BLOWING THE WHISTLE ON WHISTLEBLOWER PROTECTION: A TALE OF REFORM VERSUS POWER

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I. INTRODUCTION

The ability of the law to curb the exercise of political and economic power is always suspect, and this is a point of agreement among voices on the Right and the Left.¹ The Left suggests that the law is subservient to power, and the Right suggests that powerful economic and political interests are easily able to overcome collective action challenges to pursue their special interests at the expense of the general welfare.² So it is with legal protections for whistleblowers.³ Whistleblowers threaten those with power.⁴ This Article shows that the law’s protection of whistleblowers today is illusory at best but that durable reform may be

¹ See RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS x–xi (2004). Business Professors Rajan and Zingales focus upon the power of economic and political incumbents to distort the political system—and thus law—in ways that undercut the proper functioning of markets. Id.

² Historian Gabriel Kolko demonstrated that, in the end, the Progressive Era reforms served the interests of powerful capitalists. See GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916, at 3 (1963). Law and Economics scholars argue that regulation is self-defeating, as those economic interests subject to regulation exercise their economic power to dominate the regulatory process. See Ronald A. Cass, The Meaning of Liberty: Notes on Problems Within the Fraternity, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 777, 790 (1985) (“Take almost any government program at random, and a ‘special interest’ counter-majoritarian explanation can be found that is more plausible than the public interest justification for it.”).

³ Whistleblowing as used in this Article denotes conduct by an employee designed to reveal potential illegality or unlawful conduct undertaken by an organization. See DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 23 (2d ed. 2004). Whistleblower protection refers to laws designed to assure that whistleblowers do not suffer specified adverse consequences as a result of their disclosures.

⁴ In fact, the pressures against whistleblowing have powerful cultural roots. Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 VAND. L. REV. 1, 26–28 (2003). Simons identifies historical criticism (such as Benedict Arnold and religious criticism (such as Judas’ kiss leading the Roman soldiers to Jesus’ capture and death, and the Jewish “Talmudic prohibition against testifying against another Jew”) as examples of our cultural bias against those who betray the trust of confederates. Id. at 27, 30 n.140.
possible if the law is restructured appropriately. Thus, this Article seeks to use the law of whistleblower protections to demonstrate that law can more efficaciously curb the excessive exercise of power to serve the general welfare. In short, legal structure matters.

An excellent example of the power dynamics underlying whistleblowing law is the Sarbanes-Oxley Act of 2002, which offers protection for those blowing the whistle on corporate and securities fraud. The Act became law during a compelling political context; indeed, the Act passed the U.S. Senate ninety-nine to zero. Yet, when President Bush signed the measure, he issued an executive signing statement that, out of literally hundreds of reform provisions, narrowed only whistleblower protection. The executive signing statement introduced confusion to a facially clear statute. Despite the protestations of key senators, the whistleblower provision was thus diluted before the ink of the President’s signature was dry. Those contending that law is essentially a manifestation of power and interest group politics would have predicted this very outcome.


6. For example, President Bush objected to the Act approved by the House on the ground that it would compromise national security. Id. In fact, the bill failed to include provisions, like those urged herein, to address national security concerns. See H.R. 985, 110th Cong. (2007).


9. Statement by President George W. Bush upon Signing H.R. 3763 (July 30, 2002), reprinted in 2002 U.S.C.C.A.N. 543 (hereinafter Signing Statement of President Bush) (“[T]he legislative purpose of section 1514A . . . is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority,” therefore, “the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.”).

10. Indeed, Professors Butler and Ribstein identify many other provisions of the Sarbanes-Oxley Act that imposed costs that they estimate to total $1.1 trillion that were not deemed worthy of targeting. BUTLER & RIBSTEIN, supra note 8, at 3.

11. Compare Signing Statement of President Bush, supra note 9, with Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(a)(1)(B) (providing protection for employees against discrimination in retaliation for providing or assisting in providing information “when the information or assistance is provided to or the investigation is conducted by . . . (B) any Member of Congress or any committee of Congress”).

12. See Kelly Wallace, Senators: Bush Could Undercut Whistleblowers, CNN, July 31, 2002, available at http://foi.missouri.edu/whistleblowing/senatebush.html (reporting that U.S. Senators Pat Leahy (D-Vermont) and Charles Grassley (R-Iowa) sent to President Bush on July 31, 2002, a letter raising concerns with the President’s signing statement: “The statement ‘embody a flawed interpretation of the clearly worded statute and threatens to create unnecessary confusion and to discourage whistleblowers . . . from reporting corporate fraud to Congress.’”).

13. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 24
The goal to better protect whistleblowers from retaliation is not new. The issue has international interest as nations struggle to protect those employees who seek to protect the public interest. Whistleblowing is crucial to effective law enforcement efforts and, in the business sector, serves to enhance the transparency and integrity of financial markets. Still even weak and ineffective reforms have been legislatively stalled in the past. The widespread extent of employer retaliation to legitimate whistleblowing by employees suggests lawmakers and reformers must identify a means to extend broader protection to employees to enhance law enforcement mechanisms. This Article argues that power

(2001) (“But after the celebration dies down, the great victory is quietly cut back by narrow interpretation, administrative obstruction, or delay.”). Critical race theorists have demonstrated that racial reform occurs when it coincides with the needs of those with economic and political power. Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980) (stating that Brown was the “subordination of law to interest-group politics”). Bell’s assessment was vindicated when archival research revealed that when the Department of Justice intervened on the side of the NAACP, the administration “was responding to a flood of secret cables and memos outlining the United States’ interest in improving its image in the eyes of the Third World.” DELGADO & STEFANCIC, supra, at 19–20; Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 66, 82–84 (1988) (examining extensive materials in the U.S. Department of State and the U.S. Department of Justice files, including foreign press reports, letters from U.S. ambassadors abroad, and Department of Justice amicus briefs, confirming Bell’s thesis).


16. Terry Morehead Dworkin, SOX and Whistleblowing, 105 MICH. L. REV. 1757 (2007) (arguing that Congress should create rewards to encourage whistleblowing because of its important role in securing legal compliance).

17. See, e.g., KOHN, supra note 14, at 378 (“In 1990 the Senate Committee on Labor and Human Resources approved, by a one vote margin, the Employee Health and Safety Whistleblower Protection Act. . . . which did not even close the loopholes in existing legislation [and] was extremely complex and unworkable. . . . It was never debated [n]or voted upon by the Senate and, since 1990, has not been seriously reintroduced.”).

18. See Simons, supra note 4, at 29–31; KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 172 (1985) (observing the sanctions faced in the marketplace by informants as a result of informing on business associates). Sherron Watkins’s experience at Enron is telling. Ms. Watkins waited until CEO Jeffrey Skilling’s departure from Enron because she feared she would be fired, given that the company treasurer, Jeff McMahon, was transferred after he “complained
deliberately crafted whistleblower “protection” laws so that whistleblowing is hazardous and costly to the ordinary citizen who blows the whistle.\footnote{19}

By definition, whistleblowers threaten those with power—an employee rarely needs protection from blowing the whistle on an underling.\footnote{20} This Article seeks to light the way for durable reform, notwithstanding the power dynamics—and the cultural mores—at stake. Those seeking enhanced whistleblower protections must be prepared to exploit opportune times when a political coalition in favor of more effective law enforcement against those with power may emerge.\footnote{21} Such a reform moment could give rise to an omnibus whistleblower statute that can secure the policy foundations of whistleblowing.\footnote{22}

\footnote{19} Among the numerous tactics of retaliation that are used against whistleblowers, employers have launched investigations of the whistleblowing employees to focus attention on the person and not the alleged misconduct of the employer, or have sought prosecution of the whistleblowers for “unauthorized” disclosures or “stealing” the evidence used to prove the employer’s wrongdoing. See Tom Devine, Gov’t Accountability Project, Courage Without Martyrdom: The Whistleblower’s Survival Guide 28–32, 35–36 (1997).

\footnote{20} See The World Bank, World Development Report 2006: Equity and Development 10 (2005) (“Policy reforms that result in losses for a particular group will be resisted by that group. If the group is powerful, it will usually subvert the reform.”). Economists predict that high economic inequality is associated with legal outcomes that systematically favor the rich. \textit{Id.} at 8–9; Edward Glaeser, Jose Scheinkman & Andrei Shleifer, The Injustice of Inequality, 50 J. Monetary Econ. 199 (2003). One study reveals that the income share of the top decile in United States increased substantially over last twenty-five years, garnering 40–45% of overall U.S. income. Thomas Piketty & Emmanuel Saez, The Evolution of Top Incomes: A Historical and International Perspective, 96 AM. Econ. Rev. 200, 201 (2006), available at http://elsa.berkeley.edu/~saez/piketty-saezAEAPP06.pdf. The increase is attributed to “the very large increases in top wages (especially top executive compensation).” \textit{Id.} at 204. The Economic Policy Institute supports this analysis, reporting that from 1965 to 2005, the ratio of chief executive officers’ annual compensation as compared to minimum wage workers increased from $51:$1 to $821:$1. Lawrence Mishel, CEO Pay-to-Minimum Wage Ratio Soars, ECON. POL’Y INST., June 27, 2006, http://www.epinet.org/content.cfm/webfeatures_snapshots_20060627. Consequently, “[a]n average CEO earns more before lunchtime on the very first day of work in the year than a minimum wage worker earns all year.” \textit{Id.}

\footnote{21} Such a reform moment occurred when Congress passed the Sarbanes-Oxley Act of 2002. See supra notes 7, 8.

\footnote{22} Whistleblowers are crucial to effective white collar crime enforcement because, unlike much
unified and integrated legal approach to whistleblower retaliation would offer certainty for employers and employees, would assist law enforcement’s efforts to detect crime, and would serve society’s interests in assuring legal compliance. Such a statute could also prove remarkably durable, as reactionary forces may find unassailable political opposition in favor of whistleblowing generally. Theories of legal reform suggest that disruptions to the status quo provide opportunities for reform; this Article attempts to articulate a vision of whistleblower protection that can be implemented in response to the next reform opportunity.

In Part II, this Article highlights that the current framework is an inadequate net, not a secure blanket, and thus fails to catch every falling whistleblower. Federal and state legislation both intend to encourage whistleblowing and to protect whistleblowers from retaliation; instead they require whistleblowers retain legal counsel, and thus, they operate to chill whistleblowing. The most recent federal foray, the Sarbanes-Oxley Act of 2002 (SOX), underscores this point. Congress enacted

street crime, white collar crimes are usually undertaken in the privacy of the executive suite with only minimal underlings present. See, e.g., H.R. REP. NO. 110-42, pt. 1, at 3 (2007) (“A key component of government accountability is whistleblower protection. Federal employees are on the inside. They can see when taxpayer dollars are wasted and are often the first to see the signals of corrupt or incompetent management.”). This same rationale applies to the private sector.

23. See infra Part IV.B.

24. For example, President George W. Bush did not resist the enhanced Sarbanes-Oxley whistleblower protections directly; instead he undercut those protections indirectly through a little-publicized executive signing statement. See Signing Statement of President Bush, supra note 9.

25. See Richard Delgado, Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race, 82 TEX. L. REV. 121, 138 (2003) (book review) (observing that interest convergence is “useful both in explaining the course of history and in determining when the time may be right to strike for change”); see also Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 YALE L.J. 1521, 1524 (2005) (stating that successful law reform often emerges from ideas advanced in policy circles by taking advantage of “policy windows” that open when shifts in the national mood, change in elected officials, and “focusing events” coincide); Dani Rodrik, Understanding Economic Policy Reform, 34 J. ECON. LIT. 9, 31–38 (1996) (summarizing theory of economic reform that identifies economic crises as one factor leading to reform). Although there is not a general theory of legal reform, voices on both the Left and the Right agree that elite influence is essential to all reform. See RAJAN & ZINGALES, supra note 1, at x–xi (stating that both conservative- and liberal-leaning voices agree that “the market system gets distorted by politically powerful elites”). Power held by elected officials also accounts for legal system distortion. Edward J. McCaffery & Linda R. Cohen, Shakedown at Gucci Gulch: The New Logic of Collective Action, 84 N.C. L. REV. 1159, 1233 (2006) (finding that Congress often engages in ex ante rent extraction as much as legislative activity is a function of collective action theory).


SOX to address a crisis in confidence in our financial markets brought on by multilayered accounting and securities frauds perpetrated by some of the largest corporations in the United States. Yet, SOX does little to change the hazardous path whistleblowers must tread.

Part III identifies current issues of concern in whistleblower protection while examining SOX’s approach to these issues, and it proposes the means to address the issues through omnibus legislation. Part III argues that more certainty and clarity could operate to broaden protections and to encourage more whistleblowing. Sarbanes-Oxley’s whistleblowing provision accomplishes neither of these goals. Thus, this Part suggests that SOX, like other efforts to secure whistleblowers from retaliation, misses the mark.

Finally, Part IV considers the competing interests at stake and suggests that interests can align to provide blanket protection for whistleblowers that respect employers’ rights to manage employees, investors’ rights to honest businesses, society’s right to safety, and government’s responsibility to protect its citizens through legal compliance. Central to this analysis are the benefits of an omnibus statute, in terms of protecting whistleblowers in whatever capacity or industry we may find them, as well as in political terms.

This Article concludes that omnibus legislation can be enacted in response to an appropriate reform moment and during a time of a favorable governing coalition that provide the opportunity to replace the net of unpredictable and unreliable protections with a blanket of protection that is politically unassailable.


30. Leonard M. Baynes, Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act, 76 St. John’s L. Rev. 875, 883–88, 896 (2002) (examining the fiduciary obligations of corporate insiders who want to blow the whistle and the conflict presented by the duties of care and loyalty in the whistleblowing context, and concluding that SOX does not eliminate the challenges facing whistleblowers).

31. See Lawrence A. Cunningham, The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work), 35 Conn. L. Rev. 915, 987 (2003) (comparing the reactive reforms in SOX to military planning based upon the last war rather than anticipating the next war).
II. THE NET OF WHISTLEBLOWER PROTECTION

Whistleblower protection has evolved in response to specific breakdowns in law enforcement over time. Instead of a tightly woven blanket, the evolution has yielded a porous net of protections that is complex and non-intuitive; under current protections, being a whistleblower requires bearing costs and risks. Two key considerations tend to arise for employees faced with this decision of stepping forward:

First, will coming forward with the information change the status quo and fix the problem; and second, will they be protected from a destroyed career, financial ruin, and, perhaps, physical threat. Given the stakes, the only sound course of action for a putative whistleblower is to get a lawyer. As Justice Souter has noted, the protections available to whistleblowers amount to a legal "patchwork." The questions of whether or which law covers specific

32. Cora Daniels, It's a Living Hell, FORTUNE, Apr. 2002, at 367, 368 (“About half of all whistleblowers get fired, half of those fired will lose their homes, and most of those will then lose their families too.”).


34. Sandra Blakeslee, For Los Alamos, a New Puzzle: The Case of the Battered Whistle-Blower, N.Y. TIMES, June 9, 2005, at A24 (reporting that an auditor who accused Los Alamos nuclear laboratory’s management of accounting irregularities—and was subsequently removed from his auditing duties—was severely beaten and warned by his attackers to “keep his mouth shut,” having been lured to a topless bar to meet a laboratory auditor with “important new information about fraud”); Eisler, supra note 26.

35. See C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 109–10 (2001) (observing that even in the rare instances when a whistleblower wins a claim, the victory may take years to materialize because of administrative and appeals processes, and the victory may be hollow because the legal cost of pursuing the claim and the time out of work is borne by the individual, whereas lengthy processes favor the organization).

36. RICHARD RASHKE, THE KILLING OF KAREN SILKWOOD (2d. ed. 2000) (recalling the death of Karen Silkwood, an employee of Kerr McGee’s Oklahoma plutonium facility, who was killed when her car was forced off the road while she was on her way to meet with a reporter about misconduct at the facility).

37. DEVINE, supra note 19, at 105. Devine advises that not only is it wise to consult a lawyer before blowing the whistle, but he advocates choosing the attorney carefully and provides a list of twenty tips on choosing the lawyer, including confirming the lawyer does not have a conflict of interest. Id. at 107–12.

38. Justice Souter has observed that “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”:

Some state statutes protect all government workers, including the employees of
retaliatory conduct, and where and when to file such a claim, demands the services of a lawyer.\textsuperscript{39} Thus, the whistleblower faces financial, legal, and physical risks, with no assurance that blowing the whistle will effectively stem the misconduct at issue.

In addition to these formidable risks is social and cultural risk. The celebrated “heroism” of whistleblowers Sherron Watkins of Enron fame, Cynthia Cooper at WorldCom, and Colleen Rowley from the FBI, Time Magazine’s 2002 Persons of the Year,\textsuperscript{40} ignores that a different social value is communicated to our children on playgrounds across America: Nobody likes a tattletale.\textsuperscript{41} Society values “team players” and scorns “rats,” “snitches,” and “turncoats.”\textsuperscript{42} These cultural mores help explain why the number and scope of laws protecting whistleblowers from retaliation continues to grow, but why real protection remains elusive.\textsuperscript{43}

municipalities and other subdivisions; others stop at state employees. Some limit protection to employees who tell their bosses before they speak out; others forbid bosses from imposing any requirement to warn. As for the federal Whistleblower Protection Act of 1989, current case law requires an employee complaining of retaliation to show “irrefragable proof” that the person criticized was not acting in good faith and in compliance with the law. And federal employees have been held to have no protection for disclosures made to immediate supervisors, or for statements of facts publicly known already.

Garcetti v. Ceballos, 126 S. Ct. 1951, 1970–71 (2006) (five to four decision) (Souter, J., dissenting) (refuting majority opinion statement that public employees are protected from vindictive bosses by “a comprehensive complement of state and national statutes”).

39. In fact, the state where the whistleblowing occurs could well determine whether protection is available. See Michael Delikat & Jill L. Rosenberg, Defending Whistleblower Claims Under the Sarbanes-Oxley Act, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY 9, 37 (2005).


41. Simons, supra note 4.

42. One author aptly describes the “intensely personal” decision about whether to blow the whistle as a “choice between conflicting social values”:

Our society honors “team players” and doesn’t like cynical troublemakers and naysayers. But we also admire rugged individualists and have contempt for bureaucratic “sheep.” We look down on busybodies, squealers and tattletales. But we condemn just as strongly those who “don’t want to get involved,” claim to “see nothing” or look the other way. And while we believe in the right to privacy, we simultaneously fight for the public’s right to know.

DEVINE, \textit{supra} note 19, at 4.

43. See Delikat & Rosenberg, \textit{supra} note 39, at 61–64, 67–86, apps. A–B (charting federal and state whistleblower protection provisions, respectively, and summarizing the prohibited employer action and the employee protected conduct under each provision listed). The difficulty in tracking the various laws is evident from websites such as Whistleblowerlaws.com, which lists about 58 federal laws providing whistleblower protection but notes that the list remains incomplete. See Ann Lugbill: WhistleblowerLaws.com, List of Federal Whistleblower Statutes, http://www.whistleblowerlaws.com/statutes.htm (last visited Mar. 13, 2007). In addition to whistleblower protection, a private individual may bring a qui tam action under the False Claims Act on behalf of the government to pursue fraudulent conduct against the government. 31 U.S.C. §§ 3729–3733 (2000). Other statutes also encourage the
The sheer number of anti-retaliation laws illustrate that whistleblowers are a critical component to effective law enforcement in a complex society as insiders often furnish invaluable assistance in the investigation and prosecution of public corruption and corporate fraud. Well over fifty federal statutes exist to protect whistleblowers. Nearly all states have some whistleblower protection, be it statutory or common law, but the contours of protection vary considerably from state to state. Yet, legal protection remains illusory, largely because of the piecemeal evolution of whistleblower protection.


44. In the United States, whistleblowers have disclosed or assisted in exposing acts that threatened the environment with radioactive leaks from nuclear waste disposal sites, that threatened national security and armed forces with the use of faulty parts for military equipment that failed during tests but were still sold to the government, and that resulted in billions of dollars in government contract fraud. Devine Testimony, supra note 14. See HENRY SCAMMELL, GIANTKILLERS: THE TEAM AND THE LAW THAT HELP WHISTLE-BLOWERS RECOVER AMERICA’S STOLEN BILLIONS 7–11, 14–17 (2004) (describing the experiences of a whistleblower at Teledyne who refused to falsify reports regarding failed quality assurance tests of electronic relays, an automatic electronic current switching device sold to the government for military projects).

45. See Delikat & Rosenberg, supra note 39.

46. See Delikat & Rosenberg, supra note 39, at 67–86, app. B (charting the whistleblower provisions available in each state summarizing the prohibited employer action and the employee protected conduct under each provision listed); Frank J. Cavico, Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis, 45 S. TEX. L. REV. 543 (2004).

47. One example of the legal risk facing whistleblowers is a False Claims Act (FCA) claim against Custer Battles LLC, alleging the company had submitted tens of millions of dollars in false claims to the Coalition Provisional Authority (CPA); the CPA is the organization formed in 2003 to administer the transition to a democratic society and rebuild Iraq. United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 618 (E.D. Va. 2005). One whistleblower, Robert Isakson, alleged that when he objected to Custer Battles practices, “he was held at gunpoint by company employees along with his 14-year-old son . . . [and then he and his son were kicked] off the [Baghdad] airport base” and left to find their own way home. T. Christian Miller, Contractor Accused of Fraud in Iraq, SEATTLE TIMES, Oct. 9, 2004, available at http://seattletimes.nwsource.com/html/ nationworld /2002058470_contract09.html. After a jury trial finding in favor of the relators (the whistleblowers), the district granted in part defendants motion seeking judgment as a matter of law, finding that the FCA did not apply because the CPA is not an officer or employee of the United States government under the FCA despite jury findings that Custer Battles had knowingly presented false claims valued at $3 million dollars. United States ex rel. DRC, Inc. v. Custer Battles, LLC, 444 F. Supp. 2d 678, at 680 (E.D. Va. 2006). The district court found that the CPA was “created by the United States, United Kingdom, and
Most of the development in whistleblower protection has occurred over the last thirty years, but the legal cornerstone was set during the U.S. Civil War. Congress enacted the 1863 False Claims Act to encourage private citizens to sue on behalf of the United States to address fraudulent practices of companies supplying the federal government with deficient goods during the Civil War. The formation of labor unions and the civil unrest that accompanied the labor movement spurred anti-retaliation legislation. Both the Railway Labor Act and the Wagner Act (also known as the NLRA) included provisions barring retaliation against union organizers. The disruptive labor strikes and civil unrest associated with the labor movement had led to ‘burdening [and] obstructing commerce.’ Workers had an interest in “freedom of association, self-organization, and designation of

its Coalition partners ‘acting under existing command and control arrangements through the Commander of Coalition Forces,’” and thus could not be considered an instrumentality of the United States even though it was “staffed, in large part, by employees of the United States government, [it was] led by a CPA Administrator appointed by and subject to the President, [and it] received a substantial part of its operating budget (approximately $1 billion) from Congress.”

48. Westman & Modesitt, supra note 3, at 4–12 (recounting the historical development leading to whistleblower protection laws).


50. See Westman & Modesitt, supra note 3, at 3–4; S Cammell, supra note 44, at 36 (“[C]orrupt profiteering was epidemic. Gunpowder was frequently adulterated with sawdust. Rifles didn’t fire. At the start of the Civil War, Union uniforms exposed to rain would often dissolve and fall from the wearer in clots of sodden fiber.”). The False Claims Act (FCA) was amended in 1986 to protect employees of federal contractors who proceed under the FCA. Westman & Modesitt, supra note 3, at 4.

51. The passage of the Clayton Act restricted management from resorting to federal antitrust laws or civil remedies to restrain peaceful union activity, but it did not prevent employers from firing or failing to hire persons who engaged in organizing activities; section 6 of the Clayton Act exempts labor unions from the federal antitrust laws, and thereby “prohibited federal courts from issuing injunctions restraining labor unions from peaceful picketing, or from ‘peacefully persuading any person to work or to abstain from working.’” Westman & Modesitt, supra note 3, at 5. See 15 U.S.C. § 17 (2000). The Norris-LaGuardia Act in 1932 reaffirmed the prohibition of injunctions to resolve labor disputes. See 29 U.S.C. §§ 101–115 (2000); Westman & Modesitt, supra note 3, at 6.

52. The 1926 Railway Labor Act is now codified at 45 U.S.C. §§ 151–188 (2000). The law was enforceable by any district attorney of the United States and made it a misdemeanor for any common carrier “to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.” See 45 U.S.C. § 152; Westman & Modesitt, supra note 3, at 6 & n.13.

53. 29 U.S.C. §§ 151–169 (2000); Westman & Modesitt, supra note 3, at 6. The NLRA demonstrated that the national policy in favor of collective bargaining of employees may limit employers’ right to discharge employees, prohibiting “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,” and deeming it an unfair labor practice for an employer “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.” 29 U.S.C. § 158(a)(3)–(4), Westman & Modesitt, supra note 3, at 7.

[employment] representatives of their own choosing," 55 and retaliation against union organizers impeded this interest. The preamble of the NLRA recognized the importance of union organizing by favoring collective bargaining as a means of “safeguard[ing] commerce from injury, impairment, or interruption, and promot[ing] the flow of commerce by removing certain recognized sources of industrial strife and unrest.” 56 Thus by 1940, the federal labor laws established that Congress could restrict the right of employers to discharge at-will employees in order to facilitate industrial peace, and could protect employees who participated in labor union activity. 57

In the 1960s and 1970s, national attention shifted from economic concerns to concern for civil rights, 58 and public health and safety. 59 Consequently, expansive federal regulation of businesses to promote these “national interests” solidified government involvement in the private sector workplace. Moreover, it offered protection to those employees aiding the enforcement of these laws by restricting employers’ ability to discharge such employees at will and by shifting retaliation issues from government enforced administrative actions to the civil courts. 60 The proliferation of whistleblower protections did not end there.

Protecting the public fisc provided the catalyst for the Civil Service Reform Act of 1978 (CSRA), 61 encouraging federal employees to report waste, fraud, or corruption within the federal government by establishing statutory protection for them from retaliation. 62 The

55. Id.
56. Id.
57. Westman & Modesitt, supra note 3, at 7.
60. Westman & Modesitt, supra note 3, at 8–9. The protection within the statutes vary from narrow provisions that only protect employees who participate in hearings regarding employer misconduct to prohibiting retaliation by employers against employees who oppose improper conduct. Id.; see also Cavico, supra note 46, at 553–83 (comparing the variety of protections offered in whistleblower protection provisions).
62. Westman & Modesitt, supra note 3, at 12. The legislative history provides this rationale for the statute: “Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. . . . What is needed
Whistleblower Protection Act of 1989 (WPA) addressed criticisms of the CSRA by procedurally enhancing protections for whistleblowers on the “front line . . . in the battle to save the taxpayers’ money.”

Deregulation in the 1980s and 1990s led to a whistleblower protection movement, state statutory protections for private sector whistleblowers and state judicial exceptions to the common law at-will rule followed federal expansion of employee protections. By 2004, forty-five state jurisdictions in the United States had recognized causes of action for


64. Procedural modifications included protecting the identity of whistleblowers, permitting whistleblowers to obtain orders of protection, granting prevailing whistleblowers all relief awarded to them during the pendency of any appellate review, requiring losing agencies to pay attorney’s fees and costs of prevailing whistleblowers, and substantively adding a provision allowing preferential transfers of whistleblowers seeking to leave the agency because of fear of retaliation. WESTMAN & MODESITT, supra note 3, at 62–63. An amendment to the WPA in 1994 added two ways to appeal retaliatory actions: by filing directly with the Merit Systems Protection Board (MSPB) or by filing an Independent Right of Action (IRA) with the Office of Special Counsel (OSC). 5 U.S.C. § 1214(a)(3)(B) (2000); WESTMAN & MODESITT, supra note 3, at 63. In 2002, Congress enacted the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (NO FEAR), making federal agencies responsible for paying judgments and settlements out of the agency budget in whistleblower retaliation cases. Pub. L. No. 107-174, 116 Stat. 566 (2002). Among other things, NO FEAR requires agencies to report to Congress on the number of whistleblower retaliation cases, the disposition of such cases, and the total amount of monetary awards and settlements. Pub. L. No. 107-174, § 203(a)(1)–(4), 116 Stat. at 569-70.

65. 135 CONG. REC. S2779 (daily ed. Mar. 16, 1989) (statement of Sen. Levin). The legislative history concerning adopting the “contributing factor test” presents this view: “Government employees who ‘blow the whistle’ on waste, fraud and abuse are front line soldiers in the battle to save the taxpayers’ money. Giving real protection to these whistleblowers is a simple and effective way to cut cost overruns, wasteful spending, and the bottom line save taxpayers’ dollars.” Id.

66. See MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY 12–20 (1989). During this period, whistleblower support organizations such as the Government Accountability Project (GAP) were formed. Id. at 61–63. See also WESTMAN & MODESITT, supra note 3, at 11 (suggesting that a need for private assistance in the form of whistleblower protection arose in response to perceived government inability to solve social ills).

67. WESTMAN & MODESITT, supra note 3, at 11. See also Delikat & Rosenberg, supra note 39, at 67–86, app. B (charting the whistleblower provisions available in each state summarizing the prohibited employer action and the employee protected conduct under each provision listed); WESTMAN & MODESITT, supra note 3, at 77 & app. B (stating that since the 1980s, Arizona, California, Connecticut, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Rhode Island, and Tennessee have enacted statutes that protect private sector employees from whistleblower retaliation).
wrongful termination in violation of public policy, and many states have statutory protection for whistleblowers in at least limited circumstances. Common to each step toward more expansive whistleblower protection was the alignment of interests between those with power and those seeking broader protection; business and social movements found common ground leading to limited protection—enough to keep the economy moving and pacify the populace.

B. The Political and Economic Context to Enacting Whistleblower Protection

Whistleblower protection advanced in response to a political and economic context favoring reform and supported by key political and economic interests. This is a common element to many shifts of power pursuant to law. Public choice theory, interest convergence theory, and economic theories of reform all are based upon the need for those with power to bargain for reform. Applying that approach, labor laws came about as employees bartered with employers and politicians representing the moneyed interests: Employees offered peace and the

68. WESTMAN & MODESITT, supra note 3, at 335-72. The five “holdouts” are Alabama, id. at 335; Georgia, id. at 343; Maine, id. at 349; New York has consistently declined to accept a cause of action, id. at 357–58; and Rhode Island has indicated a willingness to extend, although it has not clearly done so, id. at 364.

69. See WESTMAN & MODESITT, supra note 3, at 335–72. Connecticut now has statutory protection as its exclusive remedy, id. at 340; Florida statutes broadly protect both public and private employees, id. at 342; and Montana has statutory protection, id. at 353–54. Even in states such as Alabama where no public policy exception to the at-will doctrine has been recognized, the legislature has enacted a statute making it illegal to fire an employee for seeking workers’ compensation benefits. See ALA. CODE § 25-5-11.1 (2003); WESTMAN & MODESITT, supra note 3, at 335–36.

70. See generally Steven A. Ramirez, Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What To Do About It, 61 WASH. & LEE L. REV. 1583, 1604–06 (2004) (considering interest convergence theory in a variety of contexts, including the passage of the Sarbanes-Oxley Act of 2002). For instance, the New Deal legislation evolving from the stock market crash in 1929 and the Great Depression provided security to the U.S. financial markets and to its citizens. The legislation gained support as the financial interests in the United States realized that government needed to take action, and business interests were key in formulating the resulting legislation. See COLIN GORDON, NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920–1935, at 4 (1994) (supporting view stressing “the primacy of business interests in the formulation of U.S. public policy and the essential conservatism of the New Deal”).

71. See supra notes 1, 2, 13, 20. As such, these theories of reform arguably go back to Adam Smith’s observation regarding the appeal to self-interest over 230 years ago:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

flow of commerce in exchange for the right to form trade unions and bargain collectively, and thereby improve working conditions for the masses.

In late 2001, an extraordinary event occurred in the United States: Enron, one of the fastest growing US corporations of the 1990s, collapsed. This was followed by a series of corporate corruption revelations, culminating in the bankruptcy of WorldCom in mid-2002. A cavalcade of civil and criminal fraud cases followed these massive corporate corruption scandals, and the crush of corporate fraud cases led investors to conclude that U.S. corporations were not safe from corporate plunderers. Foreign capital fled the nation. Publicized congressional hearings and stern rebukes from the President of the United States did not salve the situation. By summer of 2002, the political and economic context as well as political and economic


73. See ROSOFF, PONTELL & TILLMAN, supra note 29, at 279–311 (describing the discovery of various corporate crimes and fraudulent schemes at Enron, Arthur Andersen, WorldCom, Global Crossing, Qwest Communications, Xerox, Adelphia, Tyco, Rite Aid, Halliburton, and Coca-Cola from 2001 to 2004).

74. Numerous criminal and civil lawsuits resulted from Enron’s collapse alone. See, e.g., John E. Black, Jr., & David T. Burrowes, D&O Litigation Trends in 2006, 139 INT’L RISK MGMT. INST., June 21, 2006, http://www.irmi.com/Expert/Articles/2006/Black06.aspx (reporting that Enron paid $7.165 billion to resolve shareholder and bond claims, the largest securities claim settlement in history); Merrill Settles Suit with Enron, L.A. TIMES, July 7, 2006, at C3 (reporting on the multi-million dollar settlements of various banks and securities firms in the so-called “MegaClaims” lawsuit filed against banks accused of failing to prevent Enron’s collapse, multi-billion dollar settlements in a class-action lawsuit filed by Enron investors, and referring to several criminal convictions related to the Enron debacle). The Houston Chronicle maintains “The Fall of Enron” webpage with a prosecution scorecard on its website, reporting sixteen guilty pleas, five jury convictions, two acquittals, two convictions overturned, one case dropped, and eight others charged; the website also provides links to stories on each individual listed on the scorecard. The Fall of Enron, Houston Chronicle, http://www.chron.com/news/specials/enron/ (last visited Mar. 15, 2007) (on file with author).

75. Two weeks before passage of the Sarbanes-Oxley Act, Federal Reserve Chairman Alan Greenspan testified that, in response to the recent reports of corporate malfeasance and the potential for further bad news, “investor skepticism about earnings reports has not only depressed the valuation of equity shares, but it also has been reportedly a factor in . . . elevating the cost of capital.” Federal Reserve Board’s Semiannual Monetary Policy Report to the Congress: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 10 (2002) (statement of Alan Greenspan, Chairman, Fed. Reserve Bd. of Governors), available at http://www.federalreserve.gov/boarddocs/hh/2002/July /testimony.htm.

76. Edmund L. Andrews, Turmoil at WorldCom: The Overseas Reaction, N.Y. TIMES, June 27, 2002, at A1 (reporting that foreign investors were withdrawing from U.S. markets after the news of WorldCom’s admission of losses and falsely reported profits).

interests demanded action. The Sarbanes-Oxley Act of 2002 reflected the intense political and economic pressure for reform generated by the corporate scandals and eroding financial markets.

Among other reforms, the Act led to many changes in corporate accountability, expanded criminal jurisdiction and penalties, and directed the Securities and Exchange Commission (SEC) to establish minimum standards of professional conduct for attorneys appearing and practicing before the Commission.

Central to SOX was the Senate Judiciary Committee’s view that existing corporate culture failed to promote honest business practices and discouraged employees from reporting dishonest practices. To address these concerns, SOX provides a civil cause of action for whistleblowers employed by publicly traded companies. The law protects employees of publicly traded companies from employer retaliation through discharge, disciplinary action, or harassment in response to employee-supplied information or cooperation with a federal agent or employee-instigated internal company investigation regarding specified violations of federal law. The identified laws are mail fraud.

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78. The Sarbanes-Oxley Act passed in the House with a 423 to 3 vote, and the Senate approved it 99 to 0. Mike Allen, Bush Signs Corporate Reforms into Law; President Says Era of “False Profits” is Over, WASH. POST, July 31, 2002, at A4.


81. E.g., Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (Supp. V 2005) (providing that the CEO and CFO of every public company required to file financial statements with the SEC must certify that the statements “fairly present in all material respects the financial condition and results of operations of the issuer”); 17 C.F.R. §§ 228, 229, 249 (2006) (requiring publicly traded companies to either adopt a code of ethics or to report and explain the decision not to adopt such a code).

82. Sarbanes Oxley Act of 2002, § 905, 116 Stat. at 805-06. In response to this directive, the guidelines were amended to increase the guideline’s ranges for obstruction of justice and for fraud offenses, and additional enhancement factors were included in the organizational sentencing guidelines. See U.S. SENTENCING GUIDELINES MANUAL § 2J1.2(b) (2006). See generally Pamela H. Bucy, “Carrots and Sticks”: Post-Enron Regulatory Initiatives, 8 BUFF. CRIM. L. REV. 277, 281–90 (2004) (reviewing SOX’s new crimes and tougher sentences).


wire fraud,\textsuperscript{86} bank fraud,\textsuperscript{87} securities fraud,\textsuperscript{88} federal securities regulations, or other federal laws relating to shareholder fraud.\textsuperscript{89} Remedies include compensatory damages and reinstatement, and the cause of action is commenced by filing a complaint with the Department of Labor (DOL).\textsuperscript{90} The provision’s purpose is to provide uniform protection of corporate whistleblowers, previously subject to varying state laws only, so as “to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies.”\textsuperscript{91} Thus, by any measure, the reform effort was a significant reconfiguration of federal regulation of corporate governance generally, and of criminal law and whistleblower protections in particular.\textsuperscript{92}

SOX illustrates again a common theme to the evolution of whistleblower protection law: Nearly all protective statutes are the result of an accommodation between the holders of power and those in favor of reform, and the accommodation is usually precipitated by some crisis or new political movement that disrupts the preexisting status quo.

\textsuperscript{90} 18 U.S.C. § 1514A(b). If the DOL fails to issue a final order within 180 days of an administrative complaint then the complaint may be pursued in federal court. \textit{Id.} § 1514A(b)(1).
\textsuperscript{91} S. REP. NO. 107-146, at 19 (2002) (Senate Judiciary Committee Report). The Senate Report describes the lack of whistleblower protection as “a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to ‘who knew what, and when,’ crucial questions not only in the Enron matter but in all complex securities fraud investigations.” \textit{Id.} at 10. In addition to civil remedies, the amended obstruction of justice statute prohibits retaliation against employee whistleblowers pursuant to SOX § 1107. 18 U.S.C. § 1513(c) (Supp. V 2005). Section 1513(c) provides the following:

\begin{quote}
Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.
\end{quote}

\textit{Id.} Notably, unlike the civil provision in SOX, this provision is not limited to reports of corporate fraud. The provision is limited, however, in that it requires that information be provided to a law enforcement officer, and must be related to a “Federal offense.” Because this is a criminal statute, a prosecutor holds the discretion to assess whether an individual should be charged, and in making that assessment, she must recognize that a much higher burden of proof is required; the prosecution must prove all elements of the crime beyond a reasonable doubt, including that the actor’s conduct was done knowingly, with a specific intent to retaliate.

\textsuperscript{92} See Romano, \textit{supra} note 25, at 1527–28 (the substantive mandates imposed on corporations in the Sarbanes-Oxley Act are unique and distinct from “conventional regulatory apparatus” that has typically limited federal oversight of corporations to mandatory disclosures); KOHN, \textit{supra} note 84, at xi (“The [Sarbanes-Oxley] Act was one of the most comprehensive reforms of Wall Street investment practices ever passed by Congress.”).
III. THE INTERPRETATION AND ADMINISTRATION OF SOX’S CIVIL WHISTLEBLOWER PROTECTION

This Part of the Article reviews how SOX’s whistleblower regime functions. Specifically, it shows that claims for whistleblower protection under SOX seem unlikely to succeed. Thus, SOX in the end fails to encourage whistleblowing.

Many of SOX’s procedural regulations are modeled on other federal whistleblower laws. Like other regimes, the regulations governing SOX’s whistleblower protective regime seek to balance the Due Process rights of the persons named by the whistleblower and Congress’s desire for an expedited administrative complaint process, prior to filing any civil claim for whistleblower protection. Despite its purpose to encourage and protect corporate whistleblowers, SOX administrative claims have had limited success. The number of SOX complaints before the DOL that are dismissed dwarfs the number that are settled by

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94. The administrative procedure for filing a claim, its investigation, findings, review, and administrative appeal are set forth at 29 C.F.R. § 1980 (2006). Under the regulations, the Occupational Safety and Health Administration (OSHA) has sixty days to complete the investigation and issue written findings as to whether there is “reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.” 29 C.F.R. § 1980.105. If OSHA determines the employee was subjected to retaliation, the Assistant Secretary may order immediate reinstatement, which is generally effective immediately upon receipt of findings. 29 C.F.R. § 1980.105. Parties are notified of the Preliminary Order and have thirty days from receipt of the notice to file objections to the findings and preliminary order before the findings and preliminary order are deemed effective for all remedies awarded by the order. 29 C.F.R. § 1980.105(b), (c). If a party files timely objections seeking review, all provisions of the preliminary order are stayed except for reinstatement. 29 C.F.R. § 1980.106(b)(1). If no timely objections are filed, the findings or preliminary order become the final decision of the Secretary, not subject to judicial review. Id. A timely objection is considered a request for a hearing. Id. Hearings are conducted de novo by an Administrative Law Judge (A.L.J.). 29 C.F.R. § 1980.107. The A.L.J. decision is the final decision of the Secretary unless a timely petition for review is filed with the Administrative Review Board (ARB). 29 C.F.R. § 1980.110(a) (2004). The ARB has thirty days to decide whether to accept review; if not accepted, the decision of the A.L.J. will become the final order for purposes of appeal. Id. § 1980.110(b). If accepted, the ARB must issue a decision within 120 days of the conclusion of the hearing. Id. § 1980.110(c). By November 2, 2004, 333 complaints had been filed with the DOL. Delikat & Rosenberg, supra note 39, at 87–90, app. C.

95. Early results of the success of SOX were mixed. The DOL released statistics on the use of SOX’s civil whistleblowing provision twenty-seven months after it became law. See Delikat & Rosenberg, supra note 39, at 87–90, app. C (graphing statistics from July 30, 2002 to November 2, 2004, obtained from the DOL). Over 95% of the DOL determinations during that period, 186 cases were dismissed by the agency, determined to lack merit; whereas only nine cases were determined by DOL to have merit. Id. Of course, the statistics alone cannot identify the basis for distinguishing a meritorious claim from a failed claim because many claims settle and others may be pursued in federal court if there is no final order from the DOL within 180 days.
the agency on the merits. This limited success for complainants suggests that many employees expecting protection by SOX are not actually enjoying such protection.

As with any whistleblower protection and anti-retaliation provisions within its purview, the DOL interprets the statutory and regulatory provisions to determine each law’s scope of protection, forum availability, application of the rules, relief afforded, and timing. The following subparts’ focus is on the interpretations of SOX that narrow coverage and on the potential to broaden coverage under an omnibus provision that would extend protection beyond financial frauds to better effect the purposes of encouraging and protecting whistleblowers. Omnibus legislation referred to below would offer a blanket of protection to the whistleblowing employee to replace the net that our federal and state laws presently offer. Such legislation could cover public and private employers, and it could protect employees who hold a reasonable belief that the conduct reported is wrongful in that it is illegal, intentionally tortious, or unethical, and who exhibit the courage to step forward with such information.

96. See E-mail from Nilgun Tolek, Director, Office of Investigative Assistance, Department of Labor, to Thomas Hitchcock (June 12 2006, 3:24 p.m. CST) (on file with author). As of May 31, 2006, the total number of SOX complaint determinations was 702; of that number, 499 complaints had been dismissed, 93 were settled, 15 more were decided on the merits, and 95 complaints were withdrawn. Id. Thus, only 3% of cases decided by DOL were decided on the merits; if settled cases are added to those addressed on the merits (assuming that settled cases have some merit), then less than 1 out of 5 complaints (18%) avoid dismissal. Id.


98. See, e.g., WESTMAN & MODESITT, supra note 3, at 24; Kohn, supra note 14, at 377–78; see also supra note 5.

99. Extending the scope of protection to public and private employers would be limited only insofar as it would fall outside Congress’s plenary authority to regulate interstate commerce under the Commerce Clause of the U.S. Constitution. U.S. Const. art. I, § 8.

The commerce power has served as the basis for Federal action on such national policies as the regulation of agricultural production; requirement of collective bargaining; prohibition of industrial monopolies and unfair trade practices; regulation of the sale of stocks, bonds, and other securities; establishment of hydroelectric, flood control and navigation projects; and an attack upon such crimes as white slavery, kidnapping, trade in narcotics, theft of automobiles, and shipments of gambling devices and lottery tickets.

S. Rep. No. 88-872 (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2368 (Senate Judiciary Committee report assessing Congressional authority to end discrimination in places of private accommodation under the Civil Rights Act of 1964). To aid in assessing whether interstate commerce is affected, the term “employer” could borrow language, in part, from Title VII’s definition of “employer”: “a person engaged in an industry affecting commerce who has fifteen or more employees in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b) (2000).
A. Scope of Coverage

SOX prohibits employer retaliation to an employee’s providing information or cooperation externally to a federal agent, a Member of Congress, a congressional committee, or in a criminal fraud or securities regulatory proceeding. SOX also prohibits employer retaliation to an employee’s providing information or cooperation internally to a supervisor or another with “authority to investigate, discover, or terminate misconduct.” Thus, SOX protects whistleblowers only in some specified instances.

SOX limits whistleblower protection to instances when whistleblowers provide information to statutorily identified categories of persons. Thus, the Act does not protect whistleblowers providing information to state or local authorities, co-workers who are not supervisors nor charged with authority to investigate the misconduct, or the press. Unless an employee has taken the unusual precaution of reviewing the statutory language, the employee is unlikely to realize the limits of its protection.

Providing protection for both internal and external whistleblowing is a response to the tension between affording employers an opportunity to address wrongdoing and protecting the institution. Presumably, most employees would prefer an opportunity to address wrongdoing in-house rather than go to regulators or law enforcement, given that the foremost reason given for failure to report wrongdoing is the belief that nothing will be done. Nonetheless, limiting reporting to internal sources likely would expose whistleblowing employees to great risk of

103. SOX concerns private employers that are publicly held. The issue of whether a public employee enjoys First Amendment protection for matters expressed as a result of employment that raise a public concern was recently addressed in Garcetti v. Ceballos, 126 S. Ct. 1951, 1960–61 (2006). See infra notes 199–205 and accompanying text.
104. See Cavico, supra note 46, at 570–71 (recognizing that for the employee to be protected, most state statutes require whistleblowing employees provide notice to the employer of wrongdoing, and some states require notice in writing so that the employer has the opportunity to correct the wrongdoing and preserve its reputation). Some state statutes further require that the employer must have an opportunity to remedy the wrong and may even require an “oath or affirmation” if external notice is permitted. Id. at 572, 574. Other federal statutory whistleblower protections vary with respect to whom the employee notifies so that some statutes limit protection to complaints made to government agencies. WESTMAN & MODESEIT, supra note 3, at 92 (assessing the limits on the substantive coverage afforded whistleblower complainants in provisions enforced by the Department of Labor).
105. See MSPB 1993 REPORT, supra note 33.
In an omnibus statute addressing broader forms of whistleblowing rather than merely financial fraud by publicly traded companies, the protected activity should cover disclosures made to a “public body” that included federal, state, and local authorities in the executive, legislative and judicial branches of the government, as well as its agencies, boards, committees, and other government offices.

Although many employees may be affected by the misconduct of a corporation, SOX limits civil protection against employment discrimination for lawful whistleblower actions to employees of publicly traded companies, and “employee” is defined by the statute as “any officer, employee, contractor, subcontractor, or agent of such company.” Litigation over the SOX’s anti-retaliation provision is sufficiently recent that there are few reported federal cases; nonetheless, the administrative cases involving disputes over the term “employee” are illustrative. For instance, the question of whether the statute applies to subsidiaries has resulted in conflicting decisions. Likewise, a federal circuit court, applying statutory canons of construction,

106. Sherron Watkins, the Enron employee who blew the whistle internally, contacted CEO Ken Lay and identified accounting problems she had discovered. Mimi Swartz & Sherron Watkins, Power Failure 275–76, 361–62 (2003). Watkins suggested Enron might be able to fix them quietly, if the probability of getting caught was low, or alternatively, they could disclose after putting a public relations team in place, if the probability of getting caught was high. Id. at 368. Employees may have a practical reason for wishing to report internally. Watkins also mentioned in her memo to Lay that, if Enron tanks, her “eight years of Enron work history will be worth nothing on my resume.” Id. at 275, 362. However, Watkins did not report the wrongdoing sooner (she waited for weeks to work up the nerve to write her first letter to Lay) because she thought she would be fired by then CEO Jeffrey Skilling because one of her friends, then company treasurer Jeff McMahon, had been transferred when he “complained mightily” to Skilling about the “veil of secrecy” surrounding the outside deals. Duffy, supra note 18. Watkins’s concerns were well-founded. She testified before Congress that after she talked to Ken Lay, CFO Andrew Fastow wanted her fired and her computer seized. Ackman, supra note 18.

107. See Kohn, supra note 14, at 379–80, 392–93 (discussing and proposing elements for a uniform national whistleblower protection law, including Model Whistleblower Protection Act).


found that § 1514A does not apply to employees outside of the United States absent specific language in statute or clear legislative intent to the contrary.\textsuperscript{110} Thus, despite the intent of Congress that SOX “protect[s] those who report fraudulent activity that can damage innocent investors in publicly traded companies,” SOX has been interpreted to permit the complexity of corporate organizational structures (such as those with international manufacturing and assembly plants) to shield corporations from the statutory provisions.\textsuperscript{111} An omnibus provision should provide specific language providing a forum in the United States to protect those would-be whistleblowers employed by employers with operations in the United States, whether the employee is stationed in the United States or outside of its borders, whether the employee is working for a subsidiary or for the parent company, and whether the employer is a private or a government entity.\textsuperscript{112}

Public confidence in corporations depends in large part upon the oversight of the corporation by others with professional duties and responsibilities, yet these professionals may not be protected by SOX.\textsuperscript{113}


\textsuperscript{111} S. REP. NO. 107-146 at 19 (2002) (Senate Judiciary Committee Report).

\textsuperscript{112} Certainly, issues of international comity must be attended; for example, in 2005 the French Commission Nationale de l’Informatique et des Libertes (CNIL) issued guidelines summarizing its position on whistleblower protections to extend extraterritorially. See Nicolas Grabar, Cleary Gottlieb Memorandum: French Regulator’s Guidelines on the Implementation of Whistleblower Procedures, Paris, 1544 PLI/Corp 353, 355 (2006); id. at 363 (providing an unofficial English translation of the French guidelines). The CNIL guidelines were created in response to CNIL’s May 2005 rulings prohibiting French affiliates of McDonald’s Corporation and Exide Technologies from implementing SOX whistleblower procedures, in particular, establishing an employee hotline. Id. at 355, 364. The French guidelines recognize the risk for malicious reporting and express concern that reporting requirements not be mandatory. Id. at 366–67. It is beyond the scope of this Article to articulate a comprehensive framework for transnational whistleblowing law.

\textsuperscript{113} Lawyers, securities analysts, public accountants, securities brokers, and bankers are some of the professionals who provide services to public corporations and also serve the public. These “gatekeepers” have been criticized for their failure to alert those dependent upon the professionals’ assessments in the corporate frauds that spawned the SOX. S. REP. NO. 107-146 (2002) (Senate Judiciary Committee Report); see, e.g., John C. Coffee, Jr., Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. REV. 301, 318–31 (2004) (hypothesizing about the reasons for gatekeeper failure in detecting the accounting irregularities of Enron and others in 2001–
Some categories of “gatekeepers” may not fall within SOX’s civil whistleblower protections because independent professionals arguably are not “officer[s], employee[s], contractor[s], subcontractor[s], or agent[s] of such companies.” Thus, whistleblowing by the independent professional risks harming the relationship with the client—or even loss of the client—without any avenue of civil protection. For young professionals working on a senior partner’s account, interfering with the partner’s client relationship can have detrimental consequences to their careers. With uncertain legal protection, the choice to whistleblow becomes less likely.

Even within the public corporation, a question arises as to whether in-house corporate counsel, who is required by SOX to report wrongdoing to the directors’ audit committee, is protected. Although in-house counsel should fit within the definition of “employee” under SOX, some courts have shown a reluctance to invade the attorney-client privilege or permit the introduction of confidential information by the complainant as support for a claim of retaliation. Thus, SOX whistleblower protection for in-house counsel is uncertain.


115. Had SOX been in effect in the 1990s, it would not have protected the accountants at Arthur Andersen who observed questionable accounting practices at Enron. Although many Andersen employees have since admitted they were uneasy with the financial structuring, none came forward until the collapse of Enron was inevitable. See SMITH & EMSHWILLER, supra note 72, at 288–90 (describing the close relationship between Enron and Arthur Andersen: “Carl Bass, an Andersen accountant . . . had witnessed how the rules were often bent and didn’t like what he saw. These concerns became especially sharp once he began working on Enron accounting issues. . . . [Enron] officials wouldn’t let up until they had found a way to get the accountants to sign off, recalled Andersen partner Mike Jones, who described the Enron assignment as a ‘very stressful’ environment.”); S. REP. NO. 107-146 at 5 (2002) (recounting the experiences of a financial advisor who was fired and an Andersen accountant who was removed from the account when they expressed reservations about Enron’s stability and accounting practices).

116. The SEC promulgated regulations, as directed by SOX, “requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company” and if remedial measures are not forthcoming, “to report the evidence to the audit committee of the board of directors of the issuer or . . . to the board of directors.” Sarbanes Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (Supp. V 2005); see 17 C.F.R. §§ 205.1–205.7 (2006).

117. Traditionally, state and federal courts have been reluctant to allow retaliation claims by in-house corporate counsel against employers, but some courts have rejected the traditional approach and allowed retaliatory discharge public policy claims in limited circumstances. WESTMAN & MODESTITT, supra note 3, at 146–50; see also Willy v. Admin. Review Bd., 423 F.3d 483, 500–01 (5th Cir. 2005) (applying breach of duty exception to the employer’s claim of attorney-client privilege and finding no “per se ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel’s retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ”).
Additionally, the release of sensitive information by any employee in the name of whistleblowing could be viewed as breaching the employee’s duty to the employer;\(^\text{118}\) the breach then undermines the employee’s retaliation claim and meets the employer’s burden of proof by further supporting employment termination or, alternatively, by providing an independent reason for termination.\(^\text{119}\) Unquestionably, precluding the employee from raising significant concerns because of related confidential or sensitive information ignores critical opportunities to gain information to protect against serious criminal acts or threats to public health or safety. An omnibus statute should provide for an in camera review to assess whether the employee took measures to limit or protect disclosure; such a review would evaluate any attempts to act internally to alert appropriate supervisors regarding the related misconduct, any reasons why alternative routes were accessed, and whether the extent of the disclosure was necessary.

Under SOX, an employer may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” in response to the lawful act of an employee covered by the statute.\(^\text{120}\) Issues also arise in whistleblower claims of retaliation as to failure to promote or in decisions to transfer.\(^\text{121}\) The language in SOX, “in any other manner discriminate,” should provide broad coverage as to what conduct is

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\(^{118}\) See Baynes, supra note 30, at 884–86 (observing that a corporate whistleblower might convert corporate proprietary information by providing corporate records to law enforcement and exposing the corporation to civil or criminal liability, or possibly, bad publicity).

\(^{119}\) One example of this is the case of Sibel Edmonds, a contract linguist hired by the FBI. See Office of the Inspector Gen., U.S. Dept. of Justice, A Review of the FBI’s Actions in Connection with Allegations Raised by Contract Linguist Sibel Edmonds: Unclassified Summary (2005) (OIG Edmonds Review). When Ms. Edmonds complained about potential espionage and security breaches by a co-worker, Edmonds’s supervisor instructed her to prepare a memo outlining her allegations. Id. at 12–13. Concerned about documents that had been removed from her work computer, Edmonds obtained permission from her supervisor to prepare the memo at home. Id. Two days after providing her supervisor with the memo, the supervisor gave the memo to the Office of Inspector General to review both the concerns in the memo that Edmonds had been threatened by the co-worker and Edmonds’s security violation of using her home computer to prepare memoranda that included classified information. Id. at 13–14. Edmonds’s home computer was seized and a second document, a draft memorandum of the memo given to the supervisor, was also discovered on the computer. Id. at 14. Edmonds’s security classification was revoked five weeks later primarily for her “‘disruptive effect’ on operational matters and her ‘documented’ mishandling of classified information at her residence.” Id. at 30, app. C. As discussed infra in Part IV.A., note 192 and accompanying text, any legislation must balance the employer’s concern to protect confidential information against the need to protect the whistleblower.


\(^{121}\) See Burlington N. & Sante Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (finding that an employer could be held liable for retaliatory discrimination under Title VII for any “materially adverse change in the terms of employment,” including an inconvenient reassignment, or for any adverse treatment that was “reasonably likely to deter” the plaintiff from engaging in protected activity).
prohibited in light of the Supreme Court’s most recent interpretation in Burlington Northern v. Santa Fe regarding adverse actions held to be retaliatory discrimination. Yet, in the hands of an administrative law judge, limits may be imposed. Any omnibus provision should be at least as broad as the formulation used in Burlington Northern.

Finally, a whistleblowing employee under SOX must “reasonably believe[]” the reported conduct constitutes a violation of specific federal fraud statutes, or any rule or regulation of the SEC. The “reasonably believe” language has also been the subject of litigation, including whether the employee must allege the specific regulation or law that was reasonably believed to be violated. Another closely

122. See id.

123. See Bechtel v. Competitive Techs., Inc., 2005-SOX-33 (A.L.J. Oct. 5, 2005) (finding whistleblowers must prove tangible job consequence to establish adverse action, and that neither removing complainant’s status as an officer of the company nor providing a performance review were adverse because no showing of actions resulting in loss of pay, raises, bonus, benefits, or negative impact on employment conditions); Dolan v. EMC Corp., 2004-SOX-1 (A.L.J. Mar. 24, 2004) (dismissing SOX whistleblower complaint alleging retaliation due to negative job performance evaluation received after employee reported to EMC that his former supervisor was engaged in improper billing schemes designed to inflate the company’s revenue, and finding that neither the negative job performance appraisal nor the company’s refusal to remove the appraisal were adverse employment actions). The A.L.J. relied upon a unanimous 2002 Supreme Court decision finding that the “continuing violation doctrine” does not apply to employees raising discrete acts of employment discrimination or retaliation as similar to Dolan’s discrete claim of a negative performance appraisal where he did not show any tangible job detriment. Id. (citing Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)). But see Halloum v. Intel Corp., 2003-SOX-7, at 15–16 (A.L.J. Mar. 4, 2004) (“An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures.”); Hendrix v. Am. Airlines, Inc., 2004-SOX-23 (A.L.J. Dec. 9, 2004) (contrary to other whistleblower protection provisions, under SOX, adverse action need not be tangible; harassment is protected under SOX). Inevitably, the determination of whether an adverse action occurred is fact specific. Koh, supra note 14, at 243–47 (listing some of the various issues that can arise including a reduction in force, a hostile work environment, and treating employees differently).

124. 18 U.S.C. § 1514A(a)(1). Legislative history suggests that the “reasonably believes” language “is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.” See 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy). “The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.” Id.

125. Some state statutes will not protect a whistleblower if the information provided by the whistleblower is erroneous. Cavico, supra note 46, at 569. Most state statutes also apply a reasonable belief standard. Id. at 567.

126. See Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1376–77 (N.D. Ga. 2004) (finding plaintiff’s disclosures raised genuine issue of material fact as to whether she engaged in protected activity based upon a reasonable belief, and observing that plaintiff need not allege the specific regulation or law that was violated when disclosures to supervisors clearly raised concerns internally that criminal violations, or violation of the company’s standards of corporate conduct, even if those allegations prove to be incorrect: “[T]he mere fact that the severity or specificity of her complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her.”); Halloum v. Intel Corp., 2003-SOX-7, at 15 (A.L.J. Mar. 4, 2004) (finding that an employee who reasonably believed shareholders were being defrauded is protected under SOX even if it is later established that no fraud occurred). But see
related issue is whether the complained acts actually violate the law or are simply a private, internal, management or policy dispute. Because SOX is limited to violations of particular statutes, employees of publicly traded companies are not covered if they report on violations of law that fall outside the specified financial fraud provisions. Thus, the statute is narrowly drawn and interpreted to limit protection to whistleblowers.

Requiring that an employee identify the specific statute believed to be violated presumes employees enjoy facility with all relevant statutes and possess the ability to predict whether a court would find a violation. An omnibus provision should clarify that the employee must reasonably believe, based upon the employee’s experience, that the reported action violates the law or threatens the public health, safety, or fisc; it should not require more than can be reasonably expected of such employee. Clearly, the reasonable belief standard affords the employer the opportunity to investigate the concern and either determine no misconduct exists or rectify the action. Providing protection to employees who report such concerns does no disservice to the employer and encourages interaction between employees and employers to detect and defuse misconduct at an early stage.

The limited scope of protection that SOX affords is not unusual in that it targets specific misconduct reported by specific workers to specific recipients. Indeed, like most whistleblower protection...
statutes, the advice of counsel is crucial to assure protection before the whistle is blown. Still, limiting the scope of protection makes the job of the whistleblower unnecessarily risky and costly.

B. Forum

Another area that prompts criticism in SOX’s whistleblower protection provisions is the identified forum in which a claim may be raised. Congress delegated the administration of SOX civil whistleblower claims to the DOL. In addition to administering SOX administrative claims, the DOL is also responsible for administering twenty-five other whistleblower or anti-retaliation provisions, and the DOL has further delegated to the Assistant Secretary for the Occupational Safety and Health Administration (OSHA) responsibility for receiving and investigating claims for fourteen of those provisions, including SOX. The speed with which a claim moves through the administrative or legal process impacts the protection afforded a litigant.

130. Supra notes 19, 37–38.
131. See supra notes 26, 32, 34, 36.
If language is interpreted narrowly, and if cases languish in the administrative process whether intentionally or through bureaucratic delay, the purpose of legislation may be undermined.\textsuperscript{135} SOX is an improvement upon complaints as to forum, but for several reasons discussed below, it does not go far enough.

SOX provides that administrative review and a final decision must be completed within 180 days of filing the claim, or after that time, the complainant may file the claim in U.S. federal district court for de novo review.\textsuperscript{136} The 180-day deadline is unique to SOX whistleblower protection.\textsuperscript{137} Because the ability to escape the administrative process and move to a federal court after 180 days guarantees either a relatively quick resolution of the administrative claim or an alternative in federal court, whistleblower protection groups have sought to have a similar provision available to federal employees.\textsuperscript{138} The move to extend the 180-day limit on the administrative process to other whistleblower protection provisions has some congressional support.\textsuperscript{139} Because the provision is unique to SOX, OSHA is unaccustomed to moving cases through the system within 180 days; consequently, complainants are seeking relief in federal district court.\textsuperscript{140} An omnibus statute should

\textsuperscript{135} The DOL is an agency that falls within the Executive Branch of the federal government, and consequently, that branch exercises oversight of the administrative process. See Signing Statement of President Bush, supra note 9, ("Several provisions of the Act require careful construction by the executive branch as it faithfully executes the [Sarbanes-Oxley] Act.")

\textsuperscript{136} A person alleging retaliatory discrimination or discharge for whistleblowing must file a complaint with the Secretary of Labor, 18 U.S.C. § 1514A(b)(1)(A), within ninety days after the date on which the violation occurs 18 U.S.C. § 1514A(b)(2)(D) (statute of limitations). If a final decision is not issued within 180 days of the filing of the complaint, the complainant may bring a civil action at law or in equity for de novo review in federal district court without waiting for claim to be resolved by the DOL. 18 U.S.C. § 1514A(b)(1)(B). This provision is unique to SOX as compared to relief under other federal whistleblower statutes administered by the DOL. See Kohn, supra note 84, at 53; see generally Delikat & Rosenberg, supra note 39, at 61–64, 67–86, app. A (identifying those federal whistleblowers statutes that are administered by the DOL). Twenty-six statutes are administered by the DOL, with fourteen of those statutes administered by the DOL through the delegated authority from OSHA. Id.

\textsuperscript{137} Kohn, supra note 84, at 53.

\textsuperscript{138} See, e.g., Stephen Barr, Whistle-Blowers Urge Congress to Get Tougher on Retaliation, WASH. POST, Apr. 29, 2005, at B2 (reporting that the National Security Whistleblowers Coalition (NSWC), a group of whistleblowers formed by former federal employees, seeks tougher federal employee whistleblower protections similar to those provided in SOX and, in particular, the right to take their cases to federal court if the DOL fails to act within 180 days); National Security Whistleblowers Coalition, NSWBC Action Alert Re: HR 1713 (HR 3097), (Sept. 26, 2005), www.nswbc.org/action_alert.htm.

\textsuperscript{139} See Stephen Barr, Senate Committee Acts to Restore Protection for Whistle-Blowers, WASH. POST, June 26, 2006, at D4 (reporting that the U.S. Senate has passed an amendment to the 2007 defense authorization bill that would enhance the protection to federal employee whistleblowers including the ability to take a claim to federal court after 180 days).

\textsuperscript{140} See Tight Time Limits, New Subject Area Pose Challenges for Labor Department, 3 Corp. Accountability Rep. (BNA) No. 9, at 278 (Mar. 21, 2003); Two Sarbanes-Oxley Whistleblower Claims
include the option to move to a federal district court after 180 days to encourage speedy resolutions or afford jury trials.

For cases proceeding on to federal courts, several issues arise. First, hope of a timely resolution may evaporate with the move to federal court because the federal courts exercise de novo review; in 2006, the median time to move a civil case through a federal district court was 8.3 months.\textsuperscript{141} Second, resources spent on the administrative process are effectively “wasted” because court review is de novo.\textsuperscript{142} Third, no single court is likely to develop expertise on the subject because cases have the potential to be scattered throughout the United States. Consequently, the potential for disparate results is great.

With its fourteen statutes to administer, even at the administrative level, OSHA may not be an adequate forum for the variety and multitude of claims that come before it. Each anti-retaliation provision is linked to a particular statute\textsuperscript{143} thereby requiring OSHA investigators

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\textsuperscript{141} See U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2006, U.S. DISTRICT COURT—JUDICIAL CASELOAD PROFILE (2006), available at http://www.uscourts.gov/ (select “Library” tab; then follow “Statistical Reports” hyperlink; then follow “Federal Court Management Statistics” hyperlink; then follow “District Courts” hyperlink). From filing to trial, the median time was 23.2 months. \textit{Id.}

\textsuperscript{142} Irvin B. Nathan & Yue-Han Chow, Interpretations and Implementation of the Whistleblower Provisions of the Sarbanes-Oxley Law, ALI-ABA SARBANES-OXLEY INSTITUTE: CORPORATE GOVERNANCE, FINANCIAL DISCLOSURE, AUDITING, AND OTHER ISSUES (Oct. 6–7, 2005), SL027 ALI-ABA 527 (Westlaw) (taking the position that the 180-day administrative process is “a very short and improbable amount of time” to reach a final order and that the provision is “in urgent need of revision by Congress”); More Legal Confusion on Whistleblowers Than When Sarbanes-Oxley Enacted in 2002, 3 Corp. Accountability Rep. (BNA) No. 4, at 80 (Jan. 28, 2005) (acknowledging that the parameters of SOX may be shaped by federal courts rather than administrative law judges as is usually the case in administrative law areas because the cases are moving too slowly through the administrative process so that cases are being refiled in federal courts, and suggesting that such federal court cases may undermine the deference usually afforded A.L.J.s, especially if circuit splits develop).

to become familiar with the strictures of each statute, its procedural
requirements, and the relative burdens of proof.144 Practitioners observe
that both the investigators and supervisors lack disposition, training, and
experience to adequately assess SOX claims because they are outside
their area of competence.145 Of course, if one defines the area of
required competence as employment law, then OSHA possesses the
appropriate training and experience.146 Creating an omnibus statute
would eliminate requiring expertise in discreet areas of law, and would
permit OSHA (or some other agency) to concentrate its investigation
and analysis on the issue of retaliation. Likewise, even if the
administrative process is retained, when claims moved to federal courts,
those courts would be more likely to develop a unified approach over
time to retaliation claims based upon whistleblower actions.

Affording the right to a jury trial would promise the whistleblower an
opportunity to be judged by the citizens the whistleblower sought to
protect.147 SOX offers the promise of a district court adjudication and,
potentially, a jury trial only if the matter is not resolved 180 days from
the date of filing the claim with OSHA.148 Yet, where a mandatory

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144. See supra note 143 (listing the federal statutes with anti-retaliation provisions administered
by OSHA).

145. See Nathan & Chow, supra note 142 (highlighting that “OSHA investigators have been
trained in health and safety issues” and that OSHA “has not increased its staff of investigators to include
those with a finance background”); see also D. Bruce Shine, A View from the Whistleblower's Attorney,
in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY,
supra note 39, at 347, 353 (reminding practitioners that the “Proof Goal” for SOX complaints is to show
the employee “reasonably believed” laws were violated).

146. If expertise was the only concern, then use of OSHA might be favored as an approach for an
omnibus statute; however, presently OSHA’s responsibilities create a conflict of interest. OSHA itself
has been subject to whistleblower claims. See Cindy Skrzycki, OSHA Slow to Act on Beryllium
Exposure, Critic Says, WASH. POST, Feb. 1, 2005, at E1 (reporting that Adam M. Finkel, a top
administrator at DOL’s OSHA became a whistleblower in 2002 when he realized the agency was not
going to protect its inspectors from Beryllium exposure despite known risks). Perhaps too much is
expected to believe OSHA can protect, police, and adjudicate whistleblower and retaliation claims.
Nevertheless, it is beyond the scope of this Article to address the particular administrative structure best
suited to administering whistleblower protections; instead, this Article focuses on explaining the
shortcomings in present whistleblower protections, demonstrating how appropriate protection could be
legislated, and explaining how present power dynamics do not favor an optimized whistleblower
protection.

147. See Devine Testimony, supra note 14 (providing checklist for whistleblower protection
laws).

148. The question of whether SOX provides for a jury trial remains uncertain. See Murray v.
provides for equitable relief only and rejecting plaintiff’s contention that the statute’s reference to
“action at law” implied a right to a jury trial). But cf. McClendon v. Hewlett-Packard Co., No. CV-05-
arbitration agreement exists, its mandate will likely prevail over the right to a jury trial.\textsuperscript{149} Although considered, SOX did not affirmatively exempt itself from the presumption of arbitration.\textsuperscript{150} In the first district court case to address the question of mandatory arbitration agreements in the SOX context, the court held that mandatory arbitration agreements are binding.\textsuperscript{151} SOX’s failure to specifically preclude mandatory arbitration is a “serious weakness in the Act” because employers can avoid the civil whistleblower provisions of SOX prospectively simply by including a provision for mandatory arbitration within employment agreements.\textsuperscript{152} Permitting the presumptive effect of mandatory

\textsuperscript{149} See Cherry, supra note 132, at 1075–83 (criticizing the use of mandatory arbitration in employment litigation and analyzing the likelihood that SOX cases will go to mandatory arbitration); Alliance Bernstein Inv. Research and Mgmt., Inc. v. Schaffran, 445 F.3d 121 (2d Cir. 2006) (dismissing declaratory judgment action brought by employer seeking to avoid arbitration, and finding the issue of arbitrability of employee’s claim was subject to arbitration); Boss v. Salomon Smith Barney, Inc., 263 F. Supp. 2d 684 (S.D.N.Y 2003) (ruling in favor of mandatory arbitration because SOX does not preclude arbitration and because arbitration does not inherently conflict with the statute’s purposes). See also 9 U.S.C. § 9 (2000); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (establishing a general presumption in favor of mandatory arbitration); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (applying a presumption in favor of arbitration where Congress does not specifically address arbitration in the statute).

\textsuperscript{150} An earlier draft of SOX exempted SOX whistleblowers from mandatory arbitration agreements: “No employee may be compelled to adjudicate his or her rights under this section pursuant to an arbitration agreement.” S. 2010, 107th Cong. § 7 (2002); H.R. 4098, 107th Cong. § 8 (2002). The language did not appear in the final version of the bill. See Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. 1541A at Supp. V 2005); S. REP. NO. 107-146, at 22 (2002) (the report of the Senate Judiciary Committee accompanying the revised version of the Senate bill references the removal of the provision dealing with arbitration agreements); see also Cherry, supra note 132, at 1080 (observing that the provision that banned mandatory arbitration was excised in committee without explanation); Westman & Modesitt, supra note 3, at 177.

\textsuperscript{151} In Boss v. Salomon Smith Barney, Inc., 263 F. Supp. at 684, Boss’s agreement with Salomon Smith Barney, titled “Terms of Employment” and “Principles of Employment,” incorporated the terms of Salomon’s Employee Handbook, providing for mandatory arbitration and “resolution of all employment disputes based on legally protected rights . . . including without limitation claims demands or actions under . . . any . . . federal, state or local statute, regulation or common law doctrine, regarding . . . termination of employment.” Id. at 684–85. The district court rejected the argument that because a statute confers jurisdiction on the federal courts to hear claims arising under the statute, such claims are not to be arbitrated. Id. The Boss holding followed similar rulings regarding other statutes. See Oldroyd v. Elmira Sav. Bank, 134 F.3d 72 (2d Cir. 1998) (affirming mandatory arbitration was available in connection with Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 26 (finding that Congress may override the presumption in favor of arbitration if it manifests its intent to do so “in the text of the [statute], its legislative history, or an ‘inherent conflict’ between arbitration and the [statute’s] underlying purposes,” allowing for mandatory arbitration in Age Discrimination in Employment Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (finding same regarding Sherman Antitrust Act); Bird v. Shearson Lehman/Am. Express, Inc., 926 F.2d 116 (2d Cir. 1991) (allowing mandatory arbitration in ERISA cases).

\textsuperscript{152} Cherry, supra note 132, at 1075–83 (analyzing the likelihood that SOX cases will go to
arbitration clauses would appear to undermine the stated intent of SOX whistleblower provisions “to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets.”

Given that many arbitration agreements are a condition of employment, those individuals most likely involved in the corporate fraud would be the same corporate leaders who possess power in choosing the arbitrator.

Providing the option for alternative dispute resolution before an arbitrator, however, may operate as an efficient means to avoid the potential duplicity, discussed above, of an administrative investigation followed by a federal district court de novo review. Recognizing this potential benefit, an omnibus statute should include an arbitration alternative to a jury trial, but only if it is specifically limited by, for example, providing that the arbitrator be selected by mutual consent to avoid placing the choice solely with the employer.

In creating an omnibus statute, multiple opportunities exist to improve upon existing forum options: any administrative option must consider issues of expertise; if arbitration is not precluded, it must be limited; and ideally, a right to relief from retaliation should be expeditiously adjudicated.

C. Burden of Proof

The burden of proof to prevail in a whistleblower retaliation claim under an omnibus statute should track the language adopted in SOX regulations, providing that the whistleblower must prove by a preponderance of evidence that protected conduct was a “contributing factor” to the retaliatory action. The same burden of proof applies at mandatory arbitration—based upon US Supreme Court cases recognizing a presumption in favor of arbitration and the legislative history of SOX—thereby avoiding the administrative and judicial forums available under the Act).

154. See supra note 18 (discussing Sherron Watkins’s experience at Enron).
155. See Devine Testimony, supra note 14 (providing checklist for whistleblower protection laws).
(a) Plaintiff engaged in a protected activity under the statute;
(b) The employer knew of the protected activity;
(c) The employee suffered an unfavorable personnel action; and
(d) The discriminatory act was a “contributing factor” in the adverse action taken by the employer against the employee. Id. at 1375–76.
the administrative review and before the district court. The “contributing factor” language contrasts favorably with earlier anti-retaliation provisions that required the claimant prove the protected conduct was “a substantial, motivating or predominant factor in the personnel action,” and has proven to be a watershed for whistleblower claims; the annual rate of whistleblower claims prevailing on the merits increased from less than 10% prior to the adoption of the language up to 25–33% by the late 1990s. This shift in the level of proof recognizes that an employer can often identify other reasons for unfavorable employment actions against an employee. If the employee meets her burden, then the burden shifts to the employer to prove by clear and convincing evidence that it would have taken same action for independent, legitimate reasons in absence of the protected activity. The ultimate burden of proof rests with the complainant to prove by a preponderance of the evidence that the unfavorable employment action was taken in retaliation for whistleblowing. Any omnibus provision would benefit from this balanced approach.

D. Relief for the Whistleblower

An omnibus statute should adopt the relief provided in SOX, but it should extend it further. SOX established both a legal and equitable remedy providing for “make-whole” relief. The remedies available

159. DEVINE, supra note 19, at 116.
160. Once proved, the burden shifts to the employer to prove by “clear and convincing evidence” that it would have taken the same adverse action even if the employee did not blow the whistle. Collins, 334 F. Supp. 2d at 1376 (applying the standard articulated in 49 U.S.C. § 42121 (2000)); 29 C.F.R. § 1980.104(c).
161. See WESTMAN & MODESITT, supra note 3, at 232 n.28.
162. 18 U.S.C. § 1514A(c) (Supp. V 2005); 29 C.F.R. § 1980.103(a)(1). The interim relief under SOX belies the notion of “make-whole relief” because it is limited to reinstatement and excludes back-pay. Because the administrative process may continue up to 180 days, possibly years if the case is filed in federal district court, the employee will have suffered, in a case of retaliatory termination, from the loss of pay during the period from termination to reinstatement. Even with interim reinstatement, the employee will have lost several months wages. Although final relief includes back-pay with interest, for many employees, the delay of months or even years would mean financial hardship. Under omnibus whistleblower relief, interim back-pay should be ordered concurrent with reinstatement, with conditional repayment to the employer should the decision be overturned. With reinstatement, the employer gets the benefit of the employee’s labor even if the decision is overturned. The problem with an interim back-pay provision is that, once interim back-pay has been paid, recovery of those funds may be near to impossible if the reinstatement decision is overturned, given that the employee would presumably now be unemployed and short on funds. On the other hand, employers may be less likely to terminate employment if interim back-pay is available to employees. Finally, hearing officers may be hesitant to
include “reinstatement with the same seniority status that the employee would have had but for the discrimination; back pay with interest; and compensation for any special damages sustained . . . including litigation costs, expert witness fees, and reasonable attorney’s fees.”

Additionally, SOX provides for immediate reinstatement of the employee in cases where OSHA determines in its initial sixty-day review that the employee was subjected to retaliation. The employer may obtain a stay of reinstatement only in exceptional cases by meeting criteria for equitable injunctive relief. Two additional remedies should be offered in appropriate circumstances under an omnibus provision. First, where the employer organizational structure is large enough, it should afford the prevailing employee transfer preference upon reinstatement, minimizing the employee’s exposure to lingering hostility by managers or co-workers who may feel defeated or betrayed. Second, individuals who engaged in the retaliatory actions should be held personally accountable. Several options are available: at a minimum, the actor would be disciplined for the wrongful conduct; the actor could be fined; or the actor could be held jointly liable for punitive damages to deter employees from merely acting at the behest of superiors without risking repercussion. The omnibus statute should explicitly state that any remedy available for retaliation should be in

order interim relief if the case is a close one and the employer may forever lose the funds paid out through interim back-pay.


164. Once a complaint is filed, OSHA has sixty days to complete the investigation and issue written findings as to whether there is “reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.” 29 C.F.R. § 1980.105(a). If the complainant demonstrates a prima facie case, the named person has twenty days to meet with representatives of OSHA and present clear and convincing evidence that it would have taken the same personnel action in the absence of the employee’s protected activity. 29 C.F.R. § 1980.104(c). If OSHA determines the employee was subjected to retaliation, it may order immediate reinstatement, which is generally effective immediately upon receipt of findings. 29 C.F.R. § 1980.106.

165. The employer must demonstrate irreparable injury, likelihood of success on the merits, and the balancing of possible harms to the parties and the public. 29 C.F.R. § 1980.106(b)(1).

166. See Devine Testimony, supra note 14 (Checklist for Effective Whistleblower Protection Laws, Part IV, ¶¶ 18–19).

167. Id.

168. Id.
addition to claims and remedies for constitutional or common law rights, and therefore does not preempt existing rights or remedies. This provision would most likely conflict with some state common law approaches, where claims are only available if there is no adequate alternative remedy.

E. Timing Issues

An omnibus provision should standardize the time in which a claim may be filed. The variance in limitations periods for filing anti-retaliation provisions and the time frames for investigating claims administered by OSHA are evident in the OSHA-issued Whistleblower Investigation Manual that provides guidance to investigators and claimants for those fourteen provisions. OSHA must contend with differing statutes providing filing limitations of thirty days up to 180 days. Further, investigational time frames vary from thirty days, to sixty days, to ninety days depending upon the statute. Consistent time frames for filing and investigating claims would aid investigators in tracking cases as they move through the administrative system and would aid informing whistleblowers about exercising legal rights.

169. See, e.g., 18 U.S.C. § 1514A(d) (Supp. V 2005) (“Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.”). An omnibus statute should clarify that constitutional claims and common law claims are not preempted.

170. Some states may preclude recovery under state law when the federal statute can provide an adequate alternative remedy. See, e.g., Flenker v. Willamette Indus., Inc., 967 P.2d 295, 299-300 (1998) (finding remedy under OSHA is inadequate alternative remedy to Kansas common law tort action for whistleblowing because Secretary of Labor has sole discretion to investigate and file suit).


Indeed, providing consistency across the current statutory schemes (in the event omnibus legislation is not pursued) would benefit the investigator and whistleblower alike.\textsuperscript{174}

In selecting an appropriate statute of limitations for an omnibus statute, tension exists between the interests of the employee and the employer. An employer may prefer a shorter time period, such as the ninety-day period, because it protects the general “at-will” nature of the employer-employee relationship and permits a claim to be investigated while the actions prompting the claims are still fresh in the minds of the witnesses. Yet, for the employee, ninety days may not be enough time to realize that an adverse employment action is based upon the whistleblowing activity of the employee.\textsuperscript{175} The employer and employee may also share common interests in the limitations period: because coworkers and supervisors often react negatively to the whistleblower due to a loss of trust in the perceived breach of loyalty, the whistleblowing activity disrupts the working environment and may take some time to settle down.\textsuperscript{176} An employee may prefer to wait to file a claim, recognizing that filing will likely further disruption and loss of trust and that time may resolve the tension in the workplace. If faced with the prospect of losing the right to file the claim for retaliation, however, the employee may file precipitously. Thus, in addition to providing for consistent limitations periods in whistleblower claims,\textsuperscript{177} an omnibus statute should provide for a realistic limitations periods.

\textsuperscript{174} For example, a person alleging retaliatory discrimination or discharge for whistleblowing under SOX must file a complaint with the Secretary of Labor, 18 U.S.C. § 1514A(b)(1)(A), within ninety days after the date on which the violation occurs. § 1514A(b)(2)(D). Failure to file within ninety days may result in dismissal. See Walker v. Aramark Corp., 2003-SOX-22 (A.L.J. Aug. 26, 2003) (ordering dismissal based upon filing 105 days after alleged discriminatory action). Commencement of ninety days begins when an employee has final and unequivocal notice that a decision has been made to take adverse action, and not on the date the decision is implemented. See Del. State Coll. v. Ricks, 449 U.S. 250, 258–59 (1980); EEOC v. United Parcel Serv., Inc., 249 F.3d 557, 561–62 (6th Cir. 2001) (cited in 69 Fed. Reg. 52106) (finding that limitations period commences once the employee is aware or reasonably should be aware of the employer’s decision); Belt v. U.S. Enrichment Corp., ARB No. 02-117, A.L.J. No. 01-ERA-00019, at 5 (Dep’t of Labor Feb. 26, 2004); Kohn, supra note 84, at 15.

\textsuperscript{175} Unambiguous termination commences the ninety day filing period even if the employee does not recognize the relationship between his protected activity and employer’s decision to terminate him. Roulett v. Am. Capital Access, 2004-SOX-00078, (A.L.J. Dec. 22, 2004) (rejecting argument that employee did not realize termination was in response to protected activity until other employees were later terminated, and finding “statute of limitations begins to run when the employee is made aware of the employer’s decision to terminate him”). Moreover, the time period is not tolled for settlement or arbitration. Kohn, supra note 84, at 15–17; cf. Collier v. Farmers Ins. Co., Inc., Civ. A. No. 91-2225-O, 1992 WL 221604 (D. Kan. Aug. 5, 1992) (finding that administrative charges of discrimination for filing workers compensation claim does not toll the statute of limitations period for state retaliatory discharge claim).

\textsuperscript{176} See, e.g., SCAMMELL, supra note 44, at 35, 135, 146–47.

\textsuperscript{177} See supra text accompanying notes 171–74.
Presently, claims delegated to the DOL and investigated by OSHA have statute of limitations ranging 30–180 days.\(^\text{178}\) Other provisions administered by DOL but not further delegated to OSHA may contain similar administrative limitations periods, but enjoy limitations periods of up to three years for cases permitted to be filed directly in court.\(^\text{179}\)

A compromised time frame for an omnibus statute should be a limitations period of one year for all retaliation claims, with equitable tolling up to three years in cases where the employee could not discover through reasonable investigation that the retaliatory act was based upon protected activity of the employee.\(^\text{180}\) One year would provide sufficient time for the employee to recognize the retaliation and sufficient time so that the employee should not be fooled into believing things will work out. Likewise, one year assures the employer that witnesses will likely still be available and limit the extended threat of potential retaliation claims.\(^\text{181}\) Tolling up to three years discourages willful conduct that would prevent the employee from discovering the true nature for the adverse employment action. Uniformity of forum and statute of limitations period provided by a single omnibus whistleblower statute would streamline the litigation process and afford a fair hearing for all parties.

Although SOX is a step forward in whistleblower protection, it feeds into the chaos of whistleblower protection developed in response to crisis. Moreover, through careful drafting of statutory language and narrow interpretation, the statute retains limitations similar to other recent whistleblower protections that hobble its effectiveness. The omnibus provisions proposed would improve the protections in that such legislation would eliminate the narrow application of protection and clarify the law. Unifying the forces that seek greater protection would promote its effectiveness.

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\(^\text{178}^\) See supra note 172.


\(^\text{180}^\) See supra note 179.

IV. REPLACING THE NET WITH A BLANKET OF PROTECTION

SOX is but the most recent formulation of whistleblower protection, reflecting years of legal development. As Part III demonstrates, its protections are uneven and difficult to predict, to say the least. As such, SOX is unlikely to encourage employees of public companies to blow the whistle on wrongful conduct. In fact, it has failed to encourage anyone to blow the whistle on even wide scale fraud.182 Specifically, during the summer of 2006, a new scandal erupted in corporate America.183 Many CEOs boosted their compensation pursuant to incentive compensation plans by backdating option grants to take advantage of lower historical prices.184 Although such backdating conduct has triggered criminal charges at two public companies and although over one hundred companies are under DOJ, SEC, or IRS investigation,185 not a single internal whistleblower emerged.186 Federal legislators continue to debate improvements to the Whistleblower Protection Act for federal employees and contractors.187 Yet, it appears

182. See Stephanie Saul, Study Finds Backdating of Options Widespread, N.Y. TIMES, July 17, 2006, at C1 (“More than 2,000 companies appear to have used backdated stock options to sweeten their top executives’ pay packages, according to a new study that suggests the practice is far more widespread than previously disclosed.”).

183. Much of the manipulation of options grants took place after the enactment of SOX. Id.


186. Instead the SEC’s attention “apparently was piqued by academic research that found unusual patterns of stock activity around the time of options grants.” Charles Forelle & James Bandler, Backdating Probe Widens as 2 Quit Silicon Valley Firm, WALL ST. J., May 6, 2006, at A1. Another external source was a senior auditor for the IRS who discovered the agency had agreed to forgive the outstanding tax liability on the backdated options; she was pressured to sign off on the file to close the audit without having viewed the tax returns—an act that would be contrary to a directive from the IRS commissioner for large- and medium-size businesses. David Cay Johnston, Tech Company Settled Tax Case Without an Audit, N.Y. TIMES, Aug. 10, 2004, at C1. The auditor took her concerns up the chain of command without relief before contacting the FBI and Sen. Charles E. Grassley’s staff. Id. After obtaining the tax returns through a routine request to the recordkeeping department, she concluded that, for the three years she reviewed, the company owed $51 million. Id. The auditor’s decision to go public with her experience placed her position with the IRS in jeopardy because IRS audits are confidential. Id.

187. See Barr, supra note 139, at D4 (reporting that the U.S. Senate passed an amendment to the defense authorization bill that would enhance the protection to federal employee whistleblowers, but recognized that the House of Representatives version did not include the protection, and therefore the amendment would be addressed in the House-Senate conference committee); S. 2285, 109th Cong. (2d
uncontestable that SOX has failed to enlist public company employees to blow the whistle.

While agreement on the need to protect whistleblowers may be widespread, the desire to provide true protection clashes with the reality of business interests and their influence on legislation. A variety of business interests are raised: agency duties of employees to their employers, the risk of false or bad faith disclosures, added tension in the work environment, and bureaucratic intrusion on employment decision making. Competing with these interests are also many societal interests: the direct and indirect financial costs of crime, psychological costs, free speech concerns, and privacy concerns. Finally, an overarching governmental interest in legislating against retaliatory conduct is the efficiency in the administration of justice.

A. The Case for Limited Legislation: Business Interests

Creating omnibus protection for whistleblowers as a substitute for the existing legal structure of narrowly drawn industry tailored protection undermines long-valued expectations of the employee’s duties of obedience, loyalty, and confidentiality to the employer. Thus, as an agent of an employer, an employee has an implicit duty to obey an employer’s reasonable instructions. Moreover, “[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency” and, in so doing, to not take unfair advantage of position, to not act or speak disloyally in connection with employment, to not compete with the employer, and to not sabotage the employer. Finally, the duty of loyalty implies a duty of confidentiality because the employer must

Sess. 2006) (introducing the Whistleblower Empowerment, Security, and Taxpayer Protection Act of 2006 (“WESTPac”)); Paul Revere Freedom to Warn Act, H.R. 4925, 109th Cong. (2d Sess. 2006) (introduced by Rep. Edward J. Markey (D-MA), a senior member of the Energy and Commerce and Homeland Security Committees, and Carolyn B. Maloney (D-NY), a member of the Government Reform Committee) (proposing a comprehensive bill to provide protections to government and private sector employees who face retaliation for reporting flaws in national or homeland security, public health and safety, or waste, fraud and mismanagement of public funds); Barr, supra note 138, at B2. Rep. Edward J. Markey had proposed a similar provision to extend SOX-type protections to federal employees and contractors as an amendment to the fiscal 2006 authorization bill for the Department of Homeland Security, but it was rejected in committee on a party-line vote. Id. See also supra note 5.

188. See WESTMAN & MODESITT, supra note 3, at 2 (citing RESTATEMENT (SECOND) OF AGENCY §§ 385, 387, 395 (1958) (defining Duty to Obey, Duty of Loyalty, and Duty of Confidentiality)).

189. RESTATEMENT (SECOND) OF AGENCY § 385(1) cmt. a (1958) (amended 2006); WESTMAN & MODESITT, supra note 3, at 28.

190. RESTATEMENT (SECOND) OF AGENCY § 387 & cmt. b; WESTMAN & MODESITT, supra note 3, at 29.

191. RESTATEMENT (SECOND) OF AGENCY § 395; WESTMAN & MODESITT, supra note 3, at 29.
often reveal confidential business information related to the employee’s responsibilities.192

Of course, even where the employee owes a duty, that duty is qualified. The duty of obedience does not require the employee follow instructions when doing so would be a crime, would be unethical, or would endanger the employee or another.193 And, the employee is not held to the duty of confidentiality if the employer has committed or is about to commit a crime.194 Under agency principles, however, the employee is not necessarily permitted to report unethical conduct.195 There is a fine line between criminal acts and unethical conduct, a line that may not be recognizable by the employee who does not possess expert knowledge of the law. Providing a blanket of protection to employees who whistleblow would thus be largely consistent with agency principles, but risks confronting employees with difficult assessments of whether an employer’s act is criminal or will endanger others.

To the degree an omnibus statute threatens intrusion on long-held agency principles, the statute should protect confidential information by providing for internal reporting procedures or oversight boards.196 Employers could thereby be pivotal in keeping information confidential by acting responsively to employee-raised concerns and keeping employees informed of the employer’s actions that address the concerns.

Financially, honest employers should welcome information regarding criminal or dangerous conduct in the organization so that such conduct can be remedied or deterred. Consequently, if the employer chooses

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192. The confidential information may include “unique business methods, trade secrets, customer lists, or other strategic information.” WESTMAN & MODESITT, supra note 3, at 29. The government has opposed whistleblower claims on the basis that disclosing the information relevant to the whistleblowing incident would threaten national security. Federal whistleblower protection legislation proposed in the Senate and in the House of Representatives addresses the “State Secrets” privilege. The Senate version creates procedures to limit the government’s frivolous assertion of the privilege and also to protect disclosure of classified information. S. 2285, §§ 2(c), 3. The House version provides for automatic judgment in favor of the whistleblower if the government prevents the case from being heard by asserting its State Secrets privilege. H.R. 4925, § 5. Sibel Edmonds failed to claim anti-retaliation protection because the government was able to show that the information necessary to prove her case was classified. Edmonds v. U.S. Dep’t of Justice, 323 F. Supp. 2d 65, 69 (D.D.C. 2004).

193. RESTATEMENT (SECOND) OF AGENCY § 385(1) cmt. a; WESTMAN & MODESITT, supra note 3, at 28, 29.

194. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f; WESTMAN & MODESITT, supra note 3, at 29.

195. WESTMAN & MODESITT, supra note 3, at 29.

196. The audit committees established under SOX are a start, although they fail to provide for adequate feedback to the complaining employee. See 15 U.S.C. § 78j-1(m)(4) (Supp. V 2005); Cherry, supra note 132, at 1070–75 (observing that SOX does not require companies to do anything with the complaints it receives).
instead to punish whistleblowers through retaliatory acts or ignore the warnings of its employees, then perhaps that employer assumes the risk of release of confidential information.197 Employers should not be shielded by piecemeal and limited whistleblower statutes while the employees who are dedicated to the employers or responsible to the public are punished for their courage in stepping forward; indeed, many employees who speak up believe they are being loyal to their employers.198 Thus, concerns of confidentiality, while sometimes legitimate, should be viewed with skepticism.

For the public sector employee, issues of First Amendment free speech, the supervisory authority of managers, and potential negative publicity must be reconciled. The courts have played a key role in balancing the public employee’s right to free expression against the public employer’s interest in managing the workplace.199 In applying this balancing test, the Supreme Court recognized the need to assess whether the statement at issue addressed matters of public concern.200 In Garcetti v. Cabellos,201 the Court recently narrowed First Amendment protection to employee statements made as a public citizen.202 This may be a hardship for a public employee choosing to first express a matter of public concern internally with the expectation that the matter can be resolved.203 After Garcetti, internal statements delivered during employment may be characterized as a part of the employee’s official duties, even though the same observation could have been made as a public citizen due in part to information obtained as a citizen.204 Thus,

197. See supra note 18 (discussing Sherron Watkins’s experience at Enron). Much retaliation, no doubt, is part of an effort to conceal wrongdoing.

198. In one survey of federal employees, of employees who reported wrongdoing at their agency, 36% reported wrongdoing to their immediate supervisors whereas less than 10% went outside of the agency when reporting wrongdoing. See MSPB 1993 REPORT, supra note 33, at 16.


200. Pickering, 391 U.S. at 574; Connick, 461 U.S. at 147.

201. Garcetti v. Ceballos, 126 S. Ct. 1961 (2006). See Garcetti, 126 S. Ct. at 1960 (holding 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”). The Court’s concern for the public employer’s interests is manifest: “[E]mployees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.” Id.


203. See, e.g., Pickering, 391 U.S. at 571–72; see also Garcetti, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting) (suggesting that the government employer might in response to the Court’s decision define job responsibilities expansively to shield the administration from the critical remarks of its employees). But see Garcetti, 126 S. Ct. at 1961 (rejecting Justice Souter’s suggestion and observing that
the Garcia decision has eviscerated First Amendment whistleblower protection in the public sector. An omnibus statute should reinstate the primacy of the question of whether the matter was of public concern and shift the balance back toward the center. Additionally, the same standard also should apply to private sector employees to prevent employers from unduly restricting employees from sharing matters of public concern as public citizens, unless doing so would breach confidentiality duties.

Changing societal views may be undermining employment relationships in the United States. Both employers and employees may perceive that less duty is owed to the other; employers lay off workers to export jobs to foreign countries and decrease job benefits to remain competitive in the global market, and employees change jobs more frequently. Employers might argue that as more restraints are placed on their control of the workplace, they will become less competitive in the global market, burdened by employment disputes and bad press from poorly informed employees. An omnibus provision, however, should only protect claimants who held a “reasonable belief” of wrongdoing or public threat.

Of course, there can be too many whistles blowing. Employees may lodge false complaints or engage in bad faith disclosures and thereby prevent the supervisor from taking legitimate adverse actions against them; alternatively, employees may not understand that conduct that appears to the employee to be inappropriate is in fact legal. The employer holds the power to minimize this concern through meaningfully educating employees as to the “kinds of problems about which they should share information, how the information is handled, determination of job duties is a “practical” inquiry).
and what the safeguards are against reprisal.”

In other words, employers should manage the risk of inappropriate employee misconduct. Moreover, under the proposed omnibus statute, the employee would bear the burden of proving the prima facie case by a preponderance of the evidence that the whistleblowing activity was a contributing factor to the adverse action; even if that burden were met, the employer could overcome it by establishing with clear and convincing evidence that it would have taken same action for independent, legitimate reasons in absence of the protected activity. Thus, the risk of too much whistleblowing seems overblown. An omnibus statute should ameliorate this concern further by encouraging internal whistleblowing, and mandating appropriate training of employees.

Social conditioning discourages whistleblowing and casts out the individuals who breach the “trust” of the group even when those individuals are truthful because co-workers may perceive whistleblowing as a witch-hunt to oust complicit employees who were simply following orders or doing their jobs. Employers can minimize this fear by creating workplace conditions that train management to appreciate the benefits of at least internal whistleblowing and the cost-savings from employee input. SOX requires audit committees of

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211. Id. at i
212. Id. at iii. In fact, when surveyed, government employees stated that they would only consider whistleblowing in the face of serious misconduct. See id. at 35–37; see also Nathan & Chow, supra note 142, at 544–45 (suggesting key features for a SOX complaints/whistleblower protection program that includes the following: providing more than one avenue for employees to confidentially report concerns; explaining what constitutes a valid complaint and how such complaint will be treated; updating employees as to actions taken; and educating managers, supervisors, subsidiaries, contractors and agents regarding SOX compliance and whistleblower policies).
214. See Simons, supra note 4, at 26–27 (asserting that betrayal or disloyalty is at the root of social condemnation); Keri A. Gould, Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?, 10 N.Y.L. SCH. J. HUM. RTS. 835, 868–69 (1993) (asserting that the federal sentencing guidelines’ incentives for cooperation by individuals charged with narcotics related crimes potentially promotes disrespect for the law by forcing the defendant to betray moral loyalties for personal gain). Professor C. Fred Alford suggests that while society may not tolerate whistleblowing, it is the organization that mobilizes forces against the whistleblower, “expos[ing] and sacrific[ing the whistleblower] so that others might see what it costs to be an individual in this benighted world.” ALFORD, supra note 35, at 3.
215. Management must be prepared to trade a “don’t rock the boat” attitude for an “everybody grab a paddle” approach. See MSPB 1993 REPORT, supra note 33, at 9–17.
216. See infra text accompanying notes 243–49.
publicly held companies to establish procedures for receiving, investigating, and processing whistleblower complaints. Although not all businesses will be large enough to require committees to establish procedures, many businesses may be able to establish a hotline to collect anonymous concerns with a means of responding or making further inquiries. Studies suggest that employees follow management leadership on ethical issues. Management can avert most of the fear by demonstrating honest behavior in its leadership and by conveying an expectation of honest behavior to employees through meaningful training, rewarding ethical conduct and appropriate whistleblowing activity, responding to whistleblower complaints with action on the issue and feedback to the whistleblower, and disciplining those who commit wrongdoing or retaliate against those who report it. Eliminating the two primary reasons employees choose to remain silent in the face of wrongdoing (belief that nothing will be done and fear of reprisal) will likely eliminate the fear of the witch-hunt.

Another objection that business leaders may raise in opposing omnibus whistleblower protection is the cost. The costs are difficult...
to quantify because adopting an effective program in response to anti-retaliation legislation may include the cost of time for training, establishing hotlines, potential arbitration, or even litigation. But without the legislation, businesses bear costs of mismanagement, potential litigation, and costs of crime, whether it is fraud, theft, or human life.\footnote{See infra Part IV.B.}

Business leaders that develop appropriate feedback systems and employee training should recognize that the costs of implementing or maintaining strong communication channels should not undermine the functioning of the workplace, and the benefits in less fraud and theft should outweigh the burdens.

\section*{B. The Case for Omnibus Legislation: Economic & Social Costs}

In conventional crimes, the victim is obvious and the perpetrator is a particular person. In white collar crime, the victim may not realize a crime has occurred and the perpetrator may be the collective acts or omissions of numerous people. Conventional measures can be taken to minimize conventional crimes, such as better lighting on dark streets or more law enforcement officers patrolling neighborhoods. In white collar crimes, conventional measures are ineffective. The crimes’ only witnesses are often participants or are working for the business perpetrating the crime. Consequently, legislation is needed to encourage those witnesses to come forward, and one thing that the government can provide is legal protection from retaliation.

The direct costs on conventional crimes (such as robbery and burglary) are estimated at $4 billion annually.\footnote{DAVID O. FRIEDRICHS, TRUSTED CRIMINALS 47 (2d ed. 2003).} In contrast, the direct costs of white collar crime are estimated to range from as low as $40 billion to as high as $1 trillion annually.\footnote{Id.} In 1986, the False Claims Act was strengthened to increase recovery under the Act “by raising the financial incentives for private citizens to sue on behalf of the...
government, and by providing protection for employees who fear reprisals if they take steps to report abuses.”  

Subsequently, between the fiscal years 1988 through 2003, the total amount recovered under the FCA when there was an associated qui tam case has been $7.9 billion.  

The FCA is only one statute in an arsenal of federal and state statutes offering protection in exchange for information. Yet, the whistleblower protective net has sizeable holes through which many cases fall. Blanket protection could be expected to afford even more cost savings.

Indirect costs are also associated with white collar crime: higher taxes, increased cost of goods and services, higher insurance rates, screening and surveillance equipment to monitor employees, greater prosecution costs on a per crime basis as compared to conventional crime (because of the cost to detect, investigate, and prosecute complex criminal conduct), and cost of capital to honest businesses due to loss of investor confidence in the U.S. financial and business markets. Environmental crimes and work-related diseases generate related costs of medical treatment and consequential absenteeism from work, increased health care costs to businesses providing insurance for employees, and costs of clean-up. Other less quantifiable costs include the psychological trauma of victimization and “[a]lienation, delegitimation, and cynicism” because white collar crime erodes trust in the government and the institutions it promotes.

To eliminate the confusion and conflict from the multitude of federal statutes, omnibus whistleblower protection should extend beyond white collar crimes to consolidate federal protection from retaliation into a single statute. The scope of the single statute should be broad, covering claims of retaliation for reporting or filing a claim of racial or sexual discrimination, financial fraud, and public health and safety threats, for example. Congress acknowledged that reporting violations of civil rights laws warrant protection from retaliation just as reporting violations of criminal laws warrants protection from retaliation. In

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227. SCAMMELL, supra note 44, at 304–05. Under the FCA, a private citizen, called a relator, is permitted to file a civil action for a violation of 31 U.S.C. § 3729, on behalf of the United States. 31 U.S.C. § 3730(b). Violators of the FCA are liable for up to treble damages and the relator is entitled to a percentage of the damages, 10–25% if the Attorney General elects to intervene and proceed with the case, and 25–30% if the Attorney General declines to take over the case. 31 U.S.C. 3730(d).
228. See FRIEDRICHS, supra note 224, at 48–49; supra notes 76–77.
229. FRIEDRICHS, supra note 224, at 48–49.
230. Id. at 49.
short, there are powerful interests in favor of whistleblower protection as a means of enhancing law enforcement efforts with respect to a broad array of laws.

The U.S. government already intrudes on public and private at-will employment decision making through a myriad of statutes. In addition to regulatory obligations such as the number of hours and the age of workers, statutes protect the health and safety of employees, require the equal treatment of employees, and provide some protection against retaliation for those employees that seek the benefit of those statutory provisions. The existence of these many laws supports the conclusion that society desires government’s presence in the employment arena and recognizes the benefits of whistleblowers to public health, safety, financial security, and equal protection principles.

Consolidating the complex web of protections into a single omnibus statute that addresses the issues of scope of coverage, forum, burdens of proof, relief, and timing for those facing retaliation for whistleblowing would presumably lower litigation costs because employees and employers could look to a single set of rules for federal protection or direction. Moreover, more complete protection would, in time, encourage those employees fearful of reprisals or lack of legal protection to come forward to report wrongdoing. This increased participation by workers in monitoring and protecting health, welfare, and safety would lower the direct and indirect costs to all.

As recognized above, federal omnibus legislation would not preempt state protections for whistleblowers but would provide a single set of federal rules so that litigants could more readily compare federal law with state law. Ideally over time, federal omnibus legislation might influence states to opt for a single state rule providing broad protection rather than multiple rules providing threads of protection.

Thus, there are powerful reasons for broader whistleblower protection, and the legitimate concerns of business and government units should be addressed in the context of a specific omnibus whistleblower statute.

232. See Delikat & Rosenberg, supra note 39.
233. See, e.g., Lacayo & Ripley, supra note 40.
234. See supra Part III.
235. See supra text accompanying notes 169–170.
236. Much like federal statutory protections, some states that have promulgated whistleblower protection statutes have enacted separate statutes for public sector employees and private sector employees. See WESTMAN & MODESITT, supra note 3, at 77–78, 281–307, app. A (listing state statutes protecting public sector employees); id. at 309–17, app. B (listing state statutes protecting private sector employees).
C. The Interests of Senior Managers

Given the overall benefits to offering blanket protection for whistleblowers and the complexity of the current statutory protections, it appears odd that more comprehensive protection is not already in place. This Article posits that the key element to current whistleblower insecurity is the interests of senior managers in the United States.

Virtually all theories of legal reform focus on the role of those holding economic and political power to use the political process to get laws and regulations enacted that serve their interests. For example, economists have shown that increased economic inequality in a society leads to a legal system that fundamentally tilts in favor of the wealthy. Scholars from the Law and Economics movement further suggest that regulation will be hijacked predictably in favor of those with the greatest economic stakes in the regulatory process—usually the very business sectors subject to regulation. Mancur Olson in particular has focused upon collective action challenges to suggest that small groups with concentrated economic resources will invariably achieve more favorable legal outcomes than widely dispersed groups. More recently, legal scholars have recognized that Congress itself may pursue organized groups with economic resources to bargain for legal indulgences. As other commentators have recognized, these reform theories would predict that CEOs and senior managers, as captains over vast pools of corporate wealth and operating within relatively concentrated groups, would hold disproportionate sway over the legal system.

There is reason to think that the political sway of senior managers is the underlying reason blowing the whistle is so hazardous and uncertain. By definition a whistleblower is a person who otherwise lacks power to stop the enterprise, through its normal governance channels (which

237. Edward Glaeser, Jose Scheinkman & Andrei Shleifer, The Injustice of Inequality, 50 J. MONETARY ECON. 199 (2003) (using the U.S. during the gilded age and post communist Russia to demonstrate how increased inequality leads to legal outcomes that fundamentally favor the wealthy).

238. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §§ 19.13, 19.14 (6th ed. 2003) (stating that the electoral process “creates a market for legislation in which legislators ‘sell’ legislative protection to those who can help their electoral prospects with money or votes”).

239. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2, 11, 165 (rev. ed. 1971) (stating that very large groups will not pursue organizations to influence public goods like law because rational actors will instead assume that they can free ride on the efforts of others).

240. McCaffery & Cohen, supra note 25, at 1233 (finding that Congress often engages in ex ante rent extraction as much as legislative activity is a function of collective action theory and demonstrating how this dynamic has played out in connection with extended legislative debate over the estate tax).

241. See, e.g., Steven A. Ramirez, The Special Interest Race to CEO Primacy and the End of Corporate Governance Law, 32 DEL J. CORP. L. 345 (2007) (arguing that CEOs have used their political advantages to achieve a CEO-primacy model of corporate governance).
always lead ultimately to the CEO and senior managers), from engaging in wrongful conduct.\textsuperscript{242} In other words, whistleblowers are a check on management prerogatives.\textsuperscript{243} During the post-Enron reform era, management interests have bridled against other reform initiatives that would have impinged upon management autonomy—particularly provisions that would have required attorneys for public corporations to report corporate wrongdoing outside the corporation and provisions that would have limited management’s ability to hand pick their nominal supervisors, the board of directors.\textsuperscript{244} Again, stated differently, managers have opposed measures that threaten their autonomy.

The Sarbanes-Oxley experience is telling. The business community was essentially split regarding SOX.\textsuperscript{245} Nevertheless, the overwhelming political support behind the Act ultimately imposed numerous new obligations on public companies, including on their managers.\textsuperscript{246} The one provision that President Bush narrowed through a presidential signing statement immediately upon signing the Act was the whistleblower provision.\textsuperscript{247} Commentators have noted that special interest influence can be difficult to track because bargains struck often leave no footprints.\textsuperscript{248} Nevertheless, it is clear that the most organized and powerful segment with the greatest stakes in Sarbanes-Oxley was management.\textsuperscript{249} They are most likely the political force behind the President’s effort to dilute whistleblower protection.

The United States does not want another Enron. It does not want military equipment failing in battle because of mechanical failures,\textsuperscript{250} water supplies polluted by chemical waste,\textsuperscript{251} or subway tunnels that collapse in earthquakes.\textsuperscript{252} Fundamentally, there is broad political support for general whistleblowing protection, which is why so many

\textsuperscript{242} Supra note 3.
\textsuperscript{243} Id.
\textsuperscript{244} E.g., Amy Borrus, SEC Reform: Big Biz Says Enough Already, BUS. WK., Feb. 2, 2004, at 43 (noting opposition to the corporate reforms).
\textsuperscript{245} BUTLER & RIBSTEIN, supra note 8, at 12.
\textsuperscript{246} Id. at 13–14.
\textsuperscript{247} Signing Statement of President Bush, supra note 9.
\textsuperscript{248} McCaffery & Cohen, supra note 25, at 1233.
\textsuperscript{249} BUTLER & RIBSTEIN, supra note 8, at 12.
\textsuperscript{250} See, e.g., Scammell, supra note 44, at 16.
\textsuperscript{251} See, e.g., Alford, supra note 35, at 75 (relating the story of a state environmental protection agency employee who was fired for calling a state senator to report the agency’s failure to test well water in neighborhoods near hazardous waste sites; the agency was forced to rehire the employee who was then given no work and an office in a former janitor’s closet).
\textsuperscript{252} See id. at 51 (describing the experience of an engineer who was fired from his position with a construction management company because he exposed defects in the construction of subway tunnels in Los Angeles).
provisions have been legislated. There is little doubt that our elected leaders have a high degree of group cohesion with many elite groups within our society. Moreover, our leaders themselves—as well as our government—are often threatened by whistleblowers. Indeed, the term “whistleblower” continues to perpetuate the social stigma. Whistleblowing will always be countercultural. All of these factors suggest that whistleblower reform will be difficult.

On the other hand, whistleblowers are lionized in our society precisely because it takes so much courage to be so countercultural. Honest business leaders will value information that improves product

253. See supra notes 5, 44–46; Stephen Barr, Armor for the Whistle-Blowers, WASH. POST, Aug. 10, 2006, at D4 (reporting that U.S. Representatives wrote a letter urging ranking members of the House Armed Services Committee to support broader protections of federal employees and to eliminate loopholes in protection, and stating that “whistle blowers can be America’s first line of defense against threats from outside, as well as from bureaucratic breakdowns within the government that can be equally dangerous”).

254. See JEFF FAUX, THE GLOBAL CLASS WAR 70–75 (2006) (asserting that those persons in the top economic echelons share loyalty and solidarity with others in their class even when such loyalty may be detrimental to the businesses they manage or the industries in which they operate).

255. See, e.g., Christopher Lee, Dispute at Whistle-Blower Office, WASH. POST, Feb. 24, 2005, at A19 (reporting that the head of the U.S. Office of Special Counsel, the department charged with protecting federal employee whistleblowers from prohibited personnel practices under the federal merit system, is accused of retaliating against twelve career employees for whistleblowing).

256. For example, the U.S. Department of Justice announced the largest government fraud settlement in history in a health care fraud probe that involved HCA, the largest for-profit hospital chain in the United States. Press Release CRM/CIV #696, U.S. Dep’t of Justice, HCA—The Health Care Company & Subsidiaries to Pay $840 Million in Criminal Fines and Civil Damages and Penalties (Dec. 14, 2000), available at http://www.usdoj.gov/opa/pr/2000/December/696civcrm.htm. The five year investigation was prompted by False Claims Act lawsuits filed by whistleblowers, and the settlement addressed wrongdoing for numerous activities including illegal charges and fraudulent claims. Id. HCA was founded by U.S. Senator Bill Frist’s father and brother, Thomas Frist, Sr. and Thomas Frist, Jr., and reportedly “formed one of the most significant sources of [the Senator’s] personal wealth” at least prior to his sale of the stock in July 2005. R. Jeffrey Smith & Jeffrey H. Birnbaum, Frist Stock Sale Raises Questions on Timing, WASH. POST, Sept. 22, 2005, at A10. His run for the U.S. Senate in 1994 was funded in part by a loan secured by the HCA stock. Id. In 2002, the Justice Department announced a tentative agreement with HCA to resolve the remaining civil claims with a settlement of $781 million, bringing the total civil and criminal recovery amount from HCA to approximately $1.7 billion. Press Release #731, U.S. Dep’t of Justice, Press Statement Re: HCA (Dec. 18, 2002), available at http://www.usdoj.gov/opa/pr/2002/December/02_civ_731.htm.

257. MSPB 1993 REPORT, supra note 33, at 35–37.

258. See James Fanto, Whistleblowing and the Public Director: Countering Corporate Inner Circles, 83 OR. L. REV. 435, 461–67 (2004) (positing that because human beings are social and “derive much of their identity from membership in groups,” “group members become uniform in their views and see only the positive, not the negative, about group attitudes and behavior”).

259. Supra note 40. See, e.g., Adam Zagorin & Timothy J. Burger, Beyond the Call of Duty, TIME, Nov. 1, 2004, at 64 (reporting on Army contract specialist Bannatine Greenhouse’s experience when she questioned a no-bid long-term Iraqi supply contract with Halliburton’s subsidiary Kellogg, Brown and Root during discussions with senior officials from the office of the Defense Secretary; several Halliburton representatives attended the meeting and left only after Greenhouse’s strong urging to the presiding general that they not be privy to internal discussions).
safety, protects financial integrity, or reduces diminished output due to workplace hostility, and thus they can be convinced of the benefits for any protection to prevail.\textsuperscript{260} Given that whistleblower protection dates to the Civil War and that each passing crisis or successful political movement seems to spur greater whistleblower protection, there is little doubt that there are strong political forces in favor of whistleblowing.\textsuperscript{261} Thus, whistleblowing protection seems to be a permanent feature of our legal system.\textsuperscript{262} This means that any omnibus statute is unlikely to be subject to the same kind of special interest limitations that are patent in the current regime.\textsuperscript{263} An omnibus statute would eliminate the patchwork of protections and would eliminate opportunities to amend whistleblower protection by stealth.\textsuperscript{264}

Legal structure matters.\textsuperscript{265} The current structure diffuses attention to whistleblower protection among a plethora of provisions. A single, unified omnibus statute would convene support and, thus, would be far more likely to secure adequate whistleblower protection than the current porous net. An omnibus statute would be far more likely to resist special interest attack or limitation because such an attack would be on whistleblower protection generally rather than just specified threads of protection. Thus, as the next step in whistleblower protection, reformers should urge the consolidation of the entire patchwork of whistleblower into one omnibus provision in accordance with the vision articulated in this Article. Such an approach should optimize whistleblower protection within the context of our political system.

V. CONCLUSION

The United States has repeatedly recognized the need to rely upon its citizens in combating crime and in protecting the health, welfare, and

\textsuperscript{260} See MSPB 1993 REPORT, supra note 33, at 35–37.
\textsuperscript{261} Supra notes 48–49.
\textsuperscript{262} The fact that the most recent federal effort to enhance whistleblower protection passed the House by a vote of 331–94 demonstrates the political support in favor of expanded protections. See Abrams, supra note 5.
\textsuperscript{263} For example, it is clear that President is not in favor of whistleblower protection. Supra notes 5, 9. Nevertheless, the administration has not proposed abolishing all whistleblower protections, presumably because it recognizes the political costs of doing so. See supra note 5.
\textsuperscript{264} Signing Statement of President Bush, supra note 9.
\textsuperscript{265} President Franklin Roosevelt understood this fact intuitively. He knew that his Social Security Act would engender resistance within more conservative business circles. He also knew that, over time, this political force could seek to undo Social Security. This is the reason that he funded Social Security through payroll taxes. To the extent participants paid into the plan, they would have a vested interest in the continuation of the program and the payout of benefits over generations. PATRICK J. MANEY, THE ROOSEVELT PRESENCE 67 (1998).
safety of the citizenry. With each newly identified threat, Congress has reacted time and again with strands of legislation intended to stem the danger and protect those who step forward to aid the battle. This Article looks at the most recent response to a threat, financial and accounting fraud, and examines the goal articulated as compared to the resulting legislation’s limited effectiveness through its narrowly defined scope, rules on forum selection, procedure rules, and remedies. From this example, this Article envisions the contours of omnibus legislation that would eliminate the piecemeal, strand-by-strand net that has evolved for whistleblowers and replace it with a blanket of protection against retaliation.

An omnibus whistleblower statute should operate to give anti-retaliation protection the maximum extent of protection from special interest limitations. A unified omnibus provision should require a frontal assault on whistleblower protection generally and limit the ability of special interests to mount stealth attacks on particular strands of whistleblower protection. Thus, when the elite business leaders and political leaders recognize and are prepared to seize the opportunity for economic savings and social benefit offered by improved whistleblower protection, those who seek protection for whistleblowers must be ready to step forward to fight crime and promote health and welfare through omnibus protection. When the next reform moment arises, reformers must be ready to strike.