

House Bill No. 2348

AN ACT concerning higher education; providing that tenure at postsecondary educational institutions shall not be defined, awarded or recognized as an entitlement, right or property interest in a faculty member's current, ongoing or future employment by an institution.

Requested by Representative Howe on behalf of Steven Lovett, an Individual

Written testimony by Steven Lovett, an Individual

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Property Rights in Employment

A property right can create an entitlement to future employment.

Property rights are not created by the U.S. Constitution. They are created exclusively by state law and state actions. Property rights "are defined by existing rules or understandings that stem from an independent source such as state law ..."¹

The existence of a property right in employment can include a property right created because of a particular employment status. "[I]f [a state] statute or regulation places substantive restrictions on the discretion to demote an employee, such as providing that discipline may only be imposed for cause, then a property interest is created."²

When a property right is created, courts determine if the right rises to the level of constitutional protection. If it does, the property right enjoys the protection of the Constitution's Due Process Clause. "[T]he Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures."³

Tenure Has Been Held to be a Property Right in the State of Kansas

*Kansas Board of Regents' (KBOR) policies created a property right in tenure by restricting the termination of a tenured faculty member to limited, "for cause" reasons.*⁴

On December 5, 2024, the Federal District Court for the State of Kansas entered an order finding that:

- Tenured university faculty are "entitled to continued employment as defined by Kansas law" because of "longstanding KBOR policy"; therefore,
- Tenured university faculty members possess "property rights in their continued employment"; and
- Those property rights invoke the U.S. Constitution's Due Process Clause.

¹ Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-539 (1985)

² Hennigh v. City of Shawnee, 155 F.3d 1249, 1254 (10th Cir. 1998)

³ Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)

⁴ See, Kansas Board of Regents' Policy Manual, Chapter II, Section C (Governance of State Universities – Chief Executive Officer, Faculty and Staff). Available at: https://kansasregents.gov/about/policies-by-laws-missions/board_policy_manual_2/chapter_ii_governance_state_universities_2.

These findings by the court rely on those KBOR policies which restrict the termination of a tenured faculty member only “for cause.” Unlike almost all other Kansas state employees, a tenured faculty member at a public institution can only be terminated for a limited number of reasons, such as being charged with a felony, being convicted of a felony, or because a university formally discontinues a program, or declares financial exigency.

What Does All of This Mean?

The property right of tenure obligates Kansans to a long-term (unfunded) fiscal liability.

Property rights in tenure mean that each individual tenured faculty member possesses an expectation of ongoing, future employment. Unless an unlikely “for cause” event occurs, the State of Kansas is, and will continue to be, required to provide payroll funding for all tenured faculty every year until a faculty member voluntarily resigns, retires, or dies.

How significant is this long-term liability?

For example, as of FY 2023, there were approximately 2,834 tenured, or tenure-track, faculty members employed by the six, 4-year educational institutions governed by KBOR. Assuming on average, each of those faculty members’ gross compensation is \$91,900 per year, the annual payroll liability for this unique employment status is \$206,444,600. Over a period of ten years, the liability would be \$2.6 billion.

While other state employees, including other faculty, can be terminated at the discretion of the hiring institution to accommodate such things as budget cuts, FTE reductions, or even programmatic changes, tenured faculty cannot be terminated except “for cause” and even then they must be provided sufficient due process, which costs more money, takes more time, and is likely to result in litigation.

The property right of tenure impedes, or restricts, needed change in Kansas higher education.

Short of restrictive “for cause” events, public universities are prohibited from making discretionary adjustments to this special group of employees, regardless of budgetary restrictions or the need for programmatic changes. Institutions that need to reduce FTE’s to increase efficiencies, or to respond to student interests or needs, or to adapt academic programs to market conditions or workforce needs, may do so, but not if any of those activities result in the termination of a tenured faculty member.

At a time when higher education is under intense financial, societal, and political pressures, and at a time when universities are more competitive than ever, trying to act upon operational, budgetary, and programmatic changes that will provide lower costs and better employment opportunities for students, sound fiscal restraint, responsiveness to economic and workforce conditions and needs, and better stewardship of physical assets, **public universities are encumbered financially and culturally by the unnecessary impediment of tenure as a property right**. Terminating a tenured faculty member, even for lawful reasons, has become nearly impossible.

The property right of tenure is not necessary to preserve and protect academic freedom.

What proponents of tenured property rights say.

One of the great fallacies obstructing change in higher education is that tenure—a *personal* guarantee of ongoing employment—is necessary to preserve and protect academic freedom. As a matter of law, however, **academic freedom is preserved and protected by the First Amendment, not by tenure or due process** procedures.

Academic freedom has been defined as “the freedom of a teacher or researcher in higher education to investigate and discuss the issues in his or her academic field, and to teach and publish findings without interference from administrators, boards of trustees, political figures, donors, or other entities.”⁵ Advocates for academic freedom point to faculty members’ need to freely discuss/teach and explore all “relevant matters in the classroom” and “all avenues of scholarship” without the fear of censure or discipline from their educational institutions.⁶ Additionally, it is argued that faculty members should be free to address “matters of institutional policy or action” and should be able to speak and write “as citizens” without fear of reprisal. Such advocacy posits that “academic freedom protects their right to criticize and oppose” their employing institutions. While these arguments underscore keys to a university’s free marketplace of ideas and inquiry, they misguidedly maintain that “tenure and appropriate due process” are the “two most essential protections for academic freedom[.]”⁷ **This belief—crucial to proponents of tenured property rights—is not supported by federal law.**⁸

⁵ Excerpted from American Association of University Professors’ website at: <https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom>.

⁶ Excerpted from American Association of University Professors’ website at: <https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom>.

⁷ Excerpted from American Association of University Professors’ website at: <https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom>.

⁸ Ironically, while tenure is a property right held by an individual and due process is only applied individually, advocates for tenure describe academic freedom as a “collective responsibility” and something that is

What the law actually says about protecting Academic Freedom.

The United States Supreme Court has held that academic freedom has “‘long ... been viewed as a special concern of the First Amendment.’”⁹ The **First Amendment, and not due process**, promotes “th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection.”¹⁰ The **constitutional rights to free speech and expression, as well as equal protection, are the “essential protections” for academic freedom—not tenure and due process.**

Public employees, such as faculty members, “do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.”¹¹ A faculty member’s First Amendment rights¹² are balanced against a university’s interest in “promoting the efficiency of the public services it performs through its employees.”¹³ Academic freedom does **not** mean “individual faculty members are free to teach or publish whatever they want without repercussions.”¹⁴ Academic freedom “means that faculty are free to engage in the professionally competent forms of inquiry and teaching that are necessary for the purposes of the university.”¹⁵

A non-tenured faculty member enjoys as much legal protection to pursue academic freedom as a tenured faculty member.

The hallmarks of academic freedom, such as “professionally competent forms of inquiry”¹⁶ in classroom instruction¹⁷ and scholarship, are matters of public concern. Those should then be balanced against a university’s interest in advancing higher education and sustaining its

“regulated by the collective[.]” See excerpts from American Association of University Professors’ website at: <https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom>.

⁹ Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 332 (2023) (citations omitted).

¹⁰ Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 332-333 (2023) (citations omitted).

¹¹ Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (citations omitted).

¹² See Sullivan v. Ohio State Univ., 2:23-cv-3174 (S. Dist. of Ohio, E.D.) (1/31/25) (applying the Supreme Court’s reasoning and analysis from Garcetti to classroom instruction).

¹³ Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (citations omitted).

¹⁴ Excerpted from American Association of University Professors’ website at: <https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom>.

¹⁵ Excerpted from American Association of University Professors’ website at: <https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom>.

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¹⁷ See Sullivan v. Ohio State Univ., 2:23-cv-3174 (S. Dist. of Ohio, E.D.) (1/31/25) (applying the Supreme Court’s reasoning and analysis from Garcetti to classroom instruction).

operations.¹⁸ The First Amendment protects classroom instruction, scholarship, research, and the professional competence of faculty members, not tenure or due process.

Currently, tenure provides an unnecessary shelter at great financial and operational cost to the State of Kansas.

Indeed, it appears obvious that tenure primarily results in nothing more than personal gain—a guarantee of one’s employment without any valid correlation to academic freedom.

What Needs to be Done?

The Kansas Legislature must abolish the property right of tenure.

House Bill 2348 eliminates the property right of tenure for faculty members employed by public universities in the State of Kansas. While tenure may continue to be awarded and may continue to provide unique employment status to tenured faculty, it can no longer be improperly used to restrain the necessary actions of a university and to unfairly burden Kansas taxpayers for selected individuals’ personal gain.

As the legislature is examining government inefficiencies and costs, while demanding fiscal accountability and the elimination of waste, it is time to address the long-standing myth about tenure. The taxpayers of Kansas, and the higher education system of Kansas, should no longer be burdened by the unnecessary expense or operational paralysis of any state employee’s “entitlement” to his or her job.

If the genuine concern is about academic freedom, then those who have tenure will support its abolishment as a property right.

If the genuine concern is about the financial health of Kansas, and the drain on taxpayers’ resources, then those who have tenure will support its abolishment as a property right.

If the genuine concern is about the affordability of higher education and the competitiveness of our educational institutions, then those who have tenure will support its abolishment as a property right.

If the genuine concern is about the quality and real-world impact of higher education’s academic programs, then those who have tenure will support its abolishment as a property right.

¹⁸ See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (citations omitted).