The Burger Court Opinion Writing Database

Regents of University of Michigan v. Ewing

474 U.S. 214 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 25, 1985

RE: No. 84-1273 - Regents of the Univ. of Mich v. Ewing

Dear John,

I join.

Regards,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 14, 1985

No. 84-1273

Regents of the University
of Michigan v. Ewing

Dear John,

I agree.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 15, 1985

Re: 84-1273 - Regents of the
University of Michigan v. Ewing

Dear John,

Please join me.

Sincerely yours,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 20, 1985

Re: No. 84-1273-Regents of University of Michigan v. Scott E. Ewing

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 19, 1985

Re: No. 84-1273, Regents of the University of Michigan v. Ewing

Dear John:

Please join me. I assume that you and Sandra can work out together the matters that are bothering her.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 26, 1985

84-1273 Regents of University of Michigan v. Ewing

Dear John:

I would like to join the second draft of your opinion as I think it is excellent, but I do have two concerns. I would not assume there is a substantive due process claim, and I will concur separately to repeat the view expressed at Conference. It seems to me the time has come for us to decide the issue that was avoided in Horowitz. I see no basis for holding that a student has the substantive due process right asserted in this case.

I write also about another point. Initially, this suit was against the Regents as a Board. Not until the petition for cert was granted was the complaint amended to join the Board members individually as defendants in their official capacities. The university did not oppose the motion, and your opinion grants it. See footnote 6, p. 7.

This troubles me for two reasons. I think the precedent of granting an amendment to a complaint after we have granted certiorari is one that may plague us. More fundamentally, I am not persuaded that all Eleventh Amendment issues in this case can be circumvented merely by a change in the description of the defendant. The relief sought can only be granted by the Board or an appropriate committee acting pursuant to Board authority. Respondent in effect seeks relief against the state. In addition, the relief sought is retroactive. Although respondent seeks an injunction that would allow him to retake the NBME, the true nature of his claim is a remedy for an alleged past violation of federal law. Respondent makes no valid argument that the violation is ongoing. Thus, his claim falls somewhere in between Ex Parte Young and Edelman, closer, I think to Edelman. The problem is that this relief may be foreclosed by the Eleventh Amendment. I do not think the Court has answered the question here presented in any prior case.

On the facts of this case, we do not need to reach the issue because the Regents have waived their Eleventh Amendment defense. Your footnote 7 mentions this waiver with respect to the technical pleading issue, and concludes

that amendment of the pleadings cured "any potential Eleventh Amendment problems." It would seem more appropriate to reserve judgment on the two Eleventh Amendment problems in this case by expressly basing footnote 7 on the Regents' waiver, and by stating that therefore we do not reach the merits of the Eleventh Amendment issues.

It seems inappropriate to decide an issue that is not necessary to the decision of this case, and indeed has not been argued. I am afraid that your note 6, p. 7, will be read as such a decision.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

December 4, 1985

84-1273 Regents, University of Michigan v. Ewing

Dear John:

In accord with our telephone talk, I suggest the following changes: Amend the last sentence of footnote 6 to read as follows:

> "We consequently grant the motion, thereby allowing Ewing to name as defendants the individual members of the Board of Regents in their official capacities. See Patsy v. Florida Board of Regents, ..."

In addition, add a sentence at the end of the footnote that reads:

> "Given our resolution of the case, we need not consider the question whether the relief sought by Ewing would be available under Eleventh Amendment principles."

As the Eleventh Amendment issue concerning the propriety of the relief sought was not clearly raised below and not argued here, it seems appropriate to make clear we need not reach it.

I appreciate your willingness to consider my suggestions.

Sincerely,

Justice Stevens

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: DEC 5 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN,
PETITIONER *v.* SCOTT E. EWING

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

[December ——, 1985]

JUSTICE POWELL, concurring.

Although I join the Court's opinion holding that respondent presents no violation of the substantive due process right that he asserts, I think it unnecessary to assume the existence of such a right on the facts of this case. Respondent alleges that he had a property interest in his continued enrollment in the University's Inteflex program, and that his dismissal was arbitrary and capricious. The dismissal allegedly violated his substantive due process rights guaranteed by the Fourteenth Amendment, providing the basis for his claim under 42 U. S. C. § 1983.

I

As the Court correctly points out, respondent's claim to a property right is dubious at best. *Ante*, at ——, n. 7. Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972), substantive due process rights are created only by the Constitution.

The history of substantive due process "counsels caution and restraint." *Moore* v. *City of East Cleveland*, 431 U. S. 494, 502 (1976) (opinion of POWELL, J., for a plurality). The determination that a substantive due process right exists is a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 19, 1985

Re: No. 84-1273 University of Michigan v. Ewing

Dear John,

I pretty much agree with the observations made by Sandra in her letter of November 15th. I agree with most of your statements as to the law, but like her, I fear that lower courts when they see the detailed discussion of Ewing's academic career might conclude that if he had not been quite such a miserable candidate, the result would have come out differently. I am sure you don't intend this, but I think the extent of the discussion of the facts in the analytical part of the opinion permits such an inference.

Sincerely,

WHR

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 25, 1985

Re: No. 84-1273 Regents of the University of Michigan v. Ewing

Dear John,

Please join me.

Sincerely,

Justice Stevens

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: NOV 14 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN, PETITIONER *v.* SCOTT E. EWING

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

[November ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

Respondent Scott Ewing was dismissed from the University of Michigan after failing an important written examination. The question presented is whether the University's action deprived Ewing of property without due process of law because its refusal to allow him to retake the examination was an arbitrary departure from the University's past practice. The Court of Appeals held that his constitutional rights were violated. We disagree.

I

In the fall of 1975 Ewing enrolled in a special six-year program of study, known as "Inteflex," offered jointly by the undergraduate college and the medical school.[1] An undergraduate degree and a medical degree are awarded upon successful completion of the program. In order to qualify for the final two years of the Inteflex program, which consist of clinical training at hospitals affiliated with the University, the student must successfully complete four years of study including both pre-medical courses and courses in the basic medical sciences. The student must also pass the "NBME Part I"—a two-day written test administered by the National Board of Medical Examiners.

[1] The Inteflex program has since been lengthened to seven years.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 19, 1985

Re: 84-1273 - Regents of the University of Michigan v. Ewing

Dear Sandra:

Thank you for your letter. I believe the revised draft that I have just sent to the printer will satisfy your concerns. If not, please let me know.

Respectfully,

Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3, 6-7, 13-14

From: **Justice Stevens**

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN,
PETITIONER *v.* SCOTT E. EWING

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

[November ——, 1985]

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[1] The Inteflex program has since been lengthened to seven years.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

P.S.

From: **Justice Stevens**

Circulated: _____

Recirculated: DEC 5 19

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN, PETITIONER *v.* SCOTT E. EWING

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

[December ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

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I

In the fall of 1975 Ewing enrolled in a special 6-year program of study, known as "Inteflex," offered jointly by the undergraduate college and the medical school.[1] An undergraduate degree and a medical degree are awarded upon successful completion of the program. In order to qualify for the final two years of the Inteflex program, which consist of clinical training at hospitals affiliated with the University, the student must successfully complete four years of study including both premedical courses and courses in the basic medical sciences. The student must also pass the "NBME Part I"—a 2-day written test administered by the National Board of Medical Examiners.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 11, 1985

MEMORANDUM TO THE CONFERENCE

Re: No. 85-5372 - Levitt v. Monroe, held for No. 84-1273, Regents, Univ. of Michigan v. Ewing

Petitioner in the held case was a professor at the University of Texas at El Paso. A committee dismissed him from that position for making unwanted sexual advances on four female students, and that action was upheld by the federal District Court and by the Fifth Circuit. The seven questions in the petition assert two claims under the Due Process Clause: first, that the committee's appearance of bias violated due process, and second, that the University's failure to follow the procedures recommended by the University's Committee on Academic Rights, Privileges and Ethics (CARPE) violated due process. The two claims are related because a tribunal convened under the CARPE rules would have lacked the appearance of bias.

The University's four-day hearing with live testimony and cross-examination before an unbiased committee more than satisfied the Due Process Clause. Cf. Cleveland Board of Education v. Loudermill, ___ U.S. ___ (1985). In addition, petitioner identifies no precedent of this Court that requires a tribunal such as this one to be impartial in appearance as well as in fact.

Finally, although petitioner raises a claim similar to Ewing's--i.e., that the University failed to adhere to its own procedural regulations (the CARPE rules)--the Court of Appeals' disposition is consistent with Ewing inasmuch as it rejected petitioner's "claim that a state's failure to follow

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 15, 1985

Re: 84-1273 University of Michigan v. Ewing

Dear John,

I have a few problems with the draft opinion in Ewing. I find most troubling the discussion on pages 11-14. At the outset, the draft appears to adopt the Youngberg v. Romeo, 457 U.S. 307 (1982) standard and to reject an arbitrary and capricious standard by quoting from Byron's dissent in Moore v. East Cleveland, 431 U.S. 494 (1977). But it appears that the standard actually applied in the subsequent analysis is an "arbitrary and capricious" one. I am concerned that the application of this analysis may send the wrong signal to lower courts.

Would it not be wiser to state simply that in view of the extensive procedural protections provided Ewing, the lack of any allegations of improper motive or bias, and the state of Ewing's record, the presumption of correctness accorded to professional decisionmaking prevails here? My fear is that despite all the cautionary language in the opinion, lower courts may construe the extended discussion of Ewing's academic performance and the possible reasons for his dismissal as a directive to conduct a more intrusive inquiry into the basis of the academic decision than is truly contemplated under the Youngberg standard.

I also have difficulty with the discussion in footnote 5, as I am not at all sure that it is correct to take the Sixth Circuit to task for deciding the constitutional §1983 claim before the state law claims. As I understand your analysis, the state and federal claims may be treated as legally distinct; thus, deciding the state law claims first would not necessarily have obviated the need to reach the constitutional claim. Moreover, if the federal constitutional claim were denied initially, the federal court would then have been able to

dismiss, without deciding, the pendent state claims. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). It would seem that instead of breaching the Aswander principle, the court below may have chosen the correct method of attack. Would you be willing to just omit the discussion of this point entirely?

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 20, 1985

Re: 84-1273 Regents of the University of Michigan
v. Ewing

Dear John,

Please join me in your second draft which accommodates, at least partially, my concerns. I, for one, appreciate your efforts to indicate more clearly the deferential standard to be applied.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference