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The State as Donor: How Indiana Uses SEA 202 and HEA 1001 to Reshape Academic Freedom and Faculty Governance[1]

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Abstract

This essay discusses how the State of Indiana is reshaping academic freedom and tenure protection by the mandates enacted in Indiana's Senate Enrolled Act no. 202 (SEA 202) and House Enrolled Act no. 1001 (HEA 1001), which require post-tenure reviews, faculty discipline policies tied to the content of the professor's instruction, and oversight of university governance. HEA 1001 appropriates the state's biennial budget and mandates the university to create a mechanism for placing professors on probation, with possible termination, if they do not satisfy the mandates of SEA 202 or HEA 1001. These bills function to influence the university's internal governance. This essay evaluates how these mandates infringe upon constitutional rights and modify tenure, analyzing the bills' mandates in relation to the First and Fourteenth Amendments. The essay concludes that while many of the mandates are likely to satisfy judicial scrutiny, they redefine tenure and the nature of work in an academic setting.

State governments are using their role as donors and primary funders of state universities to exert power over professors and universities in a manner that erodes academic freedom and autonomy. States such as Indiana have enacted laws that assert control over faculty conduct and curriculum content, as well as weaken tenure protections, through legislation and the financial pressure created by the power imbalance between the donor-state and the donee-university.

The donor-state, functioning as a powerful benefactor, thus attaches politically motivated conditions to the funding it provides to universities. Indiana's Senate Enrolled Act no. 202 (SEA 202) and House Enrolled Act no. 1001 (HEA 1001) constitute one instance of the national pressure to exert control over universities, as seen in similar laws enacted in Florida and Texas and proposed in Ohio. This scenario is thus not unique to Indiana and is likely to affect many professors, who must clearly understand how their academic freedoms are shaped by the

[1] Disclaimer: This essay offers academic analysis for informational purposes only and should not be construed as legal advice. Readers should not act or refrain from acting based on the content of this essay without seeking appropriate legal counsel licensed to practice in their jurisdiction.

financial leverage states wield as dominant donors. Academics must know fully the legal issues surrounding these laws and mandates.

Indiana's SEA 202 mandates that Indiana public universities "adopt a policy that establish[es] disciplinary actions, including: termination; demotion; salary reduction; other disciplinary action as determined by the institution" when a "tenured faculty member has failed to" foster a culture of inquiry, free expression, and intellectual diversity within the institution; introduce students to scholarly works from a variety of political or ideological frameworks; refrain from subjecting students to views and opinions about matters not related to the faculty member's academic discipline; adequately perform academic duties and obligations; and meet any other criteria established by the board of trustees.[2]

HEA 1001 appropriates the state's biennial budget and asserts the state's control over Indiana public universities by mandating a state-approved post-tenure review process, requiring approval by the Indiana Commission for Higher Education to continue low-enrollment degree programs, shifting administrative control over scholarship programs from independent bodies to the state's Department of Education, repealing alumni elections for Indiana University's board of trustees, making faculty governance bodies merely advisory and requiring their meetings to be public, and compelling faculty to post syllabi online. Collectively, these stipulations diminish faculty-led governance while increasing legislative oversight of academic policy, personnel evaluation, and institutional autonomy.

HEA 1001 effectuates the ideological mandates of SEA 202 by tying the mandates to state appropriations. The act codifies the post-tenure review process, restricts the autonomy of faculty governance organizations, and increases the state's legislative oversight of university operations and curriculum. Effectively, this creates donor-style control over the university's operations.

While SEA 202 and HEA 1001 raise many issues, this essay focuses only on these questions, which I examine in detail in the four sections that follow:

1. Is the First Amendment violated by the SEA 202 directives that require faculty to introduce students to content that meet the bill's criteria or by the mandate that proscribes faculty members from subjecting students to views and opinions outside of the faculty member's academic discipline?
2. Is tenure transformed into at-will employment by the provision of the bill that empowers the university to terminate a faculty member based on not meeting "any other criteria established by the board of trustees?"
3. Does the provision of SEA 202 that mandates the university discipline faculty who do not promote "intellectual diversity" violate the Fourteenth Amendment for vagueness?
4. Do the provisions of SEA 202 and H.B. 1001 that mandate post-tenure reviews enable universities to retrospectively evaluate faculty performance?

[2] Indiana General Assembly, Senate Enrolled Act no. 202, pub. L. 113, chap. 2 § 2(a)–(d), 2024.

Do SEA 202 Directives Violate the First Amendment?

The Free Speech Clause of the US Constitution prohibits the government from enacting laws that regulate speech or expression because of its message, ideas, subject, or content unless the law satisfies strict scrutiny. A law that regulates speech based on its content is presumptively unconstitutional, unless the government demonstrates that the law is necessary to advance a compelling state interest and the government has implemented the least restrictive method available to effectuate that interest (*Reed v. Town of Gilbert* (576 U.S. 155, 163 (2015)); *Sable Commc'ns of Cal. v. FCC* (492 U.S. 115, 126 (1989)).

When SEA 202 mandates that professors "introduce students to scholarly works from a variety of political ideological frameworks" and "refrain from subjecting students to views and opinions not related to the faculty member's academic discipline," the state is imposing a content-based speech regulation because the first mandate compels the professor to affirmatively expose students to speech that satisfies the bill's stipulated criteria and the second mandate operates as a prior restraint that forbids the professor from engaging in discourse with students on matters the bill prohibits.

Because courts recognize that public universities serve a special function in providing for the discourse of societal issues, courts do not automatically apply First Amendment protection to all of a professor's speech. In determining the applicability of the First Amendment to professors' speech at public universities, the courts recognize that, as public employees, professors do not relinquish all their First Amendment rights by virtue of accepting public employment, while simultaneously recognizing that public universities have a legitimate interest in the proper operation of their workplaces (*Urofsky v. Gilmore* 2000; *Pickering v. Board of Educ.* (391 U.S. 563, 568 (1968)).

In 1968, the Supreme Court held that to determine if the First Amendment protects a public employee's speech, it is necessary to "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," and it provided a two-pronged test to aid in the analysis (*Pickering* 1968).

A public employee's speech is protected if the speech addresses a matter of public concern, as opposed to personal grievances or issues related solely to the individual's employment, and if the speech is of a public concern, then a balance of the employee's interest in commenting upon matters of public concern outweighs the interest of the state in promoting the efficiency of the public service the employer performs through its employees (*Pickering* 1968). A matter of public concern is one of "legitimate news interest"; it is determined as a matter of law by considering the "content, context, and form of the speech at issue in light of the entire record" and will often involve "an issue of social, political, or other interest to a community" (*City of San Diego v. Roe* (543 U.S. 77 (2004)); *Connick v. Myers* (461 U.S. 138 (1983)).

The Pickering Connick balancing analysis will consider if the speech "disrupted the workplace, undermined working relationships, or impaired the employee's performance or the performance of the public agency." If a professor's speech "is made in his capacity as a private citizen and does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection" (*Pickering* 1968).

Thus, under *Pickering*, the determinative factor in whether a university can regulate a professor's speech is the topic of the speech. If the professor makes in-class comments about societal issues and he speaks as a citizen, then the speech would likely not be subject to the university's regulations. However, the professor's right to First Amendment protection, even when speaking as a citizen on a matter of public concern, would be attenuated by the university's right to have the professor not disrupt the university's workplace or interfere with the university's ability to educate students.

In 2006, the Supreme Court handed down a different framework for determining the applicability of the First Amendment to public employees. Under the framework established in *Garcetti v. Ceballos* (547 U.S. 410, 421 (2006)), when "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Thus, under *Garcetti*, the content of the employee's speech is immaterial and when the employee speaks as part of their job, the content of their speech can be regulated by their employer because the employee's speech is deemed to be outside of the First Amendment's protection. Recognizing that professors' speech presents "additional constitutional interests" and that applying the rule laid out in the *Garcetti* opinion to an academic setting would effectively eliminate First Amendment protection from nearly all speech delivered by a public university professor, the court decided to not apply the analysis to cases involving speech related to scholarship or teaching.

When a state attempts to regulate a professor's speech related to teaching or scholarship, such as SEA 202 attempts to do, determining what is permissible under the US Constitution requires a fact-intensive First Amendment analysis using the legal frameworks we have already discussed. It is also worth noting that even when a professor's speech falls within the First Amendment's protection, it may still be regulated by the state if the policy satisfies strict scrutiny.

Let's briefly look at factual scenarios where state universities have enacted regulations or rules that regulate professors' speech. We will first look at cases where the university's regulations have been upheld as constitutional and then at scenarios that have been held to be unconstitutional. Along the way, we will discuss the rationale for the courts' decisions and how the decisions apply to broader scenarios. Ultimately, this will allow us to map out the contours that separate impermissible from permissible speech regulation by policies like those mandated by SEA 202.

Courts have consistently upheld universities' rights to manage curriculum and pedagogy, even when professors object. In *Edwards v. California University of Pennsylvania* (156 F.3d 488 (3d Cir. 1998)), *Bishop v. Aronov* (926 F.2d 1066 (11th Cir. (1991)), and *Brown v. Armenti* (247 F.3d 69 (3d Cir. (2001)), professors challenged content restrictions, religious speech bans, and grading interference. Courts ruled that these matters fall within a university's legitimate academic discretion, and the professors lost. In *Scallet v. Rosenblum* (911 F. Supp. 999, 1017 (W.D. Va. 1996)), even protected speech lost when it disrupted institutional operations.

While less common, courts have found First Amendment protection in the in-class speech of some professors. In *Hardy v. Jefferson Community College* (260 F.3d 671 (6th Cir. 2001)), an adjunct instructor sued Jefferson Community College, alleging that the college had violated his First Amendment rights when the college terminated him based on allegations that he had used oppressive and disparaging words in a class activity on social constructivism. He asked students to identify and discuss words that marginalize minorities and oppressed groups. Relying on the *Pickering* analysis, the court held that because the discussion initiated by the instructor implicated the "use of racial and gender epithets in an academic context, designed to analyze the impact of these words upon societal relations, [and] touched upon a matter of public concern," the instructor's participation in the discussion was protected by the First Amendment. Further, because there was no indication that the discussion had negatively impacted the college, the instructor's interest in participating in the discussion outweighed the college's interest in preventing the instructor from using the oppressive and disparaging words during the discussion. Thus the professor's use of the sexist and derogatory language was protected by the First Amendment. This case is significant because it highlights one scenario where even if a university insists that it has the right to regulate a faculty member's speech and expressive conduct, the First Amendment places the speech beyond the university's control.

Policies enacted by Indiana universities to comply with SEA 202 will need to comply with the legal framework developed by the Supreme Court, and professors operating within this environment will likely take an interest in learning about the contours that define acceptable conduct on their end and the contours that separate constitutional from unconstitutional regulation of speech.

Does the Bill Transform Tenure into At-Will Employment?

Tenure in Indiana is governed by policy and contractual rights created between the faculty member and their university. SEA 202 states that tenure is "a status of continuous employment granted to a faculty member of an institution in which the faculty member may not be dismissed except for good cause or in accordance with one or more of the following: (1) The policies and procedures adopted by the institution. (2) An employment agreement entered into between the institution and faculty member."[3] This functions to define tenure as an expectation of continual employment that is subject to the policies of the faculty member's institution.

Because SEA 202 references the policies and procedures adopted by the individual Indiana universities in its definition of tenure, faculty members' institutions govern the creation, extent, and termination of tenure rights that the universities extend to their faculty. The tenure policies of Purdue and Indiana Universities are illustrative, explicitly allowing trustees to revise terms

[3] Indiana General Assembly, Senate Enrolled Act no. 202, pub. L. 113, chap. 1 § 7, 2024.

and deny that tenure is a binding employment contract. These policies already give institutions authority to redefine tenure standards (Purdue University 1977; Indiana University 1968).

Because the rights created by these tenure policies do not arise from a contract, tenured faculty who try to assert contractual rights are likely to fail. Further, because the policies reserve to the university the power to modify the rights it has awarded to tenured faculty, universities can update their rules and performance expectations. Illustrative is Purdue's performance review policy, updated December 2, 2024, which states, "Performance reviews will be conducted in accordance with this standard . . . as *amended* or *superseded*" (Purdue University 2024; emphasis added).

While SEA 202 requires universities to implement post-tenure reviews that comply with the mandates of the university board of trustees, to whom the legislature has given tremendous discretionary powers to set forth evaluation criteria, with HEA 1001 the state has specified the minimum categories and criteria that universities must include in their post-tenure evaluation. In addition, the state has required that universities inform faculty who do not meet the standard on probation of the possibility of dismissal. Thus, under HEA 1001, the protections of tenure have been eroded by a state-imposed review process. However, the flexibility to modify the terms of the tenure policy, while seen by some as eroding the protections of tenure, does not transform tenure into an at-will employment relationship because in an at-will employment relationship the employer can terminate an employee at any time for any (legal) reason without notice.

Under the current policies, the board of trustees has the power to modify the terms that govern the tenure process, and violation of those policies can even lead to faculty discipline or termination. However, the power to modify the policies that govern tenure differs from the power to instantly terminate a faculty member with no due process.

The protections afforded by tenure are significantly less than many tenured professors believe. Tenured professors commonly believe that tenure vests in them a right to continual employment absent misconduct on their part and that those rights are guaranteed by law. This is not the case in Indiana. SEA 202 and HEA 1001 do not transform tenure into at-will employment because tenure rights at Indiana universities already provide the respective universities with the power to modify tenure policies and to discipline faculty. SEA 202 might serve to inform faculty of the precise rights that tenure affords them, which might lead faculty members to negotiate contractually for tenure protections that match their career goals or to seek employment at universities that offer tenure rights that match their expectations.

Does SEA 202 Violate the Fourteenth Amendment?

Under the Due Process Clause of the Fourteenth Amendment, the government cannot deprive a person of life, liberty, or property without due process of law. Tenure is a property interest because it is an entitlement to future employment. Termination of a professor's tenure requires compliance with due process.

To satisfy the procedural requirements for due process, a person must receive notice of the allegations against them and have an opportunity to refute those charges. In addition, the law must be written and communicated in a manner that a person of ordinary intelligence will know what is prohibited or expected, and should not be so standardless that it would enable enforcers of the law to apply the law in a discriminatory manner. A law "that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law" (*Connally v. General Const. Co.* (269 U.S. 385 (1926)).

In *San Filippo v. Bongiovanni* (961 F.2d 1125 (3d Cir. 1992)), a professor sued Rutgers University, asserting that the university had violated his due process rights when the university stripped him of tenure and terminated him based on regulations and procedures he claimed were vague. The professor hosted Chinese scholars and made them do his lawn, threatened them with deportation if they did not do domestic tasks around his house, fraudulently forced them to pay him personally for health insurance (which he did not provide), manipulated them into filing false expense reports in connection with a National Science Foundation grant, and provided a hospital with a false name when he took one of the scholars to the hospital for treatment for an accident the scholar sustained while doing the professor's yardwork, in order to charge the health insurance of another person.

The university dismissed the professor's claim based on a policy that stated that a faculty member could be discharged for "a failure to maintain standards of sound scholarship and competent teaching." The professor claimed the policy was impermissibly vague because a reasonable professor would not interpret "a failure to maintain standards of sound scholarship and competent teaching" to mean it was improper to perform the acts the professor had been accused of performing. The court held that the university's policies, while general in scope, were not impermissibly vague because they "were not so imprecise that a person of common intelligence could not understand that the charged conduct could lead to dismissal" *(San Filippo v. Bongiovanni* 1992).

SEA 202 states that a faculty member can be sanctioned (up to termination) if the faculty member fails to "foster a culture of inquiry, free expression, and intellectual diversity within the institution," which brings this provision of the statute within the Due Process Clause because failure to comply with this mandate can deprive a tenured faculty member of their entitlement to future employment. In order for this provision to not fail for vagueness, state universities need to implement provisions in such a way that professors of common intelligence at their institutions can objectively understand how to comply with the policy. Central to that outcome will be establishing definitions and procedures for reliably determining if a professor complies with the policy.

SEA 202 provides a starting point by stating that "'intellectual diversity' means multiple, divergent, and varied scholarly perspectives on an extensive range of public policy issues."[4] This

[4] Indiana General Assembly, Senate Enrolled Act no. 202, pub. L. 113, chap. 1 § 5, 2024.

definition is likely too subjective because it is foreseeable that additional criteria and guidance would be required for faculty to objectively determine when a professor's conduct complies with the mandate. Without an objective set of criteria, the mandate might likely be implemented in a way that is neither uniform nor reliable.

While SEA 202 and HEA 1001 mandate that faculty be evaluated based on specific criteria contained in the act, the act does not detail how that evaluation will be standardized across the university and also remains silent on the retrospective evaluation of faculty. The first issue, regarding the evaluation process, creates a problem because the subjective beliefs of the higher-rank professors doing the evaluation are likely to change based on who is in the position of evaluator. The second issue, regarding retrospective evaluation, is a problem because it is possible that the priorities set forth by an administration will change over time.

To satisfy the mandate, universities are likely to enact policies and procedures to implement the bill's directive. Purdue requires each academic unit, in collaboration with its dean's office, to develop a performance review procedure that includes assessing some mandates of SEA 202 (Purdue University 2024). Those procedures are then subject to review by the provost's office and must be placed in a location accessible to faculty members. This approach has the advantage of providing academic units with flexibility while benefiting from an administrative review process likely to ensure consistency across academic units. In addition, the process appears to satisfy the notice requirement of due process. A likely potential problem is that, with each unit tackling the subjective aspects of SEA 202, different academic units might create varying and subjective thresholds classifying conduct as violating the mandates of SEA 202.

In addition to the notice required to validly establish the policy, due process will also be required for professors deemed to be noncompliant. Because the outcome of being deemed to be noncompliant could be an adverse employment action, the university must provide adequate notice and an opportunity to refute the charges. Thus the intellectual diversity mandate of SEA 202 is likely to comply with the Due Process Clause if the university both communicates a certain and definite set of criteria that objectively define the required conduct for compliance and provides alleged violators with notice of any alleged violations and an opportunity to challenge those allegations.

Do SEA 202 and HEA 1001 Enable Universities to Retrospectively Evaluate Faculty Performance?

SEA 202 requires Indiana public universities to evaluate if tenured faculty members have "adequately performed academic duties and obligations," at a minimum every five years. Tenure is defined as "a status of continuous employment" that can be terminated in accordance with the policies and procedures adopted by the faculty members' universities. The universities' policies state that tenure is granted by policy and disclaim the creation of tenure contractual rights, that tenure is awarded based on the expectation of continual academic performance, and that the universities retain the right to modify the policies that govern the tenure policies (Indiana University 1968).

Courts have generally held that post-tenure review policies do not infringe on tenured faculty rights. In *Bernold v. Board of Governors of Univ. of N.C.* (683 S.E.2d 428, 200 N.C. App. 295 (2009)), a tenured professor was terminated by the University of North Carolina after the professor received unsatisfactory post-tenure reviews in 2002, 2003, and 2004. University policy authorized termination if a faculty member received unsatisfactory reviews in two consecutive years or any three out of five years. The professor sued the university asserting that his procedural due process rights had been violated because the university's policies for terminating a professor for cause stated that a tenured professor could be terminated "only on the basis of 'incompetence, neglect of duty, or misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty.'" The professor asserted that the university had terminated him not for being an incompetent scholar but instead based on "incompetence of service" and lack of collegiality. The court held that the professor's claims were without merit because the university's post-tenure review regulation specified that a professor could be terminated for receiving unsatisfactory reviews in two consecutive years and because of the university's determination that the professor's disruptive behavior violated the college's regulation requiring faculty members to work in a collegial manner (*Bernold v. Board of Governors*).

As *Bernold v. Board of Governors* illustrates, courts generally uphold terminations that result from post-tenure review policies. However, if a professor suffers harm as a result of being found deficient in a post-tenure review because the professor engaged in conduct encouraged by the prior administration, the professor may assert a claim based on equitable estoppel. Equitable estoppel prevents a party from reneging on promises when another has reasonably relied on those promises to their detriment. This dynamic may motivate faculty to learn more about their legal protections.

The post-tenure review process mandated by SEA 202 is unlikely to violate faculty rights. However, problems will likely arise if the expectations, regulations, and promises of previous university administrations are not considered in the tenure review process.

With SEA 202, the State of Indiana has codified the inherently flexible nature of tenure at its public universities, reaffirming that university boards of trustees have substantial discretion to set employment policies. By acting as a powerful donor, the state has imposed politically motivated expectations and mandates likely to be politically motivated and erosive of faculty freedom.

It is foreseeable that SEA 202's mandate, which requires faculty to introduce material to students that complies with the content directives of the bill and its provisions that require professors not to subject students to views and opinions the bill finds objectionable, will result in conflicts over the First Amendment rights of the affected faculty. In most cases, the policies enacted by the university are likely to be permissible, but because First Amendment rights are unalienable, the possibility exists that a university might, under the bill's mandate, regulate a faculty member’s speech in an impermissible manner. In addition, it is likely that implementation of the “intellectual diversity” directive will require careful drafting of policies to ensure compliance with procedural due process requirements, specifically for providing notice of the behavior necessary for compliance.

Because SEA 202 brings attention to the fact that “tenure” does not mean the same thing at all universities and in all states, it is foreseeable that faculty will now look beyond the “tenure” label and dive deeply into the protections of what rights are included in the “tenure” offered by the universities they pursue for employment. Negotiation of the rights in “tenure” might become common in employee contracts. Some faculty members might take a lower salary for stronger tenure terms or vice versa. Just as professors embraced computer literacy, legal literacy may become essential as states assert more ideological control over universities.

Finally, it is likely that the trend to impose control over universities using this donor-donee dynamic will expand to states beyond Indiana, Florida, Texas, and Ohio, where these laws have been enacted. Knowledge of the law is critical for academics seeking to preserve their rights in these scenarios.

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