COMMENT

Garcetti v. Ceballos: Whether an Employee Speaks as a Citizen or as a Public Employee — Who Decides?

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INTRODUCTION

In *Garcetti v. Ceballos*, the Supreme Court held that public employees do not enjoy constitutional protection for expressions they make pursuant to their official duties.[1] Only speech made as a private citizen receives First Amendment protection.[2] Imagine that Abby Anderson and Joe Johnson are public high school teachers in Texas and Colorado, respectively.[3] Anderson and Johnson are concerned about their schools' lack of funding for safety measures.[4] On their own time and at their homes, they compose letters to the schools addressing their concerns.[5] Neither school district responds to the letters.[6] After the school term ends, Anderson and Johnson's contracts are not renewed.[7] They file suit in district court in their respective states, alleging that the schools violated their First Amendment rights.[8] Despite the factual similarities of the two cases, their outcomes will starkly differ.[9] This disparity in outcome turns on the courts' interpretations of *Garcetti*.[10] In Anderson's case, the court will

[1] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); *see also* Thomas v. City of Blanchard, 548 F.3d 1317, 1322-23 (10th Cir. 2008) (articulating *Garcetti*'s holding).

[2] *Garcetti*, 547 U.S. at 419; *see also Thomas*, 548 F.3d at 1323.

[3] The hypothetical presents a variation on the facts in *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121 (9th Cir. 2008) and *Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007). The parties are fictitious. *See infra* Part II (discussing *Posey*'s facts, holding, and rationale).

[4] *See generally* Pickering v. Bd. of Educ., 391 U.S. 563, 566 (1968) (describing teacher's opposition against school district's bond proposition); *Posey*, 546 F.3d at 1123-24 (summarizing high school security aide's decision to write letter to school regarding school safety); *Williams*, 480 F.3d at 690-91 (describing athletic coach's reason for writing memo to school principal).

[5] *See generally Posey*, 546 F.3d at 1123-24 (noting that plaintiff drafted letter at home, with his own resources, and at his own initiative).

[6] *See generally id.* (stating that school principal failed to respond to plaintiff's memo).

[7] *See generally id.* at 1125 (noting that school consolidated plaintiff's position with other employees' positions and subsequently terminated plaintiff after school term ended); *Williams*, 480 F.3d at 691 (noting that school district dismissed plaintiff after he wrote letter).

[8] *See* U.S. CONST. amend. I (prohibiting, among other things, deprivation of freedom of speech).

[9] *Compare Posey*, 546 F.3d at 1129 (holding that whether security aide spoke pursuant to his employment duties presented genuine issue of material fact for jury), *with Williams*, 480 F.3d at 694 (concluding that, despite dispute between parties, summary judgment was appropriate because athletic coach wrote memorandum as part of his official duties).

[10] *Compare Posey*, 546 F.3d at 1129 (holding that *Garcetti* transformed analysis on

interpret as a question of law *Garcetti*'s threshold inquiry of whether one speaks as a citizen or as a public employee.[11] As such, the court will decide on summary judgment whether Anderson spoke as an employee.[12] By contrast, the court in Johnson's case will interpret *Garcetti*'s threshold inquiry as a mixed question of law and fact.[13] The court will therefore turn the case to the jury to decide whether Johnson spoke as a citizen or as a public employee.[14]

While *Garcetti* drew a hard line on public employee speech, it did not provide guidelines for determining when an individual speaks as an employee.[15] More importantly, the Supreme Court failed to articulate whether such determination is a question of law, question of

public employee free speech into mixed questions of law and fact), Davis v. Cook County, 534 F.3d 650, 652-53 (7th Cir. 2008) (finding summary judgment appropriate when no rational trier of fact could find public employee spoke as citizen), *and* Reilly v. City of Atl. City, 532 F.3d 216, 227 (3d Cir. 2008) (concluding that *Garcetti*'s protected status of speech analysis presented mixed questions of law and fact), *with* Charles v. Grief, 522 F.3d 508, 513 (5th Cir. 2008) (holding that determining whether public employee spoke as citizen or as part of his or her work is question of law), Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202-03 (10th Cir. 2007) (finding that although parties disputed whether plaintiffs spoke pursuant to their official duties, inquiry is still question of law for courts to resolve), *and* Wilburn v. Robinson, 480 F.3d 1140, 1149-50 (D.C. Cir. 2007) (holding that employee did not speak as citizen when she asserted that salary differentiation was unconstitutional).

[11] *See generally Charles*, 522 F.3d at 513 (interpreting *Garcetti*'s threshold inquiry as question of law); *Brammer-Hoelter*, 492 F.3d at 1203 (allowing lower court to decide *Garcetti*'s threshold inquiry as matter of law); *Wilburn*, 480 F.3d at 1149-51 (granting summary judgment for defendant after finding plaintiff spoke as public employee).

[12] *See* sources cited *supra* note 11.

[13] *See generally Posey*, 546 F.3d at 1129 (finding that *Garcetti*'s preliminary inquiry is mixed question of law and fact); *Davis*, 534 F.3d at 653 (implying that *Garcetti*'s threshold question is either question of fact or mixed question); *Reilly*, 532 F.3d at 227 (applying mixed question of law and fact analysis).

[14] *See* sources cited *supra* note 13.

[15] *See generally* Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti v. Ceballos *on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 209-11 (2008) (describing *Garcetti*'s impact on teachers' speech at public schools); Herbert G. Odgen, *The Public Policy Exception to At-Will Employment*, VT. B.J., Fall 2008, at 44, 47 (noting that *Garcetti*'s analysis does not fit perfectly in at-will employment cases); Alison Lima, Comment, *Shedding First Amendment Rights at the Classroom Door?: The Effects of* Garcetti *and* Mayer *on Education in Public Schools*, 16 GEO. MASON L. REV. 173 (2008) (describing how Seventh Circuit has applied *Garcetti*'s bright-line rule despite lack of guidance from Supreme Court); Christie S. Totten, Note, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under* Garcetti v. Ceballos, 12 LEWIS & CLARK L. REV. 233 (2008) (analyzing how courts have interpreted *Garcetti* despite lack of framework).

fact, or a mixed question of law and fact.[16] After *Garcetti*, federal circuit courts of appeals disagree over whether *Garcetti*'s threshold inquiry is a mixed question of law and fact.[17] Some, like the Fifth, Tenth, and D.C. Circuits, remain faithful to a pre-*Garcetti* case, *Connick v. Myers*, which held that the inquiry of whether the Constitution protects an employee's speech is a question of law.[18] By contrast, the Ninth, Third, and Seventh Circuits argue that after *Garcetti* distinguished between citizen and employee speech, the inquiry into whether employment speech receives protection is no longer purely legal; rather, *Garcetti*'s threshold inquiry is a mixed question of law and fact.[19] The nature of the inquiry is important because it determines whether a court can dismiss these cases on summary judgment, thereby further limiting the ability of public employees to obtain recourse against improper retaliation.[20]

[16] *Compare Posey*, 546 F.3d at 1127 (acknowledging that Supreme Court in *Garcetti* failed to clarify who decides whether employee spoke pursuant to his official duties), *and Reilly*, 532 F.3d at 227 (holding that whether employee spoke pursuant to his employment duties is mixed question of law and fact), *with Charles*, 522 F.3d at 513 n.17 (finding that *Garcetti*'s inquiry is still question of law), *Brammer-Hoelter*, 492 F.3d at 1203 (finding that *Garcetti*'s threshold inquiry is for courts to resolve), *and Wilburn*, 480 F.3d at 1149 (noting that whether one spoke as citizen or public employee is legal question).

[17] *Compare Posey*, 546 F.3d at 1128-29 (holding that inquiry over whether speech was part of employee's official duties is mixed question of law and fact), *Davis*, 534 F.3d at 653 (finding summary judgment appropriate when no rational trier of fact could find plaintiff spoke as citizen), *and Reilly*, 532 F.3d at 227 (finding that question of whether contested speech was part of employee's job duties presented mixed question of law and fact), *with Charles*, 522 F.3d at 513 n.17 (holding that determining whether plaintiff's speech was made as citizen or employee is question of law), *Brammer-Hoelter*, 492 F.3d at 1202-04 (finding that although parties disputed whether plaintiffs spoke as part of their work duties, inquiry is still question of law for courts to resolve), *and Wilburn*, 480 F.3d at 1148-50 (holding that employee did not speak as citizen when she asserted salary differentiation was unconstitutional).

[18] *See* Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) (holding that inquiry on protected status of public employee speech is question of law for courts); *see, e.g.*, *Charles*, 522 F.3d at 512 (holding that whether plaintiff spoke as private citizen or employee is question of law); *Brammer-Hoelter*, 492 F.3d at 1202-03 (finding that analysis on public employee speech is question of law); *Wilburn*, 480 F.3d at 1149-51 (granting summary judgment after finding that interim director did not speak as citizen when she criticized salary differentiation).

[19] *See, e.g.*, *Posey*, 546 F.3d at 1129 (noting that parties disputed over whether security guard spoke as part of official duties and therefore presented genuine issue of fact); *Davis*, 534 F.3d at 653 (implying that *Garcetti*'s inquiry into protected status of speech is not purely legal question); *Reilly*, 532 F.3d at 227 (holding that whether contested speech is made within employee's job duties is mixed question of law and fact).

[20] *Compare Posey*, 546 F.3d at 1130 (finding that *Garcetti*'s threshold inquiry

This Comment argues that the determination of whether one speaks as a citizen or as an employee is a mixed question of law and fact.[21] Part I examines the historical and legal background of public employee free speech rights.[22] In addition, it explores how the Supreme Court has generally distinguished among questions of law, questions of fact, and those of mixed law and fact.[23] Part II illustrates the circuit split by examining two cases — *Charles v. Grief* and *Posey v. Lake Pend Oreille School District* — which represent the conflicting views.[24] Part III argues that the inquiry over whether one speaks pursuant to his employment is a mixed question of law and fact.[25] First, characterizing the threshold inquiry of citizen speech versus employee speech as a question of law is inconsistent with the fact-intensive inquiry that *Garcetti* requires.[26] Second, allowing the jury to determine whether an employee speaks pursuant to one's employment duties accords with *Connick v. Myers*.[27] Finally, allowing the jury to decide whether an employee spoke as a citizen or as an employee advances public policy goals of fairness.[28]

I. THE HISTORY OF PUBLIC EMPLOYEE FREE SPEECH RIGHTS

Early decisions on public employees' free speech rights play an important role in understanding *Garcetti* and the resulting circuit split.[29] For over a century, courts held that public employees waived

should go to jury), *with Charles*, 522 F.3d at 512 (granting summary judgment for plaintiff after finding that he spoke as citizen), *and Wilburn*, 480 F.3d at 1149-51 (granting summary judgment after finding that interim director did not speak as citizen when she criticized salary differentiation).

[21] *See infra* Part III (arguing that *Garcetti*'s threshold inquiry is mixed question of law and fact).

[22] *See infra* Part I (presenting background by exploring historical and legal background of public employee free speech rights).

[23] *See infra* Part I (distinguishing between questions of law, questions of fact, and mixed questions of law and fact).

[24] *See infra* Part II (presenting split between circuits on issue of whether *Garcetti*'s threshold inquiry is question of law, or mixed question of law and fact).

[25] *See infra* Part III (arguing that *Garcetti*'s threshold inquiry is mixed question of law and fact).

[26] *See infra* Part III.A (arguing that Supreme Court precedent supports contention that inquiry into protected status of speech is mixed question of law and fact).

[27] *See infra* Part III.B (arguing that jury determination on whether employee speaks pursuant to one's official duties is still consistent with Supreme Court precedent).

[28] *See infra* Part III.C (arguing that it is more fair for members of community, not courts, to determine *Garcetti*'s threshold inquiry).

[29] *See generally* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (recognizing

certain constitutional rights once they accepted public employment.[30] A classic example is *McAuliffe v. Mayor of New Bedford*, where the Massachusetts Supreme Judicial Court upheld a city ordinance prohibiting police officers from engaging in political activity.[31] Justice Oliver Wendell Holmes, then a justice on the Massachusetts Supreme Judicial Court, famously announced that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[32]

The landscape changed drastically with the emergence of the Civil Rights Movement in the 1950s and 1960s, when the U.S. Supreme Court began to recognize that public employees retain some constitutional rights after employment.[33] The Court defined the scope of modern public employee speech jurisprudence in *Pickering v. Board of Education*, and later reformulated the *Pickering* test in *Connick v. Myers*.[34] The Supreme Court attempted to further refine the *Pickering*

that public teacher's speech on matters of public interest is constitutionally protected); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (acknowledging that public employees may have some First Amendment freedom of speech rights); McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892) (illustrating that historically, public employees did not enjoy much constitutional rights to free speech in workplace).

[30] *See, e.g.*, *McAuliffe*, 29 N.E. at 517-18 (finding that policeman surrendered his freedom of speech when he accepted position as police officer); *see also* Adler v. Bd. of Educ., 342 U.S. 485, 492-93 (1952) (recognizing that while citizens have First Amendment rights, they do not have right to public employment); Garner v. Bd. of Pub. Works of L.A., 341 U.S. 716, 718-21 (1951) (noting that city could require its employees to disclose membership in Communist Party and take oath of loyalty); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 78 (1947) (noting that Congress can limit rights of public employees to engage in political activities); United States v. Wurzbach, 280 U.S. 396, 398-99 (1930) (recognizing that Congress can regulate political activities of public officers); *Ex parte* Curtis, 106 U.S. 371, 374-75 (1882) (refusing to recognize public employees constitutional rights). *See generally* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1010-14 (2005) (discussing history of public employee freedom of speech rights).

[31] *See McAuliffe*, 29 N.E. at 518.

[32] *Id.* at 517.

[33] *See, e.g.*, *Keyishian*, 385 U.S. at 593-94, 609-10 (holding statute which authorized removal of teachers affiliated with certain organizations or activities unconstitutional); *see also* Sherbert v. Verner, 374 U.S. 398, 403-04 (1963) (finding that state cannot withhold government benefits because employee refused to comply with employment regulation that conflicted with her religious beliefs); Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 897 (1961) (declaring that federal and state government could not deny employment for vague reasons such as membership in political parties); Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952) (holding unconstitutional state law that required employees to swear oaths of loyalty to government as condition of public employment).

[34] *Pickering*, 391 U.S. at 568-70 (establishing balancing test for public employee speech cases); *see also* Connick v. Myers, 461 U.S. 138, 146-47 (1983) (reformulating

test in *Garcetti v. Ceballos*, in which the Court drew a bright line rule regarding public employee speech.[35]

*A. Pre-*Garcetti *Precedent*

The foundation of modern public employee First Amendment jurisprudence is *Pickering v. Board of Education*.[36] In *Pickering*, the Board of Education of Township High School District 205, Will County, Illinois, discharged one of its teachers for writing a letter to a newspaper criticizing a local referendum.[37] The teacher sued the school, alleging that the dismissal violated his First Amendment rights.[38] The school district defended the dismissal as necessary to promote the orderly operation of the schools.[39]

The case ultimately reached the Supreme Court, which ruled in favor of the teacher.[40] In evaluating the teacher's First Amendment retaliation claim, the Court established a balancing test for analyzing public employee free speech cases.[41] Specifically, the Court weighed

Pickering balancing test by making public concern prong as threshold inquiry). *See generally* Tracy L. Adamovich, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1104 (2008) (characterizing *Pickering* as landmark case on public employee speech); Seog Hun Jo, *The Legal Standard on the Scope of Teachers' Free Speech Rights in the School Setting*, 31 J.L. & EDUC. 413 (2002) (analyzing *Pickering*'s balancing test); Natalie Rieland, *Government Employees' Freedom of Expression Is Limited: The Expression Must Touch on Matters of "Public Concern" or Be Intended to Educate or Inform the Public About the Employer to Warrant First Amendment Protection:* City of San Diego v. Roe, 44 DUQ. L. REV. 185, 188 (2005) (analyzing *Connick*'s distinction between speech of matter of public concern and speech of matters of private concern); Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 897-99 (2005) (analyzing *Pickering* balancing test and *Connick* public concern test).

[35] Garcetti v. Ceballos, 547 U.S. 410, 421 (adding additional element to *Pickering-Connick* test by changing threshold inquiry to whether public employee spoke pursuant to his official duties).

[36] *Pickering*, 391 U.S. at 564-68. *See generally* Kozel, *supra* note 30, at 1015 (asserting that Justice Thurgood Marshall's opinion in *Pickering* laid foundation for modern public employee free speech jurisprudence); Kim M. Shipley, Comment, *The Politicization of Art: The National Endowment for the Arts, The First Amendment, and Senator Helms*, 40 EMORY L.J. 241, 289-90 (1991) (characterizing *Pickering* as landmark public employee freedom of expression case).

[37] *Pickering*, 391 U.S. at 564.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 568.

[41] *Id.* at 568-70 (noting that "the problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of

the public employee's right to speak on public matters against the government's interest in the efficient administration of government services.[42] The Court found that the teacher's speech interest prevailed because he spoke on a matter of legitimate public concern.[43] The Court further reasoned that the speech had minimal impact on the efficient operations of the school.[44] Accordingly, the speech received First Amendment protection.[45]

The Supreme Court later reformulated the *Pickering* test in *Connick v. Myers*, in which the Court broadened the public matters inquiry and turned it into an important threshold test.[46] The issue before the Court was whether *Pickering* protected speech involving office personnel matters.[47] Sheila Myers, an assistant district attorney, became upset when her supervisor proposed transferring her to another division of the criminal department.[48] She responded by circulating a survey to her coworkers seeking their input on issues such as office morale and the transfer policy.[49] Upon learning of the questionnaire, the district attorney fired her for insubordination and for refusing to accept the transfer.[50] Myers sued on First Amendment grounds.[51]

The district court found for Myers, concluding that the survey involved matters of public concern relating to the operation of the District Attorney's Office.[52] The Supreme Court reversed in a narrow

public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). *See generally* John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303 (1998) (discussing *Pickering* balancing test in military cases); Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523 (2008) (discussing *Pickering* balancing test in identity politics in workplace); Nancy J. Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL'Y 321 (2008) (describing *Pickering* balancing test in academic setting).

[42] *See Pickering*, 391 U.S. at 568-70.

[43] *See id.* at 569-72.

[44] *Id.*

[45] *Id.* at 572-73.

[46] *See* Connick v. Myers, 461 U.S. 138, 146 (1983). *See generally* Jo, *supra* note 34, at 415 (noting that *Connick* focused on public concern inquiry of *Pickering* test); Kozel, *supra* note 30, at 1016 (noting that *Connick* reformulated *Pickering* test by turning public concern inquiry into threshold question).

[47] *Connick*, 461 U.S. at 140.

[48] *Id.* at 140-41.

[49] *Id.* at 141.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 141-42.

5–4 vote.[53] The Court first addressed the public concern prong of the *Pickering* test, asserting that the threshold inquiry under *Pickering* was whether the speech at issue concerned matters of public interest.[54] The Court reasoned that this was a critical inquiry because when speech does not involve public matters, the government employer should be given wide deference to operate its offices without judicial intrusion.[55] Only if the speech meets this requirement will the courts balance the employee's interest in free speech with the employer's interest in efficiency.[56] The Court found that most of the questions in Myers's survey did not relate to matters of public concern.[57] Therefore, her expressions did not receive constitutional protection and the Court refused to review any subsequent disciplinary actions against her.[58]

Connick underscored the need to distinguish between speech on matters of public concern and speech on matters of private concern.[59] While the Court gave little guidance for making that distinction, it suggested that courts may consider the "content, form, and context" of the speech.[60] The Court relied on precedent holding that the Constitution authorizes courts to ascertain the meaning and application of speech in First Amendment cases.[61] Thus, the Court

[53] *Id.* at 154.

[54] *Id.* at 145-46.

[55] *Id.* The Supreme Court noted in subsequent cases that it was irrelevant whether the speech at issue was directed at an internal audience or at the public. *See, e.g.*, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979) (stating that *Pickering* and its progeny "do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly"). *See generally* Kozel, *supra* note 30, at 1016 n.67 (same).

[56] *Connick*, 461 U.S. at 150.

[57] *See id.* at 152-54.

[58] *Id.* at 154.

[59] *See id.* at 147-50; *see also* Waters v. Churchill, 511 U.S. 661, 671 (1994) (applying *Connick*'s speech as matter of public concern analysis); Rankin v. McPherson, 483 U.S. 378, 384-85 (1987) (applying *Connick* in public employee freedom of speech case); Chiras v. Miller, 432 F.3d 606, 617-18 (5th Cir. 2005) (applying *Pickering-Connick* test).

[60] *Connick*, 461 U.S. at 147-48; *see also* Hylla v. Transp. Commc'ns Int'l Union, 536 F.3d 911, 918 (8th Cir. 2008) (recognizing that analysis on whether speech concerns public matters requires looking at totality of circumstances surrounding speech); Wingate v. Gage County Sch. Dist. No. 34, 528 F.3d 1074, 1081 (8th Cir. 2008) (acknowledging difficulty of determining whether speech concerned matters of public interest); Thompson v. City of Starkville, 901 F.2d 456, 461 (5th Cir. 1990) (applying *Connick*'s content, form, and context formula in concluding that speech concerned matters of public interest).

[61] *Connick*, 461 U.S. at 150 n.10; *see also* Jacobellis v. Ohio, 378 U.S. 184, 190 n.5

asserted that whether the First Amendment protects public employee speech is a question of law for the courts.[62] Still, the *Pickering-Connick* test underwent another reformulation in *Garcetti v. Ceballos*.

B. Garcetti's Hard Line Between Speech as a Citizen and Speech as a Public Employee

The latest Supreme Court case on the free speech rights of public employees is *Garcetti v. Ceballos*.[63] Richard Ceballos was a calendar deputy at the Los Angeles District Attorney's Office.[64] After receiving a tip from a fellow attorney, Ceballos discovered that an affidavit supporting a search warrant had serious misrepresentations.[65] Ceballos discussed his findings with a deputy district attorney and submitted a memorandum detailing his reservations and recommending dismissal of the case.[66] The deputy declined to do so.[67] The defense later called Ceballos to testify about the validity of the warrant, but the trial court ultimately rejected the challenge to the warrant.[68] Ceballos's employers subsequently retaliated against him by demoting him to a different position, transferring him to another branch, and denying him a promotion.[69] Ceballos filed suit under 42 U.S.C. § 1983, alleging that

(1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

[62] *Connick*, 461 U.S. at 148 n.7. *See generally* Charles v. Grief, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (acknowledging that whether First Amendment protected public employee's speech was question of law); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202-03 (10th Cir. 2007) (declaring that part of five-prong inquiry of whether Constitution protected public employee's speech is question of law); Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (arguing that inquiry over whether Constitution protected plaintiff's speech should be decided by district courts).

[63] 547 U.S. 410 (2006). *See generally* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (discussing *Garcetti*'s holding); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 569-81 (2008) (analyzing *Garcetti*'s holding); Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1192-1202 (2007) (critiquing *Garcetti*); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1809-13 (2007) (analyzing *Garcetti*); Zack, *supra* note 34, at 910-11 (defending *Garcetti*'s holding).

[64] *Garcetti*, 547 U.S. at 413.

[65] *Id.* 413-14.

[66] *Id.* at 414.

[67] *Id.*

[68] *Id.* at 414-15.

[69] *Id.* at 415.

his supervisors violated his First Amendment rights by retaliating against him for reporting his concerns.[70]

The district court granted summary judgment for the government, holding that Ceballos's memo was not protected speech.[71] The Ninth Circuit reversed after applying the *Pickering-Connick* test for public employee speech.[72] First, the court relied on circuit precedent and rejected the argument that speech made pursuant to work duties received no constitutional protection.[73] The court then proceeded with the *Pickering* balancing test, holding that Ceballos's speech in exposing government misconduct outweighed the government's interest in workplace efficiency.[74]

In another 5–4 decision, the Supreme Court reversed.[75] The Court held that the Constitution does not protect public employees from disciplinary actions for speech made pursuant to an employment duty.[76] The Court reasoned that speech made as part of a public employee's duties is speech of the government, not that of a private citizen.[77] Therefore, such speech does not receive First Amendment protection, regardless of whether the speech was of a matter of public concern.[78] Because Ceballos spoke pursuant to his duties as calendar deputy, his expression did not receive constitutional protection.[79]

The *Garcetti* ruling added an additional element to the *Pickering-Connick* test.[80] Specifically, it created a new threshold inquiry into whether an employee speaks pursuant to his or her employment duties.[81] If not, the expression qualifies as citizen speech, and the next

[70] *Id.*; *see also* 42 U.S.C. § 1983 (2006) (authorizing public employees to file suit for improper employer retaliation).

[71] *Garcetti*, 547 U.S. at 415.

[72] *Id.* at 415-16.

[73] *Id.* at 416.

[74] *Id.*

[75] *Id.* at 417.

[76] *Id.* at 421.

[77] *Id.* at 421-22.

[78] *Id.* at 421-23.

[79] *Id.* at 424.

[80] *Id.* at 420-23. *See generally* Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1126 (9th Cir. 2008) (arguing that *Garcetti* added new element to public employee freedom of speech rights analysis); Williams v. Riley, 275 F. App'x 385, 389 (5th Cir. 2008) (noting that threshold inquiry into retaliation claims is whether public employee spoke as part of his employment duties); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007) (finding that *Garcetti* changed test from four-part inquiry to five-part inquiry).

[81] *Garcetti*, 547 U.S. at 421. *See generally* Thompson v. District of Columbia, 530 F.3d 914 (D.C. 2008) (stating that *Garcetti* held that threshold inquiry is whether

inquiry is whether the expression concerned public matters as articulated in *Connick* and *Pickering*.[82] If the citizen's expression was a matter of public concern, courts must then balance the employee's speech interest against the government's interest in efficiency.[83]

In *Garcetti*, the scope of Ceballos's job duties was not at issue since it was undisputed by the parties that he wrote the memorandum as part of his official duties as deputy attorney.[84] Accordingly, the Court found it unnecessary to articulate a comprehensive framework for determining when an employee speaks pursuant to her job duties.[85] However, the Court acknowledged the possibility of disputes on this

speech was part of employee's official duties); *Williams*, 275 F. App'x at 389 (noting that pursuant to *Garcetti*, threshold inquiry in public employee free speech claims was whether employee spoke as part of employment duties); *Brammer-Hoelter*, 492 F.3d at 1202 (stating that *Garcetti*'s employee versus citizen speech distinction is threshold inquiry in five-prong test). *But see Posey*, 546 F.3d at 1126 (finding that courts must examine whether speech concerned public interest and balance employee's interest against government's interest before deciding whether employee spoke as citizen).

[82] *See* Connick v. Myers, 461 U.S. 138, 142-43 (1983) (declaring that threshold inquiry in *Pickering* test is whether public employee spoke as citizen on matters of public concern); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that in public employee First Amendment claims, courts must balance employee's interest in free speech against government's interest in workplace efficiency). *See generally* City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (applying *Connick* on issue of whether speech concern matters of public interest); Piscottano v. Murphy, 511 F.3d 247, 270 (2d Cir. 2007) (applying *Connick* to determine whether speech concerned matters of public interest); Campbell v. Galloway, 483 F.3d 258, 267-68 (4th Cir. 2007) (finding that speech received constitutional protection only if speech concerned matters of public interest as articulated by Supreme Court in *Connick*).

[83] *Garcetti*, 547 U.S. at 417; *see also Pickering*, 391 U.S. at 569-72 (balancing security aide's interest in speech against school district's interest in workplace efficiency). *See generally Brammer-Hoelter*, 492 F.3d at 1202-03 (applying *Pickering* and balancing employee's speech interest against government's interest in workplace efficiency).

[84] *Garcetti*, 547 U.S. at 424. *See generally* Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?:* Garcetti v. Ceballos *and the "Citizenship" Prong to the* Pickering/Connick *Protected Speech Test*, 52 ST. LOUIS U. L.J. 589 (2008) (acknowledging that while parties in *Garcetti* did not dispute whether Ceballos spoke pursuant to his official duties as deputy attorney, parties in future cases will).

[85] *Garcetti*, 547 U.S. at 424. *See generally* Raj Chohan, Note, *Tenth Circuit Interpretations of* Garcetti*: Limits on First Amendment Protections for Whistle-Blowers*, 85 DENV. U. L. REV. 573 (2008) (illustrating that without framework, courts, such as Tenth Circuit, struggle to apply *Garcetti*); Stafstrom, *supra* note 84, at 615 (asserting that *Garcetti* did not articulate framework); Sarah F. Suma, Comment, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under* Garcetti v. Ceballos, 83 CHI.-KENT L. REV. 369 (2008) (describing uncertainty in free speech issues of public employees under *Garcetti*).

issue.[86] It rejected the notion that employers could restrict speech merely by composing broad job descriptions such that all employee speech would fall within job duties.[87] Instead, the analysis, the Court opined, should be a "practical one."[88] Notably, however, *Garcetti* failed to assert whether the court or the jury determines when a public employee speaks as a citizen or as a public employee.[89] As such, courts struggle to determine whether the analysis on public employee free speech remains a question of law as articulated in *Connick*.[90]

C. The Perplexing Nature of Questions of Law, Questions of Fact, and Mixed Questions of Law and Fact

Unlike *Connick*, *Garcetti* did not assert whether the threshold inquiry on citizen versus employee speech is a question of law, a

[86] *Garcetti*, 547 U.S. at 424-25; *see also Posey*, 546 F.3d at 1127 (acknowledging that federal circuits differ in their interpretation of *Garcetti*'s employee versus citizen distinction). *See generally* Stafstrom, *supra* note 84 (noting that *Garcetti* did not articulate framework); Suma, *supra* note 85 (articulating *Garcetti*'s lack of framework).

[87] *Garcetti*, 547 U.S. at 424.

[88] *Id.*; *see also Posey*, 546 F.3d at 1129 (relying on *Garcetti*'s use of word "practical" to mean that inquiry over whether plaintiff spoke as citizen or as public employee is fact-intensive); Davis v. Cook County, 534 F.3d 650, 653 (7th Cir. 2008) (implying that "practical" inquiry in *Garcetti* means findings of fact); Reilly v. City of Atl. City, 532 F.3d 216, 227 (3d Cir. 2008) (holding that practical inquiry of whether one spoke as employee or as private citizen is mixed question of law and fact).

[89] *See Posey*, 546 F.3d at 1127-29 (concluding that fact-intensive inquiry *Garcetti* requires must be given to jury); *Reilly*, 532 F.3d at 227 (finding that whether one spoke as citizen or as public employee presents genuine issue of material fact for jury to decide). *But see* Charles v. Grief, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (rejecting magistrate judge's determination that whether employee spoke as citizen is question of fact); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202-03 (10th Cir. 2007) (implying that *Garcetti* did not change *Pickering-Connick* test and that standard is still question of law); Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (finding that inquiry into protected status of speech is for courts to resolve).

[90] *Compare Posey*, 546 F.3d at 1129 (holding that analysis on whether First Amendment protects public employee speech is no longer purely question of law), *Davis*, 534 F.3d at 653 (implying that *Garcetti* requires some fact-finding), *and* Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir. 2007) (finding that at least one prong of public employee free speech analysis has factual element), *with Charles*, 522 F.3d at 513 n.17 (noting that while *Garcetti* inquiry presents factual inquiry, analysis on whether First Amendment protected public employee speech is still question of law for courts), *Brammer-Hoelter*, 492 F.3d at 1203 (finding that whether speech was made pursuant to plaintiff's work duties, inquiry is question of law for courts to resolve), *and Wilburn*, 480 F.3d at 1148-49 (concluding that entire analysis on whether Constitution protected public employee's speech is question of law even after *Garcetti*'s employee speech versus citizen speech distinction).

question of fact, or a mixed question of law and fact.[91] The Court's lack of guidance on this matter is perhaps due to the nebulous and sometimes elusive nature of making such a distinction.[92] To understand the confusion, it is necessary first to understand the distinctions among questions of fact, questions of law, and mixed questions of law and fact.[93] *Black's Law Dictionary* defines "question of fact" as a question that asks whether some external event has occurred.[94] "Questions of law," on the other hand, are exclusively for the courts and ask what the relevant law means.[95] "Mixed questions of law and fact" are neither purely legal nor purely factual and are typically resolved by juries.[96] Some courts characterize mixed questions of law and fact as questions involving whether a given set of facts falls within a known legal standard or definition.[97]

These definitions, however, are quite ambiguous and mutable, and do not clearly reflect the conundrum that courts experience when attempting to define the distinction.[98] Take for instance this "fact":

[91] *See Garcetti*, 547 U.S. at 425 (failing to articulate whether public employee free speech remains question of law pursuant to *Connick*); Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) (holding that inquiry on protected status of public employee speech is question of law for courts); *see also Posey*, 546 F.3d at 1127.

[92] *See generally* Miller v. Fenton, 474 U.S. 104, 113 (1985) (finding distinction "elusive"); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 n.17 (1984) (acknowledging complexities of distinguishing between questions of law, questions of fact, and mixed questions of law and fact); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (attempting to define questions of fact).

[93] *See generally* Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 269-70 (3d Cir. 2005) (Ambro, J., concurring) (explaining how to distinguish between question of law, question of fact, and mixed question of law and fact); WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 242-43 (2d ed. 1994) (discussing distinction between question of law, question of fact, and mixed question of law and fact).

[94] BLACK'S LAW DICTIONARY 1281 (8th ed. 2004).

[95] *Id. See generally Interfaith*, 399 F.3d at 269-70 (defining question of law); FORSYTH, *supra* note 93, at 242-43 (discussing character of legal questions).

[96] *See Pullman-Standard*, 456 U.S. at 290 n.19 (describing mixed questions of law and fact). *See generally* United States v. Townsend, 305 F.3d 537, 541 (6th Cir. 2002) (finding application of legal principles surrounding question of reasonable suspicion is mixed question reviewed de novo); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 238-47 (1991) (discussing how federal courts have treated mixed questions of law and fact).

[97] *See Pullman-Standard*, 456 U.S. at 290 n.19 (defining mixed question of law and fact); Lee, *supra* note 96, at 239-47 (discussing how federal courts have previously categorized issues as mixed questions of law and fact).

[98] *See generally* United States v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989) (employing sliding scale depending on nature of mixed question); State v. Waldrop, 7 S.W.3d 836, 838 (Tex. Ct. App. 1999) (reviewing mixed question of law and fact

Abby Anderson teaches for the school district.[99] A layperson might conclude that Anderson is "in fact" the school district's "employee."[100] However, she could be a substitute teacher or a contractual tutor.[101] If Anderson decides to file a workers' compensation suit against the school, she may not be the school's "employee" in a legal sense.[102] Given these circumstances, Anderson's employment status could be characterized as a question of fact if the question is whether Anderson was acting within the scope of her employment at the time of an injury.[103] Some characterize this inquiry as a mixed question because the fact finder is asked to apply a set of facts to the legal standard for course and scope.[104] Alternatively, Anderson's status could be a pure question of law if the question is whether a substitute teacher or a contractual tutor is an "employee" under the relevant workers' compensation statute.[105] Thus, Anderson's condition of employment is either factual, legal, or mixed, depending on what is being asked and the circumstances of the case.[106] It is because of this uncertainty that the Supreme Court has been reluctant to establish a principle for making such a distinction.[107] Occasionally, the decision to categorize

flexibly); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229-39 (1985) (noting that distinction is never easy for court to make).

[99] This hypothetical was taken from Julia Reytblat, *Is Originality in Copyright Law a "Question of Law" or a "Question of Fact?": The Fact Solution*, 17 CARDOZO ARTS & ENT. L.J. 181, 194-99 (1999) (analyzing question of fact and question of law distinction in copyright cases). *See generally* Monaghan, *supra* note 98, at 229-39 (discussing how courts identify facts); Kenneth Vinson, *Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula*, 47 ALA. L. REV. 723, 737-45 (1996) (analyzing concept of fact).

[100] *See generally Interfaith*, 399 F.3d at 269-70 (providing hypothetical on how to distinguish questions of fact and questions of law); FORSYTH, *supra* note 93, at 242-43 (discussing character of factual questions).

[101] *See supra* note 93.

[102] *See supra* notes 95, 96.

[103] *See generally supra* note 97 and accompanying text (distinguishing between questions of law, fact, and mixed); Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005) (analyzing mixed questions).

[104] *See generally supra* note 97 and accompanying text (discussing mixed questions of law and fact).

[105] *See generally supra* note 95 and accompanying text (discussing questions of law).

[106] *See generally* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 n.17 (1984) (finding distinction nebulous); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (characterizing vexing nature of distinction); Reytblat, *supra* note 99, at 194-99 (analyzing question of fact and question of law distinction in copyright cases).

[107] *See* sources cited *supra* note 106.

an issue may come down to whether the judge or the jury is better equipped to decide the particular question.[108]

More than a century ago, in an inquiry similar to *Garcetti*'s, the Court attempted to make such a distinction in *Washington Gas-Light Co. v. Lansden*.[109] In this libel case, the plaintiff sued a corporation for damaging statements that the corporation's general manager made to a news reporter.[110] The codefendant newspaper subsequently published these statements.[111] At issue before the Court was whether the corporation was vicariously liable for its employee's libelous statements.[112] The Court asserted that a corporation was only liable if the general manager wrote the letter pursuant to his employment duties.[113] The Court found that only one inference could be made based on the evidence before the Court and ultimately held that the manager wrote the letter in his personal capacity.[114] While the Court decided that a court can ultimately decide the issue as a matter of law, it noted that the inquiry would not always be a legal one.[115] Rather, the Court acknowledged the possibility that there might be conflicting evidence regarding whether an employee spoke in the course of his employment.[116] In such cases, the Court concluded that the inquiry would no longer be a question of law, but a question of fact.[117]

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[108] *See generally* Miller v. Fenton, 474 U.S. 104, 114 (1985) (acknowledging that in certain circumstances, court makes distinction by asking who it wants to decide this particular issue); Reytblat, *supra* note 99, at 194-99 (analyzing question of fact and question of law distinction in copyright cases); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1878 (1966) (describing how courts have attempted to distinguish questions of law, questions of fact, and mixed questions of law and fact).

[109] *Compare* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that public employees are not protected by First Amendment for speech made pursuant to official duties), *with* Wash. Gas-Light Co. v. Lansden, 172 U.S. 534, 544-47 (1899) (analyzing whether employee wrote libelous letter within scope of employment). *See generally* Pearce v. Lansdowne, (1893) 69 L.T. 316 (Q.B.) (holding that whether defendant was menial servant under Employer's Liability Act was question for jury).

[110] *Wash. Gas-Light*, 172 U.S. at 535-36.

[111] *Id.* at 536.

[112] *See id.* at 544-45.

[113] *See id.* at 544-47.

[114] *See id.*

[115] *Id.* at 545-57.

[116] *Id. See generally* Pearce v. Lansdowne, (1893) 69 L.T. 316 (Q.B.) (holding that whether potman was menial servant under Employer's Liability Act was question for jury).

[117] *Wash. Gas-Light*, 172 U.S. at 545-47. *See generally* Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1130 (9th Cir. 2008) (holding that determining whether speech was made pursuant to public employee's official duties is question of

Accordingly, the jury, not the court, must decide whether an employee spoke as an employee.[118]

Washington Gas-Light further indicates that the inquiry on whether one spoke pursuant to his work could turn from a legal question into a factual inquiry.[119] While the distinctions between factual, legal, and mixed questions remains mutable and frequently superficial, the Court's opinion in *Washington Gas-Light* provides a framework that can resolve *Garcetti*'s citizen versus employee preliminary inquiry.

II. STATE OF THE LAW

The *Garcetti* decision created disagreement within federal circuits on whether to treat *Garcetti*'s threshold inquiry on employee speech versus citizen speech as a factual inquiry or as a legal question.[120] The Fifth and Ninth Circuits have explicitly articulated differing views on how to characterize *Garcetti*'s preliminary question.[121] In *Charles v. Grief*, the Fifth Circuit, like the Tenth and D.C. Circuits, held that *Garcetti*'s threshold inquiry is a question of law for the courts to resolve.[122] By contrast, the Ninth Circuit in *Posey v. Lake Pend Oreille*

fact for jury); Reilly v. City of Atl. City, 532 F.3d 216, 227-28 (3d Cir. 2008) (holding that whether contested speech is part of employee's duties is mixed question of law and fact).

[118] *Wash. Gas-Light*, 172 U.S. at 547. *See generally Posey*, 546 F.3d at 1130 (holding that whether employee spoke as part of employment duties presents questions of fact for jury).

[119] *Wash. Gas-Light*, 172 U.S. at 545-47. *See generally Posey*, 546 F.3d at 1127-28 (noting that when case presents genuine issue of material fact, issue is no longer legal question); Davis v. Cook County, 534 F.3d 650, 652-53 (3d Cir. 2008) (noting that trier of fact must decide factual questions).

[120] *Compare Posey*, 546 F.3d at 1129 (holding that inquiry into protected status of speech is mixed question of law and fact), *with* Charles v. Grief, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (holding that while *Garcetti* presents factual inquiry, analysis is still question of law for courts). *See generally* Foraker v. Chaffinch, 501 F.3d 231, 238 (3d Cir. 2007) (noting that fact-intensive nature of whether speech was within plaintiff's job duties presented mixed questions); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007) (finding that whether speech was made pursuant to plaintiff's work duties, inquiry is still question of law for courts to resolve); Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (following holding in *Garcetti* that protected status of speech inquiry is question of law).

[121] *Compare Charles*, 522 F.3d at 513 n.17 (explaining that although *Garcetti* requires some fact-based inquiry into whether plaintiff spoke as public employee instead of as private citizen, question is still purely legal), *with Posey*, 546 F.3d at 1128-29 (acknowledging that its holding conflicts with Fifth, Tenth, and D.C. Circuits), *and Foraker*, 501 F.3d at 240 (applying mixed question of law and fact for *Garcetti*'s threshold inquiry).

[122] *Charles*, 522 F.3d at 513 n.17; *see also Brammer-Hoelter*, 492 F.3d at 1202-03

School District held that it is a mixed question of law and fact.[123] It joined the Third and Seventh Circuits, which have also found that *Garcetti*'s inquiry presents a mixed question that should be resolved by the jury.

A. Charles v. Grief

The Fifth Circuit in *Charles v. Grief* asserted that determining whether an individual spoke as a public employee is a question of law.[124] Shelton Charles, an employee of the Texas Lottery Commission, sent e-mails to Commission officials complaining of racial discrimination and retaliation against him and his coworkers within the Commission.[125] When the Commission failed to respond, Charles sent another e-mail to several legislators who controlled the Commission.[126] Charles's immediate supervisor eventually met with him to address his concerns.[127] Later that day, however, the supervisor fired Charles for insubordination.[128]

Charles sued the Commission, alleging that it had retaliated against him based on his protected speech.[129] At issue before the Fifth Circuit was whether the Constitution protected Charles's e-mails.[130] The court applied the *Pickering-Connick-Garcetti* test on whether the First Amendment protected Charles's speech.[131] The court stated that before analyzing the speech, it must determine whether Charles spoke as a citizen or as part of his work duties.[132] The court rejected the magistrate judge's conclusion that this threshold inquiry is a question

(employing question of law analysis over whether employee spoke pursuant to his official duties); *Wilburn*, 480 F.3d at 1149 (allowing courts to decide *Garcetti* question as matter of law).

[123] *Posey*, 546 F.3d at 1129 (holding that *Garcetti* transformed inquiry on protected status of speech from purely question of law into mixed question of law and fact); *see also Davis*, 534 F.3d at 652-53 (implying that *Garcetti* presents factual analysis); *Reilly*, 532 F.3d at 227 (noting that whether speech is made within employee's job duties is mixed question of law and fact).

[124] *Charles*, 522 F.3d at 512; *see also Brammer-Hoelter*, 492 F.3d at 1202-03; *Wilburn*, 480 F.3d at 1149.

[125] *Charles*, 522 F.3d at 510.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See id.* at 511.

[131] *See id.* at 512-14.

[132] *Id.* at 512.

of fact.[133] The court reasoned that although *Garcetti* requires some factual consideration, public employee speech analysis as a whole is a question of law.[134]

The court interpreted Charles's employment duties narrowly and found that Charles did not speak as a public employee.[135] Furthermore, the court found that the speech unequivocally addressed matters of public concern in that it related to government misconduct or racial discrimination.[136] Accordingly, the Constitution protected his speech.[137] The Fifth Circuit joined the Tenth and D.C. Circuits in holding that *Garcetti*'s threshold inquiry is purely a question of law.[138] This conflicts with the Ninth, Third, and Seventh Circuits, which have found that *Garcetti*'s inquiry presents a mixed question that should be resolved by the jury.

B. Posey v. Lake Pend Oreille School District No. 84

The Ninth Circuit adopted a contrasting view in *Posey v. Lake Pend Oreille School District No. 84*.[139] Specifically, the court held that *Garcetti*'s threshold inquiry transformed the entire analysis on public employee free speech into a mixed question of law and fact.[140] While serving as security aide for a high school's parking lot, Robert Posey spoke with the school principal to express his concerns about school safety.[141] When the principal did not respond, Posey composed and delivered a letter to district administration.[142] Subsequently, the school informed him that it planned to eliminate and consolidate his position with other employees' responsibilities.[143]

Posey sued the school, alleging that it had retaliated against him for his speech in violation of his First Amendment rights.[144] The school

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[133] *Id.* at 513 n.17.

[134] *Id.*; *see also* Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) (announcing that inquiry into whether First Amendment protects public employees' speech is question of law); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202-03 (10th Cir. 2007); Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007).

[135] *Charles*, 522 F.3d at 513-14.

[136] *Id.* at 516.

[137] *Id.*

[138] *Id.*; *Brammer-Hoelter*, 492 F.3d at 1202-03; *Wilburn*, 480 F.3d at 1149.

[139] 546 F.3d 1121, 1123 (9th Cir. 2008).

[140] *Id.*

[141] *Id.* at 1123-24.

[142] *Id.* at 1124-27.

[143] *Id.* at 1125.

[144] *Id.*

argued that *Garcetti* precluded Posey's First Amendment claim because he spoke pursuant to his employment duties as a security aide.[145] Posey countered that his job responsibilities did not extend beyond maintaining the school's parking lots.[146] The parties, however, did not dispute that Posey wrote the letter at home, on his own time, and of his own initiative.[147] The district court granted summary judgment to the school, finding that Posey spoke pursuant to his employment duties.[148]

On appeal, the Ninth Circuit reversed, noting that the parties disputed whether Posey had a responsibility to discuss general school safety matters.[149] The court held that when parties dispute whether an employee spoke pursuant to his duties of work, the question goes to the jury.[150] The court acknowledged that prior to *Garcetti*, the analysis on whether the Constitution protected employee speech was a legal question, as articulated in *Connick*.[151] However, the court noted that *Garcetti* added a new element to the *Pickering-Connick* analysis, namely, whether a public employee spoke pursuant to her official duties.[152] Because the parties disputed whether Posey spoke pursuant to his employment, the court noted that this presented a genuine issue of material fact.[153] The court concluded that *Garcetti*'s threshold inquiry is a mixed question of law and fact because such a determination is neither purely factual nor purely legal.[154] Rather, the jury must decide, under the set of facts, whether the plaintiff's speech is of a kind generally part of this type of employment.[155] The Ninth Circuit's ruling directly conflicts with those of other circuits that hold that the courts, not the jury, must distinguish between citizen speech and employee speech.[156]

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[145] *Id.*

[146] *Id.*

[147] *Id.* at 1124.

[148] *Id.* at 1126.

[149] *Id.* at 1123.

[150] *Id.* at 1129.

[151] *Id.* at 1126.

[152] *Id.* at 1126-27.

[153] *Id.* at 1129.

[154] *Id. See generally* FORSYTH, *supra* note 93, at 242 (discussing character of mixed questions of law and fact); Warner, *supra* note 103 (same).

[155] *Posey*, 546 F.3d at 1128; *cf.* Nichols v. United States, 796 F.2d 361, 365 (10th Cir. 1986) (holding that whether employee's action falls within scope of employment is question of fact).

[156] *Compare Posey*, 546 F.3d at 1129 (applying mixed question of law and fact), *with* Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202-03 (10th

III. ANALYSIS

The Ninth Circuit in *Posey v. Lake Pend Oreille School District No. 84* correctly held that *Garcetti*'s threshold inquiry on distinguishing citizen speech and public employee speech is a mixed question of law and fact.[157] First, characterizing the analysis as a question of law is inconsistent with the factual determination that *Garcetti* requires.[158] Second, allowing the jury to make this factual determination is consistent with *Connick v. Myers*.[159] Lastly, allowing the jury to decide this issue, instead of the courts, is consistent with public policy goals of fairness.[160]

A. Categorizing Garcetti*'s Threshold Inquiry as a Question of Law Is Inconsistent with the Fact-Intensive Inquiry that* Garcetti *Requires*

The Fifth Circuit's holding that the inquiry of whether an employee spoke pursuant to her official duties is a legal question is inconsistent with *Garcetti* and *Washington Gas-Light*.[161] In *Charles*, the Fifth Circuit asserted that it followed *Connick*, in which the Court held that the analysis on employee speech is purely a legal one.[162] However, *Garcetti* fundamentally reformulated the *Pickering-Connick* test by adding an additional element.[163] Now, *Garcetti* requires examining whether an

Cir. 2007) (finding that *Garcetti*'s threshold inquiry is question of law), *and* Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (employing question of law approach for *Garcetti*'s threshold inquiry).

[157] *See infra* Part III.A-C (arguing that *Garcetti*'s threshold inquiry is mixed question of law and fact).

[158] *See infra* Part III.A (arguing that allowing jury to decide *Garcetti* inquiry is consistent with *Garcetti* and *Washington Gas-Light*).

[159] *See infra* Part III.B (characterizing *Garcetti* as mixed question of law and fact is consistent with Supreme Court precedent).

[160] *See infra* Part III.C (arguing that allowing jury to decide employment duties promotes fairness).

[161] *Compare* Garcetti v. Ceballos, 547 U.S. 410, 424-25 (2006) (noting that analysis is practical one and that job descriptions are neither sufficient nor necessary to analysis), *and* Wash. Gas-Light Co. v. Lansden, 172 U.S. 534, 545 (1899) (finding that when conflicting evidence exists, question is no longer one for court), *with* Charles v. Grief, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (acknowledging that although *Garcetti*'s threshold inquiry requires some factual determination, it is still question of law for courts).

[162] *See Charles*, 522 F.3d at 512 n.7; *see also* Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) (holding that inquiry into protected status of speech is question of law). *See generally* Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1201-02 (10th Cir. 2007) (noting that question of whether speech is protected is question of law, not of fact).

[163] *See Garcetti*, 547 U.S. at 420 (redefining *Pickering* and *Connick* test). *See*

employee spoke as a citizen or as a public employee before employing the *Pickering-Connick* test.[164] This type of inquiry is a mixed question of law and fact because the inquiry is neither purely legal nor purely factual.[165] It requires looking at the factual circumstances surrounding the speech and determining whether the public employee spoke as part of his employment duties.[166]

1. *Garcetti*'s Inquiry Is Fact-Intensive, Which Is Inconsistent with a Question of Law Approach

Garcetti requires a factual evaluation of whether an employee spoke as part of his or her employment duties.[167] For instance, unlike the undisputed speech in *Garcetti*, employers and employees will often debate the scope of employment duties.[168] Likewise, employees and

generally Lima, *supra* note 15 (arguing that *Garcetti* changed public employee free speech analysis); McCarthy & Eckes, *supra* note 15, at 210-11 (describing how *Garcetti* changed analysis on freedom of speech rights for teachers at public schools).

[164] *See Garcetti*, 547 U.S. at 421 (noting that before courts can even apply *Pickering*, it is necessary to determine whether speech was part of plaintiff's employment duties); *see also Brammer-Hoelter*, 492 F.3d at 1202-03 (acknowledging that *Garcetti* added another element in analysis on retaliation cases, namely, whether speech was part of one's employment duties). *But see* Posey v. Lake Pend Oreille Sch. Dist., 546 F.3d 1121, 1131 (9th Cir. 2008) (describing *Garcetti*'s inquiry as third prong of public employee free speech analysis).

[165] *See* Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19 (1982) (describing mixed questions of law and fact). *See generally* United States v. Townsend, 305 F.3d 537, 541 (6th Cir. 2002) (analyzing mixed question of law and fact); Lee, *supra* note 96, at 238-47 (discussing how federal courts have treated mixed questions of law and fact).

[166] *See generally Garcetti*, 547 U.S. at 424 (noting that inquiry into whether individual spoke as citizen or as public employee is "practical one"); *Wash. Gas-Light*, 172 U.S. at 547 (acknowledging that analysis on whether employee spoke within his or her scope of employment may present genuine issue of fact for jury); Ramona L. Paetzold, *When Are Public Employees Not Really Public Employees? In the Aftermath of* Garcetti v. Ceballos, 7 FIRST AMEND. L. REV. 92, 100 (2008) (noting that *Garcetti*'s inquiry is fact-intensive).

[167] *See Garcetti*, 547 U.S. at 436 (Souter, J., dissenting) (arguing that majority's holding does not guarantee against fact-intensive litigation over whether public employee spoke as citizen or as public employee). *See generally* Paetzold, *supra* note 166, at 96 (criticizing *Garcetti* for injecting fact-intensive element into public employee free speech analysis); Suma, *supra* note 85, at 379 (characterizing *Garcetti*'s threshold inquiry as fact-intensive, which invites litigation over whether employee spoke as part of his employment).

[168] *See Garcetti*, 547 U.S. at 431-33 (Souter, J., dissenting) (posing number of hypothetical scenarios to illustrate that employees and employers are often unclear as to scope of duty); *see also* Posey v. Lake Pend Oreille Sch. Dist., 546 F.3d 1121, 1127 (9th Cir. 2008) (noting that parties disputed whether plaintiff spoke as part of his employment). *See generally* Paetzold, supra note 166, at 96-99 (asserting that parties

employers will often disagree whether the speech in question falls within the scope of those employment duties.[169] The *Garcetti* Court also characterized the inquiry as a "practical one," and noted that parties cannot rely on job descriptions to ascertain the meaning of "duty."[170] Instead, the Court invited litigants to provide external evidence to support whether or not an employee spoke as part of his employment.[171] Even Justice Souter's *Garcetti* dissent complained that the majority's "duty" inquiry was too fact-bound and uncertain.[172] When an issue requires a determination of conflicting facts, the issue is generally a question of fact.[173] This approach is consistent with Supreme Court precedent, *Washington Gas-Light*, which also found that factual determinations may require a question of fact approach.[174]

often dispute scope of employment).

[169] *Cf. Garcetti*, 547 U.S. at 431-32 (Souter, J., dissenting) (questioning majority's position). *See generally* Paetzold, *supra* note 166, at 97-100 (noting that public employees and employers often dispute whether speech was made pursuant to work duties); Suma, *supra* note 85, at 375-86 (describing problems courts face when parties dispute whether speech falls within one's employment).

[170] *See Garcetti*, 547 U.S. at 424 (finding that analysis is "practical one"); *see also Posey*, 546 F.3d at 1129 (noting that *Garcetti* requires practical inquiry into whether one spoke as public employee). *See generally* Suma, *supra* note 85 (noting that courts cannot rely on job descriptions to determine whether speech was part of one's work duties).

[171] *See Garcetti*, 547 U.S. at 436 (Souter, J., dissenting) (criticizing majority for opening floodgates to more litigation on whether speech falls within one's official duties); *see also* Suma, *supra* note 85, at 379 (noting that *Garcetti* analysis is fact-intensive and requires external evidence). *See generally* Paetzold, *supra* note 166, at 95-100 (arguing that *Garcetti* will lead to more litigation over whether speech was made pursuant to one's work).

[172] *Garcetti*, 547 U.S. at 436 (Souter, J., dissenting) (arguing that majority's opinion will lead to more litigation since "practical" means looking at totality of employment); *see also* Krystal LoPilato, Garcetti v. Ceballos*: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537, 541-42 (2006) (describing Justice Souter's dissent in *Garcetti*); Suma, *supra* note 85, at 369 (noting Justice Souter's dissent).

[173] *See supra* note 93; *see also* Wash. Gas-Light Co. v. Lansden, 172 U.S. 534, 545 (1899) (holding that when parties dispute facts of evidence, question is question of fact for jury).

[174] *See Wash. Gas-Light*, 172 U.S. at 545 (recognizing inquiry of whether employee spoke pursuant to his work duties as question of fact).

2. The Inquiry of Whether an Employee Spoke Pursuant to His or Her Employment Duties Is in Line with *Washington Gas-Light*

The fact-driven analysis in *Garcetti* is similar to the type of analysis that the Supreme Court confronted in *Washington Gas-Light*.[175] In that case, the Supreme Court had to determine whether an employee wrote a libelous letter as part of his employment with Washington Gas-Light Co.[176] Based on the evidence, the Court concluded that only one inference could be made — specifically, that the employee wrote the letter in his personal capacity.[177] Given the lack of evidence to the contrary, the Court held that the lower court should have decided the issue as a matter of law.[178] However, the Court noted that the issue over whether an employee speaks pursuant to his employment will not always be a legal inquiry.[179] Rather, some cases will require an interpretation of conflicting evidence.[180] In such cases, the inquiry becomes a question of fact that the jury should decide.[181] Like *Washington Gas-Light*, *Garcetti* invites parties to debate whether an employee spoke as a citizen or as part of his work duties.[182] Importantly, this question of fact approach does not conflict with *Connick v. Myers*.[183]

B. Allowing the Jury to Determine Garcetti*'s Threshold Inquiry Is Consistent with* Connick v. Myers

At first blush, allowing a jury to decide whether an employee spoke as a citizen or as an employee seems to conflict directly with *Connick*.[184] Specifically, *Connick* asserted that whether a public

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[175] *Compare Garcetti*, 547 U.S. at 424 (characterizing inquiry of whether one spoke as private citizen or as public employee as practical), *with Wash. Gas-Light*, 172 U.S. at 547 (analyzing whether employee wrote letter as part his employment).

[176] *Wash. Gas-Light*, 172 U.S. at 543.

[177] *Id.* at 545.

[178] *Id.*

[179] *Id.* at 547.

[180] *Id.*

[181] *Id.*

[182] *Compare* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (noting that inquiry is practical one and employers cannot rely on broad job description to insulate them), *with Wash. Gas-Light*, 172 U.S. at 547 (holding that when there is dispute over whether employee wrote letter within his scope of employment, it is question of fact for jury). *See generally* Suma, *supra* note 85, at 378-80 (characterizing *Garcetti*'s threshold inquiry as fact-intensive).

[183] *See infra* Part III.B.

[184] *Compare* Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) (holding that inquiry

employee's speech is entitled constitutional protection is a question of law for the courts.[185] However, the underlying inquiry in *Connick* is distinguishable from that in *Garcetti*.[186] At issue in *Connick* was whether *Pickering* applied to speech on matters of private concern.[187] In general, public employee speech enjoys constitutional protection only when the employee speaks as a citizen on matters of public concern.[188] While *Connick* used the term "citizen" in its holding, it did not make a distinction between speech as a citizen and speech as an employee.[189] In fact, *Connick* skipped that portion of the analysis and emphasized only the analysis on whether the speech concerned matters of public interest.[190]

By contrast, *Garcetti* drew the line that *Connick* failed to draw; it distinguished between citizen speech and public employee speech.[191] Unlike *Connick*, which focused on the speech itself, *Garcetti*'s scope of employment inquiry focused on the speaker.[192] Significantly, *Garcetti*

into protected status of public employee speech is question of law for courts), *with Wash. Gas-Light*, 172 U.S. at 547 (finding that inquiry over whether employee wrote libelous letter as part of his employment may present questions of fact for jury), *and* Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1129 (9th Cir. 2008) (finding that *Garcetti* inquiry over whether one spoke pursuant to his employment is mixed question of law and fact).

[185] *Connick*, 461 U.S. at 148 n.7.

[186] *Compare Garcetti*, 547 U.S. at 421 (defining crux of issue as whether plaintiff spoke pursuant to his duty as calendar deputy), *with Connick*, 461 U.S. at 141-48 (describing issue of case as whether employee spoke as public employee on matters of public interest). *See generally* Suma, *supra* note 85, at 371-72 (noting that while *Connick* held that *Pickering* applies to expressions made as citizen on matters of public concern, Court only analyzed whether speech itself was of matter of public concern).

[187] *Connick*, 461 U.S. at 140.

[188] *Id.* at 147.

[189] *See id.* at 145-47. *See generally* Rieland, *supra* note 34, at 188 (analyzing *Connick*'s holding); Suma, *supra* note 85, at 371-72 (noting *Connick* emphasized whether speech itself concerned matters of public interest).

[190] *See Connick*, 461 U.S. at 144-48. *See generally* Suma, *supra* note 85, at 371-72 (finding that although *Connick* referred to citizen, it did not make distinction between citizen and employee); Zack, *supra* note 34, at 896-900 (analyzing how courts have interpreted *Connick* as distinguishing between private citizen speech and public employee speech).

[191] *Garcetti*, 547 U.S. at 421 (drawing line between private citizen speech and public employee speech); *see also* Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202 (10th Cir. 2007) (noting that *Garcetti* distinguishes between citizen speech and employee speech). *See generally* Corbin, *supra* note 63, at 670 (describing *Garcetti*'s holding).

[192] *Compare Garcetti*, 547 U.S. at 421 (emphasizing that controlling factor of case was whether deputy attorney wrote memo pursuant to his employment duties), *with Connick*, 461 U.S. at 146-48 (analyzing whether assistant district attorney's speech was

noted that the Constitution might not protect some speech, even on matters of public concern, if it falls within one's duty of work.[193] This is quite different from *Connick*.[194] The inquiry is no longer a purely legal one because *Garcetti* added a factual element, transforming it into a mixed question of law and fact.[195]

Critics may argue that the procedural consequences of categorizing the *Garcetti* element as a mixed question conflicts with First Amendment jurisprudence.[196] Specifically, when an issue is a mixed question, it limits the scope of appellate review.[197] Appellate courts review jury fact-findings with great deference and reverse only if no reasonable jury could have reached such a conclusion given the evidence presented.[198] Likewise, Rule 52(a) of the Federal Rules of Civil Procedure requires appellate courts to review findings of fact under a clearly erroneous standard.[199] By contrast, appellate courts

matter of public concern). *See generally* Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1127 (9th Cir. 2008) (implying that *Garcetti* and *Connick* require different analysis).

193 *See Garcetti*, 547 U.S. at 422-23.

194 *See supra* note 191 and accompanying text.

195 *Garcetti*, 547 U.S. at 431-33 (Souter, J., dissenting) (describing majority's holding as fact-intensive); *see also* Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir. 2007) (noting that fact-intensive nature of whether speech was within plaintiff's job duties presented mixed questions).

196 *See generally* Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (noting that courts must make independent examination of facts); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (finding that courts have final authority to decide whether Constitution protected speech); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (noting that courts have constitutional power to review expressions that require interpretation).

197 *See, e.g.*, Deguio v. United States, 920 F.2d 103, 105 (lst Cir. 1990) (reviewing questions of fact and mixed questions of fact and law under clearly erroneous standard); Phillips v. Fox, 458 S.E.2d 327, 332 (W. Va. 1995) (noting that courts must review mixed questions under clearly erroneous standard); *see also* Cerilli v. Newport Offshore, Ltd., 612 A.2d 35, 39 (R.I. 1992) (finding that mixed questions of law and fact are entitled to same deference as questions of fact).

198 *See generally* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 994 (1986) (describing judicial review of jury findings); Brett T. Reynolds, *Appellate Review of Lanham Act Violations: Is Likelihood of Confusion a Question of Law or Fact?*, 38 Sw. L.J. 743, 752 (1984) (exploring appellate reviews and nature of question of law and question of fact).

199 *See* FED. R. CIV. P. 52(a) (authorizing appellate courts to review findings of fact under clearly erroneous standard); *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984) (holding that Rule 52(a) of Federal Rules of Civil Procedure authorizes clearly erroneous review of fact findings); United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (noting that appellate courts reviewing jury

review questions of law de novo.[200] Therefore, if one considers the *Garcetti* element as a mixed question, appellate courts would have less freedom in reviewing the jury's determination.[201] This seems to contradict with precedent that appellate courts in First Amendment cases must examine the entire record, including making independent inquiries on the facts.[202] Independent review is particularly important in cases where there is a line between unprotected speech and protected speech.[203] In such cases, the courts must examine the facts to determine whether the expression comports with First Amendment principles.[204] Courts have recognized that juries are often ill equipped to make such legal determinations.[205] This suggests that inquiries in all First Amendment cases are questions of law for the courts, not juries, to resolve.[206]

While this argument relies on well-settled principles, the Supreme Court has previously reconciled this seeming contradiction.[207] The Court has found that jury fact-findings do not necessarily preclude the appellate court from independently reviewing all of the facts on appeal.[208] In fact, the Court has found that Rule 52(a) actually encourages appellate courts to make independent judgments to correct jury misunderstandings of the law.[209] This applies to both findings of

findings of fact under clearly erroneous standard must give verdict great deference).

[200] *But see* United States v. Swanson, 341 F.3d 524, 528 (6th Cir. 2003) (reviewing mixed question of law and fact under de novo standard).

[201] *See supra* note 198 and accompanying text.

[202] *See* Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (noting that courts must make independent review of facts in First Amendment cases); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (establishing rule of independent review); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (implying that Constitution authorizes courts to review all records of case); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (noting that courts must review facts of case).

[203] *See, e.g.*, *Bose*, 466 U.S. at 504-05 (naming some categories of protected and unprotected speech). *See generally* Miller v. California, 413 U.S. 15, 30 (1973) (explaining that even though inquiry over whether speech is patently offensive is question of fact, appellate courts must make independent review of facts).

[204] *See generally* Fiske v. Kansas, 274 U.S. 380, 385-86 (1927) (explaining that Supreme Court will review findings of fact to ensure that such findings are consistent with constitutional principles).

[205] *See generally Jacobellis*, 378 U.S. at 188 n.3 (recognizing jury's limited role in First Amendment cases).

[206] *See supra* notes 201-04 and accompanying text.

[207] *See Bose*, 466 U.S. at 498-99 (addressing whether appellate court improperly reversed jury findings of fact under clearly erroneous rule).

[208] *Id.* at 501-02.

[209] *Id.*

fact and mixed findings of law and fact.[210] Furthermore, in many cases, jury findings of facts do not preclude independent appellate review.[211] For instance, the questions of what is actual malice in libel cases or patently offensive in obscenity cases are questions of fact for the jury.[212] In these First Amendment cases, the jury's fact-finding role does not intrude upon the appellate review of the courts of appeals.[213] As such, the Court has found that the seeming contradiction is more apparent than real.[214] Therefore, characterizing *Garcetti*'s threshold inquiry as a mixed question does not undermine the First Amendment.[215] In fact, giving the question to the jury may reinforce First Amendment principles of fairness and consistency.[216]

C. Allowing the Jury, Not the Court, to Decide Garcetti*'s Threshold Inquiry Comports with Policy Goals of Fairness*

The dissenting Justices in *Garcetti* and other scholars have criticized the majority for stripping public employees of their free speech rights.[217] By drawing a bright line between citizen speech and employee speech, *Garcetti* discourages public employees from speaking out and exposing government wrongdoings.[218] So long as a

[210] *Id.*

[211] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 545 (1965) (noting that appellate courts have power to review jury fact determinations); Roth v. United States, 354 U.S. 476, 497-98 (1957) (Harlan, J., concurring in part and dissenting in part) (observing that appellate courts must make independent examination of facts in obscenity cases).

[212] *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 159-61 (1974) (rejecting contention that jury finding of obscenity precludes appellate review); Miller v. California, 413 U.S. 15, 33-34 (1973) (recognizing jury's role in determining what is patently offensive under community standards); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (characterizing jury's role in finding actual malice in libel cases).

[213] *See supra* notes 207-08.

[214] *See Bose*, 466 U.S. at 499-502 (noting that contradiction is in some respects apparent).

[215] *See supra* Part III.A-B.

[216] *See infra* Part III.C.

[217] For criticisms of *Garcetti*'s holding, see Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick*'s Unworkable Employee/Citizen Speech Partition*, 8 J.L. SOC'Y 45, 83-86 (2007); Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2d 335, 340-41 (2006); Kathryn B. Cooper, Note, Garcetti v. Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 90-93 (2006).

[218] *See* Garcetti v. Ceballos, 547 U.S. 410, 436-38 (2006) (Souter, J., dissenting) (arguing that majority's holding discourages public employees from speaking out and undermines First Amendment principles); *see also* Chemerinsky, *supra* note 217, at

plaintiff speaks as a public employee, he does not receive constitutional protection against retaliation even if his speech concerns public matters.[219] As stated above, the analysis over whether one speaks as a citizen or as a public employee is often slippery and fact intensive.[220] The evaluation often depends on different views of what a particular public employment position entails.[221] A single judge who may impose his own understanding of work duties should not make this decision.[222] Jurors, on the other hand, are representatives of their communities.[223] They are capable of evaluating whether a public teacher or a district attorney spoke as part of their employment duties.[224] They can equally discern whether the public employee has crossed the line of their official duties.[225] Jury opinions more accurately reflect the community's understanding of what a particular work duty entails.[226]

340-41 (criticizing *Garcetti*); Cynthia Estlund, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law: Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1470-74 (2007) (finding that *Garcetti* discourages employees from speaking out from fear of retaliation).

[219] *See Garcetti*, 547 U.S. at 421; *see also* Thomas v. City of Blanchard, 548 F.3d 1317, 1322-23 (10th Cir. 2008) (articulating *Garcetti*'s holding); Morales v. Jones, 494 F.3d 590, 596-97 (7th Cir. 2007) (describing *Garcetti*'s distinction between private citizen speech and public employee speech).

[220] *See supra* Part III.A.

[221] *See Garcetti*, 547 U.S. at 431-33 (Souter, J., dissenting) (arguing that majority's holding invites parties to litigate over whether public employee spoke as citizen or as public employee). *See generally* Paetzold, *supra* note 166, at 97-99 (noting that public employees and employers often dispute whether speech was made pursuant to work duties); Suma, *supra* note 85, at 375-86 (describing problems courts face when parties dispute whether speech falls within public employee's official duties).

[222] *See* Chohan, *supra* note 85, at 587-90 (analyzing Tenth Circuit's broad interpretation of *Garcetti*); Elizabeth M. Ellis, Garcetti v. Ceballos*: Public Employees Left to Decide "Your Conscience or Your Job*," 41 IND. L. REV. 187, 196-207 (2008) (supporting narrow interpretation of work duty); Suma, *supra* note 85, at 379-85 (describing how courts have defined job duty).

[223] *See generally* Reytblat, *supra* note 99, at 207-09 (arguing that juries represent standards of community).

[224] *See* cases cited *supra* note 219 and accompanying text.

[225] *But see* Charles v. Grief, 522 F.3d 508, 512 (5th Cir. 2008) (arguing that only courts should determine whether one spoke as citizen or as public employee); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202-03 (10th Cir. 2007) (finding that *Garcetti*'s threshold inquiry is legal question); Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (finding that courts should decide *Garcetti*'s threshold inquiry on summary judgment).

[226] *Cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250-51 (1903) (explaining why jury should determine originality in copyright cases); Reytblat, *supra* note 99, at 207-09 (arguing that jury can make practical determinations that reflect

One may argue that giving the question to the jury would lead to inconsistencies in First Amendment retaliation claims.[227] Some juries may interpret employment duty more broadly or more narrowly than others.[228] As such, the outcome of a particular case may largely depend on the subjective views of jury members and the geographical location of the trial.[229] This, arguably, may undermine the judicial system's emphasis on consistency, predictability, and uniformity.[230]

However, this problem will not be resolved by allowing the courts to decide the issue.[231] Indeed, courts have also been inconsistent in determining the scope of one's duties.[232] Some courts construe work duties very broadly so that an employee will almost always speak pursuant to his work duties.[233] Other courts have interpreted employment duties very narrowly so that speech is more likely to fall outside of one's work.[234] In fact, it is actually more dangerous to have courts make such determinations because their decisions become precedent.[235] By contrast, jury fact-findings never influence future

community standards).

[227] *See* Reytblat, *supra* note 99, at 207-09 (acknowledging that jury findings may lead to inconsistencies).

[228] *But cf. Brammer-Hoelter*, 492 F.3d at 1203 (interpreting work duty broadly); *Wilburn*, 480 F.3d at 1149 (same); Bradley v. James, 479 F.3d 536, 538 (8th Cir. 2007) (same).

[229] *See supra* note 227.

[230] *See* Reytblat, *supra* note 99, at 207-08 (acknowledging that jury findings may lead to inconsistencies).

[231] *See generally* Chohan, *supra* note 85, at 581-83 (exploring how Tenth Circuit has interpreted job duty); Ellis, *supra* note 222, at 196-99 (analyzing how circuit courts of appeals interpret work duty); Suma, *supra* note 87 (describing courts' inconsistent interpretation of *Garcetti*).

[232] *See supra* note 230 and accompanying text.

[233] *See, e.g.*, *Brammer-Hoelter*, 492 F.3d at 1202-03 (interpreting work duty broadly); *Bradley*, 479 F.3d at 538 (holding that summary judgment appropriate after finding that plaintiff spoke pursuant to job duties despite dispute between parties); Piggee v. Carl Sanburg Coll., 464 F.3d 667, 670 (7th Cir. 2006) (interpreting employment duties broadly).

[234] *See, e.g.*, Charles v. Grief, 522 F.3d 508, 513 (5th Cir. 2008) (finding that plaintiff spoke as private citizen); *cf.* Kodrea v. City of Kokomo, Ind., 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (denying defendants' summary judgment motion because it was unclear whether plaintiff spoke as citizen or as public employee); Jackson v. Jimino, No. 1:03-CV-722, 2007 WL 189311, at *16 (N.D.N.Y. Jan. 19, 2007) (noting that it is not clear whether plaintiff spoke pursuant to his work duties).

[235] *See* Reytblat, *supra* note 99, at 209 (arguing that court decisions become precedent); Weiner, *supra* note 108, at 1878 (discussing consequences of court determinations). *See generally* Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 Nw. U. L. Rev. 916, 923-24 (1992) (exploring courts' role in distinguishing between questions of fact and questions of law).

cases because they have no precedential significance.[236] The Supreme Court has noted that the law-fact distinction may sometimes turn on who would be better at administrating justice.[237] In this particular issue, the jury is simply the better decisionmaker.[238]

CONCLUSION

While *Garcetti* intended to clarify job-related speech, it left circuit courts unsure about whether the entire analysis remains purely a legal question.[239] The Supreme Court should resolve this issue by providing that the jury, not the courts, decide whether an employee spoke as a citizen or as a public employee.[240] Characterizing *Garcetti*'s threshold inquiry as a mixed question is consistent with Supreme Court precedent.[241] The question of whether an employee spoke as a citizen or as a public employee is not purely legal.[242] Such characterization is consistent with *Connick v. Myers*'s question of law approach for analyzing the speech itself.[243] Furthermore, defining an employee's official duties is hardly ever straightforward and often leads to conflicting interpretations.[244] Leaving such a subjective inquiry to a

[236] *See* Reytblat, *supra* note 99, at 209 (arguing that jury decisions do not become precedent); Weiner, *supra* note 108, at 1878 (discussing consequences of court determinations). *See generally* Friedman, *supra* note 235, at 924 (exploring jury's role in trials).

[237] *See* Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (noting that distinction between question of fact and question of law may sometimes depend on who is in better position to decide issue). *See generally* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 n.17 (1984) (assessing jury's role in determining whether issue is question of fact or question of law); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (attempting to define jury's role of fact finding).

[238] *See supra* note 235.

[239] *See, e.g.*, Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1127 (9th Cir. 2008) (holding that *Garcetti* inquiry is mixed question); Davis v. Cook County, 534 F.3d 650, 653 (7th Cir. 2008) (implying that analysis is no longer purely question of law); Reilly v. City of Atl. City, 532 F.3d 216, 227 (3d Cir. 2008) (concluding that *Garcetti*'s protected status of speech analysis presented mixed question of law and fact); Charles v. Grief, 522 F.3d 508, 513 (5th Cir. 2008) (holding that determining whether public employee's speech was made as citizen or as part of employee's work is question of law); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202-03 (10th Cir. 2007) (finding that whether speech was made pursuant to plaintiff's work duties, inquiry is question of law); Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (applying question of law to *Garcetti* inquiry).

[240] *See supra* Part III.

[241] *See supra* Part III.A.

[242] *See supra* Part III.A; *supra* notes 98-100.

[243] *See supra* Part III.B.

[244] *See supra* Part III.C.

judge who may inflate or distort work duties may have a chilling effect on free speech.[245] The inquiry should instead go to the members of the community who, in essence, may have a better understanding of the meaning of official duties.[246]

[245] *See supra* Part III.C.

[246] *See supra* Part III.C.