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A Struggle of Foreign Policy, State Power, and Academic Freedom: *Faculty Senate of Florida International University v. Florida*

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A STRUGGLE OF FOREIGN POLICY, STATE POWER, AND ACADEMIC FREEDOM: FACULTY SENATE OF FLORIDA INTERNATIONAL UNIVERSITY V. FLORIDA

Joy Blanchard∗

I. INTRODUCTION

> . . . It is highly needful, in the interest of society at large, that what purport to be the conclusions of men trained for, and dedicated to, the quest for truth, shall in fact be the conclusions of such men, and not echoes of the opinions of the lay public, or of the individuals who endow or manage universities.
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> –1915 Declaration of Principles on Academic Freedom and Academic Tenure[1]

Academic freedom, though one of the most venerated principles in academe,[2] is a somewhat amorphous notion[3]—particularly as the ways in which schools deliver knowledge,[4]

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[1] Edwin R. A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure*, BULL. AM. ASS'N U. PROFESSORS, Vol. 1, No. 1, at 15, 25 (Dec. 1915) *available at* http://www.jstor.org/stable/40216731 [hereinafter *1915 Declaration*].

[2] Courts often defer to the *de facto* rights granted by the American Association of University Professors through the organization's various statements on academic freedom, tenure, copyright, and collective bargaining. *See*, *e.g.*, Donna R. Euben, *De Facto Tenure (2005)*, AAUP (July 2005), http://www.aaup.org/issues/tenure//de-facto-tenure-2005.

[3] Whether academic freedom belongs to the faculty or institution is a continual debate. Also, whether it truly is a constitutional issue or simply *de facto* practice stemming from AAUP standards and policy statements is currently debated. *See, e.g.*, David M. Rabban, *Academic Freedom, Individual or Institutional?*, 87 ACADEME 16 (2001).

[4] Institutions such as Columbia University and New York University have spent millions in online education without success. Increasingly, universities are using online education as a tool to increase revenue from enrollment without having to increase infrastructure. *See* Michael W. Klein, *'The Equitable Rule': Copyright Ownership*

govern, and fund themselves[5] continually evolve. With the changing nature of academe, both institutional policy and jurisprudential thought have changed.

Since the McCarthy-era landmark cases of the 1950s,[6] faculty have won rights via broad interpretations of the Constitution and judicial deference to the notion of academic freedom. However, some of those rights won in court (e.g., the right to free speech as a private citizen or pundit[7]) as well as rights venerated in practice (e.g., ownership of course materials and copyrightable works[8]) have become blurred as the nature of academe, governance structures, and legal opinions have shifted. One controlling question today is whether academic freedom is a right of the faculty or of the institution.[9]

In Florida, interpretations of a controversial state law are an example in which the custom of free inquiry has been challenged. In 2006, then-Governor Jeb Bush signed into law what is commonly referred to as the Travel Act ("the Act"),[10] which prohibits the use of state funds to sponsor research or travel to countries designated by the U.S. Department of State

of Distance-Education Courses, 31 J.C. & U.L. 143, 174 (2004).

[5] State universities are receiving fewer funds from legislatures. Increasingly, universities are asked to become "privatized" and seek support through "soft money," such as grants, private donations, and commercialized inventions. *See, e.g.*, DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION (Harvard University Press 2004).

[6] *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485 (1952) (ruling that a New York statute that allowed public school teachers to be dismissed because of their affiliation with subversive organizations was constitutional); Sweezy v. N.H., 354 U.S. 234 (1957) (finding that the investigation of a professor's political associations was an unconstitutional invasion of privacy); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (overturning a state law requiring public university professors to sign affidavits that they were not members of the Communist Party).

[7] The line of cases regarding the free speech rights of public employees began with *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (establishing a three-prong test that grants more rights to employees the closer their speech is to a matter of public concern) and has been most recently decided by the U.S. Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that the closer the nexus of an employee's speech to the terms of employment, the less right to free speech he enjoys).

[8] There is a *de facto* "teacher exception" to the work for hire doctrine under the Copyright Act that grants faculty members rights to their class notes, courses, and creative works. *See generally* Joy Blanchard, *The Teacher Exception Under the Work for Hire Doctrine: Safeguard of Academic Freedom or Vehicle for Academic Free Enterprise?*, 35 INNOVATIVE HIGHER EDUC. 61 (2010).

[9] In 2000, the Fourth Circuit upheld a Virginia statute that prohibited professors from accessing sexually explicit materials on state-owned computers without prior consent, holding that any rights via academic freedom belonged to the university, not to the individual professors. *See* Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

[10] *See* Fla. Stat. §1011.90(6); Fla. Stat. §112.061(3)(e) (2011).

as sponsors of terrorism: Cuba, Iran, North Korea, Sudan and Syria. The language of the Act is so broad that it has been interpreted to prohibit research sponsored by federal grants or by funds from private donors because processing the awards and paperwork would involve state resources.[11] The Florida Travel Act compromises basic notions of academic freedom by taking academic decision-making ability from universities and giving it to the legislature.

This paper will examine the legal and historical antecedents of academic freedom, particularly the tradition held by courts to defer to institutions on academic decisions. The paper will then examine the case challenging Florida's Travel Act, discuss a 2013 ruling from the 11th Circuit that conflicts with the court's stance regarding the Act, and argue why this statute should have been stricken by the U.S. Supreme Court.

II. BACKGROUND ON ACADEMIC FREEDOM

"Academic freedom is conceived of as the price the public must pay in return for the social good of advancing knowledge."[12] However, well into the start of the 20th century, presidents of American universities dismissed faculty who held unpopular beliefs.[13] With the advent of modernism and advances in science, American academe finally began to embrace the notion of individuality in a quest for knowledge

[11] Faculty Senate of Fla. Int'l U. v. Winn, 616 F.3d 1206 (11th Cir. 2010).

[12] *See* Robert Post, *The Structure of Academic Freedom,* in ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 73 (Beshara Doumani ed., Zone Books 2006).

[13] During World War I, professors were often fired for pacifist views. *See, e.g.*, Rachel E Fugate, *Choppy Waters are Forecast for Academic Free Speech,* 26 FLA. ST. U.L. REV. 187, 189 (1998); R. Kenton Bird & Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus,* 7 COMM. L. & POL'Y 431, 447 (2002); Jennifer Elrod, *Academics, Public Employee Speech, and the Public University,* 22 BUFF. PUB. INTEREST L.J. 1, 14 (2003). At Stanford University, Mrs. Leland Stanford called for the dismissal of a professor who supported the free silver market and denounced Asian immigration in favor of Anglo-Saxon purity; this was a major impetus for the start of the American Association of University Professors. *See, e.g.*, Sonya G. Smith, *Cohen v. San Bernardino Valley College: The Scope of Academic Freedom Within the Context of Sexual Harassment Claims and In-Class Speech,* 25 J. OF C. & U L. 1 (1998). The first president of Harvard resigned over controversy surrounding infant baptism and antebellum professors were fired over their opinions of slavery. *See* TIMOTHY REESE CAIN, ESTABLISHING ACADEMIC FREEDOM: POLITICS, PRINCIPLES, AND THE DEVELOPMENT OF CORE VALUES 2, 4–7 (Palgrave Macmillan 2012).

and truth. Taken from the German concepts of *Lehrreiheit* (freedom to teach), *Lernfreiheit* (freedom to learn), and *Freiheit der Wissenschaft* (academic self-governance),[14] the 1915 Declaration of Principles on Academic Freedom and Academic Tenure issued by the American Association of University Professors (AAUP) has become a *de facto* creed within higher education.[15]

In 1952, the term "academic freedom" was first recognized by the U.S. Supreme Court in *Adler v. Board of Education*.[16] In their dissent, Justices Douglas and Black decried the New York public school loyalty oaths: "There can be no real academic freedom . . . . [W]here suspicion fills the air and holds scholars in line for fear of their jobs, there can be no free exercise of intellect. Supineness and dogmatism take the place of inquiry."[17] In 1957, in *Sweezy v. New Hampshire,*[18] the "four essential freedoms" of the academy were first set forth: who may teach, what will be taught, how it will be taught, and who will be admitted.[19] The Court famously stated

> [t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[20]

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[14] *See, e.g.*, Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 309 (2002). Academic self-government, *Freiheit der Wissenschaft,* was espoused to counter the threat of censorship. *See* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America,* 66 TEX. L. REV. 1265, 1270 (1988).

[15] The Statement analogizes federal judges and the President to faculty and trustees—and how the latter should not interfere with the work of the former. *See 1915 Declaration, supra* note 1. The AAUP softened its stance during World War I, as neutrality to global politics was the position of choice for the time. The nascent AAUP was tested at its core at a time when patriotism was at its highest. *See* Cain, *supra* note 13, at 51–73.

[16] 342 U.S. 485 (1952).

[17] *Id.* at 510.

[18] 354 U.S. 234 (1957).

[19] *Id.* at 263.

[20] *Id.* at 250. Arguably, even before *Sweezy,* institutional academic freedom was established when the U.S. Supreme Court did not allow state legislatures to revoke college charters. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 624–712 (1819), *cited in* Metzger, *supra* note 14, at 1315.

The *Sweezy* case as well as the landmark *Keyishian v. Board of Regents*[21] were among the first court decisions to introduce the notion that academic freedom was not just an individual right, but one of the institution.[22] Since then, courts have continued to recognize not just the need for faculty to be free to inquire, but also for the institution to pursue its mission absent of court and/or legislative interference. This notion was reinforced by Justice Powell's opinion in *Regents of the University of California v. Bakke*, arguing that there exists an institutional need "to be free from government interference in its core administrative activities."[23] In *Regents of University of Michigan v. Ewing*, citing *Sweezy*[24] and *Keyishian,*[25] the Court noted, "academic freedom thrives . . . on autonomous decision-making of the academy itself."[26] And in the seminal affirmative action case *Grutter v. Bollinger*, the Supreme Court reaffirmed the importance of academic deference, stating that universities "occupy a special niche in constitutional tradition"[27] and that they enjoy substantial "educational autonomy"[28] that requires deference to the decisions they make related to the mission of higher education.[29]

In 1999, the Fourth Circuit court recognized academic freedom as belonging to the institution—but to the detriment of scholarly freedom in research and teaching.[30] In *Urofsky v.*

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[21] 385 U.S. 589 (1967). In that opinion Justice Brennan wrote, "[o]ur [n]ation is deeply committed to safe-guarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Id* at 603.

[22] In *Griswold v. Connecticut*, a case regarding a constitutional right to privacy regarding contraceptive use, the Court stated, "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . .—indeed the freedom of the entire university community." 381 U.S. 479, 482 (1965), *cited in* William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty,* 404 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 140, 180 (1972).

[23] *See* J. Peter Byrne, *Academic Freedom: A 'Special Concern of the First Amendment',* 99 YALE L.J. 251, 257 (1989), (citing 438 U.S. 265 (1978)). That case upheld the state's program to diversify the student body in the UC Davis medical school.

[24] 354 U.S. 234 (1957).

[25] 385 U.S. 589 (1967).

[26] 474 U.S. 214, 226 n. 12 (1985).

[27] 539 U.S. 306, 330 (2003).

[28] *Id.* at 363.

[29] *See* Paul Horwitz*, Grutter's First Amendment*, 2004 U. OF SAN DIEGO SCH. OF L. PUB. L. & LEGAL THEORY RES. PAPER SERIES 1, 3 (2004).

[30] The rationale used by the court in this case will be used later in this paper to

Gilmore, six faculty members from various public institutions challenged a Virginia statute that prohibited the access of sexually-related material from state computers without obtaining prior approval.[31] The statute used the term "sexually explicit" to include non-obscene materials in the provisions.[32] The intent of the statute was to mitigate exposure to sexual harassment claims, but the court record showed no history of disruption to the efficiency of the workplace nor was any hostile work environment complaints filed.[33] Arguing that the statute violated First Amendment freedoms, the professors contended that the material accessed from the Internet was used in the scope of research.[34]

The court held that any constitutional rights of academic freedom belonged not to the professors but to the public universities where they were employed.[35] The court concluded that the expression was related to the scope of the employment,[36] was not a matter of public concern,[37] and that the Virginia statute was not overbroad.[38] The court reasoned that "the government is entitled to control the content of the speech because it has in a meaningful sense 'purchased' the

argue that the Florida Travel Act should be struck down.

[31] 216 F.3d 401 (4th Cir. 2000).

[32] *See* Kate Williams, *Loss of Academic Freedom on the Internet: The Fourth Circuit's Decision in Urofsky v. Gilmore,* 21 REV. LITIG. 493, 497 (2002). A professor who typically gave an assignment for students to evaluate the Communications Decency Act could no longer assign it to students because, under the statute, he could not view the materials his students were accessing. *Id.* at 499. One professor was studying Pulitzer Prize-winning Toni Morrison's "Beloved" but could not access information on the Internet without permission because the book discusses rape and sodomy. *Id.* at 512. According to Williams, the Act infringes on academic freedom by compelling the university to monitor otherwise legal uses of the Internet. *Id.* at 508.

[33] *See* David Hostetler, *The First Amendment in Cyberspace,* 1 PRINCIPAL LEADERSHIP 26 (2001); Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm,* 91 CALIF. L. REV. 1061 (2003).

[34] In his dissent, Justice Murnaghan noted that the Act only addressed online material. The intent was to head off sexual harassment lawsuits, but a professor would run afoul of the Act by researching Victorian poetry but not by leaving copies of Hustler Magazine around the office. *Id* at 440, *as cited in* Williams, *supra* note 32, at 523.

[35] *See* Lynch, *supra* note 33; Rabban, *supra* note 3.

[36] In *Garcetti v. Ceballos*, the Supreme Court upheld a similarly restrictive view of public employee free speech. *See* 547 U.S. 410 (2006).

[37] A previous line of Supreme Court cases recognizes a public employee's right to speak out on matters of public concern. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983); Waters v. Churchill, 511 U.S. 661 (1994).

[38] Urofsky v. Gilmore, 216 F.3d 401, 416 (4th Cir. 2000).

speech at issue through a grant of funding or payment of a salary."[39]

III. CHALLENGE TO THE FLORIDA TRAVEL ACT

Though the Fourth Circuit judges in the *Urofsky* case would not agree, the forefathers insisted that approval of governing bodies should not limit American academic freedom. Arthur Lovejoy, a professor at Johns Hopkins University who co-authored the AAUP's 1915 Declaration, said, "the distinctive social function of the scholar's trade can not be fulfilled if those who pay the piper are permitted to call the tune."[40] Professor William Van Alstyne, preeminent scholar in the field of academic freedom, argued in his seminal 1972 article that "[t]o condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigation or utterances . . . is to abridge his academic freedom."[41] The case in Florida involves precisely these ominous conditions. Prior to presenting arguments as to why the Travel Act is unconstitutional, a background of the litigation at hand is warranted.

In 2006, then-Governor Jeb Bush of Florida signed into law Fla. Stat. §1011.90 and §112.061, commonly referred to as the "Travel Act," which prohibits the use of state funds to countries designated by the U.S. Department of State as sponsors of terrorism[42]: Cuba, Iran, North Korea, Sudan and Syria. The

[39] *Id.* at 408.

[40] Arthur O. Lovejoy, *Professional Association or Trade Union?*, BULL. AM. ASS'N U. PROFESSORS, Vol. 24, No. 5, at 409, 414 (1938).

[41] William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, 404 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 147 (1972) *available at* http://scholarship.law.wm.edu/facpubs/792/.

[42] *See* FLA. STAT. § 1011.90 (2010) ("None of the state or nonstate funds made available to state universities may be used to implement, organize, direct, coordinate, or administer, or to support the implementation, organization, direction, coordination, or administration of, activities related to or involving travel to a terrorist state. For purposes of this section, 'terrorist state' is defined as any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism."); *See also* FLA. STAT. § 112.061 (2011) ("Travel expenses of public officers or employees for the purpose of implementing, organizing, directing, coordinating, or administering, or supporting the implementation, organization, direction, coordination, or administration of, activities related to or involving travel to a terrorist state shall not be allowed under any circumstances. For purposes of this section, 'terrorist state' is defined as any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism.").

Faculty Senate of Florida International University challenged the Act in light of important research-related relationships many of its faculty have with Cuba. The University claimed that the statute violated 42 U.S.C. §1983, the Supremacy Clause of the Constitution, the Foreign Commerce Clause of the Constitution, and First Amendment academic freedom, speech, and expressive conduct.[43] The plaintiffs argued that the Travel Act interferes with Presidential powers, granted by Congress, to sanction and control relationships with certain countries.[44] The state countered, arguing that academics and students are not wholly restricted from travelling to these countries, but must do so at their own expense.[45]

The Faculty Senate lost all claims in its first appearance in the U.S. District Court, but the judge left the issue unsettled as to how private funds and federal grants could fall within the Travel Act's restrictions.[46] When the case reappeared in U.S. District Court, the State of Florida stipulated that to apply the Act to federal grants and private funds was unconstitutional.[47] The court agreed and found that the ban on "nonstate" funds was a violation of federal government powers.[48] However, in August 2010, the Eleventh Circuit overturned the prior ruling, stating "the Act's brush with federal law and the foreign affairs of the United States is too indirect, minor, incidental, and peripheral to trigger the Supremacy Clause's—undoubted—overriding power"[49] and interpreting the Act to include restrictions not just on direct state appropriations but also on private donations and federal grants.[50]

[43] Faculty Senate of Fla. Int'l Univ. v. Winn, 477 F. Supp. 2d 1198, 1203 (S.D. Fla. 2007).

[44] *Id.* at 1204.

[45] *Id.*

[46] *Id.* at 1209 ("It is not clear how Florida is going to deal with those donors who might want their money back if the universities benefitting from their largesse are now required—as a result of the Travel Act—to put unwanted (or, from the donors' perspectives, prohibited) strings on the use of those donated funds. Given the somewhat puzzled looks of the defendants' counsel at oral arguments when I raised issues like this one, I doubt very much that Florida or the defendants have given these matters much thought.").

[47] Faculty Senate of Fla. Int'l Univ. v. Bd. of Governors, 574 F. Supp. 2d 1331, 1335 (S.D. Fla. 2008), *aff'd in part, rev'd in part sub nom.* Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010).

[48] Faculty Senate of Fla. Int'l Univ., 574 F. Supp. 2d at 1335.

[49] *Winn*, 616 F.3d at 1208.

[50] *Id.* (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000), in which the Supreme Court struck down a Massachusetts law regarding trade with

In their briefs to the court, the plaintiffs explained that the Travel Act has halted much of their research. Faculty are prohibited from applying for new grants and a significant amount of money has gone unspent from previously existing federal grants.[51] Lisandro Perez, professor of Sociology and Anthropology at FIU, is authorized by the United States to travel to Cuba for research.[52] He is founder and director of the Cuban Research Institute at FIU.[53] He has raised $1 million in private funds to award grants to faculty and students to travel for research.[54] Erik Camayd-Freixas of the Modern Languages Department was awarded such a grant but, because of the breadth of the Travel Act, cannot go because if FIU were to write a "letter of introduction" to initiate his research, it would involve state resources.[55]

Houman Sadri, associate professor of Political Science at the University of Central Florida, had a contract with Saqi Books to research Caspian politics; however, the work was stalled because of the Act. He claimed that he could not circumvent the regulations by accepting private funds because it would compromise his neutrality and safety while in Iran.[56] In another example, a professor hired by the University of Florida's Center for Latin American Studies declined the position and went to the University of Virginia instead because the Act would have prevented her from traveling for research.[57]

After the circuit court ruling, FIU clarified its academic policy to state that funding travel to terrorist countries is prohibited, "including FIU Foundation and Contract and Grant account."[58] Further, the University has stated that it cannot defend or be responsible for any accidents or incidents incurred while in those countries.[59] If sponsored grants included travel to terrorist countries, directions were given to contact Division

Burma as conflicting with federal policy).

[51] *Faculty Senate*, 574 F. Supp. 2d at 1339–40.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1341.

[56] *Id.* at 1340–41.

[57] *Id.* at 1341–42.

[58] Memoradum from Douglas Wartzok, Provost and Executive Vice President, to FIU Community (Nov. 17, 2010) (on file with author).

[59] *Id.*

of Research staff to "plan alternatives to satisfy the award."[60] And, finally, faculty were advised that if their students were conducting research that would involve travel to these countries "to find academically sound alternatives."[61] Otherwise, "the student may have to reorganize their [sic] project or start a new project, even if it will delay attainment of a degree."[62]

The American Civil Liberties Union (ACLU) filed a writ of *certiorari* to the U.S. Supreme Court in March 2011.[63] Regarding the petition, an ACLU representative stated

> [w]e're asking the Court to act because this law allows Florida to be the only state in the country with its own foreign policy which runs over, above, and contrary to the foreign policy of the United States. Having 50 individual states setting individual policies for travel, commerce, and communication with foreign nations is a clear violation of federal law not to mention foolish and dangerous.[64]

In response to the writ of *certiorari*, the National Foreign Trade Council (NFTC) filed an *amicus curiae* brief in favor of the University.[65] In it, the NFTC argued that the 11th Circuit panel's decision conflicted with the Supreme Court's ruling in *Crosby v. Nat'l Foreign Trade Council*[66] and further stated that the decision "undermines the President's ability to craft and fine-tune a uniform foreign policy on one of the most important international issues of our time: state sponsorship of terrorism."[67] The NFTC compared the FIU case to *Crosby* claiming that the state of Florida "burdens conduct"[68] that Congress chose not to infringe upon.[69]

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Petition for Writ of Certiorari, Faculty Senate of Fla. Int'l Univ. v. Fla., (2011) (No 10-1139), 2011 WL 970477.

[64] Press Release, ACLU of Fla., Florida Law Aimed at Banning Academic and Research Travel to Cuba (Mar. 14, 2011) *available at* http://aclufl.org/2011/03/14/aclu-of-florida-asks-u-s-supreme-court-to-hear-appeal-of-floridas-academic-research-travel-ban/.

[65] Brief for the NFTC as Amici Curiae Supporting Respondents, Faculty Senate of Fla. Int'l Univ. v. Fla., (2011) (No 10-1139).

[66] *Id.* at 3 (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)).

[67] *Id.*

[68] *Id.* at 9.

[69] The Eleventh Circuit distinguished Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000), and Am. Ins. Assoc. v. Garamendi, 539 U.S. 363 (2000), by noting

The NFTC's brief further argued that when a nation is under trade embargo "[i]t is the policy of the United States to sustain vigorous scientific enterprise through scholarly exchange."[70] The United States has specifically excluded any restrictions on academic travel to Cuba.[71] Therefore, the Florida Travel Act is attempting to supersede national policy regarding relations with Cuba and other countries.[72]

The office of the Solicitor General also filed an *amicus* brief.[73] The brief highlighted the current federal law that encourages foreign academic exchange: the U.S. Department of Education funds study abroad through Title VI of the Higher Education Act of 1965, the Mutual Education and Cultural Exchange Act of 1961, and the Fulbright-Hays programs (i.e. Doctoral Dissertation Research Abroad, Faculty Research Abroad, and Group Projects Abroad).[74] The brief recognized that the Travel Act prohibits faculty and students from receiving the grants that are directly distributed to the institution, thus interfering "with the accomplishment of federal objectives."[75]

Conversely, the brief filed on behalf of the State of Florida argued that, "[w]hile federal law may permit travel to terrorist states, and might even encourage academic travel, it cannot mandate the use of state resources to implement such a program."[76] Those in opposition of the Act are not arguing that Florida must fund such travel but should not serve to block alternative means, as the Act restricts the use of federal grants or private funds. In its brief, the State pointed out that faculty and students may travel to foreign countries as permitted by

that the Travel Act includes no explicit penalties for travel to those countries. *See* Michael John Garcia & Todd Garvey, *State and Local Economic Sanctions: Constitutional Issues,* Congressional Research Service 12 (2013) (citing Faculty Senate of Fla. Int'l U. v. Winn, 616 F.3d 1206 at 1209, 1211).

[70] Brief for the NFTC, *supra* note 62, at 9 (citing 50 U.S.C. app. § 2402(12) (2011)).

[71] *See* 31 C.F.R. § 515.565(a) (2011), *cited in* Brief for the NFTC, *supra* note 62, at 11. *See also* 31 C.F.R. § 515.565(d) (2011) (providing that American universities can open bank accounts in Cuba to fund incidentals related to academic travel).

[72] *See* Cuban Assets Control Regulations, 64 Fed. Reg. 25,808, 25,809 (May 13, 1999), *cited in* Brief for the NFTC, *supra* note 62, at 19.

[73] Brief for the United States as Amicus Curiae, Faculty Senate of Fla. Int'l Univ. v. Fla. (2012) (no. 10-1139).

[74] *Id.* at 13.

[75] *Id.* at 15.

[76] Brief in Opposition at 10, Faculty Senate of Fla. Int'l Univ. v. Fla. (2011) (No. 10-1139).

the federal government but must pay their own way. This is an incredibly dangerous supposition, as one can imagine many important advances in knowledge that would have never been discovered had this always been the status quo (e.g., space exploration and vaccines).

Ultimately, in July 2012, the U.S. Supreme Court denied the petitioners' request for *certiorari* review.[77] Though, as stated above, the Solicitor General disagreed with the standing interpretation of the Act, the office recommended that *certiorari* be denied because of a lack of practicality in the matter (i.e. the U.S. Department of Education had not funded academic travel to any of the restricted countries in ten years). The Solicitor General did, however, indicate that the court of appeals should further examine whether Florida may restrict disbursement of federal and private grants.[78]

IV. THE *ODEBRECHT* SPLIT

In May 2013, in *Odebrecht Construction Inc. v. Florida Dep't. of Transp.*,[79] the 11th Circuit struck down a Florida law that expressly addressed dealings with Cuba. In many ways this *en banc* decision by the court contradicted the panel's 2010 decision to uphold the Travel Act in the FIU case.[80] Though the court did not take the opportunity to strike down the Travel Act, if *Odebrecht* were to make its way to the U.S. Supreme Court, the Court could strike down both of the Florida laws that restrict dealings with Cuba.

The "Cuba Amendment"[81] prevents any company that does business in Cuba from bidding on Florida public contracts worth more than $1 million.[82] Odebrecht's Brazilian parent company has a set of foreign subsidiaries unrelated to the

[77] Faculty Senate of Fla. Int'l Univ. v. Fla., 133 S. Ct. 21 (2012).

[78] Brief for the United States as Amicus Curiae, *supra* note 70, at 26–30.

[79] Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268 (11th Cir. 2013).

[80] *See Id.* at 1268 (the 11th Circuit, in addressing its inconsistency with its panel ruling in Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010), noted that the panel "recognized that 'these traditional state concerns could be overridden' in the event of a clear conflict with federal law or policy" citing *Winn*, 616 F.3d at 1208. *See also Odebrecht,* 715 F.3d at 1287, (distinguishing the Cuba Amendment from the Travel Act because it did not penalize or prohibit travel to those countries.).

[81] Fla. Stat. § 287.135, *amended by* 2012 Fla. Laws 196, § 2.

[82] Fla. Stat. § 287.135. The statute also applies to any company related to a company that does business in Cuba. *See Odebrecht,* 715 F.3d at 1272.

company in Florida that does business in Cuba.[83] In 2012, a district court granted Odebrecht Construction a preliminary injunction to prohibit the Florida Department of Transportation from enforcing the Act.[84] In its ruling, the 11th Circuit agreed that the Cuba Amendment violates the Supremacy Clause under principles of "conflict preemption."[85] "The Cuba Amendment conflicts directly with the extensive and highly calibrated federal regime of sanctions against Cuba promulgated by the legislative and executive branches over almost fifty years."[86] The court went on to say that the "Amendment also overrides the nuances of the federal law and weakens the President's ability 'to speak for the Nation with on voice in dealing' with Cuba."[87]

The U.S. government's attention to policy with Cuba has been long standing. The Cuban Assets Control Regulations ("CACR") were first promulgated by the Treasury Department in 1963 and are still enforced.[88] The CACR does not have provisions to sanction an American company like Odebrecht for business conducted by a foreign parent company.[89] The 11th Circuit predicated most of its decision on the Supreme Court's *Crosby* case, noting the Cuba Amendment "sweeps more broadly"[90] than federal policy, has its own penalties that "go

[83] *Odebrecht*, 715 F.3d at 1273.

[84] Odebrecht Constr., Inc. v. Prasad, 876 F. Supp. 2d 1305 (S.D. Fla. 2012) aff'd sub nom. Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268 (11th Cir. 2013).

[85] *Odebrecht*, 715 F.3d 1268 at 1272. *See also id.* at 1275 ("The Supreme Court has instructed us that we may infer congressional intent to displace state law altogether 'from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'" citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 115 (1992)). Presidential power regarding setting similar foreign trade policy dates back to 1917 with the Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§1–6, 7–39, 41–44, *cited in Odebrecht,* 715 F.3d 1268 at 1275).

[86] *Odebrecht*, 715 F.3d 1268 at 1272.

[87] *Id.* at 1272, *citing* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000).

[88] *Id.* at 1275, *citing* 31 C.F.R. pt. 515.

[89] *Id.* at 1276 (*see also id.* at 1279 Canada and Brazil have complained to the United States about the trade effects of the Cuba Amendment) (*see also id.* at 1280 The European Union, Canada, Norway, Switzerland, and Singapore have expressed concern about the conflicts between the Cuba Amendment and the global Agreement on Government Procurement).

[90] *Id.* at 1281.

beyond federal sanctions,"[91] and strips the President of power granted him through Congress to establish policy with Cuba. "Federal policy towards Cuba is long-standing, it is nuanced, it is highly calibrated, and it is constantly being fine-tuned."[92]

Again, though the court failed to take opportunity to overturn the panel decision in the FIU case,[93] it noted the presidential policies, particularly of the Clinton and Obama administrations, to loosen travel sanctions with Cuba and, most recently with the Obama Administration, to allow institutions of higher education to travel there.[94] Florida's Travel Act flies in the face of those efforts.

V. THE CASE AGAINST FLORIDA

By rejecting the writ of *certiorari* and letting the 11th Circuit's ruling stand, the U.S. Supreme Court has allowed a dangerous precedent in the 11th Circuit that enables additional meddling in faculty-funded research. As educational institutions are increasingly commercialized and the notion of "academic capitalism"[95] adds pressure to scholars to produce knowledge that is a commodity, academic freedom may be further eroded by additional state regulations that affect academic funding.[96] The presence of the "piper" that Lovejoy warned about could loom more frequently and more ominously.[97]

The Travel Act should have been struck down—at least any interpretation that precludes the use of federal funding or private donations[98]—on the basis of institutional academic freedom. Section II highlights several precedents that establish academic freedom not just as a right of the faculty but also of

[91] *Id.*

[92] *Id.* at 1278.

[93] Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010).

[94] *Odebrecht*, 715 F.3d 1268 at 1284–1285.

[95] *See generally* SHEILA SLAUGHTER AND GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATES, AND HIGHER EDUCATION (The Johns Hopkins University Press 2004).

[96] In certain fields, academic agendas are influenced by the pressure to obtain grants and patents; the promotion and reward system is set up in such a way that many researchers are altering their research trajectory to secure extramural funding and conform to institutional pressure to be self-supported on "soft money."

[97] *See* Lovejoy, *supra* note 40.

[98] It would perhaps be difficult to argue legally that the state of Florida must fund travel to these terrorist countries.

the institution.[99] The spending restrictions[100] placed by the Travel Act interfere with the ability of Florida public colleges and universities' to administer their mission of teaching, service, and particularly research.[101]

> Academic freedom is a "freedom" [i.e. a liberty marked by the absence of restraints or threats against its exercise] rather than a "right" [i.e. an enforceable claim upon the assets of others] in the sense that it establishes an immunity from the power of others to use their authority to restrain its exercise without, however, necessarily commanding a right of institutional subsidy for every object of professional endeavor that might engage the interest of the individual professor . . . . [A]cademic freedom would be abridged were any form of sanction threatened against a faculty member because of any of his professional pursuits, even assuming that the individual's interest pertained to a subject that the institution declines itself to support and may thoroughly disapprove . . . . [T]he principle of academic freedom clearly condemns any act of institutional censure in respect to the professional endeavors of its faculty. [102]

The plaintiffs in this case are not individual faculty members, but the Faculty Senate of Florida International University—the concept of *Freiheit der Wissenschaft* (academic self-governance) advocates against legislative meddling in the affairs of the academy.

In addition to deference to academic decisions, courts continually have recognized a special protection for academic

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[99] *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (deciding whether the system to allocate student fees to campus organizations was viewpoint neutral Justice Souter said "[o]ur understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach." *Id.* at 237).

[100] Similarly, Minnesota levied an ink tax against newspapers and structured its exemption to target certain newspapers. The Supreme Court held that singling out the press in such a way violated the First Amendment (Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983)). In *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), the Court found that Section 399 of the Public Broadcasting Act of 1967 violated the First Amendment by directing its funding restrictions at a certain form of speech—editorialized speech.

[101] *See* Lynch, *supra* note 33, at 1082 (noting: "After finding that the academic speech lies within the state's managerial domain, a court should ask whether the restriction of the professor's speech is functionally necessary to accomplish the university's goals.").

[102] *See* Van Alstyne, *supra* note 22, at 147.

speech. In *Rust v. Sullivan*,[103] the U.S. Supreme Court ruled that the government may regulate and refuse to fund certain messages that it finds counter to its policy.[104] That ruling, however, carved out an exception for academic speech,[105] as faculty speech is not construed to be representative of the state[106] and, per *Keyishian;*[107] such restrictions are prohibited by the overbreadth[108] and vagueness doctrines of the First Amendment.[109] In *Stanford v. Sullivan*,[110] the Court concluded that attempts at censorship were precisely what *Rust* excluded.[111]

In *Board of Education v. Pico*,[112] the Supreme Court ruled that there is no protection for the official suppression of ideas, particularly when the intent of the suppression is premised on content. It does appear that the intent of the Act was for Florida to set its own foreign policy, particularly as it applies to Cuba. Court record includes a quote from the sponsoring legislator, who said that the Travel Act was "'designed to stop his constituents' tax money from underwriting Fidel Castro's regime.'"[113] This came following the arrest of two FIU professors on charges of espionage.[114] Reminiscent of McCarthy-era censorship and even post-September 11 fear,[115]

[103] Rust v. Sullivan, 500 U.S. 173, (1991).

[104] *Id.*

[105] *See* Randall P. Bezanson*, Institutional Speech*, 80 IOWA L. REV. 735, 752 (1995) (citing *Rust,* 500 U.S. at 200).

[106] *Id.* at 796.

[107] Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589 (1967).

[108] The Travel Act is overly broad and vague. Would a faculty member be in violation if she wrote a letter of recommendation for a student to study in Cuba? Such an activity involves a state employee's time and, hence, state funds.

[109] Court dicta from *Rust*, 500 U.S. 173 states "[t]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Id.* at 200.

[110] Bd. of Trs. of Leland Stanford Jr. Univ. v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991) (regarding confidentiality clause that researchers must get prior approval from the government and National Institutes of Health prior to publication).

[111] *Id.* at 478–79.

[112] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

[113] Faculty Senate of Florida Int'l Univ. v. Roberts, 574 F. Supp. 2d 1331, 1336 (S.D. Fla. 2008) aff'd in part, rev'd in part sub nom. Faculty Senate of Florida Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010) (citing Marc Caputo & Oscar Corral, *Law Bans Travel to "Terrorist States,"* The Miami Herald, May 31, 2006, DE 19 at 36).

[114] Faculty Senate of Florida Int'l Univ. v. Roberts, 574 F. Supp. 2d at 1337.

[115] The most notable post-September 11 case in academe was the dismissal and

to what extent does this purported concern for national security impede the freedom to pursue and disseminate knowledge?[116]

The *Pico* decision also focused on the students' right to receive information.[117] The right of students to receive information and be educated fully hinges on faculty's ability to exercise their right to free inquiry, as was reaffirmed in the AAUP's 1940 Statement on Academic Freedom and Tenure.[118]

In *Pickering v. Board of Education*,[119] a landmark case that laid the parameters by which public employees may enjoy free speech protection, the Court stated that the government must prove that a substantial disruption exists in order to suppress speech.[120] In 1994, the Court reaffirmed that stance in *Waters v. Churchill*, holding that a higher standard existed the closer the speech in question related to an issue of public concern.[121]

Most recently, the Court in *Garcetti v. Ceballos*[122] did seem to limit some of the earlier speech-related freedoms established for public employees, finding that "when public employees make statements pursuant to their official duties, the

subsequent arrest of Sami Al-Arian, professor at the University of South Florida, for suspected connections to terrorist organizations.

116 The plaintiffs elaborated in their briefs to the court that the Travel Act prohibits faculty from applying for new grants and a significant amount of money has gone unspent from previously existing federal grants. Faculty Senate of Florida Int'l Univ. v. Roberts, 574 F. Supp. 2d at 1349.

117 *Pico*, 457 U.S. at 867; *see also* Dana R. Wagner, *The First Amendment and the Right to Hear,* 108 YALE L. J. 669 (1998). Further, in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court noted that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Id*. at 251.

118 Am. Ass'n of Univ. Professors, *1940 Statement on Academic Freedom and Tenure*, BULL. AM. ASS'N U. PROFESSORS, Vol. 26, No. 1, at 49 (Feb. 1940) *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm (stating that "teachers are entitled to full freedom in research and in the publication of the results.").

119 Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968).

120 *See* Jeffrey S. Strauss, *Dangerous Thoughts?, Academic Freedom, Free Speech, and Censorship Revisited in a Post-September 11th America,* 15 WASH. U. J.L. & POL'Y 343, 356 (2004). The ruling in *Connick v. Myers*, 461 U.S. 138 (1983), also extended that standard.

121 Waters v. Churchill, 511 U.S. 661 (1994), *cited in* Fugate, *supra* note 13, at 211; in *Jeffries v. Harleston,* 21 F.3d 1238 (2nd Cir. 1994), the Jeffries II court made a distinction about speech made in higher education needing more protection. The Court ruled that the dismissal of the chair of the Black Studies department at City College of New York, because of comments he made criticizing the local public school district, was impermissible.

122 Garcetti v. Ceballos, 547 U.S. 410 (2006).

employees are not speaking as citizens for First Amendment purposes."[123] Though many in education worried about the repercussions of that decision, there arguably is an exception carved out for faculty speech. In 2011, the Fourth Circuit—the same court that decided *Urofsky*[124]—ruled in *Adams v. Trustees of UNC Wilmington*[125] that *Garcetti* was not intended to apply to universities.[126]

First Amendment jurisprudence requires that there be a compelling government interest if there is a restriction on speech.[127] What compelling interest exists in Florida to trump academic freedom? Are the restrictions being made on research in violation of the content neutrality standard?[128] Even though the Supreme Court has carved out caveats for academic speech, is the "speech" in faculty work "purchased" by the employer?[129] Because of the guidelines inherent in the tenure and promotion process, the ability to research freely is central to and a necessary part of faculty employment.

Another argument against the Travel Act would be the theory of unconstitutional conditions. The unconstitutional conditions doctrine, first introduced in *Lochner v. New York*,[130] "provides that the government may not base the granting of public monies or other benefits on conditional terms, including conditions which force someone accepting those terms to surrender a right or rights otherwise protected by the Constitution."[131] The Supreme Court has held before that just because state funds are involved, universities cannot restrict speech.[132]

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123 *Id.* at 421.

124 Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

125 Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011).

126 *Id.* at 563–64 (ruling in favor of a professor who had been denied promotion because of his unpopular activities as a Christian pundit).

127 *See* Strauss, *supra* note 117, at 347–48.

128 In the 1970s, the U.S. government funded research in countries in which we had hostile relations.

129 Courts have recognized a teacher exception to the work for hire doctrine of the Copyright Act. *See e.g.*, Williams v. Weisser, 273 Cal. App. 2d 726 (1969) (ruling that a faculty member had a right of ownership to course notes); Weinstein v. Univ. of Ill., 811 F.2d 1091 (7th Cir. 1987) (offering often used dicta against university efforts to exert ownership of faculty creations).

130 Lochner v. N.Y., 198 U.S. 45 (1905) *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

131 Byron V. Olsen, *Rust in the Laboratory; When Science is Censored,* 58 ALB. L. REV. 299, 330–31 (1994).

132 *E.g.*, Healy v. James, 408 U.S. 169 (1972) (regarding the university's uncon-

Funding faculty research in these restricted countries does not interfere with the business of the government; if anything the Travel Act interferes with the business of the government by reaching beyond federal policies and regulations as well as the last two presidential administrations' aims to foster educational exchange with Cuba and Iran.[133] The Eleventh Circuit in its opinion remarked that the Act does not preclude faculty from travelling to these countries, just that it cannot be done at the expense of the state. How dangerous is it to presume that research will continue, particularly as faculty salaries are being cut? The knowledge faculty and students will have of these countries will be incorrect and outdated.

VI. CONCLUSION

Just as the country was in fear during the McCarthy Era and Cold War, post-September 11 private citizens and public officials alike have allowed fear to play a part in their decision making process.[134] Since September 11, professors have been investigated for holding dangerous or unpopular political beliefs to appease trustees and financial constituents.[135]

Justice Thurgood Marshall warned, "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."[136] The AAUP in its 1915 Statement warned against politics dictating academic policy.

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stitutional denial of official recognition of the Students for a Democratic Society), *cited in* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L REV. 675, 691 (1992).

[133] In *Faculty Senate of Fla. Int'l Univ. v. Bd. of Governors*, 574 F. Supp. 2d 1331, 1353 n.33 (S.D. Fla. 2008), the court cited a speech in which then-President Bush encouraged educational exchange with Iran. *See also* Karin Fischer, *Obama Administration Eases Restrictions on Academic Travel to Cuba,* CHRON. HIGHER EDUC., Jan. 16, 2011, *available at* http://chronicle.com.

[134] In February 2004, the U.S. Treasury Department's Office of Foreign Assets Control declared that American presses could be fined up to $1 million and jailed for up to ten years for publishing works authored in nations under trade embargoes. Beshara Doumani, *Between Coercion and Privatization: Academic Freedom in the Twenty-First Century, in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, at 19 (Beshara Doumani ed., 2006).

[135] *Id.* at 29 (speaking of incidents at Columbia and NYU of professors being critical of Israel and being labeled anti-Semite).

[136] Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602 (1989), *cited in* Doug Rendleman, *Academic Freedom in Urofsky's Wake: Post September 11 Remarks on "Who Owns Academic Freedom,"* 59 WASH. & LEE L. REV. 361, 364 (2002).

> Where the university is dependent for funds upon legislative favor, it has sometimes happened that the conduct of the institution has been affected by political considerations; and where there is a definite governmental policy or a strong public feeling on economic, social, or political questions, the menace to academic freedom may consist in the repression of opinions that in the particular political situation are deemed ultra-conservative rather than ultra-radical.[137]

In the past few years, politicians have begun attacking the "ivy walls"—a move that has popular favor among voters suffering from the recession and unconvinced that higher education should serve as anything but a vocational training ground.[138] The U.S. Supreme Court's decision to let stand the ruling in *Faculty Senate of Florida International University v. Winn* opens the door legally for even more political attacks on academic freedom. According to Jacques Derrida, "in a war of propaganda, ideas are weapons. They need to be honed and applied in service to your agenda and denied to the 'enemy.'"[139]

In Florida, the legislative power is redefining the terms of "allowable discourse."[140] As noted scholar Edward Said warned, "[t]o make the practice of intellectual discourse dependent on conformity to a predetermined political ideology . . . is to nullify intellect altogether."[141] If courts continue to allow these public attacks on academic freedom, political ideology may begin dictating the intellectual agenda.

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[137] *See 1915 Declaration*, *supra* note 1, at 31.

[138] Some states, including Texas and Florida, considered eliminating tenure or linking promotion and merit to faculty evaluations and other tenuous criteria. A swell in anti-faculty union sentiment made headlines across several states in 2011, while voters saved the day by repealing a bill to eliminate bargaining units in Ohio. *See* Kaustuv Basu, *Solidarity in Ohio,* INSIDE HIGHER ED., Nov. 8, 2011, *available at* www.insidehighered.com.

[139] David Barnhizer*, A Chilling of Discourse*, 50 ST. LOUIS L. J. 361, 420 (2006).

[140] *Id.* at 421.

[141] *See* David M. Rabban, *Can Academic Freedom Survive Postmodernism?* 86 CALIF. L. REV. 1377, 1381 (1998) (quoting Edward Said, former professor and founder of post colonialism epistemology).