

The new free speech: It's not for everybody

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On May 30, 2006, the U. S. Supreme Court issued an opinion holding that the free speech protections afforded by the First Amendment to the U.S. Constitution do not apply to public employees who make statements pursuant to their official duties.

In *Garcetti v. Ceballos*, a divided Court (5-4) considered an appeal by the Los Angeles County District Attorney's Office from a Ninth Circuit Court of Appeals decision that held certain statements made by a deputy district attorney – which were critical of the veracity of statements made in a probable cause affidavit for a search warrant – were protected by the First Amendment and therefore the retaliatory conduct against the deputy district attorney by his supervisors was unlawful.

In reversing the decision of the Ninth Circuit, the Supreme Court distinguished the statements made by the deputy district attorney as statements that were made in the course of his “official duties” and that when making such statements, “the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employee discipline.”

This analysis is a departure from the traditional First Amendment protections applicable to public speech involving “matters of public concern” and which does not materially interfere with the business operations of the public employer.

Micheal Salem, an Oklahoma lawyer who specializes in litigating First Amendment issues, submitted a letter to the editor of the New York Times for publication which was critical of the analysis of the Court and of this decision. The New York Times declined to publish his letter, but it is printed below with Mr. Salem's permission. The following dissent expresses the concerns of many lawyers who practice in this area:

**Editor
New York Times**

In *Garcetti v. Ceballos*, the Supreme Court decided that public employees do not enjoy the same free speech rights as other citizens. Perhaps we should not make comparisons about *Garcetti*, but one seems unavoidable and that is the Court's *Dred Scott* decision which decided that certain people “. . . had no rights which the white man was bound to respect.”

So now we have a Supreme Court which has decided that government employees in their employment have no free speech rights which the Court was bound to respect.

From *Garcetti*, it is easy to conclude that government employees, when acting as

government employees, are not citizens because they cannot exercise First Amendment rights and only citizens can exercise First Amendment rights. If you can take away their First Amendment rights, what other constitutional, statutory or common law rights will be checked at the portal to government employment?

Perhaps the answer is found in Chief Justice Taney's opinion:

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Dred Scott v. Sandford, 60 U.S. 393, *404-5.

Welcome to the new plantation.

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The complete reach and impact of this decision have yet to be determined. There will undoubtedly be subsequent litigation to define what precisely constitutes a public employee's "official duties" and how those issues are to be determined. This decision does however indicate a clear departure from prior holdings interpreting the First Amendment and could be indicative of how this Court will rule on future constitutional issues involving public employees.