADEA).

¹⁹⁹ *Id.* at 1941.

²⁰⁰ 548 U.S. 53 (2006).

²⁰¹ *Id.* at 61 (“[We must] decide whether Title VII’s antiretaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace. And we must characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision’s scope.”).

²⁰² *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (“We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.”).

²⁰³ *Burlington N.*, 548 U.S. at 62–64 (arguing that there is a difference between “discrimination” and “retaliation”).

²⁰⁴ *Id.* at 57–59.

violated Title VII's antiretaliation provision, the Court had to determine the scope of the statute's provision barring an employer from "discriminating against" an employee for opposing any practice made unlawful by Title VII, or for participating in a Title VII proceeding or investigation.²⁰⁵

Several courts of appeals had determined that Title VII's antiretaliation provision should be read to prohibit only adverse actions related to employment, which would be the same standard that courts apply to claims made under Title VII's antidiscrimination provision.²⁰⁶ Others had taken an even more restrictive approach by limiting actionable retaliation to "ultimate employment" decisions, "such as hiring, granting leave, discharging, promoting, and compensating."²⁰⁷ The Supreme Court, however, interpreted Title VII broadly, holding that it prohibited not only employment-related retaliation, but also actions unrelated to employment that could have an impact on an employee's willingness to report discrimination.²⁰⁸

The Court based its holding on the language and the purpose of Title VII's antiretaliation provision.²⁰⁹ First, the language of Title VII's antiretaliation provision differs from its antidiscrimination provision.²¹⁰ 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.²¹¹ The antiretaliation provision, however, does not have

²⁰⁵ *Id.* at 56–57.

²⁰⁶ *See id.* at 60 (citing *White v. Burlington N. & Santa Fe Ry., Co.*, 364 F.3d 789 (6th Cir. 2004); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)).

²⁰⁷ *Id.* (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (internal quotation marks omitted)); *see also Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

²⁰⁸ *Id.* at 67–68. The Court decided in favor of the employee with a nine-to-zero vote. Justice Breyer wrote the majority opinion, which was joined by seven other Justices. *Id.* at 55. Justice Alito filed an opinion concurring in the judgment only. *Id.* at 73 (Alito, J., concurring in the judgment).

²⁰⁹ *Id.* at 62–63 (majority opinion).

²¹⁰ *Id.* at 61–62.

²¹¹ 42 U.S.C. § 2000e-2(a) (2006). 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).

such limiting language. It prohibits an employer generally from “discriminat[ing]” against employees or applicants in retaliation.²¹² Second, the Court found that Congress intended these linguistic differences to make a “legal difference” because the two provisions had different purposes as well.²¹³ Because the “substantive” antidiscrimination provision seeks to prevent discrimination in the workplace, Congress needed only to prohibit acts related to employment. The antiretaliation provision, however, aims to prevent discrimination by blocking an employer from interfering with any effort by an employee to enforce the statute’s substantive antidiscrimination objectives.²¹⁴ To support this objective, Title VII necessarily must prevent a broader range of employer actions because of the various nonemployment ways in which an employer could deter employees from “[m]aintaining unfettered access to statutory remedial mechanisms.”²¹⁵

Finally, the Court noted that, although the actionable retaliatory conduct was broader than discriminatory conduct, it was not limitless. The Court stated, “it is important to separate significant from trivial harms.”²¹⁶ Thus, Title VII’s antiretaliation provision covers all employer actions “that would have been materially adverse to a reasonable employee or job applicant.”²¹⁷ By “materially adverse,” the Court meant any employer action that “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”²¹⁸ This objective standard recognizes that “petty slights, minor annoyances, and simple lack of good manners” are not actionable because they are unlikely to deter employees from complaining to the EEOC about discrimination.²¹⁹

Using this standard, the Court found that both the retaliatory reassignment and the unpaid suspension imposed by the employer in

²¹² 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 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).

²¹³ *Burlington N.*, 544 U.S. at 63.

²¹⁴ *Id.*

²¹⁵ *Id.* at 64 (alteration in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (internal quotation marks omitted).

²¹⁶ *Id.* at 68.

²¹⁷ *Id.* at 57.

²¹⁸ *Id.*

²¹⁹ *Id.* at 68.

this case violated Title VII because these actions would likely dissuade an employee from bringing a charge of discrimination.²²⁰

Interestingly, as Justice Alito noted, the Court need not have issued such a broad holding in order to find the employer's conduct in violation of Title VII.²²¹ According to Justice Alito, the standards used in various appellate courts, which limit antiretaliation protection to "adverse employment actions," would still have allowed the Court to declare that the employer's conduct violated Title VII.²²² 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, also involved Title VII and its explicit antiretaliation provision. *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee*²²³ considered whether Title VII's retaliation provision protected an employee who participated in an employer's internal investigation of a sexual-harassment complaint.²²⁴ The employee claimed that she was fired for responding to her employer's questions and reporting that another employee had engaged in sexual harassment.²²⁵

Title VII's antiretaliation provision protects two types of conduct. First, it prohibits retaliation against an employee who "has opposed" an employer's violation of Title VII.²²⁶ 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]."²²⁷ 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.²²⁸

The Court evaluated the claim only under the opposition clause and determined that the employee's actions during the investigation constituted protected conduct.²²⁹ The Sixth Circuit viewed the plaintiff's conduct as insufficient because it believed Title VII required "active, consistent 'opposing' activities to

²²⁰ *Id.* at 70–73.

²²¹ *Id.* at 79–80 (Alito, J., concurring in the judgment).

²²² *See id.*

²²³ 129 S. Ct. 846 (2009).

²²⁴ *Id.* at 849.

²²⁵ *Id.*

²²⁶ 42 U.S.C. § 2000e-3(a) (2006).

²²⁷ *Id.*

²²⁸ *Crawford*, 129 S. Ct. at 850.

²²⁹ *Id.* at 853.

warrant . . . protection against retaliation.”²³⁰ Relying primarily on the “ordinary” dictionary meaning of the term “oppose,” the Supreme Court disagreed.²³¹ As with the Court’s other recent retaliation cases, this conclusion is debatable; for example, the circuit courts were split regarding the extent to which Title VII’s antiretaliation provision requires “active” opposition.²³² Moreover, the Court could have chosen numerous other definitions of “oppose,” including ones that require much more active and overt resistance.²³³

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*²³⁴ and *Faragher v. City of Boca Raton*,²³⁵ which encouraged employer internal investigations of sexual-harassment claims.²³⁶ 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.²³⁷

²³⁰ *Id.* at 851 (omission in original) (quoting *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn.*, 211 Fed. App’x 373, 376 (6th Cir. 2006)) (internal quotations omitted).

²³¹ *Id.* at 850 (“RESIST frequently implies more active striving than OPPOSE.” (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1710 (2d ed. 1957)) (internal quotation marks omitted)).

²³² Compare *Crawford*, 211 Fed. App’x at 376 (requiring active opposition to invoke Title VII antiretaliation protections), and *McNorton v. Ga. Dep’t of Transp.*, 619 F. Supp. 2d 1360, 1376 (N.D. Ga. 2007) (holding that an employee’s cooperation with an internal investigation did not meet the required definition of “opposition conduct” for Title VII purposes), with *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (upholding Title VII antiretaliation protections for an employee who engaged in “passive” opposition to discrimination).

²³³ See, e.g., *McNorton*, 619 F. Supp. 2d at 1375 (noting recent dictionary definitions that define oppose with active terms); Brief for Respondent at 27, *Crawford*, 129 S. Ct. 846 (No. 06-1595), 2008 WL 2066116 (same).

²³⁴ 524 U.S. 742 (1998).

²³⁵ 524 U.S. 775 (1998).

²³⁶ See, e.g., *Ellerth*, 524 U.S. at 765 (stating that employers could have an affirmative defense to some sexual-harassment claims so long as they can show that they exercised reasonable care to prevent and promptly correct employee sexual harassment, and that the employee unreasonably failed to take advantage of the employer’s preventative or corrective opportunities).

According to the Court in *Crawford*, it was necessary to disavow the Sixth Circuit’s reasoning and holding because failure to do so would result in an impossible Catch-22: on the one hand, an employee could be penalized for responding to an employer’s sexual-harassment inquiries; on the other hand, if the employee failed to respond to those inquiries, then the employer would have an affirmative to defense to any future Title VII claim because the employee had unreasonably failed to take advantage of the employer’s preventative or corrective opportunities. *Crawford*, 129 S. Ct. at 852.

²³⁷ *Id.* at 851 (holding that Title VII’s antiretaliation provision extends to an employee who reports sexual harassment during an employer’s inquiry).

B. First Amendment Protection

In the midst of this series of cases addressing statutory antiretaliation protection, the Court also addressed the breadth of protection the First Amendment provides to government employees. In *Garcetti v. Ceballos*, the Court significantly limited the circumstances in which an employee may claim constitutional protection from retaliation. The five-to-four *Garcetti* majority held that the First Amendment does not protect public employees from discipline related to speech made pursuant to their official duties.²³⁸

The *Garcetti* plaintiff, a deputy district attorney, informed his supervisors in a memo that a sheriff's affidavit that was being relied on in a criminal case, contained serious misrepresentations.²³⁹ After a meeting between the plaintiff and his supervisors about the veracity of the affidavit and the merits of the case, the supervisors decided to proceed with the prosecution over the plaintiff's protests.²⁴⁰ Ultimately, the criminal defendant called the plaintiff as a witness, and he reiterated his misgivings about the sheriff's affidavit.²⁴¹ After the hearing, the plaintiff claimed that the district attorney's office violated his First Amendment rights by retaliating against him for the memo.²⁴²

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.²⁴³ 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."²⁴⁴ As summarized by the Court, its decisions "have sought both to promote the individual and societal interests that are

²³⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Justice Kennedy wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justices Stevens and Breyer each filed a dissent, and Justice Souter filed a third dissent joined by Justices Stevens and Ginsburg. *Id.* at 412.

²³⁹ *Id.* at 413–14.

²⁴⁰ *Id.* at 414.

²⁴¹ *Id.* at 414–15.

²⁴² *Id.* at 415.

²⁴³ *Id.* at 417–19.

²⁴⁴ *Id.* at 419; *see also* *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to 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." (citation omitted)); *United States v. Treasury Emps.*, 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.").

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.”²⁴⁵

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.²⁴⁶ 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.²⁴⁷ “When . . . the employee is simply performing his or her job duties,” the Constitution does not require the same “delicate balancing” that is necessary when a government employee speaks as a private citizen on a matter of public concern.²⁴⁸

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,”²⁴⁹ the Court ultimately asserted that encouraging employees to blow the whistle was not necessarily the Constitution’s job.²⁵⁰ 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.²⁵¹

In dissent, Justice Souter argued for a different sort of balancing, one that placed more emphasis on society’s interest in government employee speech. Although Justice Souter recognized a government employer’s need to manage its workforce, he asserted that society’s interest “in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation of policy.”²⁵² 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

²⁴⁵ *Garcetti*, 547 U.S. at 420.

²⁴⁶ *Id.* at 421.

²⁴⁷ *Id.* at 422–23.

²⁴⁸ *Id.* at 423.

²⁴⁹ *Id.* at 425.

²⁵⁰ *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.”).

²⁵¹ *Id.* at 424–25.

²⁵² *Id.* at 428 (Souter, J., dissenting).

protection.²⁵³ Justice Souter defined matters of “unusual importance” to include “official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.”²⁵⁴

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.²⁵⁵

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.²⁵⁶ 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.²⁵⁷

C. The Antiretaliation 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 antidiscrimination protection,²⁵⁸ while in *Burlington Northern*, the Court upheld broad retaliation protection because it was *different* from a statute’s discrimination protection.²⁵⁹ The importance of *stare decisis* controlled the outcomes of *CBOCS West* and *Gomez-Perez*,²⁶⁰ while in *Jackson* the Court ignored important precedent.²⁶¹ The Court implied broad retaliation protection when statutes were silent,²⁶² yet refused to imply even modest

²⁵³ *Id.* at 435.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 427 (Stevens, J., dissenting).

²⁵⁶ *Id.* at 446–47 (Breyer, J., dissenting).

²⁵⁷ *Id.* at 448–49.

²⁵⁸ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (finding that retaliation against one who reports sex discrimination constitutes “sex based discrimination” in violation of Title IX).

²⁵⁹ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62–63 (2006).

²⁶⁰ *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1955 (2008) (“[O]ur conclusion rests in significant part upon principles of *stare decisis* . . .”); *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1937 (2008) (resting the Court’s holding on the principles of *stare decisis*).

²⁶¹ See *Jackson*, 544 U.S. at 171–84 (finding an implicit antiretaliation right of action under 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, 281 (2001), where the Court decided not to imply a disparate-impact right of action under Title VI of the Civil Rights Act of 1964, a sister statute to Title IX).

²⁶² See *CBOCS W.*, 128 S. Ct. at 1954 (interpreting 42 U.S.C. § 1981 (2006)); *Gomez-Perez*, 128 S. Ct. at 1935 (interpreting 29 U.S.C. § 633a(a) (2006)); *Jackson*, 544 U.S. at 173

protections when examining the First Amendment.²⁶³ Although the Court typically emphasizes strict statutory interpretation and congressional intent, it broadly interpreted antiretaliation statutory provisions and examined congressional purpose in both *Crawford* and *Burlington Northern*.²⁶⁴ In *Crawford*, the Court generously construed the definition of the word “oppose,”²⁶⁵ while in *Burlington Northern* the Court interpreted the phrase “discriminate against” to include actions taken against employees that are unrelated to employment.²⁶⁶ 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 nonretaliation 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, in *Gross v. FBL Financial Services, Inc.*,²⁶⁷ the Court held that the Age Discrimination in Employment Act of 1967 required a substantially higher causation standard than previously had been thought to apply.²⁶⁸ Additionally, in the last few years, the Court severely limited the statute of limitations for discrimination cases,²⁶⁹ restricted the application of the Equal Protection Clause for public employees,²⁷⁰ and undermined Title VII’s protection from disparate impact discrimination.²⁷¹ Although numbers do not tell the whole

(interpreting 20 U.S.C. § 1681(a) (2006)).

²⁶³ See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“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 not insulate their communications from employer discipline.”).

²⁶⁴ *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 850 (2009) (interpreting Title VII of the Civil Rights Act of 1964 broadly); *Burlington N.*, 548 U.S. at 56–57 (same).

²⁶⁵ *Crawford*, 129 S. Ct. at 850.

²⁶⁶ *Burlington N.*, 548 U.S. at 56–57.

²⁶⁷ 129 S. Ct. 2343 (2009).

²⁶⁸ *Id.* at 2351–52.

²⁶⁹ See *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2177–78 (2007) (holding that any act of unlawful Title VII employment discrimination, including those involving compensation, must be presented to the EEOC within the period ordered in the statute, which, in this case, was 180 days), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5(e)).

²⁷⁰ See *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2157 (2008) (holding that “class of one” equal-protection claims are not cognizable in the public-employment context).

²⁷¹ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009) (holding that a city’s decision to throw out the results of a firefighter promotion test, which was passed almost exclusively by whites, was “impermissible under Title VII unless the [city could] demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under [Title VII’s disparate-treatment prohibition]”).

story,²⁷² the win-loss record for employees in retaliation cases conflicts with the conventional wisdom that this Court generally favors business interests in employment cases.²⁷³

Second, many of the recent retaliation cases undermine longstanding 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.²⁷⁴ Rather, federal courts must utilize basic statutory interpretation tools to examine whether Congress specifically intended to create a right of action.²⁷⁵

Yet, in the face of this precedent, the Court went out of its way to permit three claims for retaliation when no antiretaliation provision existed.²⁷⁶ As mentioned above, although the reliance on *Sullivan* may

²⁷² 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. Indeed, employees 'won' six and 'lost' three of the ten decisions pitting them directly against their employers."); Shanor, *supra* note 190, at 154 ("If this is a more conservative Court, it did not show it in [CBOCS West].").

²⁷³ 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."); Ramona L. Paetzold, *Supreme Court's 2005–2006 Term Employment Law Cases: Do New Justices Imply New Directions?*, 10 EMP. RTS. & EMP. POL'Y J. 303, 348 (2006) (noting that after the 2005–2006 term, "preliminary indicia of a new conservatism do exist"); Michael Selmi, *The Supreme Court's 2006–2007 Term Employment Law Cases: A Quiet but Revealing Term*, 11 EMP. RTS. & 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."); Linda Greenhouse, *Justices Express Skepticism in a Discrimination Case*, N.Y. TIMES, Dec. 4, 2007, at A26 (discussing whether the Supreme Court really has "drifted so far toward the employer's side in job discrimination cases that it is now to the right of the Bush administration"); see also Robert Barnes, *Term Saw High Court Move to the Right*, WASH. POST, July 1, 2009, at A1 (noting after the 2008–2009 term that the Supreme Court's "path [is] clear: a patient and steady move to the right led by Chief Justice John G. Roberts Jr.").

²⁷⁴ See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (delineating a four factor test for federal courts to apply when evaluating whether there is a private cause of action implicit in a statute).

²⁷⁵ See, e.g., *id.* at 78–79 (applying four factors to determine the legislative intent behind a statute); *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 536 (1989) ("Congress undoubtedly was aware from our cases such as *Cort v. Ash* 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." (citation omitted)); *Transamerica Mortg. 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)).

²⁷⁶ See *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1954 (2008) (holding that 42 U.S.C. § 1981 contains an implicit antiretaliation provision); *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936 (2008) (holding that the ADEA contains an implicit antiretaliation provision); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (holding that Title IX of the Education Amendments of 1972 contains an implicit antiretaliation provision); see also Lynn

have been appropriate to discern Congressional intent in *Jackson*, this rationale loses its force when applied to § 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 antiretaliation 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 antiretaliation language in other legislation during that time.²⁷⁷ Moreover, when it enacted the ADEA and the 1991 Amendment's antidiscrimination language in § 1981, Congress certainly was aware that the Court required specific language in order to recognize a private cause of action.²⁷⁸ This legislative reality significantly undermines the Court's conclusion that Congress actually constructed a general antidiscrimination provision without an antiretaliation clause because it was relying on the Court's *Sullivan* opinion released years before.²⁷⁹ 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,²⁸⁰ 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 as to what exactly it prevents employers from doing in retaliation: the statute prohibits only

Ridgeway Zehrt, *Retaliation's Changing Landscape*, 20 GEO. MASON U. C.R. L.J. 143, 179–80 (2010) (discussing the Supreme Court's revival of implied antiretaliation provisions in civil rights statutes).

²⁷⁷ See *supra* notes 171–74, 191–97 and accompanying text.

²⁷⁸ See *Karahalios*, 489 U.S. at 536 (noting that Congress is aware of the Court's "straight-forward inquiry" standard for determining whether or not a statute contains an implicit private cause of action).

²⁷⁹ See 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").

²⁸⁰ See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (rejecting the respondents' reliance on a statute's legislative history as insufficient in the face of unambiguous text); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567–71 (2005) (rejecting the use of other interpretive tools because the statute in question was not ambiguous); *Dodd v. United States*, 545 U.S. 353, 359 (2005) (noting that the Court is "not free to rewrite the statute that Congress has enacted"); see also *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 410 (7th Cir. 2007) (Easterbrook, C.J., dissenting in part) (noting that these cases indicate that the Supreme Court "insists that statutory language be followed even if inconvenient or jarring").

“discrimination.”²⁸¹ Before *Burlington Northern*, many lower courts had held that this provision should be read in pari materia with Title VII’s antidiscrimination provision; in other words, they both address the same type of employer action taken towards employees in the employment setting.²⁸² The Supreme Court, however, refused to follow this standard canon of statutory interpretation in *Burlington Northern*. After a cursory look at the differences between the specific language in the antidiscrimination provision and the general language in the antiretaliation provision, the Court felt that Congress’ *purpose* when it enacted the antiretaliation provision should guide the interpretation of the statute.²⁸³ 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 in *Crawford* presented dueling dictionary definitions to support their respective positions,²⁸⁴ but ultimately each opinion had to fall back on its own view of the provision’s *purpose* as well as the practical consequences of the interpretation of the word it presented.²⁸⁵

Commentators have had difficulty following the twists and turns. Some 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.²⁸⁶ Others highlight and

²⁸¹ Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2006) (prohibiting discrimination against an employee because the employee has opposed or accused an employer with an unlawful employment practice).

²⁸² See, e.g., *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 799–800 (6th Cir. 2004) (rejecting the EEOC’s assertion that the court adopt a different definition of “adverse employment action” only for Title VII retaliation claims); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (noting that to succeed in a Title VII antiretaliation claim, a plaintiff must show that a sufficient adverse employment action occurred); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (noting that courts have interpreted Title VII’s retaliation provision to require that the “alleged retaliation constitute ‘adverse employment action’” (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 273 (7th Cir. 1996))).

²⁸³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62–64 (2006) (“[P]urpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.”).

²⁸⁴ *Compare Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 850 (2009) (noting that *Random House Dictionary* defines “oppose” as being “hostile or adverse to, as in opinion” (internal quotation marks omitted)), with *id.* at 853–54 (Alito, J., concurring in the judgment) (noting that the commonly understood definitions of “oppose” require active and purposeful conduct).

²⁸⁵ *Id.* at 852–53 (majority opinion) (rejecting the “active” formulation of “oppose” because requiring the active definition would ultimately harm employees and encourage silence in the face of unlawful conduct); *id.* at 854 (Alito, J., concurring in the judgment) (embracing the “active” definition of “oppose” for Title VII antiretaliation purposes because otherwise it “would open the door to retaliation claims by employees who never express a word of opposition to their employers”).

²⁸⁶ See Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court’s*

analyze the Court's use of various canons of statutory interpretation and judicially created legal fictions.²⁸⁷ 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.²⁸⁸

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.²⁸⁹ 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.²⁹⁰ Indeed, he dismissed these cases as "episodic expressions of support" that "belie a persistent ambivalence" toward employees who suffer retaliation when they advance the interest of the larger public good.²⁹¹ In contrast, Daniel Westman, a prominent practitioner and author,²⁹² 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."²⁹³

Perhaps these decisions simply present examples of the Court deciding only the narrow issues of the cases before it: whether

Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs, 67 MD. L. REV. 358, 395 (2008) ("[T]he Court recognized a cause of action [in *Jackson*] not merely because retaliation might fall within intent, but primarily because allowing retaliation would undermine Title IX's purpose."); cf. Shanor, *supra* note 190, 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").

²⁸⁷ See *The Supreme Court, 2007 Term—Leading Cases, Federal Statutes and Regulations*, 122 HARV. L. REV. 445, 449, 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 276, 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").

²⁸⁸ See Brake, *supra* note 7, at 21–22.

²⁸⁹ See *The Supreme Court, 2004 Term—Leading Cases, Federal Statutes and Regulations*, 119 HARV. L. REV. 337, 365 (2005) ("To 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 . . .").

²⁹⁰ Carlson, *supra* note 7, at 244 (contrasting the pro-employee decisions in *Jackson* and *Burlington Northern* with the pro-employer decision in *Garcetti*).

²⁹¹ *Id.* at 240.

²⁹² See generally WESTMAN & MODESITT, *supra* note 119; Daniel P. Westman, MORRISON & FOERSTER, <http://www.mofo.com/daniel-westman> (last visited Dec. 21, 2010).

²⁹³ Coyle, *supra* note 4 (internal quotation marks omitted) (quoting Daniel Westman on the Supreme Court's recent antiretaliation cases). Of course, Westman's conclusion does not explain the *Garcetti* Court's reluctance to protect a person who was both an employee and a witness.

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,”²⁹⁴ which would keep with the Court’s historic view limiting the instances in which it would read a statutory provision broadly or imbue an implied right of action.

But a more comprehensive explanation exists. 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 counterintuitive results. When placed in this context, one common theme can be discerned throughout the recent retaliation cases: the Antiretaliation Principle. The Court recognized that enforcing the law requires encouraging employees to provide information about employer misconduct. Antiretaliation 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 longstanding acceptance of and adherence to the same Antiretaliation 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*, a case that, as mentioned above, relies on the Antiretaliation Principle to support its holding that § 1982 incorporates an implied right of action for retaliation.²⁹⁵ Indeed, all three of the recent implied-retaliation cases pay homage to *Sullivan*’s reference to the Principle.²⁹⁶

But, more than simply adopting *Sullivan*, the Court reinvigorated the Antiretaliation Principle through these recent cases. Again, the Antiretaliation Principle recognizes that law enforcement depends on employees blowing the whistle on illegal conduct—even if those employees are not the victims of that conduct. In order to encourage

²⁹⁴ *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1951 (2008) (Roberts, C.J., dissenting); see also *id.* at 1939 (majority opinion) (“*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 v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005))).

²⁹⁵ *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (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”); see also discussion *supra* Part I.

²⁹⁶ See *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1955 (2008) (beginning its interpretation with a discussion of *Sullivan*); *Gomez-Perez*, 128 S. Ct. at 1936 (applying the reasoning of *Sullivan* to the ADEA); *Jackson*, 544 U.S. at 180 (“*Sullivan* made clear that retaliation claims extend to those who oppose discrimination against others.”).

them to come forward, the law must protect them from retaliation. Notably, like *Sullivan*, two of the three recent implied retaliation cases—*Jackson* and *CBOCS West*—involved third-party reporters of illegal discrimination.²⁹⁷ The *Jackson* plaintiff reported inequities in the girls' basketball program²⁹⁸ and the *CBOCS West* plaintiff reported alleged discrimination against a coworker.²⁹⁹ 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.³⁰⁰ For Title IX specifically, the Court found that Title IX's enforcement depended on complaints, particularly from insiders with firsthand knowledge about violations, such as teachers and coaches.³⁰¹

Thus, the *Jackson* Court explicitly adopted the Antiretaliation 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.³⁰²

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 § 1981 in part because its sister statute,

²⁹⁷ *CBOCS W.*, 128 S. Ct. at 1954 (involving an assistant manager who was fired after complaining about the race-based discharge of a fellow employee); *Jackson*, 544 U.S. at 171 (involving a male coach and gym teacher who complained about the girls' basketball team receiving unequal access to athletic facilities and funding); *Sullivan*, 396 U.S. at 234–37 (involving the claim of Sullivan, a white man, who was expelled from his homeowners' corporation for leasing his property to a black man and advocating against racial discrimination).

²⁹⁸ *Jackson*, 544 U.S. at 171.

²⁹⁹ *CBOCS W.*, 128 S. Ct. at 1954.

³⁰⁰ *Jackson*, 544 U.S. at 179–80.

³⁰¹ *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.” (alteration in original) (quoting *Sullivan*, 396 U.S. at 237)).

³⁰² *Id.* at 180–81 (citation omitted).

§ 1982, was held by *Sullivan* to provide “protection from retaliation for reasons related to the *enforcement* of the express statutory right.”³⁰³ Although the Antiretaliation Principle is not as explicit in *Gomez-Perez*,³⁰⁴ the Court did reject the government employer’s argument that protection from retaliation was not necessary because third parties were not required to identify age discrimination and report it.³⁰⁵

The Title VII cases also advanced the Antiretaliation Principle by broadly interpreting the statute’s express antiretaliation provision. First, in *Burlington Northern*, the Court reiterated that Title VII’s antiretaliation provision prevents employers “from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”³⁰⁶ In short, the “primary purpose” of the provision is to maintain “unfettered access to statutory remedial mechanisms.”³⁰⁷ 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.³⁰⁸ Citing back to the Court’s first expression of the Antiretaliation Principle, the Court in *Burlington Northern* explicitly relied on 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 antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.³⁰⁹

³⁰³ *CBOCS W.*, 128 S. Ct. at 1958.

³⁰⁴ The *Gomez-Perez* Court explicitly denied that it had made a policy-oriented determination in *Jackson*, even though the *Jackson* Court had discussed the important role of teachers and students in reporting illegal discrimination. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1938–39 (2008). The Court claimed that the *Jackson* Court’s discussion of this topic was merely in response to the Birmingham School Board’s argument that even if Title IX permitted some antiretaliation claims, only the actual victims of sex discrimination—and not reporting third parties—should be able to institute a claim. *Id.* at 1939.

³⁰⁵ *Id.* at 1938–39.

³⁰⁶ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

³⁰⁷ *Id.* at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (internal quotation marks omitted).

³⁰⁸ *Id.* at 67.

³⁰⁹ *Id.* (citation omitted) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

Even when the Court declined to consider “petty slights, minor annoyances, and simple lack of good manners” to be actionable retaliation, the Antiretaliation Principle guided the Court’s rationale.³¹⁰ Allowing such de minimis 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.³¹¹ By focusing on the Antiretaliation 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.”³¹²

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,”³¹³ the Court allowed for the introduction of individualized factors that might dissuade one type of person but not another from reporting. This 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 Antiretaliation Principle: preventing “those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.”³¹⁴

Crawford, the second Title VII case, also emphasized the importance of the Antiretaliation Principle through 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.³¹⁵ Indeed, the *Crawford* Court made explicit its understanding that employees who report discrimination *against others* may face retaliation even when the whistleblower was not personally discriminated against.³¹⁶

³¹⁰ *Id.* at 68.

³¹¹ *Id.* (quoting *Robinson*, 519 U.S. at 346) (internal quotation marks omitted).

³¹² *Id.* at 57; *see also id.* at 68–69 (discussing the incentives created by the antiretaliation principle).

³¹³ *Id.* at 69–70.

³¹⁴ *Id.* at 70.

³¹⁵ *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 849. (2009). Although the plaintiff in *Crawford* actually was a victim of sexual harassment, she is more of a “reporter” of discrimination because she informed her employer about the sexually harassing conduct only in direct response to an employer-instigated investigation. *Id.*

³¹⁶ *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 . . .”).

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 Antiretaliation 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.”³¹⁷

Therefore, the five recent statutory retaliation cases reflect the same three premises supporting the Antiretaliation 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 those cases, two of whom reported illegal conduct that was not directed at them.³¹⁸ Second, as *Crawford*, *Burlington Northern*, and *Jackson* all explicitly recognized, employees will come forward with this inside information only if they are protected from retaliation.³¹⁹ Third, as *Crawford*, *Burlington Northern*, and *Jackson* made clear, effective law enforcement requires employees to report illegal conduct.³²⁰

This theory explains these five recent statutory cases better than focusing solely on an argument that retaliation is another form of discrimination.³²¹ Granted, language in the implied retaliation cases supports this position, particularly in *Jackson*, where the majority

³¹⁷ *Id.* at 852 (alteration in original) (quoting Brake, *supra* note 7, at 20).

³¹⁸ See *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1931, 1954 (2008); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). Moreover, in *Crawford*, the plaintiff was a victim of discrimination but reported the discrimination only during a general investigation conducted by her employer. *Crawford*, 129 S. Ct. at 849.

³¹⁹ *Crawford*, 129 S. Ct. at 852; *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2005); *Jackson*, 544 U.S. at 180–81.

³²⁰ See *Crawford*, 129 S. Ct. at 852; (discussing how reporting illegal conduct is an incentive for employers to stop discriminatory behavior); *Burlington N.*, 548 U.S. at 68 (suggesting that absent antiretaliation laws, employers will interfere with employees’ legally protected remedies); *Jackson*, 544 U.S. at 180–81; (“If recipients were able to avoid such notice by retaliating against all those who dare to complain, the statute’s enforcement scheme would be subverted.”).

³²¹ *But see* Brake, *supra* note 7, at 21–22 (arguing that the recognition of “retaliation” as a form of “discrimination” is an important and necessary step in legal theory).

makes this “retaliation equals discrimination” argument explicitly.³²² This rationale, however, does not explain Congress’ frequent practice of providing separate protection from retaliation in antidiscrimination laws.³²³ Nor does it provide insight for interpreting antiretaliation provisions in laws addressing problems other than discrimination.³²⁴ Put another way: for a law to be enforced, whether it is a law against discrimination or otherwise, retaliation against those who report violations 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 antiretaliation 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 be interpreted to mean that discrimination claims present only one example of the types of claims that also need antiretaliation protection in order to be effectively enforced.

Of course, the Court’s further focus on retaliation in the Title VII discrimination context merely provides another example of a law in which retaliation protection is required for the law’s enforcement. In those cases, however, the protection was explicit rather than implicit, and the issues involved how broadly that protection should be read.

Moreover, in the context of the Court’s other retaliation jurisprudence, the Court’s recent statements related to the broader Antiretaliation 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,³²⁵ wage claims,³²⁶ labor relations,³²⁷ nuclear-environmental safety

³²² *Jackson*, 544 U.S. at 174; see *CBOCS W.*, 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 in *Jackson*, the dissent’s argument in favor of distinct categories for “retaliation” and “discrimination” did not succeed).

³²³ See, e.g., Age Discrimination in Employment Act of 1967 § 4(d), 29 U.S.C. § 623(d) (2006); Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2006); Americans with Disabilities Act of 1990 § 503(a), 42 U.S.C. § 12203(a) (2006).

³²⁴ See, e.g., Fair Labor Standards Act of 1938 § 15(a)(3), 29 U.S.C. § 215(a)(3) (2006); Occupational Safety and Health Act of 1970 § 11(c), 29 U.S.C. § 660(c) (2006).

³²⁵ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) (holding that school teachers should be able to speak freely about matters of public concern without fear of retaliation).

³²⁶ See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292–93 (1960) (holding that employers may not retaliate against employees who lawfully complain about substandard working conditions, and that employees who are fired for their lawful complaints are entitled to back wages).

³²⁷ See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895–96 (1984) (holding that an employer’s

regulations,³²⁸ transportation-industry rules,³²⁹ and witness testimony.³³⁰ 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* provided the first example of the Court denying First Amendment protection to an employee who complained about arguably illegal conduct.³³¹ As noted above, although the employee's speech (the complaint about governmental misconduct) related to a "matter of public concern" (the possible existence of governmental misconduct in the Los Angeles County District Attorney's Office), the Court held that the First Amendment did not protect the employee from retaliation because the speech was made pursuant to his official duties.³³²

To a limited degree, however, *Garcetti* provides yet another example of the Court explaining antiretaliation protection through the lens of the Antiretaliation 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 the importance of balancing the

reporting of an illegal alien employee to the INS, in direct retaliation for that employee's joining of a labor union, constitutes unlawful employer conduct under the National Labor Relations Act); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 744 (1983) (holding that it is an unlawful labor practice for employers to prosecute baseless, intentionally retaliatory lawsuits against employees who are availing themselves of the National Labor Relations Act, and that such lawsuits may be enjoined); *NLRB v. Scrivener*, 405 U.S. 117, 121–22, 125 (1972) (holding that it is a violation of the National Labor Relations Act for an employer to fire an employee because the employee gave sworn, written statements to the NLRB).

³²⁸ See *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (holding that the Energy Reorganization Act of 1974, which prohibits retaliation by a nuclear industry employer against employees who report nuclear safety violations, does not forbid employees from seeking state-law remedies for alleged employer retaliation).

³²⁹ See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248 (1994) (holding that the Railway Labor Act does not preempt the state-law wrongful-discharge claim of an aircraft mechanic who reported his safety concerns to the Federal Aviation Administration); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258–59 (1987) (Marshall, J., plurality opinion) (discussing that the purpose behind section 405 of the Surface Transportation Assistance Act of 1982 was to provide significant antiretaliation protections to transportation industry workers because of their knowledge of an employer's motor vehicle safety violations).

³³⁰ See *Haddle v. Garrison*, 525 U.S. 121, 125–27 (1998) (holding that an at-will employee may file a claim for damages under 42 U.S.C. § 1985(2) if the employee is fired to deter him from testifying at an upcoming federal criminal trial).

³³¹ *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

³³² *Id.* at 413–15, 419–22.

employee and employer interests with the “public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”³³³

That said, the Court seems to have strayed from the Antiretaliation Principle in *Garcetti* because, despite giving lip service to the importance of society’s interest in employee speech,³³⁴ it heavily weighted the government’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.³³⁵

The Antiretaliation 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 is truly focused on the Antiretaliation Principle in the decision. A rule that is 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 Antiretaliation Principle into the Court’s *Pickering* balancing. Justice Souter argued, “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.”³³⁶ When employee speech relates to job duties, typically the government’s need for managerial authority would outweigh the First Amendment interests at stake.³³⁷ According to Justice Souter, however, when the employee “speaks on

³³³ *Id.* at 419; *see also id.* at 420 (“The [Supreme] Court’s 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.”); *cf.* *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*) (“Were [public employees] not able to speak on [the operations 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. Nat’l Treasury Emps. Union*, 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.”).

³³⁴ *Garcetti*, 547 U.S. at 419–20.

³³⁵ *Id.* at 422–23.

³³⁶ *Id.* at 428 (Souter, J., dissenting).

³³⁷ *Id.* at 435.

a matter of unusual importance and satisfies high standards of responsibility in the way he does it,” then the employee should be protected under the First Amendment.³³⁸ Justice Souter defined “a matter of unusual importance” to include speech related to “official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.”³³⁹ 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.”³⁴⁰ In other words, Justice Souter agreed with the job-duty rule generally, but understood it should be limited because of the Antiretaliation 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 Antiretaliation Principle.

Importantly, *Garcetti* ultimately confirms the Court’s belief that the Antiretaliation Principle should be implemented by Congress, instead of 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.”³⁴¹

Indeed, the Court has used a similar justification for reduced First Amendment protection in the employment setting. In *Waters v. Churchill*,³⁴² the Court noted in a plurality opinion authored by Justice O’Connor that legislatures could extend stronger antiretaliation protections to their employees “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.”³⁴³ Also, in *Bush v. Lucas*,³⁴⁴ 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 of 1978.³⁴⁵ Thus, the constitutional cases

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 433.

³⁴¹ *Id.* at 425 (majority opinion).

³⁴² 511 U.S. 661 (1994).

³⁴³ *Id.* at 674 (O’Connor, J., plurality opinion).

³⁴⁴ 462 U.S. 367 (1983).

³⁴⁵ *Id.* at 389 (“In the past [Congress] has demonstrated its awareness that lower-level

linguistically support the Antiretaliation Principle, but they also 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. These employee reports will themselves aid law enforcement by alerting authorities to wrongdoing. As important, the *threat* of possible employee reports will deter employer violations in the first place. That being said, the *Garcetti* opinion seems to confirm the Court's longstanding view that this antiretaliation 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 Plastics Corp.* and *Thompson v. North American Stainless, LP*. The Antiretaliation Principle could directly influence the outcome of these important cases.

Kasten involves the question of whether the Fair Labor Standard Act's antiretaliation provision protects an employee who files an oral complaint that an employer violated the FLSA.³⁴⁶ In the lower courts, the case turned on how to interpret the FLSA's protection of an employee who "has filed any complaint."³⁴⁷ 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.³⁴⁸

Government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates' freedom of expression.")

³⁴⁶ Petition for Writ of Certiorari, *supra* note 14, at i.

³⁴⁷ 29 U.S.C. § 215(a)(3) (2006); *see Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 837–40 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 619 F. Supp. 2d 608, 611–12 (W.D. Wis. 2008), *aff'd*, 570 F.3d 834 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010).

³⁴⁸ *Kasten*, 570 F.3d at 840; *Kasten*, 619 F. Supp. 2d at 613.

Decisions by several other circuit courts, however, have protected employees who made oral complaints about FLSA violations.³⁴⁹

Thompson examines whether Title VII prohibits retaliation against an employee by “inflicting reprisals” on a third party who is closely related to the employee.³⁵⁰ In this case, the plaintiff alleges that he was fired because his fiancée engaged in conduct protected by Title VII’s antiretaliation provision.³⁵¹ The District Court for the Eastern District of Kentucky entered summary judgment in favor of the employer, concluding that Title VII “by its plain language does not permit third party retaliation claims.”³⁵² A panel of the Sixth Circuit reversed,³⁵³ but then a divided en banc circuit court overturned the panel’s decision.³⁵⁴ 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.”³⁵⁵ 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.³⁵⁶ Because *Thompson* did not engage in the protected conduct himself, the majority ruled that he could not bring a retaliation claim for his own discharge.³⁵⁷

At first glance, both cases present relatively pedestrian statutory-interpretation issues. In *Kasten*, the Court must decide between

³⁴⁹ *E.g.*, *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989–90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011–12 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987).

³⁵⁰ Petition for Writ of Certiorari, *supra* note 16, at i.

³⁵¹ *See id.* at 3 (alleging that *Thompson*, the plaintiff, was fired because his fiancée, who also worked for the defendant, had filed a charge of sex discrimination with the EEOC).

³⁵² *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 639 (E.D. Ky. 2006), *aff’d en banc*, 567 F.3d 804 (6th Cir. 2009), *cert. granted*, 130 S. Ct. 3542 (2010).

³⁵³ *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 650 (6th Cir. 2008), *rev’d en banc*, 567 F.3d 804 (6th Cir. 2009), *cert. granted*, 130 S. Ct. 3542.

³⁵⁴ *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009) (en banc), *cert. granted*, 130 S. Ct. 3542. Nine judges joined in the majority opinion, one judge delivered a separate concurrence in the result, and six judges filed a total of three dissenting opinions. *Id.* at 805; *id.* at 816 (Rogers, J., concurring in the result); *id.* at 818 (Martin, J., dissenting); *id.* at 820 (Moore, J., dissenting); *id.* at 826 (White, J., dissenting).

³⁵⁵ *Id.* at 807 (majority opinion) (quoting 42 U.S.C. § 2000e-3(a) (2006)) (internal quotation marks omitted).

³⁵⁶ *Id.* at 805.

³⁵⁷ *See id.* at 808 (“By application of the plain language of the statute, [the plaintiff] is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation.”).

competing interpretations of the statutory terms “file” and “complaint.” In their briefs, the two sides each offered several dictionary definitions of the terms to support their arguments.³⁵⁸ Moreover, each side presented the Court with language from numerous other statutes that support its position regarding the scope of the provision’s protection.³⁵⁹

Similarly, *Thompson* ostensibly presents two competing interpretative views of Title VII’s language. As the Sixth Circuit and other circuits have found, Title VII’s retaliation provision focuses on discrimination against the person (“he”) who has opposed unlawful activity or participated in Title VII activities.³⁶⁰ Another interpretation of Title VII’s “plain language,” however, could lead to a dramatically different result.

In her dissenting opinion in *Thompson*, Judge White noted that Title VII’s antiretaliation provision merely describes an “unlawful employment practice”³⁶¹ and does not identify who receives protection from such practices.³⁶² Instead, according to Judge White, 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.³⁶³ Additionally, § 2000e-5(f)(1) permits

³⁵⁸ Petitioner’s Brief at 22 nn.10–11, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 130 S. Ct. 1890 (June 16, 2010) (No. 09-834), 2010 WL 2481867 (using a number of dictionaries to define the phrase “to file”); Brief for Respondent at 19–20, *Kasten*, 130 S. Ct. 1890 (Aug. 16, 2010) (No. 09-834), 2010 WL 3251632 (using various dictionaries to define “file” and “complaint”).

³⁵⁹ See Petitioner’s Brief, *supra* note 358, at 24–30; Brief for Respondent, *supra* note 358, at 12, 34–36.

³⁶⁰ See, e.g., *Thompson*, 567 F.3d at 807–08 (declining to create a cause of action under Title VII for retaliation against third parties who had not engaged in statutorily protected activity); *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3d Cir. 2002) (analyzing similar language in the ADA and ADEA, and concluding that “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 conclude that plaintiffs who bring antiretaliation claims must have personally engaged in protected conduct); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226 (5th Cir. 1996) (holding that under the “plain language” of the ADEA, plaintiffs may file antiretaliation suits only if they have faced discrimination for personally engaging in protected activity).

³⁶¹ *Thompson*, 567 F.3d at 827 (White, J., dissenting).

³⁶² *Id.* (“Because the language of § 704(a) addresses *what* is forbidden, rather than *who* is protected, the majority must make an inference to reach its conclusion that § 704(a) tells us who is and is not protected against the actions it prohibits, and then, more importantly, deduce from that inference who may and may not maintain a cause of action.”).

³⁶³ *Id.* at 828. Interestingly, Judge Rogers’s concurrence reached a conclusion similar to Judge White’s about the relationship between § 2000e-3 and § 2000e-5(b), but Rogers interpreted § 2000e-5(b) to permit only “those persons who are the intended beneficiaries” of Title VII to bring claims, which he declared did not include third parties. *Id.* at 817 (Rogers, J., concurring in the result).

lawsuits to be filed “by the person claiming to be aggrieved.”³⁶⁴ Thus, under this analysis, North American Stainless committed an unlawful employment practice by retaliating against Thompson’s fiancée through its firing of Thompson.³⁶⁵ Because Thompson was “aggrieved” by this act, § 2000e-5 permits Thompson to file a claim against North American Stainless.³⁶⁶ In his Supreme Court brief, Thompson has adopted this statutory argument as his primary rationale for overturning the Sixth Circuit’s decision.³⁶⁷

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.³⁶⁸ 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 Antiretaliation 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 antiretaliation protections should loom large.

With regard to *Kasten*, the Supreme Court stated fifty years ago that, consistent with the Antiretaliation Principle, the purpose of the FLSA’s antiretaliation provision was to encourage employees to report violations of the law:

³⁶⁴ 42 U.S.C. § 2000e-5(f)(1) (2006).

³⁶⁵ *Thompson*, 567 F.3d at 827–28 (White, J., dissenting) (concluding that an employer can commit an unlawful employment practice against an opposing employee by firing that employee’s coemployee, fiancé(e), or spouse in retaliation).

³⁶⁶ *Id.* at 828–29.

³⁶⁷ Brief for Petitioner at 7–9, *Thompson v. N. Am. Stainless, LP*, 130 S. Ct. 3542 (Sept. 3, 2010) (No. 09-291), 2010 WL 3501186. Interestingly, the courts that upheld third-party claims prior to *Thompson* typically ignored this type of statutory argument and, instead, relied on an analysis of the broad purposes behind antiretaliation provisions. *See, e.g.*, *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (“[A] literal interpretation of [Title VII’s antiretaliation provision] would leave a gaping hole in the protection of complainants and witnesses.”); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989) (upholding a third-party retaliation claim under ERISA because a more narrow construction would “clash[] against the congressional intent of protecting participants and beneficiaries in the exercise of rights under an ERISA plan”); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088–89 (7th Cir. 1987) (holding that the NLRA prohibited retaliation against third parties because, without such protection, covered employees would remain silent out of fear that their employer would seek revenge against their coemployee relatives); *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978) (noting that failing to protect a third party under Title VII would produce “absurd and unjust results”); *see also* John J. Feeney, Comment, *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) (discussing the EEOC’s support for third-party retaliation claims under Title VII).

³⁶⁸ *See* discussion *supra* Part II.A.

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 [FLSA] would be enhanced.³⁶⁹

Enforcement of the law requires employees to report FLSA violations, which necessitates broad antiretaliation protection.³⁷⁰

Moreover, in *NLRB v. Scrivener*, decided almost forty years ago, the Court relied upon the Principle to interpret a similar provision of the National Labor Relations Act (NLRA) to protect employees who gave informal statements to investigators, even though the NLRA's plain language seemed to narrowly limit protection only to employees who "[have] filed charges or given testimony."³⁷¹ 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, to look beyond the statute's plain, but limited, language.³⁷²

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.³⁷³ This recent trend involves employers providing employees a consistent way to make internal complaints about illegal behavior.³⁷⁴ As two prominent academics have noted, "[I]f internal

³⁶⁹ *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

³⁷⁰ *See id.* (noting that effective enforcement requires that employees feel free to report grievances to officials).

³⁷¹ *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (quoting 29 U.S.C. § 158(a)(4) (1970)) (internal quotation marks omitted).

³⁷² *Id.* at 124 ("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 the in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time.").

³⁷³ *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1138–41 (2006) (analyzing the ability of the Sarbanes-Oxley Structural Model to encourage and protect corporate employee whistleblowers).

³⁷⁴ *See id.* (describing the specific methods through which Sarbanes-Oxley allows for more employee whistleblowing); *see also* 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 recognize that employees who discover health and safety violations are likely to first notify management of these problems).

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.³⁷⁵ 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.³⁷⁶ The Supreme Court has been protective of internal reports as well. In addition to *Crawford*, which focused on the issue,³⁷⁷ the Court has noted in the constitutional context that the First Amendment protects internal reports as well as external whistleblowing.³⁷⁸ 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.³⁷⁹

More specifically, providing methods to *orally* report wrongdoing has become part of the law-enforcement landscape that encourages internal reporting of wrongdoing.³⁸⁰ Congress and administrative agencies have required companies to provide employees a means to report illegal conduct.³⁸¹ 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.³⁸² Thus, it no longer makes sense (if it ever did) to think only about protecting the formal initiation of a complaint

³⁷⁵ Dworkin & Callahan, *supra* note 374, at 281.

³⁷⁶ *See id.* at 299 (noting that in the context of sociopsychological research, internal whistleblowing is preferable to external reporting); Moberly, *supra* note 373, at 1142 (discussing how employees prefer internal reporting to external reporting as a way to preserve and demonstrate employer loyalty).

³⁷⁷ *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 849 (2009) (holding that an employee may receive Title VII antiretaliation protection when reporting discrimination, not on her own initiative, but during an employer's internal investigation).

³⁷⁸ *See Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) ("Employees in some cases may receive First Amendment protection for expressions made at work."); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979) ("The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.")

³⁷⁹ *See, e.g., Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 478–479 (3d Cir. 1993) (holding that the Clean Water Act's antiretaliation protections apply to employees who make internal complaints to their employers); 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).

³⁸⁰ *See Moberly, supra* note 373, at 1138–41, 1151 (discussing how the Sarbanes-Oxley Structural Model encourages internal whistleblowing).

³⁸¹ *See Moberly, supra* note 131, at 988–95 (describing the evolution of corporate codes of business conduct, and how and why these codes provide employee antiretaliation protections).

³⁸² *See id.* at 1030 (noting, in response to Sarbanes-Oxley, many companies publicly post the phone number for their respective whistleblower hotlines).

directly with a law-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 only the government) would constitute protected conduct.³⁸³ 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.

The Supreme Court, however, has never been interested in such nuanced and nitpicky distinctions when evaluating antiretaliation provisions, particularly in older retaliation statutes, because such distinctions undermine enforcement of the law.³⁸⁴ Given the increased importance of internal reporting, and the encouragement of oral internal reporting through the pervasive use of employee hotlines, the Court would severely hamper FLSA law-enforcement efforts if it decided in *Kasten* to deny antiretaliation protection to employees who make oral reports. The FLSA, in particular, depends heavily on employee reports for its enforcement,³⁸⁵ and an employee can play an essential part in the Act's enforcement through oral as well as written action.³⁸⁶ For example, the Department of Labor advertises a phone number for employees to call with concerns about FLSA violations, thereby explicitly encouraging oral reports and complaints.³⁸⁷

³⁸³ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 837–38 (7th Cir. 2009), *cert granted*, 130 S. Ct. 1890 (2010).

³⁸⁴ As the Court noted in *NLRB v. 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.

405 U.S. 117, 123–24 (1972); *see also* *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 851 (2009) (broadly construing the "opposition" clause of Title VII's antiretaliation provision to include an employee's participation in an employer's internal investigation).

³⁸⁵ *See* *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (describing Congress' purposeful reliance on employee complaints to ensure effective enforcement of the FLSA).

³⁸⁶ *See* *Kasten v. Saint-Gobain Performance Plastics Corp.*, 585 F.3d 310, 317 (7th Cir. 2009) (Rovner, J., dissenting from the denial of rehearing en banc) ("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."), *cert granted*, 130 S. Ct. 1890 (2010).

³⁸⁷ The Wage and Hour Division call center phone number is displayed on the U.S. Department of Labor Wage and Hour Division's website and on posters that are legally required

The Sixth Circuit's cramped reading of Title VII in *Thompson* will also undermine law enforcement (and thus the Supreme Court's Antiretaliation Principle). During the past half century, the Court consistently has permitted a wide range of plaintiffs to bring retaliation lawsuits because of the devastating "chilling" effect retaliation can have on future employer misconduct reports. Most obviously, as noted above,³⁸⁸ the Supreme Court in *Robinson v. Shell Oil Co.* relied on the purpose behind Title VII's retaliation provision to conclude that the statute protected *former* employees as well as current employees.³⁸⁹ Without this protection, the Supreme Court recognized that victims of discrimination would be deterred from complaining to the EEOC.³⁹⁰

In fact, many retaliation statutes contain vague language about their scope of protection, and the Court has broadly interpreted these statutes to allow a wide range of individuals to bring retaliation claims, including: third parties who report statutory violations,³⁹¹ at-will employees,³⁹² elected union officials against their union,³⁹³ and illegal aliens.³⁹⁴ In each instance, the Court's holding demonstrated its understanding that the enforcement of these laws depended on the granting of antiretaliation protections 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

to be displayed in workplaces. U.S. DEP'T OF LABOR WAGE & HOUR DIVISION, FAIR LABOR STANDARDS ACT MINIMUM WAGE POSTER (2009), available at <http://www.dol.gov/whd/regs/compliance/posters/minwage.pdf>; U.S. DEP'T OF LABOR WAGE & HOUR DIVISION, http://www.dol.gov/whd/contact_us.htm (last visited Oct. 11, 2010).

³⁸⁸ See *supra* text accompanying notes 41–46.

³⁸⁹ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (“[A] primary purpose of [Title VII’s] antiretaliation provisions[is] [m]aintaining unfettered access to statutory remedial mechanisms.”).

³⁹⁰ *Id.*

³⁹¹ See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that a white property owner had standing to file a 42 U.S.C. § 1982 claim after a homeowners’ association had retaliated against him for leasing his house to a black man).

³⁹² See *Haddle v. Garrison*, 525 U.S. 121, 125–27 (1998) (holding that an at-will employee may file a claim for damages under 42 U.S.C. § 1985(2) if the employee is fired to deter him from testifying at an upcoming federal criminal trial).

³⁹³ See *Sheet Metal Workers’ Int’l Ass’n v. Lynn*, 488 U.S. 347, 355 (1989) (holding that the removal of a local union’s elected business agent, by a representative of the international union, in retaliation for the local agent’s speech, violated Title I of the Labor-Management Reporting and Disclosure Act of 1959).

³⁹⁴ See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895–96 (1984) (holding that an employer’s reporting of an illegal alien employee to the INS, in direct retaliation for that employee joining a labor union, constitutes unlawful employer conduct under the National Labor Relations Act).

those reporting. As noted by the Seventh Circuit—and often repeated by others³⁹⁵—“To 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.”³⁹⁶ 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:

The anti-retaliation provisions recognize that enforcement of anti-discrimination laws depends in large part on employees to initiate administrative and judicial 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.³⁹⁷

Protecting third-party victims of retaliation would follow easily from the Court’s Antiretaliation 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 the law should prohibit a wide range of retaliatory activity.³⁹⁸ Moreover, *Robinson* recognized

³⁹⁵ See, e.g., *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568–69 (3d Cir. 2002) (“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.”); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 410–11 (3d Cir. 1990) (ordering the reinstatement and backpay of an employee who had been fired because of her relatives’ participation in a successful union organizing campaign). See generally Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931 (2007) (analyzing third party retaliation claims in the context of an employee’s right to associate with coworkers).

³⁹⁶ *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987).

³⁹⁷ *Fogleman*, 283 F.3d at 568–69. But see *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (finding a broad interpretation of Title VII’s antiretaliation provision, which would cover third parties who had not personally engaged in protected activity, is neither supported by Title VII’s plain language nor necessary to protect third parties, such as spouses, from retaliation).

³⁹⁸ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (concluding that Title VII’s antiretaliation provision covers any employer action that would be materially adverse to a reasonable employee or job applicant).

that Title VII's antiretaliation provision must protect people other than "employees" in order to be effective.³⁹⁹

Kasten and *Thompson* will give the Court further opportunities to apply the Antiretaliation 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 antiretaliation provisions with similar language to the FLSA and Title VII.⁴⁰⁰ If the Supreme Court continues its historic and recent reliance on the Antiretaliation Principle, then it should reverse the lower courts' limited views of retaliation protection because their decisions weaken law-enforcement efforts.

B. Lower Courts

The Antiretaliation Principle can serve a second important role, directed at lower courts. The Principle's emphasis on law

³⁹⁹ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (finding that an interpretation of Title VII that does not recognize former employees as "employees" would undermine the purpose behind the act's antiretaliation provisions by barring an entire subset of actions allowed under Title VII, such as discriminatory termination).

⁴⁰⁰ For statutes with language similar to the FLSA language at issue in *Kasten*, see Civil Service Reform Act of 1978 § 701, 5 U.S.C. § 7116(a)(4) (2006) (prohibiting retaliation against a federal employee "because the employee has filed a complaint, affidavit, or petition, or has given any information under this chapter"); Foreign Service Act of 1980 § 1015(a)(4), 22 U.S.C. § 4115(a)(4) (2006) (prohibiting discrimination or punishment of an employee "because the employee has filed a complaint or petition, or has given any information, affidavit, or testimony under this subchapter"); Occupational Safety and Health Act of 1970 § 11(c)(1), 29 U.S.C. § 660(c)(1) (2006) (prohibiting the discharge of an employee "because such employee has filed any complaint"); Migrant and Seasonal Agricultural Worker Protection Act § 505(a), 29 U.S.C. § 1855(a) (2006) (prohibiting coercion or discrimination against "any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint"); Employee Polygraph Protection Act of 1988 § 3(4)(A), 29 U.S.C. § 2002(4)(A) (2006) (prohibiting retaliation against an employee because that employee has filed any complaint); Workforce Investment Act of 1998 § 184(f), 29 U.S.C. § 2934(f) (2006) (requiring the Secretary of Labor to take action or order "corrective measures" if an employee subject to protection under this chapter is discharged "because such individual has filed any complaint"); Railway Labor Act 49 U.S.C. § 20109(a)(3) (Supp. II 2009) (prohibiting railroad carriers from retaliating against an employee if that retaliation is due "in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done . . . to file a complaint"); Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1)(A)(i) (Supp. I 2009) (prohibiting retaliation against a commercial motor vehicle employee if "the employee, or another person at the employee's request, has filed a complaint . . . related to a violation of commercial motor vehicle safety"). For statutes with language similar to the Title VII language at issue in *Thompson*, see Age Discrimination in Employment Act of 1967 § 4(d), 29 U.S.C. § 623(d) (2006) (prohibiting retaliation against "any individual . . . because such individual . . . has opposed any practice made unlawful by this section"); Employee Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (2006) (prohibiting retaliation against an employee "for exercising any right to which he is entitled under the provisions of an employee benefit plan" or for testifying against the employer in a proceeding); Americans with Disabilities Act of 1990 § 503(b), 42 U.S.C. § 12203(b) (2006) (prohibiting retaliation against an individual for "his or her having exercised or enjoyed . . . any right granted or protected by this chapter").

enforcement provides lower courts the proper perspective from which to evaluate 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 antiretaliation provisions as well as the common law of wrongful discharge in violation of public policy. I will address two such areas in this Section.

1. 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) that the employee engaged in protected conduct; (2) that the employee suffered an adverse employment action; and (3) that the employee's engagement in a protected activity caused the adverse employment action.⁴⁰¹

As explained below, "but for" causation could be required, or perhaps some lower standard (such as requiring that protected conduct be a "motivating" or "substantial" factor in the adverse employment action).

Because of this "causation ambiguity," courts have examined and disagreed about the level of causation required in retaliation cases.⁴⁰²

⁴⁰¹ See Rosenthal, *supra* note 67, at 1133 (describing the three prima facie elements of a Title VII retaliation claim). Some scholars, however, believe that there are more than three prima facie elements in an antiretaliation claim. For example, Westman and Modesitt believe that there are four prima facie elements of a typical antiretaliation claim: (1) that the employee has engaged in protected activity; (2) that the employer knew that the employee had engaged in the protected activity; (3) that the employee has suffered an adverse employment action; and (4) that there is a causal connection between the employee's protected conduct and the adverse employment action. WESTMAN & MODESITT, *supra* note 119, at 230

⁴⁰² Compare *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490, 501 (7th Cir. 2010) ("[T]he Supreme Court has recently clarified that unless a federal statute provides otherwise, the plaintiff bears the burden of demonstrating but-for causation in suits brought under federal law."), and *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1343 (11th Cir. 2000) ("In demonstrating causation, the plaintiff must prove that the adverse action would not have been

Many older antiretaliation provisions express their causation standard by prohibiting retaliation “because of” various protected conduct.⁴⁰³ Although one reading of this language would suggest that “but for” causation is required, the Supreme Court’s decision in *Mt. Healthy City School District Board of Education v. Doyle*, 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 employment action⁴⁰⁴—a lower standard of proof for the employee than “but for” causation. As the Court noted, “A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct.”⁴⁰⁵

Although *Mt. Healthy* was a constitutional case, the Supreme Court has examined causation language in employment statutes as well. In *Price Waterhouse v. Hopkins*,⁴⁰⁶ a Title VII “mixed motive” discrimination case, a majority of the Court required the plaintiff to show that his or her protected status was a motivating factor in the employer’s adverse decision.⁴⁰⁷ In other words, the Court interpreted

taken ‘but for’ the assertion of FLSA rights.”), with *Smith v. Xerox Corp.*, 602 F.3d 320, 334 (5th Cir. 2010) (using “motivating factor” or “mixed-motive” causation standards in a Title VII antiretaliation claim), and *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000) (“To establish a causal connection, a plaintiff must show that ‘the decision-maker[s] [were] aware of the protected conduct,’ and ‘that the protected activity and the adverse action were not wholly unrelated.’” (alterations in original) (quoting *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999))).

⁴⁰³ See, e.g., National Labor Relations Act of 1935 § 8(a)(4), 29 U.S.C. § 58(a)(4) (2006) (prohibiting retaliation against an employee “because he has filed charges or given testimony under this subchapter”); Fair Labor Standards Act of 1938 § 15(a)(3), 29 U.S.C. § 215(a)(3) (2006) (prohibiting the discrimination or discharge of an employee “because such employee has filed any complaint”); Age Discrimination in Employment Act of 1967 § 4(d), 29 U.S.C. § 623(d) (2006) (prohibiting retaliation against an employee because the employee has opposed an unlawful action or because the employee participated in an investigation); Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2006) (prohibiting retaliation “because [an employee] has opposed any practice made an unlawful employment practice by this subchapter”); Americans with Disabilities Act of 1990 § 503(a), 42 U.S.C. § 12203(a) (2006) (prohibiting retaliation against an employee because that employee has made a charge, testifies, or assists in an investigation related to the employer’s unlawful conduct).

⁴⁰⁴ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

⁴⁰⁵ *Id.* at 286. The Court also held that the employer should have an affirmative defense if it could show by a preponderance of the evidence that it would have reached the same employment decision “in the absence of the protected conduct.” *Id.* at 287.

⁴⁰⁶ 490 U.S. 228 (1989) (plurality opinion).

⁴⁰⁷ A “mixed motive” discrimination case, such as *Price Waterhouse*, involves an allegation that an employer took an adverse employment action against an employee because of both permissible and impermissible considerations. *Id.* According to *Price Waterhouse*, an employer can still prevail on the employee’s Title VII claim if it can prove, by a preponderance of the evidence, that it would have made the same employment decision had it not taken the plaintiff’s protected status into account. *Id.* at 242.

Although *Price Waterhouse* did not result in a single majority opinion, six justices agreed

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)⁴⁰⁸—a similar affirmative defense to the one set forth in *Mt. Healthy* for First Amendment retaliation cases.⁴⁰⁹ Satisfying this burden provided the employer a complete affirmative defense to the employee’s discrimination claim.⁴¹⁰

In the Civil Rights Act of 1991, Congress enshrined this mixed-motive analysis, and its accompanying “motivating factor” causation standard, in Title VII’s statutory language regarding discrimination.⁴¹¹ Subsequently, Congress lowered even further the employee’s causation burden in whistleblower antiretaliation provisions by adopting a “contributing factor” standard,⁴¹² indicating a substantial congressional preference for this lower burden of proof.

that the “motivating” or “substantial” factor standard was the proper standard. *Id.* at 258 (plurality opinion) (adopting the “motivating” factor standard); *id.* at 259 (White, J., concurring in the judgment) (stating that the plaintiff’s burden is “to show that the unlawful motive was a substantial factor in the adverse employment action”); *id.* at 276 (O’Connor, J., concurring in the judgment) (stating that the plaintiff must show by direct evidence that his or her protected status played a substantial factor in an adverse employment decision); see also *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2347 (2009) (reiterating the “causation” holdings in *Price Waterhouse*).

⁴⁰⁸ *Price Waterhouse*, 490 U.S. at 258 (plurality opinion) (“[T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.”).

⁴⁰⁹ *Mt. Healthy*, 429 U.S. at 287 (noting that after the plaintiff satisfies its initial burden by showing that he or she engaged in constitutionally protected conduct, the burden shifts to the defendant to show by the preponderance of the evidence that it would have made the same employment decision absent the plaintiff’s protected conduct).

⁴¹⁰ See *Price Waterhouse*, 490 U.S. at 258 (holding that the defendant can avoid liability by proving that it would have made the same decision regardless of the plaintiff’s gender).

⁴¹¹ See 42 U.S.C. § 2000e-2(m) (2006) (establishing that an unlawful hiring practice has taken place when “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”). The Civil Rights Act of 1991 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 *id.* § 2000e-5(g)(2)(B) (providing that where a violation is established under this section and the employer demonstrates that it would have taken the employment action “in the absence of the impermissible motivating factor,” then the court may award only declaratory relief, injunctive relief in certain circumstances, and certain costs and attorney’s fees). Congress utilized language similar to that in *Price Waterhouse* in a provision prohibiting retaliation against employees who take leave from employment to serve in the military. See Uniformed Services Employment and Reemployment Rights Act of 1994 § 2(a), 38 U.S.C. § 4311(c) (2006) (prohibiting discrimination against employees where an employee’s leave for military service is a motivating factor, unless the employer would have made the same decision absent that motivating factor).

⁴¹² A whistleblower must prove that his protected conduct was only a “contributing factor” in the adverse employment action taken against him. See, e.g., Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) § 519(a), 49 U.S.C.

The Civil Rights Act of 1991, however, did not resolve the debate around the meaning of the “because of” language, since it applies only to Title VII’s discrimination section (not the antiretaliation provision). Older antiretaliation provisions still utilize the “because of” language, and lower courts have struggled with the level of causation required by these older antiretaliation statutes, including Title VII, the Age Discrimination in Employment Act, and the False Claims Act.⁴¹³ Some courts, relying on *Mt. Healthy* or *Price Waterhouse*, interpreted the statutes to implicitly adopt the “motivating factor” standard (and also the complete affirmative defense for employers set forth in *Price Waterhouse*).⁴¹⁴

Complicating matters further, in a surprising 2009 decision in *Gross v. FBL Financial Services, Inc.*, 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).⁴¹⁵ Despite the fact that the ADEA was patterned after Title VII and the two statutes typically have been interpreted similarly, the Court’s rationale was that the Civil Rights Act of 1991 applied the “motivating factor” language only to Title VII’s discrimination provision.⁴¹⁶ According to the Court, because Congress did not also amend the ADEA with this language, the more traditional “but for”

§ 42121(b)(2)(B)(i) (2006) (requiring an employee filing a complaint under this act to demonstrate that the protected conduct was a “contributing factor” in the employment decision); Pipeline Safety Improvement Act of 2002 § 6(a), 49 U.S.C. § 60129(b)(2)(B)(i) (2006) (requiring that the plaintiff filing a complaint under this act show that his or her protected conduct was a “contributing factor” in the employment decision). Other recent statutes have explicitly adopted the burden of proof standard announced in AIR 21. *See, e.g.*, Sarbanes-Oxley Act of 2002 § 803(a), 18 U.S.C. § 1514A(b)(2)(C) (2006) (“An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in [49 U.S.C. § 42121(b)].”).

⁴¹³ *See* statutes cited *supra* note 400.

⁴¹⁴ *See, e.g.*, *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th 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, 852 (8th Cir. 2000) (“We . . . conclude that the Civil Rights Act of 1991 did not change the *Mt. Healthy/Price Waterhouse* [causation and burden shifting] analysis applicable to retaliation claims under the [False Claims] Act . . .”); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552–54 (4th Cir. 1999) (applying the *Price Waterhouse* mixed-motive scheme to a Title VII retaliation claim).

⁴¹⁵ *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350–51 (2009) (“A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the ‘but-for’ cause of the challenged employer decision.”).

⁴¹⁶ *Id.* at 2349 (“Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was ‘a motivating factor’ for an adverse employment decision. This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now.” (citations omitted)).

standard should apply to the ADEA's "because of" language.⁴¹⁷ 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.⁴¹⁸

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.⁴¹⁹ Indeed, some circuit courts have interpreted *Gross* to apply "but for" causation to any federal statute that does not explicitly utilize some other standard.⁴²⁰

In March 2010, however, the Fifth Circuit issued an unexpected opinion in *Smith v. Xerox Corp.*,⁴²¹ finding that Title VII's retaliation provision, coupled with the accompanying "motivating factor" language from *Price Waterhouse*, permitted a mixed-motive theory.⁴²² The employer in *Smith* argued that *Gross*'s reasoning should apply to Title VII retaliation cases because the Civil Rights Act of 1991 did not amend the Title VII antiretaliation provision to include the "motivating factor" language.⁴²³ Therefore, according to the

⁴¹⁷ *Id.* ("Congress neglected to add [a motivating-factor] provision to the ADEA when it amended Title VII . . . even though it contemporaneously amended the ADEA in several ways.").

⁴¹⁸ *Id.* at 2350–51 (holding that a plaintiff seeking relief under the ADEA must show that they would not have been fired but for their age).

⁴¹⁹ See statutes cited *supra* note 400.

⁴²⁰ See, e.g., *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) ("*Gross* makes clear that in the absence of any additional text bringing mixed-motive claims within the reach of the statute, the statute's 'because of' language demands proof that a forbidden consideration . . . was a 'but for' cause of the adverse action complained of."); *Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th 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."); see also *Warshaw v. Concentra Health Servs.*, 719 F. Supp. 2d 484, 502–03 (E.D. Pa. 2010) (applying a "but-for" causation standard to an ADA retaliation claim and holding that *Gross* prohibits the use of a "mixed motive" standard for future ADA retaliation claims).

In light of *Gross*, the lower courts appear to be reconsidering precedent that automatically applied Title VII's burden-shifting schemes to other employment statutes by closely examining the language of various statutes to determine causation. Compare *Hunter v. Valley View Local Schs.*, 579 F.3d 688, 691–92 (6th Cir. 2009) (finding that the FMLA permitted a "mixed-motive" analysis based on the statute's use of the term "interfere 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 *17–18 (N.D. Ill. Sept. 25, 2009) (suggesting that the FMLA's use of "for opposing" is not distinguishable from the ADEA's use of "because of," and, as a result, the FMLA probably mandates a "but for" causation standard).

⁴²¹ 602 F.3d 320 (5th Cir. 2010).

⁴²² *Id.* at 330 ("Because we believe that *Gross* does not unequivocally control whether a mixed-motive jury instruction may be given in a Title VII retaliation case, we must continue to allow the *Price Waterhouse* burden shifting in such cases unless and until the Supreme Court says otherwise.").

⁴²³ *Id.* at 328 ("[The employer] urged . . . [that] a Title VII retaliation plaintiff, like an ADEA discrimination plaintiff, may not obtain a motivating factor jury instruction and must instead prove that retaliation was the but-for cause for the adverse employment action.").

employer, Congress must have meant to keep the “but for” standard implied by the provision’s “because of” language.⁴²⁴ The court maintained, however, that *Gross* required courts to interpret Title VII and the ADEA differently, and that *Price Waterhouse* should still apply to Title VII retaliation cases.⁴²⁵ 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.⁴²⁶

To the extent that *Gross* can be limited in this manner—to apply only to age-discrimination claims—lower courts should utilize the Antiretaliation 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—in large part that is what makes them whistleblowers—and, as a result, their employers can perceive them as troublemakers. Accordingly, 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 evidence demonstrates that causation is notoriously difficult to prove.⁴²⁷ If lower courts take the Court’s Antiretaliation Principle seriously, then

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 330 (noting that *Price Waterhouse* still controlled Title VII antiretaliation-claim analysis because of the Supreme Court’s recognition in *Gross* that “Title VII and the ADEA are ‘materially different with respect to the relevant burden of persuasion’ (quoting *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 (2009))).

⁴²⁶ *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 (“The specific text of the Title VII retaliation provision, § 2000e-3(a), prohibits an employer from discriminating ‘because’ the employee has, *inter alia*, made a charge against the employer. The statute provides no indication of the type of evidentiary showing necessary to prove the retaliation claim. Because the text of § 2000e-3(a) neither requires nor prohibits a specific evidentiary showing, construing it to include the mixed-motive framework to be shown by circumstantial evidence does no violence to the statute. Title VII does not affirmatively require direct evidence from a plaintiff, whether in a discrimination or retaliation context, and we can see no basis for requiring a heightened evidentiary showing in order to obtain a motivating factor jury instruction predicated only on the theory of liability alleged in the complaint (discrimination versus retaliation).” (footnotes omitted)). *But see* *Fierros v. Tex. Dep’t of Health*, 274 F.3d 187, 192 (5th Cir. 2001) (holding that direct evidence was required for a mixed-motive retaliation case to shift the burden to the defendant).

⁴²⁷ *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) (analyzing the success rates of employees bringing Sarbanes-Oxley retaliation claims when courts address issues of causation).

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.

2. Reasonable Belief

The Antiretaliation Principle also could influence lower courts when they determine whether a whistleblower had a “reasonable belief” that the reported employer conduct was actually 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 antiretaliation provision.⁴²⁸ Courts could interpret this language to mean that the employee must report actual illegal conduct in order to be protected.⁴²⁹ 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.⁴³⁰ 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.⁴³¹

Nevertheless, despite this potentially narrow protected conduct requirement, other courts have required employees only to

⁴²⁸ See, e.g., Age Discrimination in Employment Act of 1967 § 4(d), 29 U.S.C. § 623(d) (2006) (prohibiting retaliation against an employee who has “opposed any practice made unlawful by this section”); Family and Medical Leave Act of 1993 § 105(a)(2), 29 U.S.C. § 2615(a)(2) (2006) (prohibiting retaliation “against any individual for opposing any practice made unlawful by this subchapter”); Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2006) (prohibiting retaliation against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter”); Americans with Disabilities Act of 1990 § 503(a), 42 U.S.C. § 12203(a) (2006) (prohibiting retaliation against an individual who “has opposed any act or practice made unlawful by this chapter”).

⁴²⁹ See WESTMAN & MODESITT, *supra* note 119, at 82 (noting that both the Minnesota Supreme Court and the State of New York Court of Appeals have required whistleblowers to prove that their employers actually violated either state or federal law).

⁴³⁰ See Rosenthal, *supra* note 67, at 1140–41 (arguing that in *Breedon*, “the [Supreme] Court’s language suggested that perhaps it would require an actual violation” for the employee’s actions to constitute “protected activity” for a Title VII antiretaliation claim). Compare *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (stating that an employee had engaged in protected conduct under Title VII so long as he had a reasonable belief that his employer had engaged in unlawful conduct), with *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975) (holding that in order for an employee to have engaged in “protected activity” under Title VII, the employer must have actually committed an unlawful employment practice).

⁴³¹ See, e.g., *Barker v. State Ins. Fund*, 40 P.3d 463, 469–70 (Okla. 2001) (declining to recognize a state law claim for “public employees who complain about the way an organization is managed when the complaints merely exhibit differences of opinion or dissatisfaction with discretionary management decisions and the like”).

demonstrate a “reasonable belief” that employer conduct is illegal.⁴³² The most well known example of this standard stems from the Supreme Court’s 2001 decision in *Clark County School District v. Breeden*. In that case, the Court assumed (without deciding) that the reasonable-belief standard applied to Title VII retaliation cases,⁴³³ a decision that paved the way for courts uniformly to adopt the reasonable-belief standard for a broad range of statutes.⁴³⁴ This requirement involves both a subjective and an objective component.⁴³⁵ 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.⁴³⁶

The reasonable-belief standard seems to comport with the Antiretaliation Principle, particularly when compared with the fact that courts could interpret some statutory language to protect only reports of actual violations.⁴³⁷ Despite this seemingly employee-

⁴³² See Brake, *supra* note 7, at 76–77 (discussing how and why courts do not require plaintiffs to prove that their employers actually engaged in unlawful conduct).

⁴³³ *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

⁴³⁴ See Rosenthal, *supra* note 67, at 1129 n.7 (“Although the [*Breeden*] Court specifically declined to answer the question regarding what an opposition-clause plaintiff must prove with respect to this issue, since *Breeden*, courts within all United States circuits have adopted the objectively reasonable standard.”). Courts also use the reasonable-belief standard for other statutes that do not specify the standard to be utilized, such as Title VI and Title IX. See Brake, *supra* note 7, at 83 n.223 (collecting cases).

⁴³⁵ See Rosenthal, *supra* note 67, at 1134 (“[C]ourts evaluate whether the employee had a subjective, good-faith belief that the activity was unlawful, and whether that belief was objectively reasonable.”).

⁴³⁶ See, e.g., Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(a)(1) (2006) (providing antiretaliation protection to employees who reasonably believe that their employer has engaged in unlawful conduct).

⁴³⁷ 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 antiretaliation provision to encourage employees to report violations of the statute. See Rosenthal, *supra* note 67, at 1130–31 (arguing that Title VII’s antiretaliation provision should protect employees who report on an employer in subjective good faith, even if the employee is wrong or the employee’s belief 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. *Id.*; see also Brake, *supra* note 7, at 81 n.215 (arguing that the Court’s decision in *Breeden* “forecloses a more lenient standard requiring only a subjective good faith belief”). More broadly, the statutory language of more recently enacted antiretaliation provisions explicitly utilizes the “reasonable belief” standard, which would seem to preclude courts from using the good-faith standard. See, e.g., Sarbanes-Oxley Act of 2002

friendly standard, however, lower courts often have applied the reasonable-belief requirement to *narrow*, rather than broaden, retaliation protection.⁴³⁸ 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.⁴³⁹ These courts have required employees to know 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.⁴⁴⁰ For example, in *Jordan v. Alternative Resources Corp.*,⁴⁴¹ 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

§ 806(a), 18 U.S.C. § 1514A(a)(1) (2006) (granting antiretaliation protection to employees of publicly traded companies who report against their employers with a reasonable belief that the employer's conduct is illegal); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a), 123 Stat. 115, 297 (to be codified in 26 U.S.C.) (utilizing the reasonable-belief standard to protect whistleblowing employees in state and local governments).

⁴³⁸ See Brake, *supra* note 7, at 76 ("One of the most problematic limits [imposed by courts] 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."); Brienne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1472-73 (2007) (arguing that courts often apply the reasonableness standard so narrowly that it deprives complaining employees of antiretaliation protections).

⁴³⁹ See Moberly, *supra* note 131, at 1003 & n.161 (arguing that many courts have applied the "reasonable belief" standard so as to require employees to prove that their employers have violated the law); Rosenthal, *supra* note 67, at 1162-63 ("[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.").

⁴⁴⁰ See, e.g., *George v. Leavitt*, 407 F.3d 405, 416-17 (D.C. Cir. 2005) (holding that the reasonableness of a report of illegality should be judged by whether a reasonable jury could find the conduct illegal); *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003) (remanding a Title VI retaliation claim to the district court so that the plaintiff could further develop the record to show that she had a reasonable belief that her employer had engaged in intentional discrimination); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 708 (7th Cir. 2000) ("In conclusion, Hamner's retaliation claim fails as a matter of law because the conduct that he opposed (harassment because of his sexual orientation) is not, under any circumstances, proscribed by Title VII, and thus he has failed to provide sufficient evidence for a reasonable jury to conclude that he opposed (or reasonably believed that he was opposing) an unlawful employment practice under Title VII."); *Little v. United Techs., Carrier Transcold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) (denying the plaintiff's Title VII antiretaliation claim because the plaintiff could not reasonably believe that a single racially offensive remark was unlawful conduct); *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 the plaintiff's Title VII retaliation claim because the plaintiff could not have reasonably believed that isolated and minor instances of offensive conduct violated Title VII); see also Brake, *supra* note 7, at 86-98 (discussing how courts apply the "reasonable belief" standard to reinforce narrow constructions of unlawful or discriminatory behavior).

⁴⁴¹ 458 F.3d 332 (4th Cir. 2006).

use of a racial epithet violated Title VII.⁴⁴² The *Jordan* court, however, seemed more intent on examining whether the incident could have amounted to unlawful harassment rather than on whether the employee could have reasonably believed that the conduct was unlawful.⁴⁴³

The Antiretaliation Principle could affect courts' thinking about how to interpret the reasonable-belief standard so as to more fully incorporate 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. This law-enforcement interest will be better served because employees—lay persons with no legal background or expertise—will feel more free to report an employer's questionable conduct. Society would be better off with knowledgeable decisionmakers determining whether the disclosed, questionable 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 sufficiently adverse to constitute "retaliation" under Title VII.⁴⁴⁴ As noted above, the Court concluded that retaliation occurred if the employer's action "could well dissuade a reasonable worker from making or supporting a charge of discrimination."⁴⁴⁵ Later in the opinion, the Court stated that when courts consider the "reasonable employee," they should take into account the specific employee's

⁴⁴² *Id.* at 339 (stating that an unlawful employment practice under Title VII requires a workplace "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (internal quotation marks omitted)); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998) (noting that one incident typically cannot create a hostile work environment that is actionable under Title VII, unless the incident is sufficiently severe).

⁴⁴³ *Jordan*, 458 F.3d at 341–43 (discussing whether the allegations in plaintiff's complaint could support a finding that his employer engaged in unlawful conduct).

⁴⁴⁴ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

⁴⁴⁵ *Id.*

individual circumstances. “[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.”⁴⁴⁶

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.⁴⁴⁷ In-house counsel may be expected to know the intricate details of sexual-harassment law, but perhaps a worker with a high-school education should not.⁴⁴⁸ 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.⁴⁴⁹

⁴⁴⁶ *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:

[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 (footnotes omitted).

⁴⁴⁷ See *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1179 (2d Cir. 1996) (“[T]he subjective sensibilities of an alleged victim may be a relevant consideration in determining whether conduct by a supervisor or a coworker is legally sanctionable.”); cf. Brake, *supra* note 7, at 103 (“[Courts should] ask whether the plaintiff can make a reasoned case that the practices opposed interfere with the goals and objectives of discrimination law. . . . 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.”).

⁴⁴⁸ Compare *Henderson v. Waffle House, Inc.*, 238 Fed. App’x 499, 503 (11th Cir. 2007) (per curiam) (holding that a waitress could not have had an objectively reasonable belief that her manager’s isolated jokes and comments about her breasts had violated Title VII), with *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.”).

⁴⁴⁹ Cf. *Allen v. Stewart Enterp., Inc.*, ARB No. 06-081, at 14 (July 27, 2006), available at http://www.oalj.dol.gov/public/arb/decisions/arb_decisions/sox/06_081.soxp.pdf (holding that a lay-employee could not have had a “reasonable belief” that her employer had violated the SEC’s regulations concerning “internal consolidated financial statements” because she had “testified that she was not aware of any SEC rule or regulation requiring that these internal documents be filed with the SEC or comply with SEC rules and regulations”). In *Allen*, the employee alleged that she examined “internal consolidated financial statements” and that these statements indicated that the company violated an SEC rule. *Id.* The Administrative Review Board (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, the employer could not have violated SEC regulations. *Id.* Based on this nuance, the ARB found that the employee could not have “reasonably believed” that a violation of the rule occurred. *Id.*; see

Lower courts can best support the Antiretaliation 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 Antiretaliation 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 Antiretaliation 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 Antiretaliation Principle by strengthening the protections available to whistleblowers who report illegal corporate behavior.

Although this Article has detailed the ways in which the Antiretaliation Principle can aid 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 antiretaliation protection, which would relieve the Supreme Court of having to

also Jason M. Zuckerman, *SOX's Whistleblower Provision—Promise Unfulfilled*, SEC. LITIG. REP., July/Aug. 2007, at 14, 16–17 (discussing the ARB's interpretation of the "reasonable belief" standard); cf. Gorod, *supra* note 438, at 1484–96 (criticizing the "reasonable belief" standard because courts may use it to improperly reject Title VII retaliation claims by lay employees who are unaware of the law and its nuances).

perform jurisprudential gymnastics to satisfy the Antiretaliation Principle.⁴⁵⁰ Furthermore, the Court's Antiretaliation Principle teaches that Congress and its statutes are better at protecting employees from retaliation than the First Amendment. Accordingly, Congress could encourage the reporting of illegal conduct in the government by improving the statutory whistleblower protections for federal employees.

In fact, identifying the Supreme Court's use of the Antiretaliation 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, on 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 Antiretaliation 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.

⁴⁵⁰ See discussion *supra* Part II.C (discussing the difficulties of finding implied retaliation protection in Title IX, § 1981, and the federal sector provision of the ADEA).