SUPREME COURT OF THE UNITED STATES

No. 92–1450

CYNTHIA WATERS, ET AL., PETITIONERS *v.* CHERYL R. CHURCHILL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[May 31, 1994]

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

The central issue in this case is whether we shall adhere to our previously stated rule that a public employer's disciplining of an employee violates the Speech and Press Clause of the First Amendment only if it is in retaliation for the employee's speech on a matter of public concern. JUSTICE O'CONNOR would add to this prohibition a requirement that the employer conduct an investigation before taking disciplinary action in certain circumstances. This recognition of a broad new First Amendment procedural right is in my view unprecedented, superfluous to the decision in the present case, unnecessary for protection of public-employee speech on matters of public concern, and unpredictable in its application and consequences.

I do not doubt that the First Amendment contains within it some procedural prescriptions—that in some circumstances, "the freedom of speech" recognized by the Constitution consisted of a right to speak unless and until certain procedures to prevent the speech had first

been complied with. Thus, for example, I have no quarrel in principle with (though I have not inquired into the historical justification for) decisions such as *Freedman* v. *Maryland*, 380 U. S. 51 (1965), which established the administrative and judicial review provisions that a film licensing process must contain in order to avoid constituting an unconstitutional prior restraint, see *Patterson* v. *Colorado ex rel. Attorney General of Colorado*, 205 U. S. 454, 462 (1907) (Holmes, J.).

We have, however, been most circumspect about acknowledging procedural components of the First Amendment. Almost all of the cases JUSTICE O'CONNOR cites as exemplars are elaborations upon the limitation on defamation suits first announced in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). See, *e.g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984); *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767 (1986); *Masson* v. *New Yorker Magazine, Inc.*, 501 U. S. 496 (1991). These cases deal with alleged governmental deprivation of the freedom of speech specifically *through the judicial process*, in which context procedures are necessarily central to the discussion.[1] *Speiser* v. *Randall*, 357 U. S. 513 (1958), also involved judicial (and pre-judicial adjudicative) process, holding that a State tax deduction could not be denied for a speech-related reason (advocacy of overthrow of the government of the United States or of the State by unlawful means) by placing the burden of *dis*proving that speech-related reason upon the taxpayer. Moreover, although the existence of a First Amendment right was central to the Court's reasoning, the decision was squarely rested on the Due Process

[1]Moreover, the remedy in that context is self-evident: remand for readjudication pursuant to the proper procedures. In the present context, by contrast, the remedy is not all clear, see *post*, at 10.

Clause, see *id.*, at 529, and not on the First Amendment, see *id.*, at 517, n. 3. The last case cited by JUSTICE O'CONNOR, *Freedman*, *supra*, was, as I described earlier, a prior restraint case; review and requirement of procedures was to be expected.

In today's opinion by JUSTICE O'CONNOR, our previous parsimony is abandoned, in favor of a general principle that "it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures," *ante*, at 6. Although we are assured that "not every procedure that may safeguard protected speech is constitutionally mandated," *id.*, at 7, the implication of that assurance is that many are. We never are informed how to tell mandated speech-safeguarding procedures from nonmandated ones, except for the clue that "each procedure involves a different mix of administrative burden, risk of erroneous punishment of protected speech, and risk of erroneous exculpation of unprotected speech," *ibid.*

The proposed right to an investigation before dismissal for speech not only expands the concept of "First Amendment procedure" into brand new areas, but brings it into disharmony with our cases involving government employment decided under the Due Process Clause. As JUSTICE O'CONNOR acknowledges, see *ante*, at 15, those cases hold that public employees who, like Churchill, lack a protected property interest in their jobs, are not entitled to any sort of a hearing before dismissal. See, *e.g.*, *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577–578 (1972). Such employees can be dismissed with impunity (insofar as federal constitutional protections are concerned) for the reason, *accurate or not*, that they are incompetent, that they have been guilty of unexcused absences, that they have stolen money from the faculty honor bar—or indeed *for no reason at all*. But under JUSTICE O'CONNOR's opinion, if a

reason happens to be given, and if the reason relates to speech and "there is a substantial likelihood that what was actually said was protected," (whatever that means), *ante*, at 15, an investigation to assure that the speech was not the sort protected by the First Amendment must be conducted—after which, presumably, the dismissal can still proceed even if the speech was not what the employer had thought it was, so long as it was not speech on an issue of public importance. In the present case, for example, if the requisite "First Amendment investigation" disclosed that Nurse Churchill had not been demeaning her superiors, but had been complaining about the perennial end-of-season slump of the Chicago Cubs, her dismissal, erroneous as it was, would have been perfectly OK.

This is a strange jurisprudence indeed. And the reason it is strange is that JUSTICE O'CONNOR has in effect converted the government employer's First Amendment liability with respect to "public concern" speech from liability for intentional wrong to liability for mere negligence. What she proposes is, at bottom, not new procedural protections for established First Amendment rights, but rather new First Amendment rights. *Pickering* v. *Board of Ed. of Township High School Dist.*, 391 U. S. 563 (1968), did not require government-employer "protection" of "public concern" speech, but merely forbade government-employer hostility to such speech. "[I]t is essential," *Pickering* said, "that [public employees] be able to speak out freely on such questions without fear of *retaliatory* dismissal." *Id.*, at 572 (emphasis added). See also *Connick* v. *Myers*, 461 U. S. 138, 149 (1983) (same). The critical inquiry for the factfinder in these cases is whether the employment decision was, "in fact, made in retaliation for [the] exercise of the constitutional right of free speech." *Perry* v. *Sindermann*, 408 U. S. 593, 598 (1972). A category of employee speech is certainly not being

"retaliated against" if it is no more and no less subject to being mistaken for a disciplinable infraction than is any other category of speech or conduct.

The creation of procedural First Amendment rights in this case is all the more remarkable because it is unnecessary to the disposition of the matter. After imposing the new duty upon government employers, JUSTICE O'CONNOR's opinion concludes that it was satisfied anyway—*i.e.*, that the investigation conducted by the hospital was "entirely reasonable." *Ante*, at 17. And then, to make the creation of the new duty doubly irrelevant, it finds that the case must be remanded anyway for a pretext inquiry: whether "petitioners actually fired Churchill not because of the disruptive things she said to Perkins-Graham, but because of nondisruptive statements about cross-training that they thought she may have made in the same conversation, or because of other statements she may have made earlier." *Ante*, at 19; see also *ante*, at 1–3 (SOUTER, J., concurring). Surely this offends the doctrine that constitutional questions that need not be addressed should be avoided.

The requirement of a pretext inquiry, I think, renders creation of the new First Amendment right of investigation not only superfluous to the disposition of the present case, but superfluous to the protection of previously established speech rights. JUSTICE O'CONNOR makes no attempt to justify the right of investigation on historical grounds (it is quite unheard of). The entire asserted basis for it is pragmatic and functional: without it the government employee's right not to be fired for his speech cannot be protected. The availability of a pretext inquiry disproves that argument. Judicial inquiry into the genuineness of a public employer's asserted permissible justification for an employment decision—

be it unprotected speech, general insubordination, or laziness—is all that is necessary to avoid the targeting of "public interest" speech condemned in *Pickering*.

Our cases have hitherto considered this sort of inquiry all the protection needed. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), involved an arguably weaker case for the public employer than the present one, in that there was a "mixed motive" for the disciplinary action—that is, the employer admitted that the "public concern" speech was part of the reason for the discharge, but asserted that other valid reasons were in any event sufficient. In deciding that case, we found no need to invent procedural requirements, but simply directed the District Court "to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's [e]mployment even in the absence of the protected conduct." *Id*., at 287. The objective, we said, was to "protec[t] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Ibid.*

The Court considers "pretext" analysis sufficient in many other areas. See, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, [112 S. Ct. 2072, 2091] (slip op., at 30–31) (1992) (antitrust laws); *Hernandez* v. *New York*, 500 U. S. 352, 363–364 (1991) (plurality opinion) (constitutionality of peremptory challenges); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 187–188 (1989) (employment discrimination suit under 42 U. S. C. §1981); *New York* v. *Burger*, 482 U. S. 691, 716–717, n. 27 (1987) (Fourth Amendment challenge to administrative searches); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 895–896, n. 6 (1984) (unfair labor practice suit under the National Labor Relations Act); *Geduldig* v. *Aiello*, 417 U. S. 484, 496–497, n. 20 (1974) (Equal Protection

Clause sex-discrimination claim against legislation); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 804–805 (1973) (discrimination claim under Title VII). And it considers "pretext" analysis sufficient in other First Amendment contexts. For example, in *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 54 (1986), after holding that zoning laws restricting the location of movie theaters do not violate the First Amendment unless they are a pretext for preventing free speech, we did not think it necessary to prescribe "reasonable" procedures for zoning commissions across the Nation; we left it to factfinders to determine whether zoning regulations are prompted by legitimate or improper factors. See also *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697, 708 (1986) (O'CONNOR, J., concurring) (same). There is no reason why the same approach should not suffice here.

JUSTICE STEVENS believes that "pretext" review is inadequate, since "it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights;" and "[o]rdinarily," he contends, "when someone acts to another person's detriment based upon a factual judgment, the actor assumes the risk that an impartial adjudicator may come to a different conclusion." *Post*, at 2. But that is true in contractual realms only to the extent that the contract provides a "right" whose elimination constitutes a legal "detriment." An employee dismissable at will *can* be fired on the basis of an erroneous factual judgment, with no legal recourse—which is what happened here. Churchill also had a *non*contractual right: the right not to be dismissed (even from an at-will government job) in retaliation for her expression of views on a matter of public concern. That right was not violated, since she was dismissed for another reason, erroneous though it may have been. The issue before us has nothing to do with according the deprivation of a right the

ordinary degree of protection; it has to do with expanding the protection accorded a government employee's public-interest speech from (1) protection against retaliation, to (2) protection against retaliation and mistake.

The approach to this case adopted by JUSTICE O'CONNOR's opinion provides more questions than answers, subjecting public employers to intolerable legal uncertainty. Despite the difficulties courts already encounter in distinguishing between protected and unprotected speech, see, *e.g.*, *Miller* v. *California*, 413 U. S. 15, 22 (1973), and in determining whether speech pertains to a matter of public concern, compare *O'Connor* v. *Steeves*, 994 F. 2d 905, 915 (CA1), cert. denied, 510 U. S. ___ [114 S. Ct. 634] (1993) with *Gillum* v. *City of Kerrville*, 3 F.3d 117, 120–121 (CA5 1993), cert. denied, 510 U. S. [114 S. Ct. 881] (1994), JUSTICE O'CONNOR creates yet another speech-related puzzlement that government employers, judges and juries must struggle to solve. The new constitutional duty to provide certain minimum procedural protections is triggered when "an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected," *ante*, at 15. But on what does the "reasonable supervisor" base his judgment as to whether "there is a substantial likelihood that what was actually said was protected?" Can he base it upon the *report* of what was said? Seemingly not, since otherwise JUSTICE O'CONNOR would not have found the minimum procedural protection of investigation to have been required in the present case (the report of Churchill's conversation gave no hint of protected speech). It remains entirely unclear what the employer's

judgment *must* be based on. To avoid liability, he had better assume that it must be based on *what was actually said* — which means that he had better investigate the incident in order to determine whether he has an obligation to investigate the incident. Hopefully I am wrong, however, and (despite today's holding) the basis for judging whether investigation is required will be solely the *report*. Then the public employer will only have to figure out what a hypothetical reasonable supervisor would infer about actual speech from that report, and then determine whether that constructed "actual speech" has a substantial likelihood of being on a matter of public concern. May the employer at least assume that no investigation is required if the report does not *mention* speech? Or can he be liable if the recommended basis for the discipline (for example, "disrupting the workplace") had a substantial likelihood of involving speech which would have had a substantial likelihood of being on a subject of public concern? I suppose ultimately it will be up to the jury to answer all these nice, once-removed questions. Or come to think of it, perhaps it will be up to the judge. JUSTICE O'CONNOR does not specify whether all this is a question of law or fact.

JUSTICE O'CONNOR states that "employer decision-making will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be." *Ante*, at 15 (emphasis in original). This explains the subsequent course of events when the employer's investigation has been found reasonable: the court (or the jury) decides whether, on the facts as found by the employer, the speech was on a matter of public concern, and if not, whether the employer's reliance on the report was pretextual. But what happens when the employer's investigation has been found *un*reasonable? I presume that there has then been established a violation of the procedural component of the First Amendment—the failure to

treat possibly protected speech with the requisite "amount of care"—without regard to whether the employee's speech was in fact on a matter of public concern. JUSTICE O'CONNOR does not reveal what the remedy for this violation is to be. There are various possibilities: One could say that the discharge without observance of the constitutionally requisite procedures is invalid, and must be set aside unless and until those procedures are complied with. Alternatively, one could charge the employer who failed to conduct a reasonable investigation with knowledge of the protected speech that a jury later finds—producing a sort of constructive retaliatory discharge, and entitling the employee to full reinstatement and damages. Or alternatively again, the jury could be required to determine what information a reasonable investigation would have turned up, and then to decide whether it would have been permissible for the employer to fire the employee based on that information.

These are only a few of the numerous questions left unanswered by JUSTICE O'CONNOR's opinion. Loose ends are the inevitable consequence of judicial invention. We will spend decades trying to improvise the limits of this new First Amendment procedure that is unmentioned in text and unformed by tradition. It seems to me clear that game is not worth the candle, given the adequacy of "pretext" analysis to protect the constitutional interest at stake.