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Leonard Jeffries, a tenured professor at the City University of New York ("CUNY"), is well known for his outspoken anti-Semitism. Jeffries first attracted widespread attention after newspapers reported remarks that he made at a state-subsidized Empire State Black Arts and Cultural Festival in Albany on July 20, 1991.[1] Jeffries alleged "a conspiracy, planned and plotted and programmed out of Hollywood, where people [were] named Greenberg and Weisberg . . . and what not."[2] Jeffries also accused "rich Jews" of conspiring with the Mafia to "put together a system [for the] destruction of black people."[3] After these speeches drew attention to Jeffries and to CUNY, the university's Board of Trustees decided to reduce Jeffries' new term as the Black Studies Department Chairman to one year rather than the customary appointment of three years.[4] Jeffries sued, claiming that the university's action violated his First Amendment rights.[5] Jeffries ultimately lost.[6]

CUNY never attempted to fire Jeffries from his position as a tenured faculty member; the legal fight was solely over Jeffries' administrative

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1. *See* Jeffries v. Harleston, 21 F.3d 1238, 1241 (2d Cir. 1994), *aff'g in part and vacating in part* 828 F. Supp. 1066 (S.D.N.Y. 1993), *vacated and remanded*, 513 U.S. 996 (1994), *and rev'd*, 52 F.3d 9 (2d Cir. 1995). Jeffries' speech concentrated on his perception of biases against minorities in the public schools. *See Jeffries*, 21 F.3d at 1242.

2. Vivienne Walt, *Cuomo in CUNY Fray Supports Action Against 2 Profs over Racial Views*, NEWSDAY, August 9, 1991, at 3, *available in* 1991 WL 4023476 (stating that the conspiracy was to denigrate African people in the movies).

3. *Jeffries*, 21 F.3d at 1242. In addition, Jeffries referred to a supporter of the public school curriculum as the "ultimate, supreme, sophisticated, debonair racist." *Id.*

4. *See id.* at 1241.

5. *See id.* at 1243. Jeffries sued Harleston and the members of the Board of Trustees. *See id.*

6. *See* Jeffries v. Harleston, 52 F.3d 9, 15 (2d Cir. 1995) (concluding that Jeffries was not deprived of his constitutional rights).

position.[7] This article specifically addresses the constitutionality of the action that the university took: What free speech rights do public university professors have with regard to their roles as administrators? Does the right to free speech operate differently when a professor is acting in his role as a professor rather than that of an administrator? This article argues that when evaluating suits by public employees over free expression claims, courts should first consider the nature of the job the public employee-plaintiff holds. If the employee's job requires freedom of thought and dissemination of ideas, then the protection accorded the employee should be quite high and, correspondingly, the power of the government to punish this employee for expressing her ideas should be relatively low. If, on the other hand, the job is one where acceptable performance does not necessitate such freedoms, then a "disruptiveness" standard may be more appropriate. Under this analysis, the First Amendment rights of university professors should be very high while the rights of administrators can be relatively low. Additionally, this article will argue that a public university can separate administrative from professorial functions in its relations with an individual who plays both these roles.[8] This distinction would allow a public university to take disciplinary action with regard to an employee's administrative role that is not appropriate with regard to his professorial role.

Part I will discuss prior cases that have addressed the general issue of free speech rights of public employees[9] and then discuss the Jeffries litigation in greater detail.[10] The standard proposed by this article represents a switch from prior jurisprudence in this area that has tended to focus exclusively on the nature of the speech in question, and not the nature of the employee. Part II will draw an analogy between professors and judges and the level of protection required for adequate performance for each job.[11] Under this analysis, professors require a high degree of free speech protection for reasons that are similar to the reasons judges require immunity for actions taken in their official capacity.[12] Part III will suggest a professor/administrator distinction in free speech protection that is analogous to the different levels of immunity granted to judges acting in their judicial capacity

7. *See Jeffries*, 21 F.3d at 1243.
8. *See infra* Part I.B.2.
9. *See infra* Part I.A.
10. *See infra* Part I.B.
11. *See infra* Part II.
12. *See infra* Part II.B.

and judges acting in non-judicial roles.[13] Just as this distinction allows suits against judges for actions taken outside the realm of their judicial roles, it allows universities to take actions against professors as administrators that would not be acceptable if taken against the professor acting as a professor.[14]

I. BACKGROUND

A. Public Employees and the First Amendment

If employee Smith tells her fellow employees that she thinks the boss is a rat, or if she writes a letter to the local paper expressing this view, she can probably expect to lose her job. Most employees in the United States are at-will employees, and even an employer who must show "just cause" to fire an employee, has justification by labeling "demeaning talk" as insubordination or a disruption of the efficient running of the office. Under these circumstances, if Smith is fired she will certainly not prevail in a lawsuit against her employer claiming violation of free speech rights. But what if the employer in this case is the government? Shouldn't the First Amendment prevent the government from punishing the employee for expressing her opinion? On the other hand, doesn't the government, like any employer, have an interest in promoting efficiency in the office? Is the government really barred from taking action against an insubordinate or disruptive employee?

The Supreme Court addressed this issue in a series of cases, three of which are outlined below.[15] The Court has held that while the government as employer can act to preserve interests it has in common with private employers, public employees retain at least some of their First Amendment rights.[16] In deciding these cases, the Court has tended to focus almost exclusively on the nature of the speech in question, rather than the nature of the job performed by the employee in question.

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13. *See infra* Part III.

14. *See infra* Part III.B. This article focuses primarily on claims to academic freedom that can be made by university professors. It should be noted, however, that universities may themselves lay claim to an institutional form of academic freedom. *See infra* notes 196-203 and accompanying text (explaining how a university can raise a claim of academic freedom).

15. *See* Waters v. Churchill, 511 U.S. 661 (1994); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968). The *Waters* decision came down after the original *Jeffries* decision by the Second Circuit.

16. *See Waters*, 511 U.S. at 682; *Connick*, 461 U.S. at 154; *Pickering*, 391 U.S. at 573-75.

In *Pickering v. Board of Education*,[17] petitioner Pickering was a high school teacher who was fired after he wrote a letter to a local newspaper that criticized the school board and the superintendent's performance on revenue issues.[18] Before being fired, Pickering was granted a hearing, and he was fired pursuant to an Illinois statute that permitted such action when the "interests of the school [so] require[d]."[19] In its opinion, the Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[20] On the other hand, the Court noted that the idea that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work," had been unanimously rejected.[21] The Court observed that Pickering's letter was about not just any matter of public concern, but about school spending policies.[22] Because of their close connection to the schools, the Court maintained that it was "essential" for teachers to be able to voice their opinions about such matters.[23]

However, even if this had not been the case, Pickering's speech would have implicated free speech concerns not because he was a teacher, but simply because he was a public employee. Justice Marshall's majority opinion explained that "[t]his Court has . . . indicated . . . that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[24] Thus, while the Court did not completely ignore the nature of Pickering's particular public sector job, the analysis suggests that it was not determinative either.[25] Had Pickering been a public employee but not a

17. Pickering v. Board of Educ., 391 U.S. 563 (1968), *rev'g* 225 N.E.2d 1 (Ill. 1967).

18. *See id.* at 564.

19. *Id.* at 564-65.

20. *Id.* at 568.

21. *Id.* (citing the following cases as examples in which a teacher's First Amendment rights were protected: *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)).

22. *See id.* at 569-70.

23. *See id.* at 572.

24. *Id.* at 574. An additional element in *Pickering* was that Pickering's letter contained allegedly false charges. *See id.* at 566. Because of this, at least part of the Court's ruling in favor of Pickering was tied to an application of the libel standard of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See id.* at 574.

25. *See id.* (concluding that the Court was disinclined "to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with

teacher, the Court likely would have attempted to balance the interests of his rights to comment on public issues against the State's interest in promoting efficiency.[26]

An additional element in *Pickering* was that Pickering's letter contained allegedly false charges.[27] Because of this, at least part of the Court's ruling in favor of Pickering was tied to an application of the libel standard of *New York Times Co. v. Sullivan*.[28] Aside from the issue of free speech rights for public employees, the Court was able to hold for Pickering on the narrower ground that a teacher speaking on a matter of public importance could not be fired "absent proof of false statements knowingly or recklessly made by him."[29] The logic of the Court's analysis contained implications beyond the scope of the particular facts before it. Additionally, the Court mentioned prior cases that had held that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[30] However, the Court did not use *Pickering* to explicitly establish a more general rule for the free speech rights of public employees or the extent of the government's power to fire an employee for engaging in First Amendment activity that interfered with the operation of that employee's office.[31] That analysis would wait for *Connick v.*

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awarding damages in libel suit by a public official for similar criticism").

26. *See id.* at 568-71. In making this analysis, the Court bore in mind that Pickering's letter was "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher," and that there was "no question of maintaining either discipline by immediate superiors or harmony among coworkers . . . presented." *Id.* at 569-70. These are not considerations that would be relevant only in the context of a teacher, as opposed to other public employees. Furthermore, Justice Marshall remarked that his majority opinion was "evaluating the conflicting claims of First Amendment protection and the need for orderly school administration *in the context of this case*[.]" *Id.* at 569 (emphasis added). This indicates that, to the extent that the Court's opinion focuses on the fact that Pickering was a teacher, it was not because his status as a teacher necessitated analysis different from the analysis that would have been required had he had a different public sector job, but rather that it focused on his role as a teacher because that was part of the facts presented to the Court. *See id.* There is nothing to suggest that similar logic would not have been applied had Pickering not been a teacher. *See supra* note 25 and accompanying text (establishing that Pickering's job was not a determinative factor).

27. *See Pickering*, 391 U.S. at 566-67.

28. *See id.* at 573 (citing *Pickering*, 391 U.S. at 573); *Sullivan*, 376 U.S. at 2.

29. *Pickering*, 391 U.S. at 574. Again, this was not because of any special status afforded to Pickering because he was a teacher. In fact, quite the opposite was true. The Court held that for purposes of libel analysis Pickering was to be considered a "member of the general public." *Id.*

30. *Id.*

31. *See id.*

Myers.[32]

Harry Connick, Sr. was the District Attorney for Orleans Parish in Louisiana and Sheila Myers was an assistant District Attorney working under Connick.[33] Upset after being told that she was being transferred, Myers wrote and distributed a questionnaire to several other assistant district attorneys.[34] The questionnaire concerned a whole range of issues including office morale, office transfer policy, and whether workers ever felt pressured to work in political campaigns.[35] Feeling that Myers' actions constituted insubordination, Connick fired her.[36] Myers sued in federal court and won; the lower courts held that the firing was illegal under *Pickering* because Myers' speech was on "matters of public importance and concern."[37]

The Supreme Court reversed.[38] Writing for the Court, Justice White held that the lower courts had misapplied *Pickering* by holding that any speech that related to the efficient operation of a government office (in this case the District Attorney's office) was for that reason speech "of public importance and concern."[39] Instead, Myers' questionnaire concerned mere "internal office matters."[40] The lower court's view could not be upheld because "government offices could not function if every employment decision became a constitutional matter."[41] Under such a standard any discussion about the workings of a government office would considered speech of public interest and concern protected under the *Pickering* standard.

The Court was careful to make clear that it was not suggesting that the speech at issue was wholly without First Amendment protection, or that it was in the same category as well-known forms of low-value speech such as obscenity or fighting words.[42] Instead, "when a public

32. Connick v. Myers, 461 U.S. 138 (1983), *rev'g* 507 F. Supp. 752 (E.D. La. 1981) *and* 654 F.2d 719 (5th Cir. 1981).

33. *See id.* at 140 (establishing that Myers worked in the office for five and a half years).

34. *See id.* at 141.

35. *See id.*

36. *See id.* Prior to being fired, Myers told Connick she would consider the transfer. *See id.*

37. *Id.* at 143 (quoting *Myers*, 507 F. Supp. at 758).

38. *See id.* at 154. The Court held in favor of Connick in a five-four decision. *See id.* at 139. Justices Brennan, Marshall, Blackmun, and Stevens dissented. *See id.* at 156-70.

39. *Id.* at 143.

40. *See id.*

41. *Id.*

42. *See id.* at 147 ("The First Amendment does not protect speech and assembly only to the extent it can be characterized as political.") (internal citation omitted).

employee speaks . . . as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[43] The Court, however, did not rule that speech by a public employee would never be protected under the *Pickering* standard.[44] Instead, deciding whether a public employee's speech merited such protection would require taking into account the "content, form, and context of a given statement, as revealed by the whole record."[45] Even if the speech in question met this standard, it would still need to be balanced against the "government's interest in the effective and efficient fulfillment of its responsibilities to the public."[46] Such balancing would take into account *Pickering*'s requirement that the "state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."[47] Applying this standard, the Court upheld Connick's decision to fire Myers, even though it recognized that one of the questions in the questionnaire addressed a matter of public concern.[48] The firing was acceptable in spite of this because "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[49]

In a case decided after the Second Circuit's initial decision in *Jeffries*, the Supreme Court supplemented the *Pickering/Connick* test in *Waters v. Churchill*.[50] Cheryl Churchill was fired from her job as a nurse at a public hospital for allegedly making comments that were critical of certain hospital policies and her supervisors.[51] Churchill

43. *Id.*

44. *See id.*

45. *Id.* at 147-48.

46. *Id.* at 150. The Court noted that the government had a "legitimate purpose in promot[ing] efficiency and integrity in the discharge of official duties." *Id.* at 150-51 (internal citation omitted).

47. *Id.* at 150.

48. *See id.* at 154. Question 11 asked "Do you ever feel pressured to work in political campaigns on behalf of office candidates?" *Id.* at 155.

49. *Id.* at 151-52. Of course, the public interest/government efficiency standard has not lacked critics. *See* Edward J. Velazquez, Comment, *Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 BROOK. L. REV. 1055 *passim* (1995) (arguing that the public interest/government efficiency standard is insufficiently solicitous of the free speech rights of public employees).

50. Waters v. Churchill, 511 U.S. 661 (1994), *vacating* 977 F.2d 1114 (7th Cir. 1992).

51. *See id.* at 664-66. Churchill received a negative evaluation from her supervisors that indicated that Churchill "promote[d] an unpleasant atmosphere and hinders

disputed her supervisors' account of the conversation in question.[52] Subsequently, the hospital won a partial grant of summary judgment in district court.[53] The district court ruled that regardless of whose version of Churchill's comments was correct, the speech was not about a matter of public concern and was therefore not protected.[54] The ruling was reversed on appeal.[55] The Seventh Circuit held that Churchill's version of her comments did qualify as speech on a matter of public concern and was protected under *Connick*.[56] Because Churchill's speech was not disruptive, the hospital had fired her illegally.[57] Significantly, the Seventh Circuit also ruled that the inquiry into what Churchill said had to hinge on what Churchill actually said, and not on what the hospital thought she said.[58] If the hospital's determination of Churchill's comments turned out to be mistaken, then the hospital could be held responsible for its error and would be required to rectify it.[59]

The Supreme Court vacated and remanded the case.[60] Justice O'Connor's plurality opinion held that if a supervisor wanted to fire an employee for comments made in a situation in which a "reasonable supervisor would recognize . . . a substantial likelihood that what was said was actually protected, the manager must tread with a certain amount of care."[61] The plurality was clear, however, that it would give managers in this situation a certain amount of leeway in making these determinations.[62] The manager's care need not reach the level required of an attorney during a trial using the rules of evidence.[63] The manager should use that reasonable care required in employment decisions of this sort.[64] The "reasonable care" required should not be limited to a specific course of action and should conform to the situation.[65] Accordingly, a manager should be liable only if his or her

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constructive communication and cooperation." *Id.* at 665 (internal citation omitted).

52. *See id.* at 666. Churchill admitted to criticizing a hospital vice-president but asserted her support for her supervisor. *See id.*

53. *See id.* at 667.

54. *See id.* (citing *Churchill*, 977 F.2d at 1119-20).

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.* at 667-68.

60. *See id.* at 682.

61. *Id.* at 677.

62. *See id.* at 677-78.

63. *See id.*

64. *See id.* at 678.

65. *See id.* (stating that many different courses of action can be considered

actions do not fall within the range of those considered reasonable.[66]

Applying this standard, the plurality held that the hospital had made a reasonable effort to inquire into what Churchill had actually said even if this effort may have produced an erroneous outcome.[67] Furthermore, given Churchill's alleged comments, the hospital had ample reason to believe that Churchill's continued presence on the job threatened to disrupt the hospital's operations.[68] Thus, even if her speech was on a matter of public concern—an issue that the plurality did not reach—the hospital's act of firing Churchill was within the range of reasonable behavior because the potential disruption outweighed her free speech rights.[69]

B. The Jeffries Litigation

The controversy surrounding Professor Jeffries began after Jeffries gave an off-campus speech on education reform that included implicit and overt anti-Semitic comments.[70] When news reports of the speech reached campus, CUNY President Bernard Harleston initiated a review of Jeffries as chairperson of the Black Studies Department.[71] Fearing negative repercussions, the Board of Trustees voted to reduce Jeffries' term as department chairman from three years to one year.[72] Jeffries' suit claimed the action violated his First Amendment rights.[73]

1. The District Court

The case was initially litigated in the Southern District of New York.[74] The district court made two points that are relevant to the discussion here. First, in applying the *Pickering/Connick* test, the court stated that the government must show that an employee's speech

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"reasonable").

66. *See id.* (recognizing that different managers will disagree on the exact course of action to take).

67. *See id.* at 680 (noting that time constraints limited the investigation).

68. *See id.* at 680-81 (noting that the person who heard the comments felt they were "unkind and inappropriate").

69. *See id.* at 680-82. The Court did, however, remand the case to the Court of Appeals because it held that there was a genuine issue of material fact as to whether the hospital had fired Churchill for the reasons stated or whether there were other motives involved. *See id.*

70. *See* Jeffries v. Harleston, 828 F. Supp. 1066, 1073 (S.D.N.Y. 1993), *aff'd in part and vacated in part*, 21 F.3d 1238, 1241 (2d Cir. 1994), *vacated and remanded*, 513 U.S. 996 (1994), *and rev'd*, 52 F.3d 9 (2d Cir. 1995).

71. *See id.* at 1073-74.

72. *See id.* at 1075.

73. *See id.* at 1077.

74. *See id.* at 1066.

actually interfered with the operation of the office before the government can discharge an employee for speech that involves a matter of public concern.[75] In making this ruling, the district court relied on a Supreme Court case in which the Court had ruled that an employee could not be fired over a statement on a matter of public concern because the government employer lacked evidence that the employee's comment had interfered with office operations.[76]

Secondly, the district court rejected the defense's argument that even if the university was aware that its actions would not have been acceptable if a mere professor was involved, CUNY should not have been expected to know that similar actions would also be unacceptable when taken against a departmental chairperson, who had "greater responsibility" and a position "higher up in the academic hierarchy."[77] In rejecting this argument, the court relied on *Piesco v. City of New York, Dept. of Personnel*,[78] in which the Second Circuit had applied *Connick* in spite of the plaintiff's high government position.[79] Because, the district court reasoned, Piesco's position[80] was much higher in the governmental hierarchy than was Jeffries', his "high government position" was clearly not enough to make the *Connick* standard inapplicable to this suit.[81] Based on the reasoning in *Piesco*, the district court noted that Jeffries' higher position did not give the government license to retaliate against him for his speech.[82] The distinction between departmental chair and professor is significant, but not for the "high government position" reason argued by the defense at this stage of the proceedings.[83]

After losing in the Southern District, CUNY appealed to the Second Circuit.[84] The Second Circuit upheld the lower court ruling on the issues discussed above.[85] The court reversed the award of punitive damages and remanded to the district court for a new trial solely on

75. *See id.* at 1089.

76. *See id.* (citing Rankin v. McPherson, 483 U.S. 378, 388-89 (1987)).

77. *Id.* at 1088.

78. Piesco v. City of New York, Dept. of Personnel, 933 F.2d 1149 (2d Cir. 1991).

79. *See Jeffries*, 828 F. Supp. at 1086-89 (citing *Piesco*, 933 F.2d at 1151-61).

80. Judith Piesco was Deputy Personnel Director for Examinations in the New York City Department of Personnel. *See Piesco*, 933 F.2d at 1151.

81. *See Jeffries*, 828 F. Supp. at 1088.

82. *See id.* at 1088-89.

83. *See infra* Part II.B (discussing the distinction between professors and academic administrators).

84. *See* Jeffries v. Harleston, 21 F.3d 1238, 1238 (2d Cir. 1994).

85. *See id.* at 1250.

this issue.[86] The defendants appealed to the Supreme Court, which remanded the case to the Second Circuit for further consideration in light of the Court's recent holding in *Waters v. Churchill*.[87]

2. The Second Circuit on Remand

The Second Circuit ruled that the university's actions were justified in light of its legitimate fear that Jeffries' outspoken anti-Semitism "would disrupt university operations."[88] The Second Circuit's decision reflected the view of a plurality of the Supreme Court in *Waters v. Churchill*.[89] The court had to resolve what counted as "disruptiveness."[90] The Second Circuit noted that "[o]ne of the principles driving our earlier *Jeffries* decision was that the First Amendment protects a government employee who speaks out on issues of public interest . . . unless the speech *actually* disrupted the employer's operations."[91] The court noted that this was the Second Circuit rule set forth in *Piesco*.[92] The court read *Waters* as holding that the governmental employer did not need to show actual interference, but rather a "substantial showing of *likely* interference."[93] Because the original district court jury found that a majority of the *Jeffries* defendants had acted out of a "reasonable expectation" that Jeffries' Albany speech would harm the university, the decision to shorten Jeffries' term as department chairperson was not unconstitutional.[94]

Rather than focusing solely on Jeffries' potential for "disruption," the court should also have focused—at least initially—on the different nature of his First Amendment rights as a university administrator, and the greater discretion this gave CUNY to legally shorten his tenure as department head.[95] Thus, while a university may not interfere with a

86. *See id.*

87. *See* Harleston v. Jeffries, 513 U.S. 996, 996 (1994) (vacating the Second Circuit's ruling and remanding for further consideration in light of *Waters*); *supra* notes 50-69 and accompanying text for a thorough discussion of *Waters*.

88. *See* Jeffries v. Harleston, 52 F.3d 9, 10 (2d Cir. 1995).

89. *See id.* at 13.

90. *See id.* at 13-14.

91. *Id.* at 12 (citation omitted).

92. *See id.*

93. *Id.* at 13 (citation omitted).

94. *See id.* at 13-14.

95. The "purpose of the job" standard proposed by this article may not solve every conceivable question in this area. Public employees work in an extremely broad range of occupations, and it may not always be clear how to "rank" a particular occupation on this scale (and, needless to say, it would be well beyond the scope of this article to attempt to rank all or even most such occupations). However, some important distinctions can be made—such as that, as this article discusses, professors acting as

professor's professorial duties because of speech the university finds objectionable, that same university may limit or eliminate altogether a professor's administrative role because of that same speech by relying on the "disruptiveness" standard.[96]

II. WHY PROTECT PROFESSORS?

The nature of academic jobs requires heightened protection of First Amendment rights relative to other public employees, but this heightened protection requirement should not extend to administrative positions. This claim is similar to arguments made in support of immunity from suit for judges acting within their official capacities. Just as a judge cannot be expected to perform her job effectively if she is forced to operate under threat of suit from unhappy litigants, a professor cannot be expected to perform her job effectively if she is forced to work under threat of punishment for expressing her views.[97]

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professors rank at or near the top of this scale—and that if courts attempt to apply this standard it will represent a significant improvement in jurisprudence in this area over just using the "disruptive" standard (which, it need hardly be said, is not itself exactly an objective, easy to apply standard). For different approaches to the problems raised by the Jeffries scenario, see Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes, and the Blurred Limits of Academic Freedom*, 50 OKLA. L. REV. 1, 32-43 (1997) (recommending an inquiry into whether the restricted speaker has experienced an "undue burden"); Rachel E. Fugate, Comment, *Choppy Waters Are Forecast For Academic Free Speech*, 26 FLA. ST. U. L. REV. 187, 213-17 (1998) (recommending an academic standard allowing content restrictions only in the event that a speech's secondary effects were targets of the regulation).

96. To be clear, this standard applies regardless of where the "objectionable" speech occurred. In the case of Leonard Jeffries, his anti-Semitic comments did not occur in the classroom, but even if they had, this standard would still have allowed CUNY to remove him from his administrative role but not from his position on the faculty. At the same time, universities have attempted to impose limitations on professors' classroom activities because of the interests of students, particularly in cases involving alleged sexual harassment. *See, e.g.*, Silva v. University of N.H., 888 F. Supp. 293 (D.N.H. 1994) (involving a professor who was disciplined for using sexually explicit imagery in a writing class). This article does not claim that sexual harassment law is always unconstitutional as applied to a professor or that a professor's classroom conduct should not be subject to limitations. Rather, this article maintains that different interests are implicated when an academic's professorial duties are curtailed than are implicated when the same individual's administrative role is at stake. For a discussion of hostile environment claims by university students, see Timothy E. Di Domenico, Comment, *Silva v. University of N.H.: The Precarious Balance Between Student Hostile Environment Claims and Academic Freedom*, 69 ST. JOHN'S L. REV. 609, 619-31 (1995) (discussing hostile environment claims in the context of academic freedom); Donna Prokop, Note, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533, 2568-77 (1993) (discussing the weighing of student interests against teacher's free speech rights).

97. In an article connected to a symposium on federal judicial independence, Judge James Zagel and Adam Winkler have argued that judicial independence and academic freedom are not at all similar in their operation. *See* James Zagel and Adam Winkler, *The*

A. *The Judicial Immunity Analogy*

The Supreme Court has long recognized that judges are immune from suit where the alleged wrong arises out of action taken by a judge acting in her official capacity.[98] This is a doctrine that dates back more than a century.[99] In recent years, the Court has applied this doctrine to suits brought under the Civil Rights Act of 1871,[100] even where a judge was accused of acting maliciously,[101] and even in a case where a judge issued an order to sterilize a 15-year-old girl without the girl's knowledge or consent.[102] As the Court noted in *Bradley v. Fisher*,[103] judicial immunity is a doctrine taken from English common law.[104] The Court cited English cases that explained that judicial immunity was a doctrine that served to benefit not just judges, but the public as well, which has an interest in judges being able to perform their jobs without fear of lawsuits.[105] Similarly, the Court in *Stump v. Sparkman*[106] rejected arguments that a suit against an Indiana circuit court judge should be allowed because of the "tragic consequences" of the judge's action, arguing that "[t]he fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit,"[107] since such immunity was in the "best interests of 'the proper administration of justice.'"[108] These cases establish two defenses for judicial immunity. First, immunity is required to allow judges the freedom to make decisions on controversial matters.[109]

Independence of Judges, 46 MERCER L. REV 795, 806-812 (1995) (discussing the differences between judicial discretion and academic speech). While their arguments are well taken, they do not contradict the claim I am making here, which is that the *reasons* that judges and academics require a high level of "immunity"—that it is a sine qua non for them to fulfill their professional obligations—are similar, even if academic freedom and judicial independence do not look the same in practice.

98. *See, e.g.*, Bradley v. Fisher, 80 U.S. 335 *passim* (1872) (affirming a jury verdict for the defense in a suit brought against a judge who barred a lawyer from practicing in the judge's court); Randall v. Brigham, 74 U.S. (1 Wall.) 523 *passim* (1868) (affirming a state court dismissal of a suit against a judge that alleged wrongful removal from the state bar).

99. *See Bradley*, 80 U.S. (1 Wall.) at 335; *Randall*, 74 U.S. (1 Wall.) at 523.

100. *See* Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (holding that the judicial immunity doctrine is not abolished by 42 U.S.C. § 1983).

101. *See id.* at 554.

102. *See* Stump v. Sparkman, 435 U.S. 349, 364 (1978).

103. Bradley v. Fisher, 80 U.S. (1 Wall.) 335 (1872).

104. *See id.* at 349.

105. *See id.* at 349-50.

106. Stump v. Sparkman, 435 U.S. 349 (1978).

107. *Id.* at 363-64.

108. *Id.* at 363 (quoting *Bradley*, 80 U.S. (1 Wall.) at 347).

109. *See id.* at 363-64.

Second, the public has a strong interest in maintaining this protection for judges.[110]

B. Academic Freedom as "Immunity"

Analogous arguments apply with equal force to giving professors "immunity" or academic freedom so that they may fulfill their professional responsibilities: the pursuit of knowledge through the testing of and exchange of ideas.[111] Just as judges are supposed to apply the law independent of personal biases in order to reach a just outcome, professors are supposed to search for truth and to expand existing bodies of knowledge independent of governmental pressure to reach particular results. This also requires being free from threat of sanction from people who dislike the professor's ideas.[112]

During the McCarthy era, academics, like people from many walks of life, were subject to extreme political pressure, accusations, and blacklists.[113] Professors from a variety of different universities lost jobs or were subject to other sanctions in the course of McCarthy hysteria.[114] The result was perhaps predictable: self-censorship.[115] A 1955 study that involved over 2,000 academics revealed that many admitted being "scared" by the McCarthy era purges and that more

110. *See Bradley*, 80 U.S. (1 Wall.) at 349-50.

111. This argument assumes that the importance of professors pursuing knowledge is on a par with the importance of judicial independence. *See infra* notes 122-29 and accompanying text (discussing the Supreme Court's recognition of the importance of academic freedom).

112. In this sense, "immunity" for professors is more analogous to judicial immunity than it is to legislative immunity. While legislators are in some sense protected so that they can be free to reach the "best" outcome, they are also subject to potential "sanctions" from their constituents, who are free—perhaps even encouraged—to put political pressure on a legislator even when the legislator claims to be acting in the public interest. Judges, even those who are elected and are therefore potentially subject to political pressure, are not thought to represent constituents in the same manner. *See* Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972) (refusing to apply one-person/one-vote standards to judicial elections because "[j]udges do not represent people, they serve people," and are therefore entitled to greater protection even when reaching unpopular results). Obviously, this is even more true of appointed judges. *See also* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE 26 (1915), *reprinted in* THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION 26 (Walter P. Metzger, ed., 1977) (hereinafter GENERAL REPORT) (comparing the relationship between university trustees and university professors to that between presidents and the federal judges they appoint).

113. *See* ELLEN W. SCHRECKER, NO IVORY TOWER 10 (1986).

114. *See generally id.* at 161-282 (discussing the impact and effects of McCarthyism on the academic community)

115. *See id.* at 309.

than a quarter admitted to "some form of political self-censorship."[116] A similar number of those surveyed said that if they were to face a politically motivated charge, they would not expect support from their colleagues.[117] Given this level of fear, it is certainly worth wondering what work was not undertaken, what questions were not investigated by university faculty, and how much academia suffered because of outside political pressures.

The McCarthy era may be unique in the extreme level of political pressure applied to professors and the resulting interference with academic work. Still, today it is not unheard of for professors to restrict their work in response to outside pressure. Professors may simply decide to stop teaching classes because of political pressure.[118] Furthermore, political pressures keep people who espouse certain views from being hired at all—a scenario that seems frighteningly similar to McCarthy era events.[119] The unsurprising consequence of outside pressure is that not only do academics fail to teach classes in "controversial" areas, they turn away from certain fields altogether.[120] As with the effect of the McCarthy-era purges, it is hard to quantify what is lost, or what is not learned or discovered. Nonetheless, it is hardly bold to claim that the negative consequences are considerable for educators in general, and therefore for the country as a whole.[121] If professors are too scared to ask difficult questions or to make "unpleasant" arguments, education suffers.

The Supreme Court has long recognized that academic freedom is a vital interest protected by the First Amendment. In so noting, the Court has made clear that the reason academic freedom is so crucial is because of its connection to the ability of academics to fulfill their responsibilities of pursuing knowledge.[122] This, in turn, is vital because of its importance to the country as a whole.[123] In *Barenblatt*

116. *Id.*

117. *See id.*

118. *See* NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 152 (1992); *see also* DINESH D'SOUZA, ILLIBERAL EDUCATION 148-51, 194-97 (1991) (providing examples of professors censored at the University of Michigan and Harvard University).

119. *See* D'SOUZA, *supra* note 118, at 212 (discussing feminism and its impact on professors desiring to teach women's study courses); *see also* Thomas Sowell, *Do Colleges Indoctrinate or Educate?*, ALBANY TIMES-UNION, Feb. 26, 1997, at A7, *available in* 1997 WL 3483869.

120. *See* D'SOUZA, *supra* note 118, at 248.

121. *See infra* notes 173-85 and accompanying text (discussing a report issued by the American Association of University Professors which argued that professors should be free to inquire and publish without fear of reprisal for unpopular work).

122. *See* Barenblatt v. United States, 360 U.S. 109, 112 (1959).

123. *See id.*

v. United States, though the Court upheld Congress' right to question petitioner Barenblatt about supposed Communist party affiliations during his time as a graduate student, Justice Harlan's majority opinion emphasized that the First Amendment protected academic freedom.[124] Justice Harlan stated that the Court needs to be a bulwark against invasions of academic freedom, at least in part because of the vital interests at stake in allowing professors to meet their obligations.[125] He explained:

> [I]nquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.[126]

Justice Black, in dissent, expressed dismay at the decision because of its impact on academic freedom: "This result, whose importance cannot be overestimated, is doubly crucial when it affects the universities, on which we must largely rely for the experimentation and development of new ideas essential to our country's welfare."[127]

Expanding on this theme, the Court has also pointed out that the benefits of academic freedom extend far beyond the protection given to the individual professors protected by this doctrine.[128] The Court has recognized the nation's commitment to safeguarding academic freedom not only for the teachers concerned, but because of its value for all its citizens.[129] The Court in *Keyishian v. Board of Regents* also recognized that academics should not be kept from pursuing even

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124. *Id.* at 112.

125. *See id.*

126. *Id.* The Court went on to state that these essential freedoms would not prevent Congress from interrogating a witness just because he was a teacher. *See id.* The Court commented that "[a]n educational institution is not a constitutional sanctuary from inquiring into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls." *Id.*

127. *Id.* at 144 (Black, J., dissenting).

128. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

129. *See id.* In *Keyishian*, certain faculty members of the State University of New York refused to sign "loyalty" certificates concerning whether they held communist beliefs. *See id.* at 592. The Court held that the New York statutes and regulations, which were designed to prevent "subversive" persons from obtaining state employment, were unconstitutional. *See id.* at 592-93. The Court stated in part:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603.

controversial topics.[130] "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[131] This view reflected Chief Justice Warren's plurality opinion in *Sweezy v. New Hampshire*, in which the Chief Justice wrote:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate . . . otherwise our civilization will stagnate and die.[132]

These statements make clear how seriously the Court takes the protection of academic freedom and how vital the interests at stake are.

Thus, it is quite evident that the "immunity" of academic freedom is required for professors to be able to function effectively and that there are serious consequences when this freedom is invaded. It is also unmistakable that the Supreme Court believes one of its functions is to serve as a protector for those whose academic "immunity" is threatened.

III. THE LIMITS ON IMMUNITY

A. Immunity is not Applied Across the Board

In its rulings on immunity for government officials—judges, legislators, and executive officials—the Court has established two separate, though related, principles. First, the Court has ruled that whether immunity applies in a given situation depends not upon the individual's office, but the function being performed.[133] Second, in an extension of the first point, immunity does not apply where a judge, legislator, or executive official performs a non-judicial, legislative, or executive function.[134] This is true even if the function in question is central to the operation of his role that has given rise to the grant of immunity.[135]

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130. *See id.*

131. *Id.* (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

132. *Id.* at 250 (holding that a teacher's Fourteenth Amendment due process rights were violated when he was adjudged guilty of contempt of court for refusing to answer questions on, inter alia, his lectures at the University of New Hampshire).

133. *See* Butz v. Economou, 438 U.S. 478, 511 (1978).

134. *See* Forrester v. White, 484 U.S. 219, 227-28 (1988).

135. *See id.* at 228.

In *Butz v. Economou*,[136] Arthur Economou sued officials in the Department of Agriculture for damages, claiming that they had initiated an investigation and an administrative proceeding against him in retaliation for his criticism of the Agency.[137] The defendants claimed that they were immune from such suits.[138] The Supreme Court held that executive branch officials were not entitled to absolute immunity from damage actions under all circumstances, noting that this "would seriously erode the protection provided by basic constitutional guarantees."[139] However, the Court held that such officials *were* entitled to absolute immunity when acting in a judicial capacity.[140] Justice White's majority opinion explained that the Court of Appeals had placed too much emphasis on the fact that the government officials who had been sued were employees of the Executive Branch.[141] He went on to state "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities."[142] Because judges are entitled to absolute immunity for actions within their judicial capacity,[143] executive branch officials who perform adjudicative functions within a federal agency are entitled to absolute immunity for such actions because the process is similar enough to the judicial process to warrant "judicial-like" immunity.[144]

Among immunities given to government officials, judicial immunity is the most analogous to academic freedom. As a result, it is with this type of immunity that this article is most concerned. However, it is worth pointing out that the Supreme Court has had occasion to make rulings on the immunity to be afforded government officials in all branches of government.[145] In each of these cases, regardless of the office or branch involved, a threshold inquiry has been whether the officials in question were acting within the capacity that entitled them

136. Butz v. Economou, 438 U.S. 478 (1978).

137. *See id.* at 480.

138. *See id.* at 483.

139. *Id.* at 505.

140. *See id.* at 514.

141. *See id.* at 511.

142. *Id.* at 511.

143. *See id.* at 508-10; *see also supra* Part II.A (discussing judicial immunity).

144. *See Butz*, 438 U.S. at 512-14.

145. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (involving a state prosecuting attorney); Wood v. Strickland, 420 U.S. 308 (1975) (involving public school officials), Scheuer v. Rhodes, 416 U.S. 232 (1974) (involving various members of the executive branch of a state government); Tenney v. Brandhove, 341 U.S. 367 (1951) (involving a member of a state legislature).

to immunity.[146]

As the previous section discussed, the Supreme Court has given a generous level of immunity to judges acting in their judicial capacities.[147] Judicial immunity, however, is not boundless. The Court has chosen not to extend this immunity to judges when they have been sued for actions taken outside their judicial functions. This rule has applied in a number of different cases. The Court in *Ex Parte Virginia*[148] permitted a criminal indictment issued against a state judge who was accused of excluding blacks from juries. The Court first argued that the role of selecting jurors was not a judicial act, arguing that "[t]he duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge."[149] The Court further argued that even if this were not true, and if selecting jurors could be considered a judicial act, a judge could not consider conduct that violated the law, such as excluding jurors on the basis of their race, to be action taken within his judicial capacity.[150]

In 1980, the Supreme Court ruled that state judges were not entitled to judicial immunity for activities connected to their promulgation of a state code of professional responsibility.[151] The Court ruled that such activity was not judicial in character because compiling a code involved rulemaking and not adjudication.[152] In doing so, the Court relied on the separate opinion of one member of the three-judge district court that had heard the case initially.[153] The Court agreed with the distinction made that "[d]isciplinary rules are rules of general application and are statutory in character . . . . They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct . . . ."[154] The Court also agreed with the lower court's conclusion that, when the Supreme Court enacted disciplinary

146. *See Imbler*, 424 U.S. at 430; *Wood*, 420 U.S. at 321; *Scheuer*, 416 U.S. at 247-48; *Tenney*, 341 U.S. at 377-78.

147. *See supra* Part II.A (discussing judicial immunity).

148. Ex Parte Virginia, 100 U.S. 339 (1879).

149. *Id.* at 348.

150. *See id.* at 348-49. An analogous argument could be made that conduct by professors that violates the law (such as sexual harassment) is not activity undertaken within a professor's official capacity. *See supra* notes 17-31 and accompanying text (discussing *Pickering*, 391 U.S. 563 (1968), which involved the firing of a teacher after he wrote a letter critical of the school's superintendent).

151. *See* Supreme Court of Va. v. Consumers Union of the United States, 446 U.S. 719, 739 (1980).

152. *See id.* at 731.

153. *See id.* (citing Consumers Union of United States, Inc. v. American Bar Ass'n, 470 F. Supp. 1055 (E.D. Va. 1979)).

154. *Id.* at 731 (quoting *Consumers Union*, 470 F. Supp. at 1064).

rules, it was acting as a legislative rather than a judicial body.[155]

More recently, in *Forrester v. White*,[156] the Court refused to grant immunity to a judge who was sued in a section 1983 action for allegedly demoting and dismissing a probation officer on account of her gender, in violation of the equal protection clause of the Fourteenth Amendment.[157] In so ruling, the Court reviewed the aforementioned cases that established that absolute immunity for judges does not extend to non-judicial acts.[158] The Court further observed that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts."[159] In addressing the specific fact scenario involved, Justice O'Connor wrote:

> In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative . . . . [A] judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions . . . yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.[160]

Because the judge was not acting "judicially," he was not immune from suit.[161] The next section will argue that, just as cases have distinguished between judges acting in judicial and non-judicial capacities, a similar distinction can and should be made between academics acting in a professorial manner and academics acting in administrative roles.

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155. *See id.* The Court ruled, however, that the Virginia Supreme Court was entitled to legislative immunity with regard to its role as issuer of the disciplinary code. *See id.* at 733-34.

156. Forrester v. White, 484 U.S. 219 (1988).

157. *See id.* at 230.

158. *See id.* at 228-29 (citations omitted).

159. *Id.* at 228.

160. *Id.* at 229.

161. *See id.* at 230.

B. Professors Acting as Administrators Need Not Be Immune

In addition to their roles as teachers and researchers, professors may serve in a variety of administrative capacities. Some of these roles—such as being a department chairperson or head of a department committee—may be taken on in addition to regular professorial duties. Other roles, such as being a university president, may be complete jobs in themselves, leaving little or no time for work as a "regular" professor. In either situation, administrative duties, even those that may be extremely important to the teaching and researching enterprises, differ from strictly educational responsibilities. Most notably, administrative duties do not demand the same level of academic freedom and should therefore receive different treatment under the Constitution.

In order to understand why this is the case, we should again consider the reasons, as outlined above, for the various immunities from suit that the Court has given. Immunities are necessary because the person—or rather the office—in question cannot function without some sort of protection. As the Court noted in *Pierson v. Ray*,[162] judges require absolute immunity for actions taken in their official capacity because "[i]mposing such a burden on judges [the fear of lawsuits by unsuccessful litigants] would contribute not to principled and fearless decisionmaking but to intimidation."[163] Or, as the Court stated in *Randall v. Brigham*,[164] "[t]o secure the maximum of impartiality, a judge must be protected from personal responsibility for his errors . . . ."[165] To hold otherwise, and to allow suits by unhappy litigants would be "to offer a bounty on dissent."[166] Obviously, "principled and fearless decisionmaking"[167] and "the maximum of impartiality"[168] are desirable qualities in judges, while a perverse disincentive brought about by a "bounty on dissent" is not. Thus, immunity is granted for judicial acts. However, certain other functions

162. Pierson v. Ray, 386 U.S. 547 (1967).

163. *Id.* at 554.

164. Randall v. Brigham, 74 U.S. (1 Wall.) 523 (1868).

165. *Id.* at 533. The Court stated:

> It would be absurd to say that he should receive protection of the law only in those cases where no protection is required. Accordingly, for more than five hundred years, by a uniform series of decisions, judges have been held exempt from personal responsibility for their judicial words and acts.

Id.

166. *Id.* at 534.

167. *See Pierson*, 386 U.S. at 554.

168. *See Randall*, 74 U.S. (1 Wall.) at 533.

that may be *performed* by judges, such as picking jurors,[169] hiring and firing court personnel,[170] or promulgating a code of professional responsibility,[171] can be separated from the parts of a judge's job that require "principled and fearless decisionmaking" and "the maximum of impartiality." Because these duties may be separated, allowing suits for tortious actions taken while pursuing these tasks does not threaten these desired judicial qualities that we seek to preserve. Hence, immunity is not granted for actions in these roles. This is true even though some of the actions for which suit is allowed involves activities that are "essential to the very functioning of the courts."[172]

As discussed earlier, professors require "immunity," or academic freedom to allow them to perform the function that we wish them to perform. Professors should be free to add to the body of scholarly knowledge without fear of reprisals for unpopular or controversial work. In 1915, a committee of the American Association of University Professors (AAUP) issued a report on academic freedom.[173] In this report, the committee, which included such luminaries as Arthur Lovejoy and Roscoe Pound,[174] argued that "[t]he importance of academic freedom is most clearly perceived in the light of the purposes for which universities exist."[175] The committee listed three such purposes: (1) promoting inquiry and advancing knowledge; (2) instructing students; and (3) developing experts for public service.[176] With regard to the first of these goals, the committee declared that "the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results."[177] Academic freedom was thought to be equally important in the classroom because:

> No man can be a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity . . . . [T]his confidence will be impaired if there is suspicion on

169. *See* Ex Parte Virginia, 100 U.S. 339, 348 (1879).

170. *See* Forrester v. White, 484 U.S. 219, 229 (1988).

171. *See* Supreme Court of Va. v. Consumers Union of the United States, 446 U.S. 719, 739 (1980).

172. *Forrester*, 484 U.S. at 228. There are, of course, cases in which judicial immunity does not apply because it is clear that the actions taken by the judge were not even remotely central to the functioning of a court. *See* Zarcone v. Perry, 572 F.2d 52, 53 (2d Cir. 1978) In *Zarcone*, the Second Circuit upheld a damage award against a traffic court judge who ordered that a vendor be handcuffed and brought in front of the judge because the vendor sold coffee that the judge thought tasted "putrid." *See id.* at 53.

173. *See* GENERAL REPORT, *supra* note 112.

174. *See id.* at 43.

175. *Id.* at 27.

176. *See id.*

177. *Id.* at 28.

> the part of the student that the teacher is not expressing himself fully or frankly, or that college and university teachers in general are a repressed and intimidated class . . . .[178]

Finally, in order to be of service to the community, "[i]t is obvious that . . . the scholar must be absolutely free not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come into conflict with accepted opinion."[179] Just as judges are given immunity because the judiciary could not function properly otherwise,[180] academics require protection from reprisals for their academic work because the university could not serve its mission otherwise.

Two points stand out from this report. First, the report makes clear the paramount importance of unrestricted academic freedom for the intellectual pursuits of a professor. Second, the report does not mention a necessity for freedom from review for administrative tasks. Part II of the committee's report makes several policy proposals. The first of these calls for judicial bodies to be convened before university *teachers*—but not administrators—are fired or disciplined.[181] The reason such bodies are required is "[t]o safeguard freedom of inquiry and of teaching against both covert and overt attacks."[182] Again, it is the academic and not the administrative role that must be protected. Similarly, a 1940 report of the AAUP states that "[t]he teacher is entitled to full freedom in research and in the publication of the results,"[183] and that "[t]he teacher is entitled to freedom in the classroom in discussing his subject."[184] Again, there is no mention of a similar need to protect those serving in administrative roles. One might argue that an organization such as the AAUP would be more inclined to concern itself with professorial duties. However, because professors frequently fill administrative roles at universities, the

178. *Id.*

179. *Id.* at 29.

180. *See supra* Part II.A (discussing judicial immunity). The Supreme Court stated:

> It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act . . . . The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by any vexatious action . . . .

Bradley v. Fisher, 80 U.S. (1 Wall.) 335, 349 (1871) (internal citations omitted).

181. *See* GENERAL REPORT, *supra* note 112, at 40.

182. *Id.*

183. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ACADEMIC FREEDOM AND TENURE, 1940 STATEMENT OF PRINCIPLES AND INTERPRETIVE COMMENTS 2, *reprinted in* THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION (Walter P. Metzger, ed., 1977).

184. *Id.*

AAUP might well have spoken up about the need for administrative immunity if it felt that such roles demanded similar protection. While it can be problematic to interpret the meaning of inaction, the absence of such statements on behalf of administrators, or on behalf of professors acting as administrators, should at a minimum tell us that this was not an issue at the forefront of the AAUP's agenda.[185]

In the textbook *An Introduction to Educational Administration*, Emil Haller and Kenneth Strike remark that their research revealed that "teachers were generally most willing to accept the authority of administrators over 'administrivia' and least willing to accept their authority over the things that really matter, such as curriculum and teaching."[186] This view is

> tantamount to seeing the administrator as a servant of teachers rather than supervisor of teachers. The administrator is the person who is responsible to see to it that . . . the teacher has available the resources that are necessary to teach. It is not, however, the responsibility of the administrator to interfere with the professional judgment of the teacher with respect to central educational decisions.[187]

They claim that this "is precisely the view of administration that is held by many university professors,"[188] and that this view is "(arguably) more appropriate to a university context than to [the pre-college setting they are concerned with]."[189] This description helps to make clear the reason that administrative roles do not require immunity: these roles, and the duties they entail, are not part of promoting inquiry, expanding existing bodies of knowledge, or of classroom instruction.[190]

This is not to say that administrative tasks are trivial or unnecessary. Indeed, a university needs competent administrators in order to run smoothly. In its immunity rulings, however, the Supreme Court has differentiated between actions that are immunized because they are part of the official's actual job, and actions that are not immunized because they are not part of that actual job. The Court has maintained this

185. Perhaps an AAUP report that calls for a high level of protection for professors can be seen as self-serving. However, if that is true, the absence of a call for similarly strong protection of administrative roles is even *more* striking. If *this* group did not feel that it needed to call for academic freedom protection for administrative roles, the claim that such protection is required seems particularly weak.

186. EMIL J. HALLER & KENNETH A. STRIKE, AN INTRODUCTION TO EDUCATIONAL ADMINISTRATION 47 (1986).

187. *Id.*

188. *Id.*

189. *Id.*

190. *See supra* notes 173-85 and accompanying text (discussing the 1915 AAUP Report on the challenges of academia).

distinction even where the non-immunized actions have been central to the functions of the official for which immunity is granted.[191] A similar distinction is appropriate in the academic arena. If applied correctly, professors should be given "judicial-like immunity" (i.e. academic freedom) for actions taken as professors that serve the goals of the university as set out above,[192] but are not entitled to a similar degree of immunity for their administrative actions.[193] Helping to facilitate inquiry is not the same as engaging in the inquiry itself.

Finally, there is the issue of claims to "institutional" academic freedom that may be raised by a university. The Supreme Court has recognized these claims. For example, in *Regents of the University of California v. Bakke*, Justice Powell's opinion that held that it was

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191. *See supra* notes 156-161 and accompanying text (discussing *Forrester* and the Court's refusal to immunize a judge acting in a non-judicial role). Furthermore, though administrative jobs at universities may frequently be filled by academics, they do not have to be in every instance. There is nothing inherent in the role of university administrator that requires that the position be filled by someone who operates under a grant of immunity. This was also true of the tasks performed by the judges who were the subject of the suits in *Ex Parte Virginia* and *Forrester v. White*. *See supra* notes 148-50, 156-60 and accompanying text (discussing the holdings of *Ex Parte Virginia* and *Forrester v. White*).

192. *See supra* notes 175-76 and accompanying text (listing the purposes of universities).

193. Subsequent to the end of the *Jeffries* litigation, a panel of the Sixth Circuit issued a ruling that turned at least in part on distinguishing between university jobs that require protection of academic freedom and those that do not. *See* Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1189-90 (6th Cir. 1995). In *Dambrot*, the court upheld Central Michigan University's (CMU) firing of its men's basketball coach, who had used a racial epithet during a locker room discussion with his players, despite the fact that the court ruled the University's anti-discriminatory harassment policy was unconstitutional. *See id.* at 1193. Judge Keith's unanimous opinion noted that Dambrot's job was not one that implicated academic freedom concerns. *See id.* at 1189-90. The court stated:

> Dambrot's use of the N-word is even further away from the . . . concept of academic freedom because his position as coach is somewhat different from that of the average classroom teacher. Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, Dambrot's role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. . . Moreover, [there is] a disincentive on any debate with the coach's ideas . . . .

Id. at 1190.

We cannot be sure if the ruling would have been the same if Coach Dambrot had held a position as an "average classroom teacher." However, the logic of the decision suggests that had Dambrot been a tenured professor at CMU in addition to his duties as men's basketball coach, the university could still have fired him from his coaching position for the conduct in question even if it could not have fired him from his professorial position, though it is also possible that a professor's use of a racial epithet in class might be actionable under a hostile environment claim.

acceptable for the university to take race into account in admission decisions relied on the university's right to academic freedom, as manifested here through its decision that a racially diverse student body would be beneficial to the school.[194] Justice Powell relied on Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, in which the Court referred approvingly to an academic address that maintained that universities must be free to "determine . . . on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[195]

Certainly institutional claims to academic freedom can conflict with the individual claims of a professor.[196] These circumstances may make for hard cases. As this article has demonstrated, however, if the professor is acting as an administrator, claims of academic freedom are demonstrably weaker. Thus, to the extent that a university may make institutional academic freedom claims, the university should be in a relatively stronger position. A university's claims to institutional academic freedom are implicated most frequently with regard to hiring and tenure decisions,[197] but one can easily imagine claims it might make with regard to the job status of an administrator. Just as a university might make a decision to fill jobs in certain areas and not others, or to maintain programs in some disciplines and not in others,[198] a university might decide that a particular chairperson was leading a department down an unsatisfactory or injurious path and that

194. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

195. *Id.* at 312 (citing Sweezy v. New Hampshire, 354 U.S. 234 (1957)). For scholarly discussions of institutional academic freedom, see Judith Jarvis Thomson, *Ideology and Faculty Selection*, LAW & CONTEMP. PROBS., Summer 1990, at 155 (discussing the role ideology should play in the hiring of faculty); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227 (discussing tension between the AAUP view of academic freedom which stresses freedom of individual faculty members and the Supreme Court decisions about freedom of institutions from state interferences).

196. *See* Rabban, *supra* note 195, at 280-300.

197. *See* Thomson, *supra* note 195; Rabban, *supra* note 195, at 266-280.

198. Obviously, these decisions may well have ideological components to them. However, it seems that there is a difference between a university or a department deciding what types of experts it would like to have on the faculty and that same university or department sanctioning a current member of the faculty because of the content of that faculty member's ideas. Furthermore, a claim that a professor should be free to pursue her work free of threats from those who dislike her conclusions does not mean that same professor has a similar right as a dean or department chair to take an entire school or department in the directions she chooses, without any input from the university. At a minimum, institutional academic freedom would seem to allow for a university to have some input into the broad directions its academic departments take in their pursuit of knowledge.

the university should be free to take corrective action.

The Second Circuit held that CUNY could legitimately take action because Jeffries'—the chair, and therefore public representative of the Black Studies department—vocal anti-Semitism threatened university operations.[199] What type of "threat" might Jeffries have posed? CUNY might have felt that Jeffries was hurting the University in two ways. CUNY might have felt that Jeffries, as chair, was likely to lead the department in an undesirable direction in the eyes of the university. Their concern over the direction he was leading his department would constitute "internal" damage to a department in its ability to provide a good Black Studies department.[200] The university could also claim that having a vocal and well-known anti-Semite in such a public position would damage CUNY's ability to provide any educational services efficiently. This would constitute "external" damage to the school.[201] The university could legitimately consider either or both types of damage in making a decision on whether to remove Jeffries from his administrative post.[202] Institutional academic freedom suggests that a university should have at least some and perhaps a great deal of leeway to make such determinations.[203]

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199. *See supra* note 88 and accompanying text (noting that CUNY argued Jeffries' discussion of "widespread conspiracy" at a state subsidized lecture "would disrupt university operations").

200. A claim such as this one might have both ideological and non-ideological components to it. CUNY might have felt that having Jeffries as chair threatened its ability to attract competent scholars of any ideological bent to the Black Studies department. Conversely, it might also have felt that Jeffries' comments were a sign of a type of "scholarship" that CUNY did not want to support by having Jeffries in the influential position of departmental chair.

201. This seems to be fairly close to the claim that CUNY actually made. *See supra* note 88 and accompanying text (noting that CUNY thought Jeffries might harm the university's reputation).

202. This is not meant to suggest that a university may automatically rid itself of any administrator who happens to be a professor whose views some find objectionable. The disruptiveness standard should not be simply a rubber stamp for government employers. In Jeffries' case, CUNY was in the position to argue that the extreme amount of negative publicity that Jeffries' comments caused did constitute an important interference with University operations as a whole. However, given that most employees of a university are not well-known to the public at large (with the possible exception of a few sports coaches), a university will most likely have a hard time claiming that ostensibly controversial comments made by a particular employee does much "external" damage. Similarly, a claim of "internal" damage caused by controversial comments may often be hard to sustain when the employee's comments are placed against the backdrop of intellectual cacophony that is commonplace in university communities.

203. Relying on the "disruptiveness" standard, as CUNY and the courts ultimately did, does not distinguish CUNY from other employers (such as the hospital in *Waters*) that might not have available claims to "institutional" academic freedom. While allowing CUNY to discipline a "disruptive" departmental chair implies some freedom to

IV. CONCLUSION

Ultimately, in ruling in favor of CUNY, the Second Circuit reached the correct result. The university acted within its legitimate bound of authority when it disciplined Professor Jeffries in his role as department chair. Unfortunately, the court reached the right outcome for the wrong reason. The court should not have focused on the supposed "disruptiveness" of Jeffries' anti-Semitic remarks, at least not initially. Instead, the court should have focused on the nature of the disciplinary action taken against Jeffries. If CUNY had sanctioned Jeffries in his professorial capacity, then the fact that Jeffries' speech was "disruptive" would not, standing alone, have been an acceptable defense. Professors need the freedom to be "disruptive" in order to perform their jobs properly. However, because the university acted against Jeffries in his administrative capacity, rather than in his professorial capacity, the university's actions did not implicate Jeffries' "professorial immunity." While this is not to say that public university administrators (or nurses at public hospitals, or assistant district attorneys) are completely without First Amendment protection, the lack of a similarly compelling reason for "administrative immunity" means that CUNY could properly take account of Jeffries' disruptiveness, or of other harm he was causing the university. As a result, administrator Jeffries did not have a valid claim.

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make judgments about "disruptiveness" by CUNY, the disruptiveness standard gives leeway to all public employers to make such judgments.