

ON PUBLIC EMPLOYEES AND JUDICIAL BUCK-
PASSING: THE RESPECTIVE ROLES OF
STATUTORY AND CONSTITUTIONAL
PROTECTIONS FOR GOVERNMENT
WHISTLEBLOWERS

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INTRODUCTION

In *Garcetti v. Ceballos*, the Supreme Court held that public employees have no First Amendment protections for speech made “pursuant to their official duties.”¹ Writing for the majority, Justice Kennedy assured readers that the holding did not undermine “the potential societal value of employee speech.”² Among other things, Kennedy pointed to a “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to [public employees] who seek to expose wrongdoing.”³ Yet as Justice Souter pointed out in dissent and as several amici had informed the Court in their briefs, “the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief.”⁴ Indeed, in 2006—the year that *Garcetti* was handed down—federal employees lacked statutory protection for speech made pursuant to their official duties, and it was unclear in many states whether state employees were entitled to such protections.⁵

This aspect of *Garcetti* illustrates several difficulties that can arise when courts point to statutory protections to soften the perceived impact of limits on constitutional guarantees. First, courts may simply get their facts wrong, misrepresenting the lay of the legislative land. The same court or other

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1 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

2 *Id.* at 422.

3 *Id.* at 425.

4 *Id.* at 440 (Souter, J., dissenting).

5 *See infra* Section II.A.

courts may compound the error, repeating it as an article of faith in subsequent opinions. Even if a court correctly describes the existing statutory picture, the picture may change while courts continue to point uncritically to the original description, and while the constitutional doctrine that it helped to justify remains in place. Indeed, a number of lower courts have relied on *Garcetti*'s assurance of a "powerful network of legislative enactments" to soften the perceived impact of their own denials of First Amendment claims.⁶

Second and more fundamentally, courts may highlight potential legislative solutions partly to gloss over weaknesses in their constitutional reasoning. For example, the *Garcetti* Court suggested, at points, that there is little of value at stake when public employees speak in their capacities as employees.⁷ Yet that reasoning flies in the face of the Court's acknowledgment elsewhere in *Garcetti* and in earlier cases that public employee speech has constitutional value largely because of the expertise that employees acquire on the job.⁸ Concluding that there is no constitutional right at stake while assuring that robust legislative protections exist seems but a feeble attempt to have it both ways.

Finally, weak constitutional reasoning about the claimed right at stake can lend itself to equally dubious analysis about the relative advantages of statutory versus constitutional protections for that right. In *Garcetti*, for example, the Court not only downplayed public employees' unique contributions, through their work product, to discourse about matters of public concern, it also overlooked a core assumption manifest elsewhere throughout First Amendment precedent—namely, that government actors are highly motivated to suppress information that they find embarrassing or politically inconvenient.⁹ Ignoring that predictive insight made it easier for the Court to conclude not only that the right at issue was not of constitutional dimension, but that the political branches could be trusted to protect it.

In this Article, I consider the influence that actual or potential statutory protections do, should, and should not have on judicial decisions about the scope of constitutional protections, looking predominantly through the lens of public employees' First Amendment rights. In Part I, I reflect on several areas in which the Supreme Court has incorporated the existence or potential existence of statutory protections into its constitutional reasoning. In Part II, I assess the Supreme Court's use of statutory protections to help justify limits on public employees' First Amendment rights in *Garcetti*. I explain that the Court made questionable factual assumptions about the statutory landscape. Its constitutional analysis was more precarious still, as was its related reasoning as to why it could comfortably rely on legislative protections. In Part III, I look at judicial citations to *Garcetti*'s language about the "powerful network of legislative enactments" over the past twelve years. Most

6 *Garcetti*, 547 U.S. at 425; see *infra* Part III.

7 See *infra* Section II.B.

8 See *infra* text accompanying note 58; see also Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 309–12.

9 See *infra* Part II.

courts have simply taken *Garcetti*'s factual assertion as an article of faith. Some also have reiterated *Garcetti*'s reasoning to the effect that statutory protections are more fitting vehicles than the Constitution to protect public employee speech rights. In Part IV, I consider the relationship that ideally should exist between constitutional and statutory protections for public employee speech.

I. HOW STATE OR FEDERAL LAWS OR PRACTICES CAN IMPACT CONSTITUTIONAL PROTECTIONS

It is an oversimplification to suggest, as Justice Souter did in his dissent in *Garcetti*, that “[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.”¹⁰ This Part briefly reviews several settings in which the Supreme Court or individual Justices have surveyed the statutory landscape to inform their determinations of the scope of constitutional protections. The examples demonstrate that it can be reasonable, even necessary, to consult statutes—as well as related authorities including regulations and professional norms to which a statutory program refers—in the course of shaping constitutional guarantees and remedies. Yet the examples also reflect perils of the enterprise. Potential missteps include misreading external authorities, neglecting to revisit doctrine when those authorities change, misunderstanding the relationship between the extraconstitutional authorities and the constitutional question presented, or invoking the authorities in a manner that undermines the constitutional provisions themselves.

A. *Developments as Bases to Expand or Contract Protections in Due Process and Equal Protection Cases*

The constitutional doctrines of equal protection and substantive due process have robust but complicated relationships to legislative authorities. In the equal protection context, Supreme Court Justices at times have deemed protective legislation for particular groups to signify that the groups have political power and thus are not “suspect” or “quasi-suspect” classes that require enhanced judicial attention. In *City of Cleburne v. Cleburne Living Center*, for instance, the Court cited federal and state legislative accommodations for cognitively disabled persons as indicia that the group does not need courts to apply heightened scrutiny to laws that treat them differently from others.¹¹ Elsewhere, the Court has engaged in the flip side of this inquiry: it has asked whether laws historically have been passed to disadvantage particu-

10 *Garcetti*, 547 U.S. at 439 (Souter, J., dissenting) (alteration in original) (quoting Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996)).

11 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985); cf. *Romer v. Evans*, 517 U.S. 620, 645–46, 652 (1996) (Scalia, J., dissenting) (deeming it “preposterous” for the majority to call gays and lesbians “politically unpopular” when the group “enjoys enormous influence in American media and politics,” and citing examples of legislative protections to support this point).

lar groups and counted affirmative answers as factors favoring heightened review of classifications targeting those groups.¹²

Complicating matters further, members of the Court at times have cited statutes that protect particular groups or activities to justify its own safeguarding of those same groups or actions. In the context of gender-based equal protection claims, for example, the Court has referenced the easing of statutory restraints on women's participation in economic and civic life over the course of the twentieth century.¹³ This evolution, it explains, reflects a growing understanding that such restraints are unsupported by real differences between men and women.¹⁴ The legislative transformation thus justifies heightened judicial skepticism toward gender-based laws.¹⁵

In the substantive due process context, some Justices have cited longstanding statutory restraints on personal decisionmaking—for instance, choices about one's intimate partners—to argue that the liberty to make such decisions is not so constitutionally salient as to warrant protection under the Due Process Clause.¹⁶ Other Justices have contested those historical understandings; they also have pointed to more protective modern statutes to demonstrate that those liberties have become highly valued and warrant strong constitutional protection.¹⁷

These examples illustrate the reasonableness, if not inevitability, of looking at past and present statutory terrain to give content to some constitutional provisions. "Liberty" and "equal protection" are not self-defining terms. There is a logic to looking, for example, at evidence that certain personal choices are widely prized, or that certain groups are more or less likely to need judicial protection in light of their relative political strength.

The examples also demonstrate the frequently tight connection between judicial use of extraconstitutional authorities and a judge's approach to constitutional interpretation. In the substantive due process context, for example, Justices have clashed over whether the current statutory landscape is constitutionally relevant, or whether interpreters should consider only the state of the law during or prior to a constitutional provision's drafting and ratification.¹⁸ In the equal protection setting, one might worry that Justices

12 See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (explaining that heightened scrutiny in gender discrimination cases is warranted in light of "volumes of history," including discriminatory statutes and judicial decisions upholding the same).

13 See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973).

14 See *id.* at 685–87.

15 See *id.* at 687–88 (deeming it relevant to the standard of review that, "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications").

16 See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

17 See *Lawrence*, 539 U.S. at 567–77.

18 Compare, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (explaining that the Court has "insisted" that any liberty deemed "fundamental" be one that is "traditionally protected by our society"), with *id.* at 137 (Brennan, J., dissenting) (criticizing Justice Scalia's opinion for "plac[ing] a discernible border around the Constitution," and disput-

will see the forest and miss the trees, deeming a group politically powerful in light of legislation not directly at issue, while overlooking discrimination that is manifest in the statute under review.¹⁹

Finally, it often is difficult to discern just what the statutory landscape is or was at any given time. This problem is particularly evident where Justices in the same case dispute one another's interpretation of the facts. We see this, for example, in the debate between the majority and dissenting Justices in *Lawrence v. Texas* over the history of antisodomy laws.²⁰ Among the challenges in this and other cases is determining just what statutes are relevant to the legal questions at issue, how to address rarely enforced statutes, and whether there is some numerical threshold—a majority of states, for example—that must be reached in any given case.²¹

B. *Defining the Contents of the Government's Own Creations*

Another set of examples follows from courts' rejection of the rights-privilege distinction in the mid-twentieth century.²² With this move, courts took upon themselves the task of examining public programs' features to determine what constitutional constraints apply to them. Justice Scalia referenced this reality in a 1996 dissent in which he objected, among other things, to the majority's remark—which Justice Souter would later quote in *Garcetti*²³—that “[t]he applicability of a provision of the Constitution has never depended on

ing that “a search for ‘tradition’ involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history”).

19 In *Cleburne*, the Court arguably avoided that problem by applying an unusually searching version of rational basis review (elsewhere called “rational basis with bite”) and holding the challenged action unconstitutional. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–50 (1985); see also, e.g., Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1363 (2013) (explaining that “[c]ommentators—and, in a few rare instances, courts—have identified a wide range of cases employing rational basis with bite,” and that *Cleburne* is among the “five ‘classical’ rational basis with bite cases”).

20 Compare *Lawrence*, 539 U.S. at 567–77, with *id.* at 595–98 (Scalia, J., dissenting).

21 See, e.g., David Crump, *How Do Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 862 (1996) (“[T]he apparent objectivity of the history-and-tradition method [of discerning unenumerated fundamental rights] is less obvious when one considers what sources are to be consulted.”); Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 927–28 (2006) (explaining that “the Supreme Court has been remarkably inconsistent, even sloppy, in its application of the tradition test” in fundamental rights cases—its methods have included, among other things, “reviewing Anglo-American legal practices and the common law in the states,” and “counting the number of states”).

22 For a classic examination of the role of government largesse in the law, including the traditional distinction between rights and privileges and early developments imposing some constitutional restraints on government's ability to attach conditions to its largesse, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739–40, 778–82 (1964).

23 *Garcetti v. Ceballos*, 547 U.S. 410, 439 (2006) (Souter, J., dissenting) (quoting *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996)).

the vagaries of state or federal law.”²⁴ Scalia observed, in response, that a “property interest entitled to Fourteenth Amendment protection” arises not from the Constitution itself, but from “existing rules or understandings that stem from an independent source such as state law.”²⁵

In the context of public employee speech cases, the distinction between rights and privileges was epitomized by the statement—made by Oliver Wendell Holmes when he was a justice on the Massachusetts Supreme Judicial Court—that “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”²⁶ After courts abandoned such reasoning and subjected public employers to First Amendment limits on their disciplinary powers, jurists had to find ways to discern the nature of particular jobs. Only then could they determine the impact that an employee’s speech might have had on her workplace,²⁷ or, after *Garcetti*, whether an employee spoke in her on-the-job capacity. Such judicial inquiries necessarily draw upon extraconstitutional authorities, including statutes, regulations, subregulatory job descriptions, and professional norms.

Similarly, in the context of government subsidies for expressive activity, courts look closely at the contours of the subsidized programs to determine whether they amount to “government speech” and thus are unconstrained by the First Amendment,²⁸ or whether they constitute vehicles for private expression and are subject to some First Amendment restrictions.²⁹ In making these assessments, courts have little choice but to consult statutory and regulatory authorities, among other extraconstitutional sources of information.

Although it is sensible for courts to consult extraconstitutional authorities to determine the scope and nature of government programs to which constitutional protections might apply, the task is fraught with opportunities for error and manipulation. For example, the Supreme Court has increasingly displayed a willingness to characterize as “government speech”—and thus free from the constraints of the First Amendment—expression that is created by private actors that is not “transparently presented as having been shaped by the government” and that onlookers would have reason to believe

24 *Umbehr*, 518 U.S. at 699 (Scalia, J., dissenting) (internal quotation marks omitted) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O’Connor, J., concurring in part and dissenting in part)).

25 *Id.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972)).

26 *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892).

27 *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (explaining that courts must weigh, case by case, the “interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,” against the speech interests at stake).

28 *See* Mary-Rose Papandrea, *The Government Brand*, 110 Nw. U. L. REV. 1195, 1198–204 (2016) (summarizing government speech doctrine).

29 *See id.* at 1200–04 (noting distinction in the caselaw between government speech and government programs that are vehicles for private speech).

represents the private creators' professional or artistic judgments.³⁰ These characterizations might reflect Justices' genuine but questionable judgments that the subsidy programs at issue simply are vehicles through which the government conveys its own messages. More cynically, they might reflect a desire to narrow the realm of subsidized speech to which First Amendment protections apply and to use the government speech label as a means to that end. In either event, this phenomenon illustrates some of the perils of courts relying on extraconstitutional authorities—and on their own interpretations thereof—in shaping and applying constitutional guarantees.

C. *Bivens Actions and Limits Thereupon*

In a number of cases, courts also have deemed the existence of statutory remedies to preclude constitutional damages suits against federal officers acting in their official capacities. Although courts long have taken the view that no federal statute creates a general right of action to bring such suits,³¹ they have, since the 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,³² held that the Constitution itself can support such actions.³³ Yet in the decades since *Bivens*, courts have placed substantial limits on parties' abilities to bring such cases. While early post-*Bivens* cases reflected a rebuttable presumption in favor of constitutional damages

30 See Kitrosser, *supra* note 8, at 328; see also Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 666 (2008) (criticizing the Supreme Court for “shatter[ing] the bargain where the government may promote certain positions to the exclusion of others but only on the condition that the electorate can hold the government accountable for its advocacy”); Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 28 (2009) (“[T]he Supreme Court has too often characterized speech as governmental without requiring the government to signal the origin of its speech in a way that allows the public meaningfully to evaluate the message and its source.”); Papandrea, *supra* note 28, at 1228 (“*Walker* is potentially dangerous because it will give the government much greater ability to restrict private speech whenever the government wants to avoid the appearance that it endorses it.”).

31 They have concluded, in other words, that there is no analogue, for federal officials, to 42 U.S.C. § 1983 (2012), which grants a right of action in damages suits for abuses carried out “under color of state law.” See John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1670 (2009). But see James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009) (arguing that the 1988 Westfall Act “puts the *Bivens* action on a much firmer federal statutory foundation, analogous if not identical to § 1983,” which authorizes suits against state government actors).

32 403 U.S. 388 (1971).

33 See *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (citing *Bivens*, 403 U.S. 388); see also Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 725–27 (2012) (explaining that injunctive remedies were available prior to *Bivens*, and that damages actions often were available earlier in American history).

actions,³⁴ more recent cases “suggest that where sub-constitutional law is available for relief, the Constitution is unavailable.”³⁵

In one of the most important post-*Bivens* cases, 1983’s *Bush v. Lucas*, the Supreme Court held that federal statutory civil service protections implicitly preclude damages actions against federal employers for First Amendment violations.³⁶ The *Lucas* Court found that the civil service laws, including the Civil Service Reform Act (CSRA) of 1978, create an “elaborate” and “comprehensive” framework,³⁷ within which public employees’ First Amendment claims “are fully cognizable.”³⁸ Although the Court assumed, *arguendo*, that the remedies available within this framework were not “as effective as an individual damages remedy,”³⁹ it declined to authorize suits for damages.

The *Lucas* Court reasoned, in short, that existing statutes provided ample recourse for any First Amendment violations suffered by federal employees, and that Congress, not the courts, should judge the wisdom of any additional remedies.⁴⁰ It stressed that the question was one of “federal personnel policy,”⁴¹ and that the “policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees’ First Amendment rights.”⁴² The Court also expressed confidence in Congress’s appreciation of the speech values at stake. Congress, it observed, “has a special interest in informing itself about the efficiency and morale of the Executive Branch. In the past it has demonstrated its awareness that lower-level [g]overnment employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates’ freedom of expression.”⁴³

Even if one agrees, in principle, that courts should infer remedial exclusivity from detailed statutory schemes that encompass constitutional claims, the *Lucas* case illustrates two risks in implementing this approach. First, courts may overestimate the adequacy of particular statutory frameworks. Indeed, the federal legislation on which the *Lucas* Court relied was a dead

34 See Bernstein, *supra* note 33, at 734–36.

35 Preis, *supra* note 31, at 1666; see also Bernstein, *supra* note 33, at 736–41, 744–51.

36 *Lucas*, 462 U.S. at 368.

37 *Id.* at 385.

38 *Id.* at 385–86; see also Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1124 (noting that by statute, “federal civil servants are able to bring First Amendment claims . . . for personnel decisions based on the employee’s disapproving or controversial comments about the agency”).

39 *Lucas*, 462 U.S. at 372.

40 See *id.* at 388 (“The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.”).

41 *Id.* at 380–81.

42 *Id.* at 388.

43 *Id.* at 389.

end, effectively, for federal employees alleging First Amendment violations. According to a 2008 study by Professor Paul Secunda, “not a single First Amendment . . . claim filed by a federal employee against the employee’s agency” had, by that point, “ever been successful on the merits before either” the adjudicative appeals board—the Merit Systems Protection Board (MSPB)—established by the CSRA or the U.S. Court of Appeals for the Federal Circuit, which was the exclusive venue for appeals from the MSPB until 2012.⁴⁴ This startling record was attributable partly to structural features of the CSRA’s adjudicative framework. Rather than initiating their cases before a federal district court judge, federal employees had to choose between a union grievance procedure, if one was available to them, or a hearing before an Administrative Judge (AJ) who lacked salary and tenure protections and was appointed by the MSPB.⁴⁵ An AJ decision could be appealed to the MSPB, whose members have greater independence than AJs but who are more vulnerable to the political winds than are Article III judges.⁴⁶ From the MSPB—or directly following the AJ’s decision—federal employees could appeal only to the Federal Circuit.⁴⁷ That court has taken notoriously narrow views of both constitutional and statutory speech protections for federal employees.⁴⁸ Thus, even if the remedies theoretically available to federal employees through the CSRA were adequate, there were weighty reasons—both before and after *Lucas*—to doubt that it gave federal employees a meaningful opportunity to adjudicate liability.⁴⁹

Second, courts’ assessments of the adequacy of statutory remedies may be colored by their ambivalence about the importance of the substantive rights at stake. Indeed, the *Lucas* Court likened the question before it to those raised by earlier cases that did not involve constitutional rights at all. The Court acknowledged that, unlike those earlier cases, *Lucas* “concerns a claim that a constitutional right has been violated. Nevertheless, just as those

44 Secunda, *supra* note 38, at 1103; *see also* S. REP. NO. 112-155, at 1–2 (2012) (noting that the Federal Circuit was the exclusive federal court of appeals for CSRA claims until the 2012 passage of the Whistleblower Protection Enhancement Act).

45 *See* Secunda, *supra* note 38, at 1124.

46 *See id.* at 1125. For example, each of the three members is appointed for a single term of seven years. As of shortly before this Article’s publication, the Board had *zero* members, due partly to partisan politics. *See infra* notes 136, 140.

47 *Id.*

48 *See* S. REP. NO. 112-155, at 1–2 (“[F]ederal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA).”); *id.* at 26 (“In recent years, both the MSPB and the Federal Circuit Court of Appeals have repeatedly applied the WPA in a manner inconsistent with congressional intent.”).

49 Indeed, the very low number of First Amendment claims brought by public employees under the CSRA likely reflected their reasonable beliefs that those claims would “not be treated seriously.” Secunda, *supra* note 38, at 1104; *see also* S. REP. NO. 112-155, at 26 (“According to Thomas Devine, Legal Director of the Government Accountability Project, certain decisions by the MSPB and the Federal Circuit Court of Appeals that narrowly interpret the WPA have undermined employees’ confidence in the Board process.”).

cases involved ‘federal fiscal policy’ and the relations between [g]overnment and its employees, the ultimate question on the merits in this case may appropriately be characterized as one of ‘federal personnel policy.’”⁵⁰ More so, the *Lucas* Court expressed confidence that Congress would give ample weight to the First Amendment interests at stake, given its demonstrated awareness, in the past, “that lower-level [g]overnment employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates’ freedom of expression.”⁵¹ The Court’s sanguinity about Congress’s role overlooked the reality of Congress’s mixed record in protecting public employee speech rights. It also elided the substantial role played by the executive branch in administering statutory protections.⁵² More fundamentally, it was at odds with a central theme throughout much free speech theory and doctrine—that we must be ever wary of government attempts to police speech, particularly speech about itself.⁵³

II. PASSING THE BUCK

In *Garcetti v. Ceballos*, the Supreme Court made several missteps when it assured critics that the impact of its decision would be limited, given the “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to [public employees] who seek to expose wrongdoing.”⁵⁴ Most glaringly, the Court exaggerated the strength and breadth of such laws. The Court’s assurance about legislative protections also enabled weaker aspects of the Court’s constitutional reasoning; that is, the former seemed aimed partly toward compensating for or justifying the latter.

A. *Inaccurate Depictions of Relevant Legislation*

For federal employees, as we saw above, the CSRA provided little in the way of a meaningful opportunity to raise whatever First Amendment rights they did possess. Nor did the CSRA’s substantive statutory protections go very far to fill that gap. Indeed, the Federal Circuit—which, again, was the sole federal court with jurisdiction over CSRA cases until 2012—interpreted the CSRA to exclude from its coverage speech engaged in as part of one’s job.⁵⁵ This was, of course, precisely the type of speech that the *Garcetti* Court deemed constitutionally unprotected. The Federal Circuit’s interpretation

50 *Bush v. Lucas*, 462 U.S. 367, 380–81 (2004).

51 *Id.* at 389.

52 *See supra* text accompanying notes 45–46 (citing reliance of whistleblower protection laws on AJs and MSPB); *see also* Charles S. Clark, *Newly Installed Special Counsel Wants to Adjudicate Cases More Swiftly*, GOV’T EXECUTIVE (Dec. 11, 2017), <https://www.govexec.com/oversight/2017/12/newly-installed-special-counsel-wants-adjudicate-cases-more-swiftly/144431/> (describing the important role played by the Office of Special Counsel).

53 *See infra* Section IV.A.

54 *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

55 *Willis v. Dep’t of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998).

prevailed for fourteen years—from its opinion’s issuance in 1998 until Congress passed the Whistleblower Protection Enhancement Act of 2012.⁵⁶ Amici had alerted the *Garcetti* Court to the fact that the CSRA did not “cover[] speech that is part of carrying out assigned duties.”⁵⁷ In the aftermath of *Garcetti*, too, many commentators pointed to the absence of statutory—or, by that point, constitutional—protection for whistleblowing engaged in by federal employees in the course of performing their duties.⁵⁸

The *Garcetti* majority’s faith in a “powerful network” also was belied by the spottiness of state protections. Justice Souter made this point in dissent, characterizing the combined protections of state and federal whistleblower laws as “a patchwork, not a showing that worries may be remitted to legislatures for relief.”⁵⁹ Several organizations similarly informed the Court of this reality in an amicus brief.⁶⁰ Commentators also echoed and elaborated on this point in the wake of *Garcetti*. For example, in congressional testimony delivered shortly after *Garcetti* was decided, Stephen Kohn of the National Whistleblower Center explained that “58% of state whistleblower laws do not explicitly protect internal/official duty whistleblowers [O]f states which provide some protection for internal/official duty whistleblowers, 95% . . . provide whistleblowers with less procedural and/or remedial protection” than they could receive by bringing a constitutional claim under Section 1983.⁶¹

Despite abundant evidence of a more complicated reality, the Supreme Court reiterated *Garcetti*’s “powerful network” language in its 2011 opinion in *Borough of Duryea v. Guarnieri*.⁶² The *Guarnieri* Court cited the language to

56 See *infra* notes 123–25 and accompanying text.

57 Brief for Gov’t Accountability Project et al. as Amici Curiae Supporting Respondent at 22, *Garcetti*, 547 U.S. 410 (No. 04-473); see also Brief for Nat’l Treasury Emps. Union as Amicus Curiae Supporting Respondent at 19 n.22, *Garcetti*, 547 U.S. 410 (No. 04-473) (“Courts have denied whistleblower protection to employees who are performing their normally assigned duties in reporting waste, fraud and abuse.”).

58 For example, the U.S. House Committee on Government Reform held a hearing on *Garcetti* shortly after it was decided. Several of the witnesses criticized the *Garcetti* Court for overstating the robustness of statutory protections. They cited weaknesses in the WPA and judicial interpretations thereof, including the lack of coverage for work product speech. *What Price Free Speech? Whistleblowers and the Ceballos Decision: Hearing Before the H. Comm. on Gov’t Reform*, 109th Cong. 13–17 (2006) [hereinafter *Hearings*] (statement of Rep. Henry Waxman); *id.* at 28–52 (statement of Stephen M. Kohn, Chair, National Whistleblowers Center); *id.* at 76, 79–80 (statement of William Bransford, General Counsel, Senior Executives Association); *id.* at 102, 109–10 (statement of Barbara Atkin, Deputy General Counsel, National Treasury Employees Union); *id.* at 207, 210 (statement of Joe Goldberg, Assistant General Counsel for Litigation, American Federation of Government Employees).

59 *Garcetti*, 547 U.S. at 440 (Souter, J., dissenting).

60 Brief for Gov’t Accountability Project, *supra* note 57, at 20–21.

61 *Hearings*, *supra* note 58, at 32–33 (statement of Stephen M. Kohn, Chair, National Whistleblowers Center). Kohn also found that “of the states which provided some form of protection for internal whistleblowers, six states actually *require* the employees to contact their supervisors as a condition of receiving protection under state law.” *Id.* at 33.

62 564 U.S. 379 (2011).

draw an analogy between whistleblower rights laws and measures that protect public employees more broadly,⁶³ but gave no indication of a need to rethink the statement's factual foundations. More so, as we shall see in Part III, many lower courts have cited the "powerful network" language over the years, effectively reasserting the factual claim that it encompasses.

B. The Link to Weak Constitutional Reasoning

Elsewhere, I have detailed a number of weaknesses in the *Garcetti* Court's legal reasoning.⁶⁴ In this Section, I highlight three such vulnerabilities and link them to the Court's assurance about the availability of robust statutory protections. My point is not that the "powerful network" language itself gave rise to these analytical weaknesses. The language does, however, play an enabling role insofar as it seems aimed toward compensating for, deflecting attention from, or even justifying each weakness.

The most fundamental of *Garcetti*'s analytical difficulties is its enervated conception of the social value of public employee speech. The *Garcetti* Court acknowledges, as it has consistently done throughout its public employee speech cases, that "the First Amendment interests at stake extend beyond the individual speaker," to "the public's interest in receiving the well-informed views of government employees engaging in civic discussion."⁶⁵ The Court denies that its opinion undermines these interests, explaining that its "[r]efus[al] to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate."⁶⁶ This assurance, however, overlooks how much the "special value" of public employee speech—as the Court calls it in a subsequent case⁶⁷—relies on the unique channels to which employees have access as employees, and the impact on public debate of speech conveyed through those channels. For example, a government scientist tasked to draft a report on climate change, or a government economist charged to project the impact of a proposed bill, may write directly for public consumption. Even when they write for an internal audience or engage in internal discussions and debates about their reasoning and conclusions, these communications can help to shape public debate. The impact may take the form, for example, of subsequent drafts of the initial work product, public testimony based on that product, or tacit references to the same by government officials. Even internal communications not directly linkable to eventual public statements—for instance, internal reports of corruption—can serve important checking functions by

63 *Id.* at 392.

64 See Heidi Kitrosser, *Public Employee Speech and Magarian's Dynamic Diversity*, 95 WASH. U. L. REV. 1405 (2018) [hereinafter Kitrosser, *Public Employee Speech*]; see also Kitrosser, *supra* note 8, at 302.

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

66 *Id.* at 422.

67 *Lane v. Franks*, 573 U.S. 228, 240 (2014); see also *supra* text accompanying note 8.

keeping agency operations from straying very far from the official images conveyed to the public.⁶⁸

Of course, the *Garcetti* Court did not have to invoke the “powerful network” language in order to define public employee speech value narrowly. But doing the former enables the Court to downplay objections to the latter. Indeed, the Court framed its reference to legislative protections as responsive to concerns that work product speech may expose corruption or dishonesty or otherwise prove important to public, interbranch, or intragovernmental deliberations. In such cases, the Court suggested, the “powerful network of legislative enactments,” along with voluntary agency practices, ethical rules, or other protections will be available.⁶⁹

Just as the *Garcetti* Court understated the speech values at stake, so it overstated the relevant government interests. One interest cited by the Court was the government’s ability to control the work product that it has itself “commissioned or created.”⁷⁰ This rationale is “wildly overbroad. While some public employment entails conveying messages that are dictated by one’s superiors, this is simply not true of much government work.”⁷¹ The rationale does not apply, for instance, to the government scientist or economist ostensibly hired to apply their expertise honestly and competently. The other government interest embraced by the *Garcetti* Court—the need for supervisors to evaluate work product quality—does reflect a genuine managerial need across all areas of government employment. Yet this interest, too, is overstated insofar as it is used to support the categorical removal of work product speech from the reach of the First Amendment. The overstatement “rests on the faulty assumption that judicial scrutiny of work product speech retaliation claims must entail substantive assessments of work product quality. To the contrary, judicial review of such claims can and should be designed to ferret out retaliation for reasons other than work product quality.”⁷²

The *Garcetti* Court’s invocation of the “powerful network” of legislative protections enables its overstatement of the government’s interest no less than it does the Court’s understatement of the speech value at stake. First, insofar as the Court suggests that legislative protections cushion the practical impact of its opinion, the point applies to the opinion’s expansive view of government interests, just as it does to its thin conception of free speech value. Second, in referencing a “powerful network of legislative enactments,” the Court gestures at the notion that the political branches are best equipped to balance the government’s complicated managerial needs against

68 Kitrosser, *Public Employee Speech*, *supra* note 64, at 1410; Kitrosser, *supra* note 8, at 331.

69 *Garcetti*, 547 U.S. at 425–26 (citing “powerful network of legislative enactments,” professional ethical rules, and “additional safeguards,” including the “dictates of [employers’] sound judgment”).

70 *Id.* at 422 (stating that discipline for work product speech “simply reflects the exercise of employer control over what the employer itself has commissioned or created”).

71 Kitrosser, *Public Employee Speech*, *supra* note 64, at 1420 (footnote omitted).

72 *Id.*

employee speech interests. The Court had relied on this point explicitly in *Bush v. Lucas*, taking the view that “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 service.”⁷³

Finally, the *Garcetti* Court’s rosy depiction of available statutory protections both reflects and helps to justify the Court’s credulousness that the political branches will protect work product speech adequately. This Panglossian view is manifest as well in the Court’s observations that government agencies “retain[] the option of instituting internal policies and procedures that are receptive to employee criticism,”⁷⁴ and that it is in their interests to do so.⁷⁵ As we saw above, the Court in *Lucas* made a similar point about Congress’s incentives to protect government whistleblowers, citing Congress’s “special interest in informing itself about the efficiency and morale of the Executive Branch.”⁷⁶

Of course, the reality is far more mixed than the Court’s optimistic take on legislative and executive measures and incentives suggests.⁷⁷ The Court’s attitude also flies in the face of a core concern that animates much free speech theory and doctrine: a fear that government will abuse restrictions on speech to skew public knowledge and debate in its favor.⁷⁸ This fear is especially well justified where the threatened speech concerns the government’s own operations.⁷⁹ The Court’s reference to the “powerful network,” then, implicitly aims to justify the Court’s faith that government will use its discretion over employee speech wisely and judiciously, a faith that conflicts sharply with assumptions central to much First Amendment doctrine and theory. At the same time, the Court’s sunny depiction of the powerful network itself seems fueled partly by such faith.

73 *Bush v. Lucas*, 462 U.S. 367, 389 (1983). Similarly, in *Guarnieri*, the Supreme Court explained—in arguing that public employees should receive no more protection under the Petition Clause than the Speech Clause against retaliation for filing workplace grievances—that statutory protections are available, and “are subject to legislative revision and can be designed for the unique needs of State, local, or Federal Governments, as well as the special circumstances of particular governmental offices and agencies.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 392 (2011). Before making this point, the Court provided a “*cf.*” citation to *Garcetti*’s powerful network language. *Id.*; see also *supra* notes 62–63 and accompanying text.

74 *Garcetti*, 547 U.S. at 424.

75 *Id.* at 424–25.

76 *Lucas*, 462 U.S. at 389.

77 See *supra* Section II.A.

78 See Kitrosser, *supra* note 8, at 324 nn.104–06.

79 *Id.* at 324 n.106; see also Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22, 52 (2008) (“The debate about protecting public employees through legislation inevitably leads to questions of whether government officials can be trusted to fully protect whistleblowers who may report their wrongdoing.”).

III. THE “POWERFUL NETWORK” LANGUAGE IN THE LOWER COURTS

Lower federal courts, as well as state courts, have invoked *Garcetti*'s reference to a “powerful network of legislative enactments” on a number of occasions since *Garcetti* was decided over a decade ago.⁸⁰ Most often, these courts simply and uncritically employ the language in the same way that the Supreme Court invoked it in *Garcetti*. That is, they reject the plaintiff's First Amendment claim, but quote the language to suggest that other means of protection may be available.⁸¹

A few examples of this phenomenon help to illustrate *Garcetti*'s impact on socially valuable speech and the weight that courts have placed on the “powerful network” as a safety net for such speech. In *Green v. Board of County Commissioners*,⁸² the Tenth Circuit upheld the district court's entry of summary judgment against Jennifer Green, a former drug-lab technician and

80 On August 10, 2018, I conducted a Westlaw search for all state and federal cases using the exact language, “powerful network of legislative enactments,” with no other restrictions. Fifty-five cases came up, including *Garcetti* and *Guarnieri*, meaning that fifty-three lower court cases (including all state courts and lower federal courts) used the exact term. All fifty-three cases refer to the language from *Garcetti*, although in some cases courts quote subsequent opinions that themselves quote *Garcetti*. See, e.g., *Green v. Bd. of Cty. Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007) (quoting *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (per curiam)); *Johnson v. City of New York*, No. 16-CV-6426, 2018 WL 1597393, at *21 (E.D.N.Y. Mar. 31, 2018) (quoting *Ruotolo v. City of New York*, 514 F.3d 184, 189 (2d Cir. 2008)); *Kurtzman v. Univ. of Cincinnati*, No. 09-cv-580, 2012 WL 1805486, at *15 (S.D. Ohio May 17, 2012) (quoting *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 392 (2011)); *Tessler v. Paterson*, 768 F. Supp. 2d 661, 668 n.7 (S.D.N.Y. 2011) (quoting *Glicksman v. N.Y.C. Envtl. Control Bd.*, 345 Fed. App'x 688, 691 (2d Cir. 2009)). In one case the deciding court does not place quotations around the language, but it is clear from the context that the language comes from *Garcetti*. See *Pearson v. District of Columbia*, 644 F. Supp. 2d 23, 45–46 (D.D.C. 2009).

81 See, e.g., *Ruotolo*, 514 F.3d at 186–89, 189 n.1 (noting that plaintiff did not appeal from the district court's conclusion that a memo for which he was disciplined was work product speech and adding that public employees are not unprotected for their official speech in light of the “powerful network”); *Foraker v. Chaffinch*, 501 F.3d 231, 239 n.5, 247 (3d Cir. 2007) (concluding that plaintiffs spoke as employees and thus are unprotected by the First Amendment, but citing “powerful network” language to explain that “protection from retaliation and protection under the First Amendment are mutually exclusive considerations”); *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 543, 545–56 (6th Cir. 2007) (holding that plaintiff spoke as an employee and thus has no First Amendment protection, but quoting “powerful network” language and noting that the Supreme Court wrote that language in response to the “potential inequity that its holding might countenance”); *Perrotta v. City Sch. Dist. of Yonkers*, No. 16CV9101, 2017 WL 4236565, at *2–4, *4 n.4 (S.D.N.Y. Sept. 22, 2017) (finding that plaintiff spoke pursuant to his official duties, but adding that people in his position are “not without recourse” because of the “powerful network”); *Fritz v. Daly*, No. 06-cv-191, 2006 WL 3095755, at *5–6 (D.N.H. Oct. 31, 2006) (rejecting First Amendment claim because plaintiff spoke as an employee rather than a citizen, but invoking “powerful network” language and stating, “[a]lthough I rule against Fritz today, I do not suggest that a public employee who has knowledge of government misconduct must remain silent”).

82 472 F.3d 794 (10th Cir. 2007).

detention officer in a county juvenile justice center.⁸³ Green claimed that her supervisors had retaliated against her for raising concerns about the center's lack of a confirmation drug testing policy and the resulting risk of false positives.⁸⁴ Among other things, Green arranged for a confirmation test in a case that she suspected had yielded a false positive.⁸⁵ The test confirmed Green's suspicions, and she communicated the result to her supervisors.⁸⁶ The court of appeals held that Green had spoken in her capacity as an employee, and thus was unprotected by the First Amendment.⁸⁷ Whether Green's speech was effective—indeed, her supervisors had adopted a confirmation policy after being “faced with the false positive”—made no difference.⁸⁸ After all, the court observed, *Garcetti* and several lower court cases applying *Garcetti* “also involved employees trying to focus attention on apparently misguided actions or improper situations,” and “their conduct was not protectable under the First Amendment.”⁸⁹ To the contrary, the *Garcetti* Court had “acknowledged that ‘[e]xposing governmental inefficiency and misconduct is a matter of considerable significance,’” but “concluded the public interest was protected by other means, including a ‘powerful network of legislative enactments.’”⁹⁰

Another example comes from the Western District of Pennsylvania where, in *Baranowski v. Waters*, a district court reaffirmed its earlier grant of summary judgment against James E. Baranowski, a former police officer.⁹¹ Baranowski had arrived at the scene after another officer fatally shot a twelve-year-old boy.⁹² As the highest-ranking officer present in the shooting's aftermath, Baranowski was tasked to investigate the incident.⁹³ After completing his report, Baranowski began to doubt the veracity of the officers who had been present for the shooting, and he relayed his concerns to the FBI and his supervisors.⁹⁴ The court found that these communications took place pursuant to Baranowski's official duties, and thus were unprotected by the First Amendment.⁹⁵ Before quoting *Garcetti*'s “powerful network” language, the court stressed that it

does not trivialize the courage of those who seek to expose governmental misconduct. Instead, it merely clarifies that the Constitution was never

83 *Id.* at 796, 801.

84 *Id.* at 797.

85 *Id.* at 796.

86 *Id.*

87 *Id.* at 801.

88 *Id.*

89 *Id.*

90 *Id.* (alteration in original) (quoting *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (per curiam)).

91 *Baranowski v. Waters*, No. 05-1379, 2008 WL 4000406, at *1 (W.D. Pa. Aug. 25, 2008).

92 *Id.*

93 *Id.*

94 *Id.* at *2–3.

95 *Id.* at *21–22.

meant to provide a remedy for every inappropriate action taken by a governmental official. The people of Pennsylvania, of course, remain free to address the concerns of people in Baranowski's position by invoking the legislative process.⁹⁶

In addition to citing *Garcetti* to justify dismissals based on speech's work product status, courts also have drawn from *Garcetti*'s reasoning, including its "powerful network" language, to argue that speech in particular cases does not involve a matter of public concern. In *Davis v. City of Chicago*, for example, Lorenzo Davis—a former police officer, investigator, and supervisor for the Police Review Authority—alleged that he was fired for refusing to "change sustained findings of police misconduct."⁹⁷ The Northern District of Illinois granted the defendants' motion to dismiss, partly on the basis that "Davis' written reports and findings, as well as his verbal refusals to change such reports and findings, were made pursuant to his official duties."⁹⁸ The court also found that because the "overall objective" of Davis's communications related to his professional obligations, the speech "did not involve a matter of public concern."⁹⁹ Somewhat confusingly, the court went on to cite *Garcetti*'s acknowledgment that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance."¹⁰⁰ It reiterated, however, that Davis's speech was unprotected by the First Amendment, and cited "the powerful network of legislative enactments" to which "those who wish to expose wrongdoing" can turn.¹⁰¹

The Western District of Pennsylvania engaged in similar reasoning in *Mitchell v. Miller*.¹⁰² Danielle Mitchell, a former cadet with the Pennsylvania State Police (PSP), claimed that members of the PSP had retaliated against her for complaining of gender and disability discrimination.¹⁰³ The court granted summary judgment to the defendants on Mitchell's First Amendment retaliation claim, holding that her allegations of discrimination were not of public concern.¹⁰⁴ Although the court did not decide whether Mitchell had spoken as an employee, its reasoning on the public concern question bore traces of an official speech inquiry. Citing *Garcetti*, the court in *Mitchell* explained that "[a] critical factor in determining whether an employee's expression relates to a matter of public concern is whether it is fairly analogous to expressive or petitioning activities typically 'engaged in by citizens who do not work for the government.'"¹⁰⁵ The court concluded its First Amendment discussion by quoting *Garcetti*'s "powerful network" language to

96 *Id.* at *22.

97 *Davis v. City of Chicago*, 162 F. Supp. 3d 726, 729–30 (N.D. Ill. 2016).

98 *Id.* at 732.

99 *Id.* at 733.

100 *Id.* at 736 (alteration in original) (internal quotation marks omitted) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

101 *Id.*

102 884 F. Supp. 2d 334 (W.D. Pa. 2012).

103 *Id.* at 347, 352.

104 *Id.* at 362–63, 365.

105 *Id.* at 363 (quoting *Garcetti*, 547 U.S. at 423).

support the notion that “[e]mployees in Mitchell’s situation are not without legal protection from retaliation.”¹⁰⁶ The court also cited *Guarnieri* to the effect that legislatures are better equipped than courts to formulate such measures.¹⁰⁷

These examples do not exhaust the array of settings in which lower courts have deployed *Garcetti*’s “powerful network” language.¹⁰⁸ They do, however, give a sense of the language’s most typical uses. That is, to reassure observers that, even if *Garcetti*’s “official speech” inquiry (and in some cases the public concern test) preclude First Amendment protection for socially valuable speech, employees who know of misconduct or other problems need not “remain silent.”¹⁰⁹

IV. THE RESPECTIVE ROLES OF CONSTITUTIONAL AND STATUTORY SPEECH PROTECTIONS FOR PUBLIC EMPLOYEES

Much of the preceding two Parts can be summed up by stating that the *Garcetti* Court, relying partly on a misplaced faith in political branch speech protections, underprotected public employee speech. The Court demonstrated its (perhaps willful) naiveté most concretely when it assured readers

106 *Id.* at 365.

107 *Id.*

108 For example, one of the more interesting contexts in which the language arose was a concurring opinion by Judge Cudahy of the U.S. Court of Appeals for the Seventh Circuit in *Pavlyk v. Gonzales*, 469 F.3d 1082, 1091–93 (7th Cir. 2006) (Cudahy, J., concurring). The majority had cited *Garcetti* to help justify rejecting a political asylum claim by a former Ukrainian prosecutor on the basis that speech engaged in as a prosecutor is not political speech that would justify asylum. *Id.* at 1089–90. Cudahy concurred in the judgment but wrote separately to object to this use of *Garcetti*. *Id.* at 1091 (Cudahy, J., concurring). He cited *Garcetti*’s “powerful network” language to help explain why *Garcetti*’s constitutional reasoning does not translate to the asylum context: “Even within our borders, a ‘powerful network of legislative enactments’ extends the Constitution’s minimum protection of politically charged speech. The Immigration Act’s political asylum provisions similarly extend that protection.” *Id.* at 1092 (citation omitted).

Another set of unusual examples consists of three opinions from federal district courts within the Eleventh Circuit, two of which used virtually identical language and responded to essentially identical motions three months apart in the same case. The courts in these three cases did not use the “powerful network” language to help justify refusing to protect speech. Rather, they used a longer quote of which the quoted language is a part to explain why such speech is valuable. *Smith v. Birmingham Water Works*, No. CV 12-J-3493-S, 2013 WL 841331, at *4–5 (N.D. Ala. Mar. 6, 2013) (rejecting defendants’ second motion to dismiss plaintiffs’ free speech claim); *Smith v. Birmingham Water Works*, No. CV 12-J-3493-S, 2013 WL 246018, at *6–7 (N.D. Ala. Jan. 23, 2013) (rejecting defendants’ first motion to dismiss plaintiffs’ free speech claim in same case as preceding cite); *Ranck v. Rundle*, No. 08-22235-CIV, 2009 WL 1684645, at *8–10, *13 (S.D. Fla. June 16, 2009) (using longer quote to bolster notion that plaintiff’s speech was of public concern, but ultimately granting defendants’ summary judgment motion against plaintiff’s free speech claim).

109 *Fritz v. Daly*, No. 06-cv-191, 2006 WL 3095755, at *6 (D.N.H. Oct. 31, 2006) (citing “powerful network” language and noting that, “[a]lthough I rule against Fritz today, I do not suggest that a public employee who has knowledge of government misconduct must remain silent”); see also *supra* note 74 and accompanying text.

that a “powerful network of legislative enactments” is at the ready for “those who seek to expose wrongdoing.”¹¹⁰ In portraying legislative provisions as a bulwark rather than the “patchwork”¹¹¹ that they more closely resemble, the Court enabled the weaknesses of its own constitutional reasoning and paved the way for lower courts to rely on its questionable depiction of the statutory landscape.

If there is a cautionary tale to draw from these events, it is that courts ought not to treat the actual or potential existence of political branch protections as relevant to the scope of public employees’ Free Speech Clause rights. This is not to say that “the vagaries of state or federal law”¹¹² ought never to inform the nature or sweep of constitutional rights. As I suggested in Part I, there are contexts in which such analysis may be appropriate, even necessary. But to deem public employees’ First Amendment rights less pressing than the former otherwise would be due to the fact or potentiality of legislative or executive protections is to misunderstand why nonpolitical protections for such speech are needed. At the same time, treating political branch measures as substitutes for constitutional protections obscures the important role that they can play, not as stand-ins for constitutional protections, but as complements to them.

In Section IV.A, I elaborate on the argument that courts err in treating political branch protections for public employee speech as actual or potential substitutes for First Amendment protections. In Section IV.B, I discuss the positive potential of political branch measures as complements to First Amendment protections.

A. *The First Amendment Floor*

In treating the actuality or potentiality of political branch protections as relevant to the scope of public employees’ First Amendment rights, courts ignore one of the foundations of much free speech theory and doctrine: that is, fear that government will abuse censorial powers.¹¹³ The worry is especially well founded when government seeks to restrict speech about its own operations.¹¹⁴ Although this concern has played little explicit role in the modern doctrine of public employee speech protections—which can be

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

111 *See id.* at 440 (Souter, J., dissenting) (“[T]he combined variants of statutory whistleblower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief.”).

112 *See id.* at 439 (quoting *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 680 (1996)); *see also supra* notes 23–25 (citing and discussing this language).

113 Professor Frederick Schauer demonstrated that all major free speech theories share a core distrust of government, and that this should be a central concern of free speech doctrine. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 33–34, 44–46, 86, 162–63 (1982).

114 *See Kitrosser, supra* note 8, at 324–25 (offering examples to demonstrate that “[v]igilance against government efforts to skew public knowledge and debate in its favor is central to the Supreme Court’s understanding of the First Amendment”).

traced back to the 1968 case of *Pickering v. Board of Education*¹¹⁵—it featured prominently in *Pickering*'s most immediate antecedents. Those precedents were a series of cases involving “the widespread efforts in the 1950’s and early 1960’s to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated.”¹¹⁶ The Court’s rejection of these efforts was “rooted partly in fears that government will leverage its power as an employer to enforce a culture of political orthodoxy.”¹¹⁷ Such leveraging may prove especially tempting to officials wishing to use it to “manipulate knowledge and criticism about themselves.”¹¹⁸

These fears—that government will abuse its censorial powers to protect itself from disparagement or exposure or to enforce political orthodoxy—militate against an attitude of sanguinity that the political branches will reliably protect public employee speech. This is not to say that the legislature and the executive branch have no role to play in this area. To the contrary, some important legislative achievements can occur and have occurred, as discussed in Section IV.B. The role of the political branches is complicated, and their political and practical incentives cut in more than one direction. But there remain strong bases for skepticism concerning their reliability in this realm.

The government distrust rationale also cannot be fully disentangled from the affirmative value of public employee speech, particularly the “special value of public employee speech”; that is, the unique value that employees can add to the speech marketplace by virtue of their expertise, their access to information about their workplaces and to special channels for conveying the same. This value is grounded partly in such speech’s potential service as a counterweight to official narratives, a service necessitated by the potential for government abuse or incompetence.

B. A Still-Important Role for the Political Branches

1. The Respective Roles of Political and Constitutional Protections: An Overview

Although the availability of political branch protections should not bear on the scope of public employees’ First Amendment rights, the former have significant roles to play as complements to the latter. Indeed, just as courts must provide a backstop of protections that is independent of the whims and incentives of the political branches, so the judiciary has its own limitations against which political branches can provide some relief.

First, even when *Garcetti* does not preclude constitutional protection entirely, courts consistently betray a reluctance to second-guess the judg-

115 391 U.S. 563 (1968); see also Kitrosser, *supra* note 8, at 304–06 (tracing cases from *Pickering* through *Garcetti*).

116 *Connick v. Myers*, 461 U.S. 138, 144 (1983) (calling these cases “the precedents in which *Pickering* is rooted”); see Kitrosser, *supra* note 8, at 312 n.42.

117 Kitrosser, *supra* note 8, at 313.

118 *Id.* at 314.

ments of government employers.¹¹⁹ Indeed, one of the nation's leading whistleblower advocates told me in an interview that his organization, the Government Accountability Project, determined in the 1970s—long prior to *Garcetti*—that the deferential balancing test prescribed in *Pickering v. Board of Education* was so weak that “[w]e had to have legislation. Whistleblower rights were going to have to be established . . . through statute.”¹²⁰

This is by no means to suggest that First Amendment protections are a nullity for public employees or that it is not worth the effort to urge courts to interpret them more generously. To the contrary, as I have argued throughout this Article, a floor of First Amendment protections is essential, that floor should be determined independent of political protections, and at least one new extension—specifically, work product speech protections—should be added to that floor. At the same time, First Amendment protections are best understood as a floor rather than a ceiling, and certainly not as a panacea for public employees. One reason for this framing is the reality that courts, recognizing their distance from agencies' day-to-day activities and pressures, consistently defer to employers' purported managerial judgments, and there is little reason to think that this fundamental dynamic will change in the foreseeable future.

Second, while the political branches themselves are hardly stalwarts for public employee speech protections, neither are they unmitigated defenders of employer prerogatives. Both legislative and executive branch actors have somewhat mixed incentives in this realm. On the one hand, as I have observed throughout this Article, there is much reason to suspect that agencies will not reliably police their own responses to employers who reveal wrongdoing. Even if legislators can be counted on to pass forceful measures, those provisions will rely on the executive branch for some aspects of their enforcement. More so, the executive branch will have a strong hand in negotiating any legislation given presidential or gubernatorial veto power. Meaningful reform also may be less likely where the same party controls the executive and the legislature.

At the same time, the concept of public employee protections—particularly whistleblower protections—has some real political purchase. Indeed, a theme that I heard repeatedly in interviewing whistleblower advocates, as well as current and former oversight staffers from both parties on Capitol Hill, is that whistleblower protections—at least in the abstract—command strong bipartisan support.¹²¹ Certainly, executive branch employers have reputa-

119 See, e.g., *Connick*, 461 U.S. at 151–52 (“[A] wide degree of deference to the employer’s judgment is appropriate.”); Tony M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 4 (1987) (“[C]ourts defer broadly—often decisively—to the government employer’s need for disciplinary discretion.”).

120 Interview with Louis Clark, Gov’t Accountability Project, in Washington, D.C. (Dec. 7, 2017).

121 See, e.g., Interview with Elise Bean, former longtime staffer to Democratic Senator Carl Levin, in Arlington, Va. (May 21, 2018); Interview with Mark Cohen, former Principal Deputy Special Counsel, U.S. Office of Special Counsel, and former Executive Director,

tional incentives to convey the message that they have nothing to hide, and that they welcome constructive feedback from employees. Both legislative and executive branch actors thus have incentives, at minimum, to pay lip service to public employee speech protections. Under the right circumstances, those incentives can turn into meaningful pressure to do more than just talk.

Third, constitutional protections, however robust, are poor vehicles for granular rules as opposed to broadly applicable standards. Thus, while courts might be well advised to apply the *Pickering* balance test with less deference than they have applied it in the past, they surely will continue to apply it or some similar balancing mechanism. The policymaking realm, on the other hand, is conducive to more intricate fine-tuning; for example, to identifying particular types of information disclosures and according them absolute protection. At the same time, this feature of policymaking illustrates yet another reason why a consistent backstop of constitutional protections is needed. That is, whereas statutes might provide fine-grained protections—absolutely protecting disclosures on some topics, for instance, while leaving others unprotected—constitutional law, with its relatively sweeping tests and standards, is better suited to broad, if in some respects, thinner coverage.¹²²

2. Two Examples from the Realm of Federal Statutory Protections

Two examples of the CSRA's whistleblower protections and their history illustrate lawmakers' mixed incentives, the resulting hit-or-miss nature of the legislative process for whistleblower protections, and the relationships between legislative and constitutional protections.

First, under the current iteration of the CSRA, a supervisor may not take a prohibited personnel action against an employee or applicant "because of" information disclosures that the employee or applicant "reasonably believes evidences . . . any violation of any law, rule, or regulation," or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."¹²³ A disclosure's protected status is not contingent on case-by-case balancing—that is, on whether its value outweighs the employer's efficiency interests. At the same time, disclosures on other topics, however valuable, receive no protection under the law. The resulting coverage gap is illustrated by a remark made to me in an interview by attorney Katherine Atkinson, who represents Joel Clement, a former Interior Department scientist and policy analyst. Clement allegedly was retaliated against for sharing his views that certain Native Alaskan villages are "sliding

Gov't Accountability Project, in Arlington, Va. (May 24, 2018); Interview with longtime congressional investigator who has worked closely with whistleblowers (I agreed not to name them due to their concerns over office publicity policies) in Washington, D.C. (May 23, 2018); Telephone Interview with longtime Republican congressional staffer (Apr. 11, 2018) (I agreed not to name them due to their concerns over office publicity policies).

¹²² Cf. Garcia, *supra* note 79, at 35–40 (pointing to relative spottiness of statutory coverage).

¹²³ 5 U.S.C. § 2302(b)(8)(A)(i)–(ii) (2012).

into the sea” due to climate change, and that the villagers must be relocated.¹²⁴ Atkinson explained that Clement’s case is “just incredible” insofar as it features a disclosure about climate change in which the “threat to the American public [is] sufficiently specific,” given the direct and imminent danger faced by Alaskan Native populations. In contrast, Atkinson said, “[i]f ten people from EPA came to me today” regarding other climate change disclosures, “I would have to say, ‘you have no case,’” because the statute demands disclosure of a substantial and specific danger to public health or safety.¹²⁵ The CSRA’s narrow but deep coverage of a few types of disclosures marks an instance of legislative fine-tuning. It also illustrates the need for constitutional backstops to protect potentially valuable speech to which fine-grained legislation might not extend.

Second, between 1998 and 2012, the statutory provision invoked by Clement would not have applied to him, because his alleged disclosures were part of his official duties.¹²⁶ The official duties exclusion was imposed by the Federal Circuit in a controversial 1998 opinion.¹²⁷ Congress reversed this judgment in the Whistleblower Protection Enhancement Act (WPEA) of 2012, clarifying that disclosures may not be excluded from protection because they were “made during the normal course of duties of an employee.”¹²⁸ The Senate Report accompanying the WPEA stated that “the Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection,” and that the WPEA “address[es] these problems by restoring the original congressional intent of the [1989 Whistleblower Protection Act].”¹²⁹

The WPEA illustrates Congress’s capacity to provide meaningful whistleblower protections, including those that bypass judicially imposed limits.¹³⁰ At the same time, the fourteen-year span between the Federal Circuit’s

124 Joel Clement, Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity, U.S. Office of Special Counsel, at 6 (July 12, 2017) (on file with author).

125 Interview with Katherine Atkinson, Partner, Wilkenfeld, Herendeen & Atkinson, Washington, D.C. (Dec. 7, 2017).

126 See Whistleblower Protection Enhancement Act of 2012 § 101(f)(2), 5 U.S.C. § 2302(b)(9) (2012) (amending the law to protect such disclosures); Jason Zuckerman, *Congress Strengthens Whistleblower Protections for Federal Employees*, ABA LEL FLASH, Nov.–Dec. 2012 (explaining that this 2012 amendment was necessary to close the restriction on protection for whistleblowers imposed by a 1998 decision by the U.S. Court of Appeals for the Federal Circuit).

127 *Willis v. Dep’t of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998).

128 Whistleblower Protection Enhancement Act of 2012 § 101(b)(2), 5 U.S.C. § 2302(f)(2); see also Zuckerman, *supra* note 126.

129 S. REP. NO. 112-155, at 1–3 (2012); see also Zuckerman, *supra* note 126 (explaining that “several Federal Circuit decisions . . . creat[ed] loopholes that were contrary to Congressional intent,” and WPEA closed those loopholes.); Interview with Louis Clark, *supra* note 120 (making similar points).

130 See *supra* note 128 and accompanying text. In addition to reversing the official duties exclusion, the WPEA reversed Federal Circuit holdings that had deemed disclosures unprotected if they were made “to a supervisor or to a person who participated in the [disclosed] activity,” or “not . . . in writing.” See Whistleblower Protection Enhancement Act

decision and the WPEA's passage, and the six-year gap between *Garcetti's* exclusion of work product speech from First Amendment coverage and the WPEA's partial protection of the same, illustrates the contingent nature of such progress. Indeed, Congress had considered, and civil society groups had sought earlier versions of the WPEA for more than a decade prior to the law's eventual passage.¹³¹ More so, "in each of the four congressional sessions prior to 2011–12," the WPEA had "passed by Unanimous Consent in both chambers" of Congress.¹³² Each time, however, the legislation died when a secret hold was placed on it in the Senate.¹³³ The WPEA's eventual passage was facilitated partly by media attention, including a crowdsourcing effort launched jointly by the National Public Radio program *On the Media* and the Government Accountability Project to ferret out the source of the secret hold.¹³⁴

That the WPEA ultimately did pass is a testament, among other things, to the political resonance of public employee whistleblower protections. The difficulties encountered in its passage, however, coupled with continuing gaps in coverage and enforcement,¹³⁵ offer a glimpse of the political branches' intrinsic limits in protecting public employee speakers, and the ever-green need for a protective constitutional floor.

CONCLUSION

In an alarming turn of events that occurred during this Article's final editing stages, the MSPB—which had been without a quorum since January 2017—lost its final member when his term expired on March 1, 2019.¹³⁶

of 2012 § 101(b)(2)(C), 5 U.S.C. § 2302(f)(1)(A), (D); see also Zuckerman, *supra* note 126 (citing these changes). The WPEA also created a pilot program that opened review of whistleblower appeals to all U.S. circuit courts. Congress recently extended that program indefinitely. See *Make It Safe Coalition Praises Congressional Approval of the All Circuit Review Act*, GOV'T ACCOUNTABILITY PROJECT (June 25, 2018), <https://www.whistleblower.org/press/make-it-safe-coalition-praises-congressional-approval-all-circuit-review-act/>.

131 In 2006, for example, very shortly after *Garcetti* was decided, the U.S. House Committee on Government Reform held a hearing entitled, *What Price Free Speech? Whistleblowers and the Ceballos Decision*, in which several representatives and civil society advocates suggested that new legislation was needed. See *Hearings*, *supra* note 58.

132 *Whistleblower Protection Enhancement Act (WPEA)*, GOV'T ACCOUNTABILITY PROJECT (May 9, 2018) (emphasis omitted), <https://www.whistleblower.org/uncategorized/whistleblower-protection-enhancement-act-wpea/>.

133 *Id.*

134 *Blow the Whistle!*, WNYC, <https://www.wnyc.org/blowthewhistle> (last visited Feb. 22, 2019).

135 See *infra* note 136 and accompanying text.

136 Eric Katz, *Federal Employee Appeals Board's Doomsday Has Arrived*, GOV'T EXECUTIVE (Feb. 28, 2019), <https://www.govexec.com/pay-benefits/2019/02/federal-employee-appeals-boards-doomsday-has-arrived/155216/> [hereinafter Katz, *Doomsday*]; Eric Katz, *MSPB Likely to Remain Powerless as Senate Panel Fails to Advance Trump's Nominees*, GOV'T EXECUTIVE (Nov. 28, 2018), <https://www.govexec.com/pay-benefits/2018/11/mspb-likely-remain-powerless-senate-panel-fails-advance-trumps-nominees/153100/> [hereinafter Katz, *MSPB*].

Given the Board's central role in adjudicating whistleblower claims under the CSRA,¹³⁷ its 2000 backlogged cases (as of March 2019)¹³⁸ as well as future cases that would normally reach it, are in an unprecedented state of limbo.¹³⁹

This episode exemplifies—albeit in unusually dramatic fashion—the relative vulnerability of administrative processes—and of politically crafted remedies more broadly—to political headwinds.¹⁴⁰ This is not to suggest that constitutional adjudication by Article III courts is itself unimpeachable, or that political branch protections cannot play important roles in protecting whistleblowers or speech freedoms more broadly. It should serve, however, as a cautionary tale; an admonition that the scope of public employees' constitutional speech protections ought not to hinge on the vigor, whether real or imagined, of those rights bestowed by the political branches.

137 See *supra* notes 44–47.

138 Katz, *Doomsday*, *supra* note 136.

139 Evan Osnos, *Trump vs. The "Deep State,"* NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> (“Since 1979, the board has never been without a quorum for longer than a few weeks.”).

140 Nominations to the Board were held up due partly to partisan political concerns, including a desire by Senate Republicans to ensure that their party would hold a Board majority. Katz, *MSPB*, *supra* note 136 (quoting Republican Senator Ron Johnson to this effect). One prominent whistleblower advocate also speculated that “[t]he Trump philosophy is they just don’t want the agency to function at all.” Osnos, *supra* note 139 (internal quotation marks omitted).

