Policeman, Citizen, or Both? A Civilian Analogue Exception to Garcetti v. Ceballos

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NOTE

POLICEMAN, CITIZEN, OR BOTH? A CIVILIAN ANALOGUE EXCEPTION TO GARCETTI V. CEBALLOS

Caroline A. Flynn*

The First Amendment prohibits the government from leveraging its employment relationship with a public employee in order to silence the employee's speech. But the Supreme Court dramatically curtailed this right in Garcetti v. Ceballos by installing a categorical bar: if the public employee spoke "pursuant to her official duties," her First Amendment retaliation claim cannot proceed. Garcetti requires the employee to show that she was speaking entirely "as a citizen" and not at all "as an employee." But this is a false dichotomy—especially because the value of the employee's speech to the public is no less if she is speaking pursuant to mixed motivations.

A recent Second Circuit case, Jackler v. Byrne, suggests an exception to Garcetti's categorical bar. Because the public employee's speech in Jackler had a civilian analogue—that is, because an ordinary citizen could speak in the same manner and to the same audience—the court allowed the employee's claim to proceed. The Second Circuit's exception contradicts Garcetti, but it furthers significant First Amendment values while adequately protecting public employers' interest in controlling employee speech. As such, the Supreme Court should adopt the civilian analogue exception to ameliorate Garcetti's problematic rule.

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Speech law has evolved considerably from Justice Oliver Wendell Holmes’s declaration that “[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”1 Today, the law prohibits the government from basing a policeman’s employment on a condition that violates his First Amendment right to freedom of expression.2 This doctrine recognizes that the threat of dismissal from public employment is “a potent means of inhibiting speech”3 and that the significant public interest in free and open debate on matters of public concern requires giving public employees the same meaningful speech protection that other citizens enjoy.4 Thus, in a series of landmark decisions beginning in the 1960s, the Supreme Court crafted a First Amendment doctrine that protects public employees from employer retaliation in response to the employees’ speech.5

This protection follows from basic First Amendment values. First, a government employee has the same interest in commenting on public matters that a nongovernment employee has.6 Second, there is “value to the public [in] receiving the opinions and information that a public employee may disclose.”7 At the same time, the Court’s decisions acknowledged that the First Amendment should not insulate a public employee’s disruptive speech at a significant cost to her government employer, even if that speech related to a public matter.8 The resulting doctrine, known as the Pickering–Connick framework, involves a threshold inquiry and a balancing test: a public employee’s speech is protected only if (1) the employee was speaking

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4. Id. at 573; see also Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) (“The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.”).
7. Id. at 429.
8. Connick, 461 U.S. at 150–52 (balancing employees’ interest in speaking on a matter of public concern against the government’s interest in the “effective and efficient fulfillment of its responsibilities to the public”).
on a matter of public concern\(^9\) and (2) the employee’s interest in speaking outweighs the employer’s interest in controlling her speech.\(^{10}\)

In 2006, the Supreme Court added a third requirement to the doctrinal framework—a requirement that drastically curtails the speech rights of government employees. In *Garcetti v. Ceballos*, the Court categorically denied First Amendment protection to any public employees who speak “pursuant to their official duties.”\(^{11}\) For a public employee to have any chance of sustaining a First Amendment retaliation claim post-*Garcetti*, the employee must have spoken entirely “as a citizen” and not at all “as an employee.”\(^{12}\)

Under this test, when a public employee’s speech concerns the subject matter of her employment, the government employer’s interest in controlling its operations and message is assumed to always outweigh the employee’s interests and the interests of the public.\(^{13}\)

The line the *Garcetti* Court drew between the employee’s dual roles as citizen and public servant lacks adequate justification.\(^{14}\) As Justice Stevens wrote in dissent, “The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong.”\(^{15}\) If protection of a particular employee’s speech is supported by First Amendment policy—that is, if the employee is speaking as a citizen on a matter of public concern—there is no compelling rationale for why the claim should not proceed to the balancing stage regardless of whether the speech’s subject matter “fall[s] within a job description.”\(^{16}\) Due to the majority’s failure to appreciate the dual roles public employees occupy simultaneously, *Garcetti* significantly reduced the scope of protection for those employees; it replaced the balancing framework with a bright-line rule designed to automatically privilege the interests of the government employer at the expense of the speaker and the public. To quote Justice Stevens once again, “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.’”\(^{17}\)

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9. Id. at 146–47. For a description of what constitutes “a matter of public concern,” see infra text accompanying note 34.


12. Id.

13. *Garcetti*, 547 U.S. at 422–23. For further discussion about what exactly it means for an individual to be speaking “pursuant to his official duties,” “as an employee,” or about “the subject matter of his employment,” see infra Section I.C.

14. See *Garcetti*, 547 U.S. at 434 (Souter, J., dissenting) (“But why do the majority’s concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech . . . without drawing the strange line . . . ?”).

15. Id. at 427 (Stevens, J., dissenting).

16. Id.

17. Id. at 426 (citation omitted).
A recent Second Circuit case, *Jackler v. Byrne*,\(^{18}\) takes an important step toward remedying the dual-role problem in *Garcetti*'s "pursuant to official duties" test. Relying on language in the *Garcetti* opinion stating that speech pursuant to an employee's official duties has "no relevant analogue to speech by citizens who are not government employees,"\(^{19}\) the Second Circuit crafted an exception to *Garcetti*'s categorical rule: if the employee's speech *does* have a relevant civilian analogue—that is, if a citizen could speak in a way that is substantially similar in motivation, in the same forum, and to the same audience\(^{20}\)—then it may be protected regardless of whether the employee is concurrently speaking pursuant to his professional obligations.\(^{21}\) The Second Circuit applied this exception to protect a police officer who refused to alter his witness statement in an official department report concerning another officer's use of force. Finding that the officer's acted as a private citizen when he chose not to lie in an investigation, the court allowed his claim to proceed—despite the fact that he was speaking *in part* as a police officer.\(^{22}\)

It must be acknowledged that the Second Circuit's exception does not follow from a strict interpretation of *Garcetti*. The *Garcetti* Court was clear in stating that, when employees speak pursuant to their official duties, no possibility of First Amendment protection exists.\(^{23}\) Not surprisingly, the *Jackler* decision was severely criticized by the D.C. Circuit a month afterward; the D.C. Circuit accused its sister circuit of having "g[otten] *Garcetti* backwards."\(^{24}\) But while *Jackler* may be unsound under current doctrine, it is sound as a matter of First Amendment policy.

The Supreme Court appears uninterested in overturning *Garcetti* in the near future. Even the four *Garcetti* dissenters agreed that the *Pickering–Connick* framework needed refinement to exclude a greater number of public employee retaliation claims (though they disagreed about how).\(^{25}\) Given this state of affairs, *Garcetti*'s detractors must refine the decision at the margins. The Second Circuit's civilian analogue exception to the harsh "pursuant to official duties" rule could prove to be the compromise that fills

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20. *See infra* Section III.B.
22. *Id.*
23. *Garcetti*, 547 U.S. at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").
25. *See Garcetti*, 547 U.S. at 434 (Souter, J., dissenting) (recommending a "feasible" "adjustment using the basic *Pickering* balancing scheme"); *id.* at 449–50 (Breyer, J., dissenting) (suggesting a test in which the plaintiff could proceed to the *Pickering* balancing stage if he demonstrates "augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs").
in Garcetti's theoretical gaps and brings the doctrine back in line with First Amendment principles.

This Note argues that the Supreme Court should adopt the Second Circuit's civilian analogue exception to Garcetti's "pursuant to official duties" rule. Part I surveys the relevant pre-Garcetti First Amendment doctrine and argues that by issuing a categorical bar, Garcetti overly limited the instances in which a public employee can seek First Amendment protection. Part II explains how the Second Circuit developed the civilian analogue exception that it ultimately applied in Jackler and acknowledges that this exception does not faithfully adhere to Garcetti. Part III argues that although the civilian analogue exception does not follow from Garcetti, it properly identifies the value of public employee speech to society and recognizes the dual roles that public employees can occupy. The Supreme Court should embrace the exception as a beneficial reworking of Garcetti's problematic rule.

I. THE SPEECH RIGHTS OF PUBLIC EMPLOYEES

AND GARCETTI v. CEBALLOS

This Part discusses Garcetti v. Ceballos and argues that its rule marks a problematic shift from precedent. Section I.A details the development of public employee speech protection through Pickering v. Board of Education, Connick v. Myers, and Givhan v. Western Line Consolidated School District. Section I.B discusses Garcetti itself and examines the holding's "theoretical underpinnings." Section I.C argues that Garcetti's categorical bar is unjustified as a matter of First Amendment policy.

A. The Problem of First Amendment Protection for Public Employee Speech

Meaningful protection for public employee speech began in Pickering v. Board of Education, in which a public school teacher brought a retaliation claim against the school board after it fired him for writing a political letter to a local newspaper. In Pickering, the Court pointed to "[t]he public interest in having free and unhindered debate on matters of public importance" as the "core value" of the Free Speech Clause. The Court found the content of the teacher's letter—whether the school system required additional funds and how those funds should be distributed—to be "matter[s] of legitimate public concern" on which the public would benefit from the teacher's opinion. The Court recognized that society could not realize this benefit if the threat of retaliation prevented public employees from exercising their

26. "Id. at 423 (majority opinion).
27. 391 U.S. 563 (1968). The letter criticized the board for its handling of a funding ballot proposal and its allocation of financial resources between the school's educational and athletic programs. Pickering, 391 U.S. at 566.
28. "Id. at 573; see also Roth v. United States, 354 U.S. 476, 484 (1957) ("[The First Amendment] was fashioned to assure un fettered interchange of ideas for the bringing about of political and social changes desired by the people.").
speech rights. Accordingly, it held that the right of public employees to speak on a matter of public concern was protected up to the point at which the employer's interest in controlling the speech outweighed the employee's interest in speaking. This test required courts "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."  

In *Connick v. Myers*, the Court refined the *Pickering* balancing test to categorically exclude claims based on employee speech not involving a matter of public concern. In *Connick*, the public employee was an assistant district attorney who, upon learning that she was to be transferred, distributed a questionnaire to her coworkers asking their opinions on office policies, their confidence in their supervisors, and whether they felt pressured to work on political campaigns. Instead of proceeding directly to the *Pickering* balancing test, the Court decided that "if [the plaintiff's] questionnaire 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." Concluding that the majority of the questions "[could not] be fairly considered as relating to any matter of political, social, or other concern to the community," the Court only allowed the assistant district attorney's claim regarding the question about forced campaigning to proceed to the balancing stage. Ultimately, the Court did not find that her interest in asking that question outweighed her employer's interest in managing its office.

*Connick*'s "matter of public concern" screening device reflected the Court's worry about "attempt[s] to constitutionalize the employee grievance" at the extreme end of the spectrum of public employee cases. But the Court also acknowledged the government employer's need for wide discretion in managing its operations and personnel for the public's ultimate benefit. Recognizing that the government has a responsibility to ensure the efficient provision of its services, the Court limited the instances in which the First Amendment protects public employee speech. Nonetheless, because employee speech on matters of public concern provides significant value to the public as well as the speaker, the Court held that it was neces-

30. Id. at 572, 574.
31. Id. at 568.
34. Id. at 146.
35. Id. at 146-49.
36. Id. at 150-54.
37. Id. at 154; see also id. at 146 (noting that although some instances of a government employer's dismissal of an employee may seem arbitrary or unfair, ordinary civilians must face such outcomes without any chance of judicial intervention).
38. Id. at 146.
39. Id. at 150.
sary to balance the employee’s interests against her employer’s after this threshold requirement had been met.40

The Court also demonstrated its unwillingness to automatically bar First Amendment claims based on the setting in which the employee spoke. In *Givhan v. Western Line Consolidated School District*, the Court established that public employee speech need not necessarily be made publicly—that is, outside of the office—in order to merit First Amendment protection.41 The teacher in *Givhan* complained privately to the school principal about racially discriminatory policies in staff hiring.42 Despite the fact that the employee voiced her opinions privately to a supervisor, rather than using outside channels to speak to the public at large, her speech qualified for constitutional protection.43 The Court held that the First Amendment was not concerned with a distinction between public and private speech; it noted that the fact that its prior decisions had only involved public expressions was not controlling.44 *Givhan* thus indicated the Court’s opposition to a categorical rule excluding claims based on the context in which the employee spoke.45

There are important takeaways from the cases leading up to *Garcetti*. First, the Court consistently emphasized the importance of public employee speech to the public itself and crafted a doctrine that would preserve this “core value” of the First Amendment.46 Second, while these cases provided an increasingly robust articulation of the government employer’s interests in controlling employee speech,47 the Court did not see fit to categorically privilege this interest or determine its weight ex ante. Instead, the Court analyzed the policies at play in each case in order to ensure that the

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40. Pursuant to the facts in *Connick*, the Court found that the issue of whether employees felt pressured to work on political campaigns constituted a matter of public concern. *Id.* at 149–54 (“The limited First Amendment interest here does not require that [the government supervisor] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.”).


43. *Id.* at 415–16.

44. The Court stated as follows:

The First Amendment forbids abridgment of the “freedom of speech.” Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

*Id.*

45. See *Garcetti* v. Ceballos, 547 U.S. 410, 430 (2006) (Souter, J., dissenting) (arguing that *Givhan* stands for the proposition that an employee’s speech may be protected even if she does not speak publicly); Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1178 (2007) (noting that the *Givhan* Court adhered to “ad hoc balancing considerations”); cf. *Connick* v. *Myers*, 461 U.S. 138, 149–54 (1983) (proceeding to the *Pickering* balancing test for one portion of the plaintiff’s speech, despite the fact that the relevant expression took place entirely within the office).


47. See, e.g., *Connick*, 461 U.S. at 150.
substantive goals of the First Amendment were achieved.\textsuperscript{48} \textit{Garcetti v. Ceballos}, however, marked a radical departure from both of these approaches.

B. Garcetti v. Ceballos

In 2006, the Supreme Court held in \textit{Garcetti} 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."\textsuperscript{49} The \textit{Garcetti} decision amounted to a screening device barring all First Amendment claims brought by a public employee acting pursuant to her official duties.\textsuperscript{50}

The plaintiff in \textit{Garcetti} was a deputy district attorney tasked with preparing memoranda for his supervisors advising them on how prosecutions should proceed. The memo at issue regarded a sheriff's affidavit that had been used to obtain a search warrant in a particular case.\textsuperscript{51} After conducting his own investigation, the deputy district attorney concluded that the affidavit contained misrepresentations; he documented his concerns as well as his recommendation that the case be dismissed.\textsuperscript{52} The deputy's supervisors decided to proceed with the prosecution and indicated their disapproval of his handling of the case.\textsuperscript{53} In the aftermath of these events, the deputy's supervisors reassigned him, transferred him to another courthouse, and denied him a promotion.\textsuperscript{54} The deputy eventually brought an 18 U.S.C. \textsection 1983 action, alleging that his supervisors retaliated against him because of his memo in violation of the First Amendment.\textsuperscript{55}

The \textit{Garcetti} Court referenced \textit{Pickering}, \textit{Connick}, and \textit{Givhan} with approval.\textsuperscript{56} Nonetheless, the Court found that the "controlling factor" was that "[the employee's] expressions were made pursuant to his duties as a calendar deputy."\textsuperscript{57} By treating this factor as controlling, the Court parsed the

\begin{itemize}
\item \textsuperscript{48} See \textit{Givhan}, 439 U.S. at 414–16; cf. \textit{Rhodes}, \textit{supra} note 45, at 1176–87 (emphasizing the \textit{Pickering–Connick} doctrine's flexibility pre-\textit{Garcetti}).
\item \textsuperscript{49} 547 U.S. at 421.
\item \textsuperscript{50} \textit{Rhodes}, \textit{supra} note 45, at 1187 ("Eschewing the prevailing balancing standard governing such claims, the Court adopted a new categorical rule banning any constitutional safeguards."); \textit{Lawrence Rosenthal}, \textit{The Emerging First Amendment Law of Managerial Prerogative}, 77 \textit{Fordham L. Rev.} 33, 39 (2008) (arguing that after \textit{Garcetti}, First Amendment protection for a public employee's duty-related speech is "categorically denied").
\item \textsuperscript{51} \textit{Garcetti}, 547 U.S. at 413–15.
\item \textsuperscript{52} \textit{Id.} at 413–14.
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 415.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} See \textit{id.} at 417–20 ("The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.").
\item \textsuperscript{57} \textit{Id.} at 421.
\end{itemize}
Connick inquiry; it turned the question of whether an employee spoke “as a citizen upon matters of public concern” 38 into two separate questions, the first of which was “Did the employee speak as a citizen?” 39 The Court found that if the answer was no—because the employee spoke pursuant to her official duties—then the First Amendment analysis did not need to proceed to the second question: whether the employee spoke on a matter of public concern. 60

The Garcetti majority emphasized that its decision was supported by the policy goals enunciated in the Court’s precedent. 61 First, the Court stated that its holding demonstrated due “attention to the potential societal value of employee speech,” 62 as the holding only excluded an employee’s “work product” from serving as the basis for a First Amendment claim. 63 Because an employee could presumably still participate in public debate without using her work product to do so, the Court insisted that its holding did not diminish “the prospect of constitutional protection for [an employee’s] contributions to the civic discourse” to a significant extent. 64

Second, the Court stressed “the emphasis of our precedents on affording government employers sufficient discretion to manage their operations.” 65 The Court stated that its holding showed due deference to managerial discretion because “[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity.” 66 In other words, the Court determined that it was proper to automatically add extra weight to the employer’s side of the Pickering scale whenever the employee was speaking on behalf of his employer. 67 This extra weight should be added, the Court reasoned, because “[o]fficial communications have official consequences, creating a need for substantive consistency and clarity.” 68

60. Garcetti, 547 U.S. at 423 (“When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.”).
61. Id. at 422–23.
62. Id. at 422.
63. Id. The Court used the term “work product” to mean something created by an employee that belongs to the employer; it was not referring to materials prepared in anticipation of litigation.
64. Id.
65. Id.
66. Id. (emphasis added).
67. See Diane Norcross, Comment, Separating the Employee from the Citizen: The Social Science Implications of Garcetti v. Ceballos, 40 U. BAL T. L. REV. 543, 561 (2011) (“Rather than a rule providing for case-by-case balancing like in Pickering, the Court conclusively held in favor of managerial discretion for all future public-employee speech cases ...”).
68. Garcetti, 547 U.S. at 422.
Though the Court grounded this concern about managerial discretion in precedent, it was effectively articulating a new adherence to the normative idea that the government employer should not only have managerial control over its office and personnel but also over its office’s public message. The Court’s deference to the government’s “managerial prerogative” was a significant development in *Connick’s* articulation of the employer’s general interest in controlling its operations. This concern is reflected in the Court’s description of the memo as “speech that owes its existence to a public employee’s professional responsibilities” and that which “the employer itself has commissioned or created.” *Garcetti’s* managerial prerogative argument posits that because the government is exercising ownership over speech it considers its own work product, it cannot be infringing on the employee’s general speech rights as a citizen. If the opportunity for the speech would not have existed but for an employment duty, a citizen could not have spoken in the same manner free from government control.

Administrative considerations also informed the *Garcetti* decision. The Court stated that an unqualified obedience to the *Pickering–Connick* balancing framework, on the facts of *Garcetti*, “would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.” Thus, the Court installed the “pursuant to official duties” screen presumably to avoid excessive judicial intrusion into the political branches’ operations. By promulgating a formalist test, the Court attempted to promote predictability and uniformity in future public employee First Amendment cases by limiting the judicial discretion inherent in the *Pickering–Connick* framework. Principles of federalism and separation of powers obviously support a rule that limits the judiciary’s constitutional license to intervene in governmental affairs. But the Court did not explain why these principles trumped First Amendment considerations to the extent that claims based on official-duty speech must be denied across the board.


72. *Id.* at 421; see also Dale, supra note 70, at 213.

73. *Garcetti*, 547 U.S. at 423.

74. See Rhodes, supra note 45, at 1175–76 (describing the commonly perceived advantages and disadvantages of formalist rules).

75. See *Garcetti*, 547 U.S. at 434 (Souter, J., dissenting).
C. Garcetti’s Misguided Line Drawing

In Garcetti, the Court categorically barred all First Amendment claims based on speech that arises out of a public employee’s official duties; however, the Court’s separation of the employee’s dual roles is unjustified. Determining the boundaries of public employee speech protection is difficult, in part because the speakers “are occupying multiple roles, and the different roles possess very different rights and powers.” But instead of adhering to a doctrine that allows courts to make a meaningful assessment of whether a public employee had actually spoken as a citizen, the Garcetti Court opted for an inflexible dichotomy. To the Garcetti Court, if a public employee spoke in her role as an employee, she could not have been speaking concurrently as a citizen. But the Court should have resisted the urge to put the speaker in one box or the other.

First, the Court’s suggestion that its categorical bar is consistent with precedent emphasizing the “societal value of employee speech” rings hollow. Although the Court cited Pickering with approbation, its endorsement was necessarily limited. The Garcetti holding does not allow for a full realization of the values Pickering stands for—namely, the value of the public employee’s speech to public decisionmaking. The Garcetti Court stated that it would uphold Pickering’s result because “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how [school] funds . . . should be spent. Accordingly, it is essential that they be able to speak out freely on such questions.” Thus, the majority acknowledged that the societal value of a public employee’s speech could potentially be great if the speech related to her job. Yet the majority gave no reason why speech is any less valuable if it pertains to matters at the essence of the public employee’s job—that is, if the speech furthers her official responsibilities. The majority’s argument instead appears to rely on an

76. E.g., id. (“But why do the majority’s concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a Pickering balance without drawing the strange line . . . ?”).
78. Norton, supra note 69, at 12 (arguing that the holding renders the categories of employee and citizen mutually exclusive “such that an employee’s official-duties speech can never be characterized, for First Amendment purposes, as also expressing the employee’s views as a citizen”).
79. Garcetti, 547 U.S. at 422 (majority opinion).
82. See id.
83. See id. at 433 (Souter, J., dissenting).
assumption that when the speech is pursuant to employment duties, the government employer's interests will nearly always outweigh the value of that speech to the employee (and, though this goes unstated, to the public as well). But the majority did not demonstrate why this is necessarily true. As a result, in most public employee First Amendment cases, the public's interest in hearing what the employee has to say is rendered moot.

Some commentators argue that the *Garcetti* majority's assumption proceeds from its acknowledgment of the importance that should be accorded to the government's managerial prerogative. But even if this is so, the Court never explained why the prerogative must be given absolute priority at the expense of the speaker's interest in speaking and the public's interest in hearing it. Even assuming that the Court's deference is warranted and there is value in protecting the government's ability to control those who speak on its behalf, the Court failed to explain why the government should have a right to control all speech made on its behalf by all public employees.

This last theoretical gap is problematic because the strict on-duty / off-duty distinction bars any First Amendment claims brought by employees whose official duties require them to report wrongdoing internally. Justice Souter was especially troubled by the lack of protection for such employees. It seemed "obvious" to him that "the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties." In the absence of a satisfactory justification for why the employer's managerial interests should always

84. Cf. Norcross, *supra* note 67, at 562 ("*Garcetti* placed the individual employee and the government employer on opposite sides of the balancing scale in spite of the prior theory that public-employee speech can be beneficial to all involved.").


86. Rosenthal, *supra* note 50, at 42-43 (arguing that managerial prerogative was "critical" to *Garcetti's* outcome but admitting that the Court "never explained how an employer's entitlement to control speech that it has commissioned can be reconciled with the First Amendment's commitment to unfettered public discussion and debate"); cf. Rhodes, *supra* note 45, at 1192 (arguing that a categorical rule is not appropriate when it must be applied to highly varied circumstances and suggesting that a better course would have been for the Court to reemphasize the importance of the government's interest).

87. Helen Norton contests *Garcetti's* premise that all public employees speak on behalf of their government employer such that the government "owns" their expression. See Norton, *supra* note 69.

88. See id. at 68.

89. Id. at 13-14 ("Although public entities frequently hire workers specifically to monitor and flag dangerous or illegal conditions, *Garcetti* now counterintuitively—indeed, perversely—empowers the government to punish them for doing just that." (footnote omitted)).

outweigh the other policy considerations that underlie pre-Garcetti doctrine, the point at which the Court drew its line appears arbitrary.

The Garcetti decision also failed to explain how a lower court should determine whether an employee spoke pursuant to her official duties. The Court did mention some factors that it did, and did not, consider relevant to this "practical" inquiry. For example, the Court acknowledged Givhan's continued precedential force by cautioning that nonpublic, intraoffice communication could still qualify for First Amendment protection. Similarly, the Court indicated that the determination could not be based on whether the speech touched on a matter related to the plaintiff's employment, as "[t]he First Amendment protects some expressions related to the speaker's job." Finally, the Court offered descriptions of what could constitute speech pursuant to official duty, such as "speech that owes its existence to a public employee's professional responsibilities" or "what the employer itself has commissioned or created." But this language does not create a satisfactory standard for lower courts to apply to the facts of other cases, as the past six years of post-Garcetti decisions have illustrated. Some courts, for instance, apply a standard that asks whether the employee's speech is required by her job; others ask whether the speech aids or furthers the employee's execution of her responsibilities in some way. Nor does the Court's vague

91. Garcetti, 547 U.S. at 424 (majority opinion). The issue was not in dispute in the Garcetti case, as both parties agreed that the plaintiff was acting pursuant to his duties as a deputy district attorney when he wrote the memo at issue. Id.

92. Id. For instance, the Court unequivocally rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." Id.

93. Id. at 420 ("That [the Garcetti plaintiff] expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work.").

94. Id. at 421.

95. Id. at 421–22.

96. See, e.g., Dale, supra note 70, at 196–204 (discussing both the procedural and substantive confusion lower courts have faced in implementing Garcetti); Norcross, supra note 67, at 556–58 (describing the "pursuant to official duties" standards applied by lower courts as "inconsistent"); Tyler Wiese, Note, Seeing Through the Smoke: "Official Duties" in the Wake of Garcetti v. Ceballos, 25 A.B.A. J. LAB. & EMP. L. 509, 515–23 (2010) (describing the divergent approaches circuits take when determining whether speech falls within an employee's official duties and contrasting the "chain-of-command" approach to the "assigned-responsibility" analysis). See generally Sonya Bice, Note, 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, 45–46 (2007) ("Circuits had often referred to the approach chosen by the Court as a per se rule, but Garcetti is a per se rule with an Achilles' heel—a refusal to say how 'official duties' are to be defined—that gives plaintiffs unexpected leverage to resist dismissal and summary judgment."); Thomas Keenan, Note, Circuit Court Interpretations of Garcetti v. Ceballos and the Development of Public Employee Speech, 87 NOTRE DAME L. REV. 841 (2011).

97. E.g., Chaklos v. Stevens, 560 F.3d 705, 712 (7th Cir. 2009) (analyzing whether plaintiffs were "expected" to perform the function in question).

98. E.g., Weintraub v. Bd. of Educ., 593 F.3d 196, 202–03 (2d Cir. 2010) (speech "in furtherance" of official duties suffices); Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689,
articulation properly answer the question why the scope of the employee's speech rights depends on the on-duty / off-duty distinction.

In short, *Garcetti* was wrongly decided. It replaced the *Pickering–Connick* balancing framework with a bright-line rule designed to automatically privilege the interests of the government employer at the expense of the speaker and the public. The decision's shortcomings stemmed, in part, from the majority's failure to appreciate how a public employee can occupy more than one role while speaking. The majority refused to credit the fact that "[t]he 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.'" Nonetheless, *Garcetti* is the law as it stands today. And so its detractors are left to address, and perhaps curtail, its ramifications at the margins. If adopted by the Supreme Court, the civilian analogue exception might prove a viable avenue for the preservation of public employee speech rights in some important instances.

II. *JACKLER v. BYRNE: A CIVILIAN ANALOGUE EXCEPTION TO GARCETTI?*

This Part discusses the possibility of a civilian analogue exception to *Garcetti*. Though *Garcetti* referred obliquely to the idea of a public employee's speech having an analogue to citizen speech in some circumstances, the Second Circuit in *Jackler v. Byrne* drew upon this language to create a novel exception to *Garcetti*'s rule. The Second Circuit held that if an employee's speech is sufficiently analogous to speech an ordinary citizen could make, then the First Amendment claim may proceed despite the fact that the employee was speaking pursuant to his official duties as well.

Section II.A briefly reviews *Weintraub v. Board of Education*, the Second Circuit precedent on which the *Jackler* court relied in articulating the civilian analogue exception. Section II.B discusses *Jackler* itself and explains how the Second Circuit used the presence of a civilian analogue to the plaintiff's speech as the basis for an exception to *Garcetti*'s blanket holding. Section II.C concedes, in agreement with the D.C. Circuit, that the Second Circuit misapplied *Garcetti* in *Jackler*: a civilian analogue exception does not follow from either the language or the logic of that decision.

A. *Prologue to Jackler*

The Second Circuit first suggested that the presence of a civilian analogue could have independent legal significance in *Weintraub v. Board of Education*. 693–94 (5th Cir. 2007) (official duty speech is that which is "not necessarily required . . . but nevertheless . . . related to his job duties").

99. *Garcetti*, 547 U.S. at 426 (Stevens, J., dissenting) (citation omitted).

100. *Id.* at 424 (stating that speech pursuant to an employee's official duties has "no relevant analogue to speech by citizens who are not government employees").


102. *Jackler*, 658 F.3d at 234–42.
The employee in Weintraub was a public school teacher who filed a complaint with his teachers' union after school officials refused to discipline a student. Although the Second Circuit ultimately concluded that the teacher spoke pursuant to his official duties because the complaint was in furtherance of his teaching responsibilities, the court supported its conclusion by noting that there was "no relevant civilian analogue" for the employee's speech.

The Weintraub court explained that the "civilian analogue" concept had its origins in Garcetti itself. In articulating the distinction between on-duty and off-duty speech, the court quoted language from the Garcetti opinion stating that "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." The Weintraub court reasoned that because there is no form of speech a nongovernment employee-citizen could make that is sufficiently analogous to the teacher's complaint to his teacher's union—that is, a nonteacher could not submit his own grievance to the union—the employee was speaking in his role as a teacher when he filed the complaint.

To illustrate the form a relevant civilian analogue to employee speech could take, the Weintraub court pointed to a Ninth Circuit case, Freitag v. Ayers. In Freitag, the employee was a prison guard who complained to a state senator and the state inspector general about her supervisors' failure to address inmates' inappropriate behavior toward female guards. The Ninth Circuit reasoned that a prison guard's "responsibility as a citizen to expose such official malfeasance" meant that the guard's complaints to public officials—complaints that someone who was not a prison guard presumably could also make—were not made pursuant to her official duties. "[The guard's] right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee," and so the Ninth Circuit held that her complaints constituted protected speech.

In contrast to Freitag, the Second Circuit reasoned, the teacher in Weintraub "could only speak in the manner that he did by filing a grievance with his teacher's union as a public employee." The opportunity to bring one's grievance to an elected official or state agency is a channel available to

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103. 593 F.3d 196, 203 (2d Cir. 2010).
104. Weintraub, 593 F.3d at 198–99.
105. Id. at 203.
106. Id.
107. Id. (alterations in original) (quoting Garcetti v. Ceballos, 547 U.S. 410, 424 (2006)).
108. Id. at 204.
109. 468 F.3d 528 (9th Cir. 2006).
110. Freitag, 468 F.3d at 535.
111. Id. at 545.
112. Id.
113. Weintraub, 593 F.3d at 204 (emphasis added).
citizens generally, but union grievances are part of a particular dispute resolution process that exists only by virtue of an agreement between a union and an employer. The latter channel is otherwise foreclosed to the general citizenry. Without a relevant analogue to civilian speech, the Weintraub court held that the teacher’s complaint “retain[ed] no possibility” of constitutional protection.” The lack of a civilian analogue was not dispositive in Weintraub. It merely supported the conclusion the court was already prepared to draw. The decision nevertheless set the stage for Jackler, a case in which the existence of a civilian analogue did determine the outcome.

B. Jackler v. Byrne

The Jackler court held that the existence of a relevant civilian analogue for an employee’s speech entitled the speech to First Amendment protection, despite the fact that the employee spoke pursuant to his official duties as well. The public employee, Jackler, was a police officer who witnessed his fellow officer use unjustified force against a suspect. Jackler was required by police department policy to make his own formal report of what he witnessed. After he issued his report, Jackler’s department supervisors instructed him to retract it and write a new one that more closely corroborated his fellow officer’s version of the events. In effect, his supervisors asked him to retract his true statements and issue false ones in their place.

Jackler refused to do so and suffered retaliation. In pretrial motions, Jackler did not argue that the First Amendment protected his filing of the original truthful report. Instead, he argued that the First Amendment protected his second “speech”: his refusal to speak falsely in a law enforcement investigation.

The Second Circuit held that “Jackler’s refusal to comply with orders to retract his truthful Report and file one that was false ha[d] a clear civilian analogue” and so “Jackler was not simply doing his job in refusing to obey those orders from the department’s top administrative officers and the chief of police.” The key to the holding was the court’s finding that any non-police officer could make some kind of report to a police department and, having done so, the police could not constitutionally force the individual to retract that report and say instead what the police wanted him to say. In

114. Id.
115. Id. (alteration in original) (quoting Garcetti v. Ceballos, 547 U.S. 410, 423 (2006)).
117. Id. at 230–31.
118. Id. at 231.
119. Id. at 231–32.
120. See id. at 232.
121. Id. at 241–42.
122. Id. at 241 (“[A] citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false. Thus, a citizen who has truthfully reported a crime has the
fact, the court reasoned, if the individual did comply with those orders, he would be breaking the law by knowingly giving false information in a police investigation.\(^{123}\) Jackler and a hypothetical non-police officer were in essentially the same position, since “retracting a truthful statement to law enforcement officials and substituting one that is false would expose the speaker—whether he be a police officer or a civilian—to criminal liability.”\(^{124}\) The court thus took one logical step beyond \textit{Garcetti} and \textit{Weintraub}: instead of pointing to the lack of a civilian analogue to the employee's speech as a reason why the employee could not have been speaking as a citizen, the Second Circuit used the existence of a civilian analogue to justify the conclusion that the employee \textit{was} speaking as a citizen.

At first glance, the \textit{Jackler} holding may not seem like it goes significantly further than \textit{Garcetti}. After all, the \textit{Garcetti} Court endorsed the result in \textit{Pickering}, a case in which a teacher was protected partly on the logic that he wrote a letter to a newspaper just as an ordinary citizen could.\(^{125}\) The key difference is that the \textit{Jackler} court did not hold that Jackler was not speaking pursuant to his official duties; instead, the existence of a relevant civilian analogue for Jackler's speech triggered First Amendment protection \textit{despite} the fact that he spoke pursuant to his official duties. Had the court faithfully applied \textit{Garcetti}, the fact that Jackler had spoken pursuant to his official responsibilities, even in part, would have foreclosed his First Amendment claim entirely. But although the Second Circuit acknowledged that Jackler was speaking as a police officer when he refused to take back his report and issue a false one in its place—noting that “[o]f course a police officer has a duty not to substitute a falsehood for the truth, \textit{i.e.}, a duty to tell ‘nothing but the truth’”—it justified the result because “he plainly ha[d] that duty as a citizen \textit{as well}.”\(^{126}\) The Second Circuit did not merely apply \textit{Garcetti}'s employee-versus-citizen rule; it created a significant exception to it.

\textbf{C. Jackler’s \textit{Manipulation of Garcetti}}

Unfortunately, the Second Circuit’s civilian analogue exception does not follow from \textit{Garcetti} itself. While the \textit{Garcetti} Court did mention the relevance of a civilian analogue to determining whether an individual was speaking as an employee or a citizen, a close reading of that discussion does not indicate that the Court meant to state that whenever an analogue is present, the categorical bar does not apply.

The \textit{Garcetti} majority made only one reference to the idea of civilian analogue in the opinion. That mention was in the context of explaining the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused.”\(^{123}\)

\begin{itemize}
\item \(^{123}\) \textit{Id.} at 239–41.
\item \(^{124}\) \textit{Id.} at 240.
\item \(^{126}\) \textit{Jackler}, 658 F.3d at 241 (emphasis added). The court’s concession that Jackler was also acting pursuant to his official duties is emphasized by the language of the holding: “Jackler was not \textit{simply} doing his job” but was also acting as a citizen. \textit{Id.} at 242 (emphasis added).
\end{itemize}
“theoretical underpinnings” of its prior public employee speech decisions.\textsuperscript{127} The Court contrasted the speech of “[e]mployees who make public statements outside the course of performing their official duties” with an “employee speak[ing] pursuant to employment responsibilities,” asserting that the latter has “no relevant analogue to speech by citizens who are not government employees.”\textsuperscript{128} The civilian analogue reasoning thus served as a justification for the conclusion that a public employee has no First Amendment claim when he is speaking as an employee qua employee and not as a an employee qua citizen. The reference to a lack of a civilian analogue was effectively an observation about the state of the world—a statement of fact. It was not an invitation for lower courts to search for civilian analogues as an escape hatch from \textit{Garcetti}.

The \textit{Garcetti} majority did not indicate that the analogy between the employees in its previous cases and civilians was the reason why those employees’ speech could be protected. Instead, the analogy was relevant evidence allowing the Court to find that those plaintiffs were not acting pursuant to their official duties when they made the speech. Second Circuit judge Guido Calabresi’s dissent in \textit{Weintraub} made a similar point, arguing that \textit{Garcetti}’s discussion of a civilian analogue was not meant “to set out a doctrinal requirement.” The \textit{Garcetti} Court “was explaining why speech that is ‘pursuant to employment responsibilities’ is unprotected, not defining that category of speech.”\textsuperscript{129} The \textit{Jackler} court went even beyond the move that Judge Calabresi criticized in \textit{Weintraub}. Instead of requiring the presence of a civilian analogue to find that an employee was not speaking pursuant to his employment responsibilities, it used the presence of a civilian analogue to allow the plaintiff to move on to the balancing stage despite his failure to meet \textit{Garcetti}’s “pursuant to official duties” bar.\textsuperscript{130}

\textsuperscript{127.} \textit{Garcetti}, 547 U.S. at 423–24.
\textsuperscript{128.} \textit{Id.}
\textsuperscript{129.} \textit{Weintraub} v. Bd. of Educ., 593 F.3d 196, 206 (2d Cir. 2010) (Calabresi, J., dissenting) (citations omitted).
\textsuperscript{130.} It bears mentioning that some courts have interpreted the \textit{Jackler} decision differently in this respect. A post-\textit{Jackler} decision from the District Court for the Southern District of New York, \textit{Matthews v. City of New York}, No. 12 cv 1354 (BSJ), 2012 U.S. Dist. LEXIS 53213 (S.D.N.Y. Apr. 12, 2012), reasoned that the \textit{Jackler} court merely found that Jackler’s refusal to speak falsely was only “related to his job duties,” not pursuant to his job duties, and therefore Jackler was speaking only as a citizen and not concurrently as an employee. \textit{Id.} at *11–12 (emphasis added). Having drawn this distinction, the \textit{Matthews} court held that \textit{Jackler} did not create an exception to \textit{Garcetti} but merely applied it. See \textit{id}. at *12–13 (“It is not, as [the plaintiff] contends, that the presence of a civilian analogue necessarily confers First Amendment protection, but rather the reverse—when a public employee engages in citizen speech, it is unavoidable that there will be some civilian analogue to his speech.”). In addition, another Second Circuit panel referred to \textit{Jackler} in the footnote of a summary dismissal and stated that the decision concluded only “that an officer who refused an order to retract a truthful statement and replace it with a false one acted as a private citizen, rather than as a public employee.” See \textit{D’Olimpio v. Crisafi}, 462 F. App’x 79, 81 n.1 (2d Cir. 2012). According to these courts, \textit{Jackler} only decided that the presence of a civilian analogue is relevant to determining whether the plaintiff was actually speaking as a citizen and not as an employee. If this
Unsurprisingly, another circuit severely criticized Jackler’s exception almost immediately. In Bowie v. Maddox, decided about a month after Jackler, the D.C. Circuit confronted a public employee First Amendment case concerning an official in the D.C. Office of the Inspector General (“OIG”). The facts were very similar to Jackler. The OIG official claimed he had been fired for refusing to sign an affidavit—which his employer had prepared for a subordinate’s Equal Employment Opportunity Commission (“EEOC”) proceedings and which the official believed contained false information—and for rewriting the affidavit to reflect his views. Relying on Jackler, the official argued that even if he was acting pursuant to his employment responsibilities when he modified the affidavit, his speech should nonetheless be protected because it was analogous to testimony that private citizens give to the EEOC.

The D.C. Circuit explicitly rejected the Second Circuit’s civilian analogue reasoning, stating that the Second Circuit “g[ot] Garcetti backwards.” It noted that Garcetti’s reference to a civilian analogue “does not mean that whenever speech has a civilian analogue it is protected by the First Amendment” as “[t]he Court made clear that only when public employees ‘make public statements outside the course of performing their official duties’ do they ‘retain some possibility of First Amendment protection.’ Only then is the analogy to private speech ‘relevant.’” Garcetti’s “critical question,” the D.C. Circuit emphasized, remains whether the

is correct, then the Jackler court went no further than the Second Circuit’s decision in Weintraub.

But as discussed infra, the D.C. Circuit shares my reading of Jackler’s civilian analogue discussion—i.e., as holding that the presence of a civilian analogue enables the public employee to bypass Garcetti’s bar even if the employee was concurrently speaking pursuant to official duties. See Bowie v. Maddox, 653 F.3d 45, 47 (D.C. Cir.) (stating, in criticizing Jackler’s holding, that Garcetti’s reference to a civilian analogue “does not mean that whenever speech has a civilian analogue it is protected by the First Amendment”), denying reh’g to 642 F.3d 1122 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 1636 (2012). Moreover—as I explain in this Section and as the D.C. Circuit convincingly established in Bowie—the civilian analogue exception (as I interpret the Jackler panel’s decision to have applied it) contradicts the Supreme Court’s holding in Garcetti. It is therefore not surprising that lower courts and a later Second Circuit panel are seeking to distance themselves from the Jackler panel’s doctrinal move by interpreting its discussion of a civilian analogue to stand for a less startling proposition.

131. 653 F.3d 45 (D.C. Cir. 2011). Though it had already ruled in the case earlier in the year, the D.C. Circuit considered Bowie’s petition for rehearing in light of the Second Circuit’s decision in Jackler. Bowie, 653 F.3d at 46–47.

132. Id. at 46.

133. Id. at 46–47.

134. Id. at 48; see also Petition for Writ of Certiorari at 6, Byrne v. Jackler, 132 S. Ct. 1634 (2012) (mem.) (No. 11-517), 2011 WL 5059136, at *6 (“The [Bowie] rehearing opinion explained not only why Garcetti controlled the result, but also why the Second Circuit’s entire approach in Jackler is unfaithful to Garcetti and unsound legally. In analyzing the Second Circuit Jackler opinion, the D.C. Circuit did not use tweezers; it used a sledgehammer.”).

employee was speaking pursuant to official duties, not whether the speech has a civilian analogue.\textsuperscript{136}

Though it held the Jackler petition for a month in order to consider it in conference alongside Bowie,\textsuperscript{137} the Supreme Court declined to grant certiorari in either case.\textsuperscript{138} The Court’s unwillingness to resolve the burgeoning circuit split was surprising to members of the legal community.\textsuperscript{139} Whatever its reasons for declining to confront the issue then, the Court should eventually consider the merits of the civilian analogue exception and—as this Note argues in Part III—adopt it.

\section*{III. The Merits of the Civilian Analogue Exception}

The fact that the plaintiff in Jackler was simultaneously acting as a police officer worried about fulfilling his departmental duties and as a citizen worried about his liability for perjury does not sustain his First Amendment claim in a post-Garcetti world. Garcetti makes clear that the rules are different for public employees if they are acting in their employment capacity, whether in whole or in part.\textsuperscript{140}

Therefore, as the law stands today, Jackler was wrongly decided. Garcetti’s pursuant-to-official-duties rule protects public employee speech only when it can be shown that the employee was speaking solely as a citizen. As argued above, this rule is misguided because it gives an unjustified amount of deference to the government employer’s managerial prerogative at the

\begin{small}
\begin{enumerate}
\item[136.] Id. at 48.
\item[137.] John Elwood, \textit{Relist (and Hold) Watch}, SCOTUSBLOG (Jan. 19, 2012, 10:29 AM), http://www.scotusblog.com/2012/01/relist-and-hold-watch-10/ (noting that, at the conclusion of certiorari-stage briefing in Jackler, the Court appeared to be holding the petition in order to consider it with the Bowie petition).
\item[140.] Garcetti v. Ceballos, 547 U.S. 410, 410 (2006); \textit{cf. id. at 427} (Stevens, J., dissenting) (criticizing the majority because “[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong”).
\end{enumerate}
\end{small}
The problem of Garcia's ill-chosen lines remains. But assuming that the decision endures for some time to come, it is still possible to limit its reach. If adopted, the Second Circuit's civilian analogue exception could partially address the policies given short shrift by Garcia's failure to recognize the public employee's dual roles. For this reason, this Part argues that the Supreme Court should adopt the Second Circuit's civilian analogue exception to Garcia's categorical bar.

Section II.A suggests that allowing certain cases to proceed to the Pickering balancing stage when it can be shown that the employee spoke as both an employee and a citizen will further substantive First Amendment goals at no real expense to the Garcia majority's concerns. This is because the civilian analogue exception recognizes the importance of such speech to the public debate, gives due deference to managerial prerogative, and promotes candor in judicial factfinding. Section III.B then anticipates skepticism regarding the theory behind the civilian analogue and responds briefly to these concerns.

A. A First Amendment Policy Argument for the Exception

Garcia assumes one can speak either as an employee or an off-duty citizen, but never as both. But the Court has acknowledged on previous occasions that a public employee can simultaneously occupy more than one role when she speaks. For instance, in City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, the Court noted that a teacher speaking at a public school board meeting on pending collective bargaining negotiations "addressed the school board not merely as one of its employees but also as a concerned citizen." The Madison Joint School District Court even relied on civilian analogue reasoning to reach its holding: "It is conceded that any citizen could have presented precisely the same points and provided the board with the same information as did [the teacher during the public meeting]." It is disingenuous to describe that situation as one in which the plaintiff spoke only as a citizen and not as an employee in furtherance of his duties, though that is what Garcia requires for the case's pro-plaintiff outcome. A civilian analogue exception, however, would not require a court to massage the facts surrounding a public employee's speech in order to reach an outcome that furthers First Amendment policy. Even if an employee's motives for speaking overlap with the duties her job requires of her—that is, even if the employee "retains her citizen's

141. See supra Section I.C.
142. Garcia, 547 U.S. at 429–30 (Souter, J., dissenting).
144. City of Madison Joint Sch. Dist., 429 U.S. at 175.
conscience while at work”—a court could still proceed to determine whether the employee spoke on a matter of public interest sufficient to outweigh the employer’s interest.

A civilian analogue exception to Garcetti preserves the value to the public of hearing the public employee’s speech. As discussed in Section I.A, the First Amendment is not only concerned with protecting the speaker’s interest in speaking freely. The safeguard rests on “something more, being the value to the public of receiving the opinions and information that a public employee may disclose.” As “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source,” if public employees are unduly silenced—as Garcetti’s bar currently requires—“the community . . . [is] deprived of informed opinions on important public issues. The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”

A civilian analogue exception does not completely fix the audience problem wrought by Garcetti. The decision will still bar the majority of public employee claims, and the public will continue to lose an important source of information and opinion. But allowing even a few cases currently barred by the official-duties rule to reach the Pickering balancing stage is worthwhile. Moreover, the kinds of cases that meet the exception are ones in which the value of the speech to the public discourse is likely to be high. If public employee speech has a civilian analogue, then the employee’s speech is likely to relate to a matter of public concern rather than a purely intraoffice affair or grievance. This exception is therefore more likely to capture cases the First Amendment should ultimately be concerned with, rather than cases that potentially “constitutionalize the employee grievance.”

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147. Garcetti, 547 U.S. at 429 (Souter, J., dissenting); see also Bellotti, 435 U.S. at 766 (asserting that speech concerning matters of public importance is at “the heart” of the First Amendment).
150. Garcetti, 547 U.S. at 433 (Souter, J., dissenting); Chemerinsky, supra note 90, at 340 (“[The Garcetti] opinion thus signals . . . a restriction on the ability of the public to learn of government misconduct.”).
151. See Jackler v. Byrne, 658 F.3d 225, 237 (2d Cir. 2011) (finding police misconduct to be “plainly” a matter public concern), cert. denied, 132 S. Ct. 1634 (2012); Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006) (finding the plaintiff’s assertions that prison supervisors looked the other way when inmates sexually harassed female prison guards to be “relevant[t] to the public’s evaluation of the performance of governmental agencies” (alteration in original) (quoting Coszalter v. City of Salem, 320 F.3d 968, 973–74 (9th Cir. 2003)) (internal quotation marks omitted)).
152. Garcetti, 547 U.S. at 420 (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)).
the exception is not likely to let back in the meritless cases that most worried the \textit{Garcetti} majority.\footnote{See id. at 423 (characterizing a ruling in favor of the public employee as a “displacement of managerial discretion by judicial supervision”).}

As for deference to managerial prerogative,\footnote{For a discussion of the managerial prerogative theory that animated the \textit{Garcetti} decision, see \textit{supra} Section I.B.} the civilian analogue exception does not diminish the government employer’s ability to control its official message.\footnote{\textit{Cf. Garcetti}, 547 U.S. at 422–23 (describing government supervisors’ need to deliver the government’s message to the public with “consistency and clarity”).} Although the \textit{Garcetti} decision represented the Court’s acknowledgment that government supervisors “must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission,”\footnote{Id.} this substantive goal is not readily accomplished by suppressing the speech of employees who speak in a manner akin to a nongovernment employee.

A few concrete examples help establish this point. On one end of the spectrum, there is the government spokesperson. The government has an obvious and compelling interest in controlling that employee’s speech, as the employee has identified, and the public readily understands the government to be the source of the message.\footnote{See Norton, \textit{supra} note 69, at 27–28, 30. Helen Norton argues that the First Amendment \textit{only} allows the government to control the speech of employees who the government “has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to meaningful credibility and accountability checks by the public.” \textit{Id.} at 31–34.} Speech by a spokesperson, however, is not likely to have any relevant analogue to civilian speech—the nonspokesperson will not readily find herself in a position to speak in the same manner and to the same audience.\footnote{See, \textit{e.g.}, Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010). In \textit{Foley}, the plaintiff fire chief was fired after he publicly criticized the department’s lack of funding and staffing during a press conference. The court stressed the importance of context in deciding that he was speaking pursuant to his role as a fire department employee. The fire chief spoke about matters pertaining entirely to the fire department while in uniform, on duty, at the scene of a recent fire, and immediately before the comments of another fire department official. The combination of these contextual factors gave the appearance, to the public, that his comments conveyed the department’s message, and therefore his comments were not akin to any sort of citizen speech. \textit{Id.} at 8–9.} On the other end of the spectrum, there is the \textit{Pickering}-esque public employee who writes a letter to a local newspaper\footnote{See Pickering v. Bd. of Educ., 391 U.S. 563, 565–67, 573–74 (1968).} or contacts an outside elected official\footnote{See Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006).} expressing her concern about a certain government practice. There, the government might prefer that the employee not speak in this manner. But there is no significant danger that the public will understand the employee to be speaking as an authorized representative of the government, delivering its message, at the
time that she speaks. A public employee that speaks pursuant to both her role as an employee and a citizen is likely to fall somewhere in between these two poles. But again, the circumstance that renders her manner of speech analogous to citizen speech is likely to make her more like the letter writer than the acknowledged representative. These kinds of cases will not significantly undercut the government's control of its message.

Finally, grafting a civilian analogue exception onto Garcia's blanket exclusion promotes honesty in lower court factfinding. Faced with a choice between finding that an employee spoke in part pursuant to a professional obligation—consequently barring her claim—or finding that the employee spoke entirely pursuant to motivations shared by ordinary citizens—which would allow her claim to proceed—lower courts ruling on sympathetic cases have often opted for the latter route. This is partially due to the Supreme Court's reluctance to define what exactly it means for an employee to speak "pursuant to official duties." Nonetheless, there is an incentive for lower courts to oversimplify in determining which role a public employee occupied when she spoke. The freedom to acknowledge that a given plaintiff might have spoken pursuant to mixed motivations, including her professional obligations and responsibilities, will allow a court to more candidly assess the nature of the employee's speech and determine if its protection really serves First Amendment values.

B. A Defense of the Exception

If adopted by the Supreme Court, the civilian analogue exception would mitigate Garcia's harm to public employee speech law. It should be acknowledged, however, that the concept is underdeveloped as a legal theory, and its shortcomings are already apparent. Though a complete development and defense of the exception is beyond the scope of this Note, some anticipated criticisms warrant a brief response.

161. Compare Decotiis v. Whittemore, 635 F.3d 22, 32 (1st Cir. 2011) (examining, as a factor in the official-duties analysis, "whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it 'official significance')"), with Bearss v. Wilton, 445 F. App'x 400, 402-04 (2d Cir. 2011) (finding plaintiff city information technology coordinator spoke as a representative of the city when she gave a statement to a reporter regarding city information technology policy, as her statement took on the character of an official communication).

162. See, e.g., Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1332 (10th Cir. 2007) (finding that a school superintendent was acting as a citizen when she complained to the state attorney general that the school board was making personnel decisions in violation of the state's open meetings law).

163. See supra text accompanying notes 81-87, 91-98.

164. Cf. Christine Elzer, Note, The "Official Duties" Puzzle: Lower Courts' Struggle with First Amendment Protection for Public Employees After Garcia, 69 U. PITT. L. REV. 367, 388 (2007) (calling for lower courts to make these findings "in light of public policy concerns" and to "be especially sensitive to the 'matter of public concern' of exposing governmental wrongdoing and . . . not be too quick to conclude that the public employee did not speak 'as a citizen' in disclosing that wrongdoing").
First, a legal rule that allows a public employee to bring a First Amendment claim if her on-duty speech has a civilian analogue invites an obvious follow-up question: What kind of civilian speech is sufficiently analogous? Or, put differently, how loosely may the analogy be drawn? For, as the D.C. Circuit pointed out in *Bowie*, 

\[\text{[a]ll official speech, viewed at a sufficient level of abstraction, has a civilian analogue.}^{165}\]

The Second Circuit did not endeavor to comprehensively answer this question in *Jackler*, nor in *Weintraub*. However, the law is well practiced in drawing principled lines that distinguish one thing from another.\(^ {166}\) The Second Circuit’s standard, though not fully developed at this early stage, hardly calls for extraordinary analysis. Moreover, existing cases outline what does, and does not, constitute a sufficient analogue. A prison guard’s expression of concern about sexual harassment to elected public officials is considered analogous to speech any citizen could make,\(^ {167}\) but a teacher’s act of submitting a grievance to her union, in accordance with established workplace procedures, is not.\(^ {168}\) A non–prison guard could take the same concern to elected public officials; a nonteacher could not take a similar complaint to a teacher’s union. The mode and manner of speaking are thus crucial to a determination of whether an analogue exists.\(^ {169}\)

The factual scenario presented in *Jackler* is instructive. The police officer, Jackler, did not claim—or did the Second Circuit find—that there was a civilian analogue for his drafting of the original report detailing the incident in which he witnessed his partner use unnecessary force on a suspect.\(^ {170}\) This makes sense: upon the suspect’s filing of a civilian complaint against Jackler’s partner, Jackler was required—by police department policy—to file the supplementary report detailing what he witnessed.\(^ {171}\)


\[^{166}\] The Court’s expressive conduct jurisprudence is a case in point. *Compare* Texas v. *Johnson*, 491 U.S. 397, 405–06 (1968) (the act of burning an American flag is expressive conduct), and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (the act of wearing a black armband is analogous to “pure speech”), *with City of* Dall. v. *Stanglin*, 490 U.S. 19, 25 (1989) (the act of recreational dancing with a minor is neither analogous to expressive association nor to speech). *Stanglin* Court’s reasoning is illustrative: “It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” 490 U.S. at 25.

\[^{167}\] *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (“[The guard’s] right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee.”).

\[^{168}\] *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 204 (2d Cir. 2010).

\[^{169}\] See *id.* (finding that in contrast to the guard in *Freitag*, the teacher in this case “could only speak in the manner that he did” by filing a grievance with his teacher’s union as a public employee” (emphasis added)).


\[^{171}\] *Id.* at 230–31.
Jackler was so required because he was a police officer present at the scene of the alleged incident. No non–police officer could have filed the report he filed. And Jackler's motivation stemmed only from his department's policy and his supervisor's demands. Therefore, his mode of speaking had no analogue in civilian speech. By this same logic, the speech of the Garcetti plaintiff, the deputy district attorney, had no civilian analogue. There is no act that an ordinary citizen could undertake that parallels in any significant respect a prosecutor's preparation of a case disposition memo.\(^1\)

But once Jackler issued his report and his supervisors told him to change the facts to more closely align with his partner's version of the events, Jackler's refusal to speak falsely did have a civilian analogue.\(^2\) Just as an ordinary citizen would have a First Amendment right to resist government pressure to lie in a police investigation, Jackler had the right to resist his supervisors' pressure to do the same.\(^3\) He found himself in a position analogous to that faced by a non–police officer: either lie as the government told him to and face possible criminal charges, or refuse.\(^4\) The only meaningful difference between Jackler and a hypothetical civilian is that because Jackler happened to work for the government entity that sought to control his speech, he lost his job as a result of his refusal.\(^5\) This is precisely why First Amendment protections for public employees exist—to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government."\(^6\)

Other scenarios presenting public employee speech with a sufficient civilian analogue can be gleaned from case law. For example, in \textit{Shewbridge v. El Dorado Irrigation District},\(^7\) a plaintiff water engineer was fired from his position with the local irrigation district after he reported safety concerns to outside state agencies and the public.\(^8\) The engineer claimed his termination violated the First Amendment. As usual, the dispute at summary judgment centered on whether he was speaking pursuant to his official duties at the time he voiced his concerns.\(^9\) The defendant irrigation district

\begin{enumerate}
\item Cf. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (referring to "the fact that [the plaintiff] spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case").
\item Jackler, 658 F.3d at 241–42.
\item Id. at 241 ("[A] citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false. Thus, a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused.").
\item See id. at 240.
\item Id. at 232.
\item Connick v. Myers, 461 U.S. 138, 147 (1983); see also Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2493 (2011) ("There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment.").
\item Shewbridge, 2006 WL 3741878, at *1–4.
\item Id. at *5–7.
\end{enumerate}
argued that the plaintiff had an obligation as an employee working for the irrigation district to report safety concerns, and so he must have been operating under those responsibilities when he reported the potential violations. The plaintiff argued, conversely, that it was his ethical duty as an engineer—that is, as a member of a specialized, self-regulating profession—that led him to report the potential dangers he saw.

There is merit to both the employee’s contention that he was acting pursuant to an independent duty arising out of his professional status, and also to the water district’s rejoinder that his duties as an engineer were inseparable from his duties as an employee of the irrigation district. But here the civilian analogue exception could direct the outcome. Instead of deciding which of the dual obligations the plaintiff was acting under at the time he spoke, one could persuasively argue that the engineer was acting pursuant to both. And because his speech as an engineer for the irrigation district was sufficiently analogous to speech made by other professional engineers—regardless of who employed them—the civilian analogue exception could protect his speech.

Overall, in evaluating a given speech act to determine if a civilian analogue exists, a court can be fairly literal in comparing the speech’s manner, motivation, forum, and audience to its hypothetical civilian counterpart. The exception will be a narrow one.

Another anticipated critique of the exception is that it will frustrate the Garcetti majority’s desire to avoid highly fact-based litigation in this area of the law. The Court stated that scrutiny of the relative interests involved whenever a public employee speaks pursuant to his official duties would “demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.” If nothing else, the formalist rule limits the extent to which a court can second-guess the government’s employment decisions at a cost to efficient public services. A civilian analogue exception to this rule, the criticism follows, would undercut its benefits. Or, in the more colorful terms of the D.C. Circuit, “A test that allows a First Amendment retaliation claim to proceed whenever the government employee can

181. Id. at *6.
182. Id.
183. The district court apparently agreed that the plaintiff’s argument, at least, had merit, finding that there was a sufficient issue of fact for the claim to survive summary judgment. Id. at *7.
185. Id. at 423 (majority opinion).
186. See Rhodes, supra note 45, at 1192 (acknowledging that formalist rules are preferable when the prediction of future outcomes is critical and when such rules will constrain the judiciary’s discretion in beneficial ways); Bice, supra note 96, at 66 (describing Garcetti as a “test[] designed to block disfavored types of cases”).
identify a civilian analogue for his speech is about as useful as a mosquito net made of chicken wire.’”

The first response to this line of argument is that the civilian analogue exception is hardly chicken wire. On the contrary, the exception is likely to apply only in rare instances. It is probable, especially once more case law develops indicating just how narrowly the exception will be drawn, that Garcetti’s categorical bar will be left largely intact (for better or for worse). But more importantly, it can be argued that as a result of Garcetti’s largely undefined standard for what constitutes speech “pursuant to official duties,” the Supreme Court’s attempt at formalism has not proven successful in reducing fact-based litigation in the first instance. Courts have often proven unwilling to dismiss post-Garcetti claims at the pretrial stage, or even at the summary judgment stage, finding that issues of fact regarding the employee’s official duties remain. Commentators have documented the divergent approaches lower courts have taken to the “official duties” test: some courts focus on whether the speech was directed up the typical workplace chain of command, some focus on whether the speech falls within the assigned responsibilities associated with the employee’s position, and others narrow the category of speech to only that which is required of the employee. The bottom line is that the Court’s rule has not succeeded in

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188. The Second Circuit’s docket since Jackler supports this prediction. See Massaro v. N.Y.C. Dep’t of Educ., No. 11-2721-CV, 2012 WL 1948772, at *2 (2d Cir. May 31, 2012) (finding that teacher spoke as an employee when she complained to school administrators about potential sanitation issues in her classroom); D’Olimpio v. Crisafi, 462 F. App’x 79, 80–81 (2d Cir. 2012) (finding that a state employee spoke in furtherance of his duties when state law required him to report official misconduct to the inspector general); Bearss v. Wilton, 445 F. App’x 400, 404 (2d Cir. 2011) (finding that a city information technology employee spoke pursuant to her official duties when she gave a statement about information technology department policy to a reporter and testified in a Board of Civil Authority hearing); Otte v. Brusinski, 440 F. App’x 5, 6 (2d Cir. 2011) (finding that a treatment assistant at a secured hospital spoke pursuant to his official duties when he raised a concern about patients’ use of a microwave, as the concern was “part-and-parcel” of his duty to maintain a safe environment for patients and hospital staff).

189. See, e.g., Norcross, supra note 67, at 556–58 (“[T]he lower courts’ applications of Garcetti are inconsistent because the Court’s ‘practical inquiry’ instruction left open and unclear how to specifically define ‘pursuant to official duties.’” ). Justice Souter predicted as much in his dissenting opinion, arguing that “the majority’s position comes with no guarantee against factbound litigation over whether a public employee’s statements were made ‘pursuant to . . . official duties.’ In fact, the majority invites such litigation by describing the enquiry as a ‘practical one’ apparently based on the totality of employment circumstances.” Garcetti, 547 U.S. at 436 (Souter, J., dissenting) (alteration in original) (citations omitted).

190. Dale, supra note 70, at 197–98; Bice, supra note 96, at 46, 73–77.

191. See, e.g., Dale, supra note 70, at 196–204; Rhodes, supra note 45, at 1195–96; Elzer, supra note 164, at 375–86; Wiese, supra note 96, at 515–23.


193. See id. at 519–22.

194. See id. at 1195 n.177 (citing cases).
ensuring predictability in public employee speech cases; instead, “the Court has merely shifted the uncertainty to the scope of the underlying categorization.”

If one accepts this to be the case, the value of Garcetti in reducing factbound litigation is diminished. Therefore, the further damage caused by opening up another avenue to avoiding the categorical bar is arguably not great, especially when considered in proportion to the value such an exception could have in realizing significant First Amendment policy goals.

**CONCLUSION**

“[W]hen constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.”

Garcetti’s categorical bar is an unjustified government-take-all strategy, but the Second Circuit’s civilian analogue exception could prove to be the adjustment—or compromise—that preserves First Amendment protections for public employees for the right reasons. If the ultimate goal of Pickering, Connick, and even Garcetti is to protect the speech rights of public employees to the same extent as the rights of any member of the general public, a legal rule that protects what is in essence citizen speech, even when the employee is concurrently speaking pursuant to his professional obligations, best achieves this result.

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195. Id. at 1193; see also Decotiis v. Whittemore, 635 F.3d 22, 26 (1st Cir. 2011) (“Navigating the shoals of the standard articulated by the Supreme Court in Garcetti v. Ceballos has proven to be a tricky business . . . .” (citation omitted)).
