

SALVAGING *GARCETTI*: HOW A PROCEDURAL
CHANGE COULD SAVE PUBLIC-EMPLOYEE
SPEECH

Note

INTRODUCTION	292
I. <i>PICKERING</i> AND ITS PROGENY	293
A. <i>Pickering and Connick</i>	293
B. <i>Garcetti v. Ceballos</i>	295
C. <i>The Public-Employee Speech Doctrine</i>	296
II. SOLVING THE <i>GARCETTI</i> PROBLEM.....	298
A. <i>Circuit Court Confusion</i>	298
B. <i>Reclassifying the Question</i>	299
III. DISTINGUISHING QUESTIONS OF LAW AND FACT.....	300
A. <i>The Law–Fact Distinction and Mixed Questions</i>	300
B. <i>Garcetti and the Law–Fact Distinction</i>	303
C. <i>Garcetti and Decision-Making Authority</i>	304
D. <i>Procedural Considerations</i>	307
CONCLUSION	308

SALVAGING *GARCETTI*: HOW A PROCEDURAL CHANGE COULD SAVE PUBLIC-EMPLOYEE SPEECH

INTRODUCTION

The Florida state government fired Neil Khan for telling the truth. In August 2004, Khan's supervisor in the Miami-Dade State Attorney's Office ordered him to lie to a state judge about the existence of a prior plea offer in a case Khan was working.¹ Following his clear ethical obligations, Khan refused and was subsequently fired.² He sought recourse in the First Amendment, arguing that the government fired him in retaliation for his truthful response to the judge's questions.³ But because of a then-recent Supreme Court ruling, the Eleventh Circuit ignored Khan's plea for protection.⁴ The court of appeals strictly applied the Supreme Court's new rule from *Garcetti v. Ceballos* and held that because Khan was acting under his official job responsibilities, the court would not interfere with his supervisor's firing decision.⁵ Based on the court's strict application of *Garcetti*, the First Amendment did not protect a government attorney from being fired for telling the truth in court.⁶

Critics have charged the *Garcetti* decision with producing overly formalistic, confusing, and inconsistent decisions among the federal circuit courts.⁷ Many of these critics have proposed altering or abolishing the *Garcetti* rule altogether.⁸ This Note suggests an alternative solution to the problems created by *Garcetti*. Instead of abolishing the rule, a procedural change would resolve many of the issues and provide a more feasible solution to the *Garcetti* problem. Shifting the *Garcetti* analysis from a question of law decided by judges to a mixed question of law and fact decided by juries would provide public employees more individualized and fact-intensive consideration.

Part I reviews the key Supreme Court cases developing the essential principles of public-employee speech protection. Beginning in *Pickering v. Board of*

1. Khan v. Fernandez-Rundle, 287 F. App'x 50, 50–51 (11th Cir. 2007).

2. *Id.*

3. *Id.* at 51.

4. *Id.* at 51–52.

5. *Id.* at 52–54.

6. *Id.* at 54.

7. See *infra* Part II.A.

8. See *infra* Part II.B.

Education, the Court decided a series of cases that developed a multistep inquiry to determine whether a public employee's speech should be protected based on the speech's content and the capacity in which the employee spoke. Part I ultimately argues that the Court's decision in *Garcetti* substantially changed the judicial inquiry into public-employee speech by creating a new threshold question.

Part II discusses the criticism of *Garcetti* and the confusion it has produced among the circuit courts. This Part then introduces the procedural change that I argue can save *Garcetti*. Some circuit courts have already adopted this procedural change, while most continue to approach the entire analysis as a question of law. I review how the circuit courts have disagreed as to whether and what portions of the inquiry are questions of law or mixed questions of law and fact.

Part III introduces several theoretical explanations of the differences between questions of law, questions of fact, and mixed questions of law and fact. I argue that each of these competing approaches to the theoretical distinction supports the view that the *Garcetti* analysis should be classified as a mixed question of law and fact. Part III concludes by briefly considering additional procedural questions raised by the mixed-question classification.

I. PICKERING AND ITS PROGENY

Just over fifty years ago, the Supreme Court ruled that public employees retain their right to comment on matters of public significance related to their work for the government.⁹ A doctrine protecting public employees' speech has since evolved in a series of decisions. Together with the Court's initial landmark case, these decisions provide the framework for the legal analysis of the free-speech rights of our public servants.

A. Pickering and Connick

The first of these cases, *Pickering v. Board of Education*, concerned an Illinois teacher who claimed that his First Amendment rights were violated after he was fired for writing a letter to a local newspaper.¹⁰ The Court sought to balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern" and the State's interest in the efficient performance of its employees.¹¹ Even if Pickering's comments were critical of the school board, the comments could not provide appropriate grounds for dismissal because they discussed matters of public concern at the time and were substantially correct.¹² The

9. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

10. *Id.* at 564, 567.

11. *Id.* at 568.

12. *See id.* at 570.

Court did not develop a clear structure or test for public-employee speech protection but was content to “indicate some of the general lines along which an analysis of the controlling interests should run.”¹³

Fifteen years later, the Court returned to the issue of public-employee speech and announced a clearer rule. In *Connick v. Myers*, an assistant district attorney, Myers, claimed her First Amendment rights were violated when she was fired for circulating a questionnaire within her office soliciting her coworkers’ opinions of their supervisors.¹⁴ Writing for the Court, Justice White began his analysis by recalling *Pickering*’s framing of the Court’s task as balancing the employee’s interests as a citizen with the State’s interests as an employer.¹⁵ Following the negative implication of the *Pickering* rule, Justice White ruled that determining whether an employee spoke as a citizen on a matter of public concern was a threshold question that, if answered in the negative, would end the Court’s inquiry into the reasons for the employee’s discharge.¹⁶ Thus, Justice White isolated and emphasized the *Pickering* language about the rights of an employee “as a *citizen*, in commenting upon *matters of public concern*.”¹⁷ Ultimately, the Court held that “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest,” a federal court need not review the employer’s decision to discharge the employee.¹⁸ Applying that standard, Justice White sought to determine if Myers’s speech was a matter of public concern by evaluating the statement’s “content, form, and context.”¹⁹ He concluded that Myers had generally not spoken on matters of public concern and thus was not protected by the First Amendment in this instance.²⁰

13. *Id.* at 569.

14. *Connick v. Myers*, 461 U.S. 138, 141 (1983).

15. *Id.* at 142.

16. *See id.* at 146.

17. *Id.* at 143 (emphasis added) (quoting *Pickering*, 391 U.S. at 568).

18. *Id.* at 147.

19. *Id.* at 147–48.

20. *Id.* at 148. Justice White did concede that one part of Myers’s questionnaire was a matter of public concern but concluded that the government’s interest in limiting that speech outweighed Myers’s interest under the *Pickering* balancing test. *Id.* at 149–54.

B. Garcetti v. Ceballos

Twenty-three years later, the Court made a significant change in the *Pickering* line of cases with its decision in *Garcetti v. Ceballos*.²¹ Ceballos worked as a calendar deputy in the Los Angeles County District Attorney's Office.²² In March 2000, pursuant to his duties as a calendar deputy, Ceballos submitted a memo explaining his concern regarding apparent misrepresentations in an affidavit used to obtain a search warrant.²³ After retaliation from his supervisors, Ceballos sued claiming a violation of his First Amendment rights.²⁴ The district court granted summary judgment for Ceballos's employer, but the Ninth Circuit reversed, finding that Ceballos's memo was speech on what was "inherently a matter of public concern."²⁵ In a special concurrence, Judge O'Scannlain agreed that the court's decision was compelled by precedent but argued that precedent should be overruled based on the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import."²⁶

Writing for the Court, Justice Kennedy followed Judge O'Scannlain's reasoning.²⁷ Justice Kennedy noted that the memo's subject matter was nondispositive.²⁸ He viewed the capacity in which Ceballos made his statements as the "controlling factor" and argued that Ceballos spoke purely in his capacity as a calendar deputy.²⁹ The Court relied on that fact in holding "when public employees make statements pursuant to their official duties," their speech is not protected.³⁰ Justice Kennedy justified the holding in part by arguing that Ceballos's speech only existed as a consequence of his employment by the government.³¹ In a sense, Ceballos's speech was "commissioned" by his employer.³²

21. See Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1187 (2007) (discussing *Garcetti's* "new categorical rule" as a significant departure from the Court's prior balancing approach to the issue of public-employee speech).

22. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

23. *Id.* at 414.

24. *Id.* at 415.

25. *Id.* at 416 (quoting *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006)).

26. *Id.* (quoting *Ceballos*, 361 F.3d at 1186–87 (O'Scannlain, J., concurring)).

27. See *id.* at 417.

28. *Id.* at 421.

29. *Id.*

30. *Id.*

31. *Id.* at 421–22.

32. *Id.* at 422.

Justice Kennedy asserted that *Pickering* balancing is only triggered when an employee speaks as a *citizen* on a matter of public concern, not when an employee speaks as an employee in the normal course of his or her job duties.³³ Thus, the Court created another threshold test to be performed before analyzing the speech's content and performing *Pickering* balancing: whether the employee spoke pursuant to the employee's official duties.³⁴ Only if this question is answered in the negative can a court proceed to analyze the speech's content and perform *Pickering* balancing. The Court noted that the inquiry into the scope of an employee's job duties "is a practical one."³⁵

C. *The Public-Employee Speech Doctrine*

Running faithfully through *Pickering*, *Connick*, and *Garvetti* is the formulation that a public employee speaking (1) as a citizen and (2) on a matter of public concern potentially merits First Amendment protection based on a balancing of interests. But if a public employee speaks as an employee or if the employee's speech is on a matter of purely private concern, the employee cannot rely on the First Amendment for protection from discipline or termination.

In *Connick*, the Court quoted the formulation as it is worded in *Pickering*. However, when the Court framed the issue, it did so in terms of the content of the speech or part (2) of the formulation as described above. After a thorough review of applicable precedent, the Court concluded that "*Pickering*, its antecedents, and its progeny lead us to conclude that if [the employee's speech] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."³⁶ The Court then proceeded to analyze the content of the employee's speech.³⁷ It was in this context that the Court noted that the "inquiry into the protected status of speech is one of law, not fact."³⁸ On its face, the Court's statement implicates the entire *Pickering* inquiry from threshold question to balancing of interests.

33. *Id.* at 423.

34. *Mills v. City of Evansville*, 452 F.3d 646, 647–48 (7th Cir. 2006) (holding that under the new threshold question created by *Garvetti*, some elements of the employee's speech were written within the scope of her job responsibilities and therefore were not protected by the First Amendment).

35. *Garvetti*, 547 U.S. at 424. In his dissent, Justice Stevens rejected the majority's bright-line rule, arguing that the "proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties' is 'Sometimes,' not 'Never.'" *Id.* at 426 (citation omitted). In a lengthier dissent, Justice Souter noted that in its precedent, the Court has "realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job." *Id.* at 430. While Justice Souter acknowledged that applying the *Pickering* balancing test would require judgment, *id.* at 434, he argued that the majority's rule would likely increase litigation over factual issues, *id.* at 436. Justice Souter's evaluation of the majority's rule would prove prescient. *See infra* Part II.

36. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

37. *Id.* at 146–48.

38. *Id.* at 148 n.7.

But in the context of the *Connick* decision, the Court's inquiry into the protected status of speech was primarily an inquiry into the nature of a public employee's speech, not the capacity in which the public employee spoke.³⁹

Garcetti redirected the Court's focus to exactly that aspect of the formulation left undeveloped in *Connick*: the capacity of the speaker.⁴⁰ While *Garcetti* did not ignore or alter the reasoning in *Connick*,⁴¹ the Court breathed life into the first half of the formulation.⁴² Taking a cue from Judge O'Scannlain's concurring opinion in the Ninth Circuit's decision, the *Garcetti* Court recognized a distinction in capacity between speaking as an employee and speaking as a citizen.⁴³ In fact, the Court named capacity as the "controlling factor" in the case and created a new rule based on that factor.⁴⁴ In its holding, the Court referred only to the capacity in which public employees make statements, not to the content of those statements.⁴⁵

The Court also responded to the Ninth Circuit's concern that "it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties."⁴⁶ The Ninth Circuit argued that shifting the analysis from the content of the speech to the capacity of the speaker would create inconsistencies.⁴⁷ Justice Kennedy responded by arguing that the Ninth Circuit's concern "misconceives the theoretical underpinnings of our decisions."⁴⁸ With this response, the Court suggested that its focus on the speaker's capacity had not been explicitly developed in prior cases. While not inconsistent with the Court's past decisions, the focus on capacity was a new element that Justice Kennedy justified by referring

39. That being said, the Court did note that determining if speech addressed a matter of concern required evaluating the speech's "content, form, and context." *Id.* at 147–48 (emphasis added); see also Jason Zenor, *This is Just Not Working for Us: Why After Ten Years on the Job—It Is Time to Fire Garcetti*, 19 RICH. J.L. & PUB. INT. 101, 118 (2016) (arguing that the Court missed an opportunity to change the problematic *Garcetti* rule in *Lane v. Franks*, 573 U.S. 228 (2014), a subsequent public-employee speech case). However, in *Connick*, the speaker's context is only relevant when evaluating the nature of the speech itself. *Connick* diminished and compartmentalized the element of the speaker's context.

40. See Rhodes, *supra* note 21, at 1192.

41. The *Garcetti* Court dutifully recites the *Connick* formulation. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

42. Eric Marshall, Note, *Rescuing the Union Grievance from the Shoals of Garcetti: A Call for the Return to Reason in Public Workplace Speech Jurisprudence*, 57 N.Y.L. SCH. L. REV. 905, 914 (2013) (criticizing the application of *Garcetti* to public employees filing union grievances); 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, 607–08 (2008) (arguing that *Garcetti*'s new rule made the public-employee speech analysis more complicated and noting that the *Garcetti* Court did not apply its new rule to the employee's subpoenaed testimony).

43. *Garcetti*, 547 U.S. at 416–17 (citing *Ceballos v. Garcetti*, 361 F.3d 1168, 1185, 1187, 1189 (9th Cir. 2006) (O'Scannlain, J., concurring), *rev'd*, 547 U.S. 410 (2006)).

44. *Id.* at 421; Rhodes, *supra* note 21, at 1188–89.

45. *Garcetti*, 547 U.S. at 421.

46. *Id.* at 423.

47. *Id.* (citing *Garcetti*, 361 F.3d at 1176).

48. *Id.*

to “theoretical underpinnings” and not to the actual factors used in the Court’s prior decisions.⁴⁹

In clarifying one aspect of this threshold question, the Court declined to offer a “comprehensive framework for defining the scope of an employee’s duties.”⁵⁰ The Court simply noted that when determining the scope of an employee’s duties, “[t]he proper inquiry is a practical one.”⁵¹

II. SOLVING THE *GARCETTI* PROBLEM

A. *Circuit Court Confusion*

Garcetti’s bright line rule has created more confusion, more fact-intensive inquiries, and less consistency among the federal courts. In his article discussing *Garcetti*’s move toward formalism, Charles Rhodes noted the seemingly limitless variety of fact patterns involved in public-employee speech cases.⁵² He argued that the *Pickering* Court was both wise and prescient to avoid issuing strict rules for these cases because of their tremendous diversity.⁵³ But since *Garcetti*, the federal courts have been embroiled in endless and sometimes contradictory rule making for these cases.⁵⁴ The *Garcetti* rule has caused both confusion and a profound lack of the predictability that Rhodes argues is “[t]he core advantage of rules.”⁵⁵ Others have affirmed that *Garcetti* has confused the circuit courts to no end.⁵⁶

For example, in the *Khan* case described at the beginning of this Note, an employee in the state attorney’s office was fired because he refused to follow his employer’s instructions to lie in court.⁵⁷ And based on *Garcetti*, the Eleventh Circuit ruled that the First Amendment did not protect his ethical obligation to speak the truth in that instance.⁵⁸ In contrast, the Second Circuit has ruled that a police officer ordered to make a false statement was protected by the First Amendment because *Garcetti* does not require a public employee to make a false statement that would expose the employee to personal, criminal liability.⁵⁹

49. *Id.*

50. *Id.* at 424.

51. *Id.*

52. Rhodes, *supra* note 21, at 1192–93.

53. *Id.* at 1192.

54. *Id.* at 1193.

55. *Id.* at 1194.

56. Stafstrom, *supra* note 42, at 619; Zenor, *supra* note 39, at 114–17. *See also* Thomas Keenan, Note, *Circuit Court Interpretations of Garcetti v. Ceballos and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 842 (2011) (proposing a new test to resolve the confusion among the circuit courts created by *Garcetti*); Marshall, *supra* note 42, at 924.

57. *See supra* Part I.

58. *Id.*

59. *See Jackler v. Byrne*, 658 F.3d 225, 241 (2nd Cir. 2011).

Following closely on the heels of the Second Circuit's decision, the D.C. Circuit encountered a factually similar case and argued an opposite interpretation. In *Bowie v. Maddox*, the D.C. Circuit did not extend First Amendment protection to a former government employee who had been fired for refusing to testify against a former subordinate in an employment discrimination claim.⁶⁰ In denying a petition for rehearing, the court argued that while the Second Circuit's recent decision in *Jackler* supported Bowie's argument, the Second Circuit had misinterpreted *Garcetti*.⁶¹ The D.C. Circuit argued that the Second Circuit had answered the "pursuant to . . . official duties" question by looking for a civilian analogue to the plaintiff's speech.⁶² The D.C. Circuit interpreted *Garcetti* to mean that the court should consider civilian analogues only *after* determining whether the employee spoke pursuant to official duties.⁶³ The courts came to opposite conclusions when applying the same rule to similar facts.

B. Reclassifying the Question

While some have argued that the solution to the confusion is to abandon *Garcetti* and find a new rule,⁶⁴ I argue that *Garcetti* can be salvaged by making a procedural modification. By shifting the *Garcetti* analysis from a question of law to a mixed question of law and fact, the circuit courts will no longer be forced into endless rulemaking, and public employees will receive more protection.

The classification of the *Garcetti* analysis as a question of law or a mixed question of law and fact has already caused a split among the circuit courts. In *Connick*, the Court stated in a footnote that the "inquiry into the protected status of speech is one of law, not fact" but offered no explanation or defense of this classification.⁶⁵ But in *Garcetti*, the Court indicated that the inquiry was a "practical one."⁶⁶ The Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have

60. *Bowie v. Maddox*, 653 F.3d 45, 46 (D.C. Cir. 2011).

61. *Id.* at 48.

62. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (omission in original)).

63. *Id.*

64. See, e.g., *Zenor*, *supra* note 39, at 120–22.

65. *Connick v. Myers*, 461 U.S. 136, 148 n.7 (1983). The lack of explanation for such a statement is not unusual. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judges/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1018 (1986) (discussing the ways in which scope of review distinguishes the powers and responsibilities of trial and appellate courts).

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

ruled that the inquiry remains solely one of law.⁶⁷ But the Third and Ninth Circuits have read the *Garvetti* “practical” language to shift the inquiry to a mixed question.⁶⁸

While these two circuits stand alone in this position, their view more closely follows the nuances of the Court’s opinions. For example, in *Posey*, the Ninth Circuit recognized that *Garvetti* introduced a new element to the First Amendment analysis.⁶⁹ This new element—analysis of the speaker’s capacity—is uniquely fact-specific, requiring a practical inquiry, and was recognized as such by the *Garvetti* Court.⁷⁰ Because the scope of job responsibilities is a practical determination, the Ninth Circuit concluded that that portion of the inquiry was a mixed question of law and fact.⁷¹ While other courts have recognized that *Garvetti* introduced a new step to the First Amendment analysis, they continue to apply the same question of law standard from *Connick* to every aspect of the analysis.⁷² The Ninth Circuit’s *Posey* opinion follows the Supreme Court’s cases more closely and accounts for the element left undeveloped in *Connick*.

III. DISTINGUISHING QUESTIONS OF LAW AND FACT

A. *The Law–Fact Distinction and Mixed Questions*

Courts often declare that a particular inquiry is a question of fact or a question of law without explaining or justifying their decision.⁷³ The cases cited in this Note have proven to be no exception to this observation. However, analyzing the courts’ classification decisions yields further support for classifying the *Garvetti* analysis as a mixed question of law and fact.

As defined in *Black’s Law Dictionary*, a question of law is “[a]n issue to be decided by the judge, concerning the application or interpretation of the law.”⁷⁴ A question of fact is “[a]n issue that has not been predetermined and authoritatively answered by the law. . . [and is] to be resolved by the jury in a jury trial

67. See *Hemminghaus v. Missouri*, 756 F.3d 1100, 1111 (8th Cir. 2014); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010); *Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008); *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007).

68. *Dougherty v. Sch. Dist.*, 772 F.3d 979, 988 (3d Cir. 2014) (quoting *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007), *abrogated on other grounds by* *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011)); *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008).

69. *Posey*, 546 F.3d at 1126.

70. See *id.* at 1129.

71. *Id.*

72. See *infra* Part III.B.

73. Louis, *supra* note 65, at 1018; Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1868 (1966) (developing a more systematic distinction between questions of law and fact).

74. *Question of Law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

or by the judge in a bench trial.”⁷⁵ A mixed question of law and fact is “[a]n issue that is neither a pure question of fact nor a pure question of law. . . [and is] typically resolved by juries.”⁷⁶ According to these definitions, questions of law lie on one end of the spectrum and questions of fact lie on the other end, with mixed questions somewhere between the two extremes.

However, these conventional definitions, while accurate and useful to some extent, belie the true complexity underlying these concepts. Despite the law–fact distinction’s constitutional basis in Article III,⁷⁷ the Supreme Court has failed to develop a coherent understanding and application of questions of law and fact, admitting that there is no “rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”⁷⁸ There is a similar lack of consensus among scholars.⁷⁹

Henry Monaghan argues that while not fixed points, law and fact lie on a “continuum of experience.”⁸⁰ Because the law–fact distinction has its roots in the Constitution, Monaghan insists that we must take these categories seriously as having theoretical substance and logic.⁸¹ He also argues that there is an analytic distinction between the two categories. Questions of law are general in nature and address issues of legal rules and standards.⁸² Questions of fact are specific in nature, and answer the “who, when, what, and where” questions in particular situations “without *significantly* implicating the governing legal principles.”⁸³

Richard Friedman also contends that there is an analytic distinction between law and fact.⁸⁴ He defines fact as “a reality that exists independently of its acknowledgment by the conscious mind of a perceiver.”⁸⁵ While conceding that law can be defined as a subspecies of fact, Friedman argues that law can

75. *Question of Fact*, BLACK’S LAW DICTIONARY (10th ed. 2014).

76. *Mixed Question of Law and Fact*, BLACK’S LAW DICTIONARY (10th ed. 2014).

77. U.S. CONST. art. III, § 2.

78. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982); see also Miller v. Fenton, 474 U.S. 104, 113 (1985) (“[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive.” (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1985); Baumgartner v. United States, 322 U.S. 665, 671 (1944))).

79. See Emad H. Atiq, *Legal vs. Factual Normative Questions & the True Scope of Ring*, NOTRE DAME J.L. ETHICS & PUB. POL’Y 47, 57–59 (2018) (discussing competing theories explaining the law–fact distinction).

80. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) (arguing that appellate courts should be able to exercise discretion as to which constitutional facts they review).

81. See *id.* at 233–34.

82. *Id.* at 235.

83. *Id.*

84. Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 917 (1992) (discussing the difficulties in applying an appropriate standard of persuasion to questions of law and fact).

85. *Id.* (quoting Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 866 (1992) (discussing the complicated aspects of determining an appropriate standard of proof for questions of law)).

also be defined distinctly from fact as asserting norms that should be applied to factual situations.⁸⁶

Monaghan and Friedman invoke two theories of the law–fact distinction that are widely held: the normative versus empirical approach and the general versus particular approach.⁸⁷ Under the normative–empirical approach, questions of fact deal with empirical data about what happened when and who was where.⁸⁸ Questions of law deal with the development of normative legal standards.⁸⁹ Like Friedman, many modern scholars recognize that legal rules can be understood as a type of fact such that the normative–empirical distinction is really between legal facts and nonlegal facts.⁹⁰ Regardless, legal and nonlegal facts can still map on to the normative–empirical distinction.⁹¹

The general–particular approach is related but distinguishes legal and factual questions based on their degree of specificity.⁹² Questions of law mostly deal with broad principles, while questions of fact deal with specific details applicable to particular situations.⁹³

In both approaches, questions of law and fact mark opposing ends of a spectrum, although the binary distinction is not always consistent.⁹⁴ Between these two “nodal” points on the “continuum of experience,” to use Monaghan’s language, lies a range of mixed questions that include elements of both normativity and empiricism, generality and specificity.⁹⁵ It is, of course, these mixed questions that are at issue in the circuit split. Mixed questions of law and fact are themselves evidence of the fact that the law–fact distinction is not a binary distinction but a continuum of experience.

In fact, the Court has even defined mixed questions of law and fact as “questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”⁹⁶ Based on that definition, mixed questions are mixed because the “purely” factual and legal issues are already resolved. The facts are largely agreed upon, and the legal standard is clear. All that is required is to decide the relationship between the settled facts and the law.

86. *See id.* at 918.

87. *See* Atiq, *supra* note 79, at 57.

88. *Id.*

89. *Id.*

90. *Id.* at 57–58.

91. *Id.* at 58.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* (quoting Monaghan, *supra* note 80, at 233).

96. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

B. *Garcetti and the Law–Fact Distinction*

Applying both theories of the law–fact distinction to *Garcetti* and the circuit courts’ interpretation of the *Garcetti* analysis shows that the *Garcetti* inquiry falls between the legal and factual nodes on the continuum and can be classified as a mixed question. In *Garcetti* the Court created the first aspect of a mixed question by clearly announcing a legal standard: “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁹⁷ However, when announcing the new threshold question in *Garcetti*, the Court did not elaborate on how that question was to be answered.⁹⁸ Justice Kennedy did indicate that the inquiry would be “a practical one” and would require investigation beyond merely considering job titles and descriptions.⁹⁹ The Court’s reference to a practical inquiry suggests a fact-intensive inquiry specific to particular employees, their job descriptions, and their actual job performance. By not offering a framework for performing this analysis, the Court left the lower courts to evaluate and compare the specific sets of facts before them to the Court’s legal standard. The Court’s legal standard and direction regarding a practical inquiry correspond to the Court’s prior description of a mixed question of law and fact.

However, as discussed above, the circuit courts have struggled with the mixed nature of the *Garcetti* inquiry. The fact-intensive nature of the analysis has caused the circuit courts to produce a variety of legal standards.¹⁰⁰ For example, the Tenth Circuit has developed several legal standards for use in answering the *Garcetti* threshold question.¹⁰¹ But the court has ultimately concluded that it “must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship.”¹⁰² Even after developing numerous legal standards in an attempt to create the framework that *Garcetti* failed to provide, the Tenth Circuit still had to acknowledge the intensively

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

98. *See id.* at 424. The Court declined to offer a “comprehensive framework” because the plaintiff in *Garcetti* did not dispute that he spoke pursuant to his official duties. *See id.*

99. *See id.* at 424–25.

100. *See supra* Part II.

101. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007) (“[S]peech relating to tasks within an employee’s uncontested employment responsibilities is not protected from regulation.” (citing *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1151 (D.C. Cir. 2007))); *Id.* (“[S]peech is made pursuant to official duties if it is generally consistent with ‘the type of activities [the employee] was paid to do.’” (second alteration in original) (quoting *Green v. Bd. of Cty. Comm’rs*, 472 F.3d 794, 801 (2007))); *Id.* (“[S]peech may be made pursuant to an employee’s official duties even if it deals with activities that the employee is not expressly required to perform. The ultimate question is whether the employee speaks as a citizen or instead as a government employee—an individual acting ‘in his or her professional capacity.’” (quoting *Garcetti*, 547 U.S. at 422)).

102. *Id.* at 1204 (citing *Garcetti*, 547 U.S. at 423). The court then reviewed the relevant facts and summarily concluded that the plaintiff had not spoken pursuant to her official duties. *See id.*

fact-based nature of the *Garcetti* inquiry. For example, in *Brammer-Hoelter*, the court could only answer the *Garcetti* question after spending several paragraphs reviewing the specific details of the plaintiff's job duties.¹⁰³ Thus, the Tenth Circuit has implicitly acknowledged the interplay of normative legal principles with empirical facts—of general rules with specific details—as it performed the *Garcetti* analysis and has effectively treated the analysis as a mixed question.

The Tenth Circuit is an example of a court recognizing the new inquiry introduced by *Garcetti* yet stubbornly holding to *Connick*'s pre-*Garcetti* broad classification of the inquiry as a question of law. This is not to say that the circuit courts are entirely without justification in doing so. In defending its decision to hold that *Connick*'s question of law standard continues to apply even to the *Garcetti* analysis, the Sixth Circuit cited the Supreme Court's instruction that lower courts should not assume the Court's recent cases have overruled an older case by implication.¹⁰⁴ While the principle is clearly stated, the Court did limit this rule to precedents that have "direct application in a case."¹⁰⁵ As argued in Part I, *Garcetti* introduced a new element to the public-employee speech analysis.¹⁰⁶ *Connick* applies to the rest of the analysis but does not directly apply to the *Garcetti* analysis that focuses specifically on the scope of the employee's duties. Therefore, *Connick* does not have "direct application" to the *Garcetti* question, and the Court's instruction against implied abrogation would not apply.

C. *Garcetti* and Decision-Making Authority

There is another critique to the argument that *Garcetti* and the circuit courts are in fact performing a mixed-question analysis. So far, I have relied on the normative—empirical and general—particular approaches to the law—fact distinction. However, in response to Monaghan and Friedman's arguments, Ronald Allen and Michael Pardo argue that there is no essential difference between questions of law and fact.¹⁰⁷ They assert that the conventional distinction between law's focus on rules and standards and fact's focus on underlying events or transactions simply does not comport with the case law as a whole.¹⁰⁸

103. See *id.* at 1204–05; see also *Kubiak v. City of Chi.*, 810 F.3d 476, 481 (7th Cir. 2016) (performing a detailed assessment of facts despite the court's claim that the inquiry is a question of law); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 348 (6th Cir. 2010) (admitting that the *Garcetti* rule does not make clear if the Court intended to change the inquiry but still holding to the *Connick* classification of the inquiry as a question of law).

104. *Mayhew v. Town of Smyrna*, 856 F.3d 456, 464 (6th Cir. 2017) (citing *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam); *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

105. *Agostini*, 521 U.S. at 237 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

106. See *supra* Part I.

107. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003).

108. *Id.* at 1778.

While it is true that there is significant criticism of the analytic distinctions between questions of law and fact, scholars have consistently recognized a functional component in the law–fact distinction. After concluding that there is no analytic distinction between questions of law and fact, Allen and Pardo conclude that all that remains is a functional distinction.¹⁰⁹ The distinction is really about what body should decide which questions and which standard should be used.¹¹⁰ Friedman also notes that there is a functional dimension to the distinction in addition to the conceptual distinction.¹¹¹ He adds that the functional distinction is not uniform but involves judges sometimes making factual evaluations and juries determining legal standards.¹¹² Monaghan likewise concedes that traditionally the law–fact distinction has served to allocate decision-making authority in the legal system.¹¹³ However, Monaghan notes that other factors certainly affect how courts allocate decision-making authority.¹¹⁴ Particularly applicable to our discussion, Monaghan asserts that mixed questions of law and fact are entirely a matter of authority allocation.¹¹⁵ Mixed questions can involve judges or juries deciding questions of law in different contexts.¹¹⁶

Gary Lawson provides a helpful gloss on the functional aspect of the distinction between law and fact. He joins Allen and Pardo in rejecting the idea that the law–fact distinction is anything more than a matter of convention.¹¹⁷ But he recognizes the usefulness of the convention as a “tool for allocating decision-making authority in a complex, layered legal system.”¹¹⁸ As law is probably just a particular type of fact, we can say that the distinction between questions of law and questions of fact properly recognizes that there are different kinds of facts (i.e. legal facts and factual facts) that require “different modes of inquiry.”¹¹⁹

The functional aspect of the law–fact distinction also has support in the Supreme Court’s cases. Citing *Monaghan*, the Court recognized that labeling issues as questions of law, fact, or mixed questions is as much an allocative decision as an analytical decision.¹²⁰ Particularly in the case of mixed questions—where the issue to be decided is neither purely legal nor purely factual (at least based on the conventional definitions described above)—the allocative decision has at least at times become a matter of which “judicial actor is better positioned

109. *Id.* at 1790.

110. *Id.*

111. Friedman, *supra* note 84, at 918.

112. *Id.* at 925.

113. Monaghan, *supra* note 80, at 234.

114. *Id.*

115. *Id.* at 237.

116. *Id.* at 237–38.

117. Lawson, *supra* note 85, at 863.

118. *Id.*

119. *Id.*

120. *Miller v. Fenton*, 474 U.S. 104, 113–14 (1985) (citing Monaghan, *supra* note 80, at 237).

than another to decide the issue in question.”¹²¹ Other considerations, such as assessing witness credibility, often weigh in favor of giving deference to the trial court and making the issue a question of fact.¹²²

To apply the functional element of the law–fact distinction to the circuit split, we must first determine the functions implicated by the *Garvetti* analysis. As previously noted, *Garvetti* explicitly calls for a practical inquiry. In following this directive, the circuit courts have consistently employed a fact-intensive analysis. The courts’ method of employing the *Garvetti* analysis is no surprise when the analysis is viewed as a mixed question. As described above, the Supreme Court has indicated that mixed questions involve the evaluation of specific facts in light of a settled legal standard.

The functional question is which decision-making body is in the best position to perform this evaluation. The Court has indicated that mixed questions are often best evaluated by treating them as questions of fact and giving deference to the trial court (presumably acting as the trier of fact).¹²³ Especially pertinent here is the *Garvetti* Court’s concern about inconsistencies between an employee’s formal job responsibilities on paper and the employee’s actual responsibilities in practice.¹²⁴ If a trial court’s fact-intensive inquiry requires the examination of witnesses, the trier of fact—again, whether that be a judge or jury—would be in a better position to determine credibility and the true facts.

In particular, juries would be functionally well-suited to perform the *Garvetti* analysis. Juries will necessarily contribute a much broader range of vocational experience to the evaluation of the parties’ claims. The *Garvetti* analysis depends on the decision maker distinguishing between what is truly a part of an employee’s job responsibilities and what could just be a formal job description artificially broadened by an employer seeking to restrict the scope of an employee’s protected speech.¹²⁵ Having a broad range of firsthand experience with a variety of job responsibilities and descriptions, a jury would likely be in a better position to evaluate the actual scope of an employee’s job responsibilities than a single judge who has generally been in the same line of work for his or her entire career.

Further, allocating decision-making authority to juries would better protect public employees’ speech. Jason Zenor has noted that the Court has affirmed again the principle stated as early as *Pickering*, namely, that “there is significant value in allowing public-employee speech because they are often in the best position to report government maleficence.”¹²⁶ But under the *Garvetti* rule, the

121. *Id.* at 114.

122. *Id.*

123. *Id.*

124. *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006).

125. *See id.* at 424.

126. *Zenor*, *supra* note 39, at 117 (citing *Lane v. Franks*, 573 U.S. 228, 236 (2014)); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 571–72 (1968).

plaintiff rarely prevails if the courts can find the slightest connection between the plaintiff's speech and the plaintiff's job duties.¹²⁷ In the hands of the circuit courts, *Garcetti* has proved too formalistic to adequately protect public servants. Classifying the *Garcetti* analysis as a mixed question would more frequently shift that analysis to juries. As juries are made up of the very public that is served by public-employee speech, it is appropriate that they bear more responsibility in adjudicating issues surrounding the speech of public employees. Juries do not bear the weight of making precedential decisions and so are free to consider a case in all its particularity without concern for future decisions.

Classifying the *Garcetti* analysis as a mixed question will also free the circuit courts from endless and inevitably contradictory rulemaking. As a mixed question decided by a jury, the decision would have no precedential authority. Further, if a jury's decision is too far afield, a trial judge is empowered to overturn the verdict. Decisions to do so, which would likely be far fewer than the trial judges' current number of decisions on *Garcetti* questions, would then be subject to appeal. Ultimately, far fewer *Garcetti* questions would reach the circuit courts resulting in fewer precedential decisions being made. The trial and appellate courts would still be able to provide broad boundaries for the scope of a reasonable jury verdict, thus over time producing a more slowly evolving, but hopefully more consistent, body of law.

D. Procedural Considerations

Classifying the *Garcetti* analysis as a mixed question would likely raise some procedural questions. There are at least two potential procedural concerns that should be considered, if only briefly. First, what standard of review should be used by an appellate court considering the trial court's judgment on the *Garcetti* mixed question? The appropriate standard of review for mixed questions continues to be a source of confusion and inconsistency among appellate courts. According to Wright and Miller, there simply is "no uniform standard for reviewing mixed questions."¹²⁸ However, the Supreme Court has suggested that the appropriate standard of review for mixed questions may change from case to case, depending on whether the trial or appellate court is in a better position to decide the issue.¹²⁹ The Court's direction for appellate review echoes the concern about who is in the best position to make decisions at the trial level. Applying the same logic to appeals, the circuit courts should recognize the fact-intensive nature of the inquiry at the trial level and accord appropriate deference

127. Zenor, *supra* note 39, at 114–15.

128. 9C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE CIVIL § 2589 (3d ed. 2008).

129. Christina Gomez, *Vexed and Perplexed: Reviewing Mixed Questions of Law and Fact on Appeal*, 47 COLO. LAW., 24, 26 (2018) (citing *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 562–64 (2014); *Brown v. Plata*, 563 U.S. 493, 517 (2011); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991)).

to the trial court's findings by reviewing decisions on the mixed question under a clearly erroneous standard.

Second, how will the trial courts handle motions for summary judgment on the *Garcetti* mixed question? This question is less clear than the first. As described above, the mixed question involved in the *Garcetti* analysis requires the trial judge or jury to evaluate certain facts in light of a settled legal standard to determine if the facts meet the standard.¹³⁰ Thus, the mixed question is not necessarily concerned with the particular facts themselves. Assuming the parties do not dispute the particular facts relevant to the mixed question, the issue for summary judgment is whether a dispute as to whether the facts meet the standard qualifies as a dispute sufficient to defeat summary judgment. As a mixed question, whether summary judgment would be appropriate is not clear.

Certainly there is a strong factual element to the mixed question that I emphasize throughout my argument. Courts could easily deem the factual element of the mixed question sufficient to constitute a dispute as to material fact (assuming the parties do dispute the mixed question) and defeat summary judgment. This approach would certainly be preferable, as my argument has relied on shifting the nature of the inquiry from a purely legal to a more factual analysis. All the benefits that I argue the mixed-question classification would create would be better served if courts were more reluctant to grant summary judgment when the mixed question is disputed.

CONCLUSION

The Third and Ninth Circuits have the better argument among the circuit courts. They have appropriately recognized that *Garcetti* introduced a new element to the analysis that demands a fact-intensive analysis and shifts the inquiry to a mixed question. Meanwhile, the other circuits continue to cling to their precedent without fully considering the ramifications of the Court's decision in *Garcetti*. A close reading of the Court's decision considered in light of theoretical understandings of the law–fact distinction weighs heavily in favor of classifying the *Garcetti* threshold analysis as a mixed question.

That classification also has the potential to resolve many of the problems that *Garcetti* has produced. By approaching the *Garcetti* analysis as a question of law, most of the circuit courts have been forced to create an often incoherent and inconsistent array of rules to manage the enormous variety of fact patterns in public-employee speech cases. The mixed-question classification would reduce the number of *Garcetti* cases reaching the appellate courts and produce more jury trials in First Amendment retaliation claims brought by public employees.

Providing public employees the opportunity to argue at least a portion of

130. See *supra* Part III.B.

their case to a jury of their peers may also give public employees an additional layer of consideration as they seek to protect themselves against inappropriate and unfair treatment at the hands of disgruntled employers. Such protection is in the best interests of society. It is essential that public employees feel protected if we wish them to speak out against injustices or provide insight to the public about issues and concerns relating to our public institutions. Reclassifying at least one part of this inquiry as a mixed question is a step the judiciary can take to protect the vital speech of our public servants.

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