10-1985

Regents of the University of Michigan v. Ewing

Lewis F. Powell Jr.

PRELIMINARY MEMORANDUM

March 22, 1985 Conference
List 1, Sheet 3

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN	Cert to CA6 (Keith, Peck, Neese [SDJ])	
v.		
EWING (dismissed medical student)	Federal/Civil	Timely

SUMMARY: Petr contends that the CA6 erred in holding that resp's substantive due process rights were violated when he was dismissed from the University's medical school because of poor academic performance.

FACTS AND PROCEEDINGS BELOW: In 1975, resp entered the Interflex program at the Medical School of the University of Michigan. Under this program, recent high-school graduates may obtain a M.D. degree in only 6 years. Resp's performance at the school was characterized by repeated shortcomings and academic deficiencies. For instance, he required 6 years to complete the course work that is usually performed in 4. Three times resp was placed on academic probabation and warned that further problems could cause his dismissal.

While on probabtion in June 1981, resp sat for Part I of a standardized test written by the National Board of Medical Examiners (NBME Part I). This two-day test covers basic science and includes questions on anatomy, biochemistry, microbiology, and the like. A medical student must pass this exam before he is allowed to enter the clinical phase of his education.

Resp failed 5 of the 7 subjects on the test. His total score was 235, well below the minimum passing grade of 345. It seems that the national mean is 500 and resp's score of 235 was "the lowest score ever recorded by a University of Michigan student." DC Opin., Pet. for Cert. 15a.

Pursuant to ususal practice, resp's failure on the NBME Part I was brought before the Interflex Promotion and Review Board, a committee of 15 faculty members and course directors who pass upon a student's qualifications. The board, after reviewing resp's academic history, voted unanimously to drop resp from the program. Resp petitioned the board to reconsider, and thus a hearing was scheduled for July 31, 1981. Resp explained that personal

problems, such as a lack of maturity, led to his academic difficulties. The board considered resp's explanations and voted unanimously to affirm its earlier decision. And the Medical School's 6-member Executive Committee, after holding another hearing, unanimously affirmed resp's dismissal.

Resp then filed a 4-count complaint in federal court (E.D. Mich; J. Feikens). He alleged that he had been dismissed from the Medical School in violation of his right to substantive due process, which is actionable under 42 U.S.C. §1983. He also asserted breach of contract and promissory estoppel claims. After a bench trial, the DC ruled against resp on all counts. The DC found that the decision to dismiss resp was based on academic grounds, and was "not influenced by ill will or ulterior purposes." Pet. for Cert. 25a. The court held, therefore, that resp's dismissal was "in accord with substantive due process." Id.[1]

The CA6 reversed. The court began from a procedural due process perspective and noted that resp had a "property interest" in not being arbitrarily dismissed from the medical school. The court then considered substantive contraints on public schools and cited Stevens v. Hunt, 646 F.2d 1168 (CA6 1981) for the proposition that a student at a public institution has a substantive constitutional right (due process) not to be dismissed arbitrarily or capriciously.

Applying this rule of constitutional law, the court noted the

---

[1]The DC also ruled against resp on his state-law claims.

consistent practice of the University of Michigan to allow medical students two chances to pass the NBME Part I. Between 1975 and 1982, 40 medical students failed the exam and every one of these students, except resp, was given a second chance. Accordingly, "the action of the University of Michigan was arbitrary and capricious and must be reversed." Pet. for Cert. 33a. As a remedy, the CA6 ordered the University to allow resp to retake the test; because only current students may sit for the exam, this means that resp must be readmitted. And the CA6 also directed the DC to order the University to allow resp to continue in the Interflex program if he passes the test.

CONTENTIONS: Petr first maintains that the Eleventh Amendment bars the CA6's remedy. Petr is a state agency (i.e., the State) and Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984), teaches that "a suit against a State is barred regardless of whether it seeks damages or injunctive relief." Id., at 909. The exception of Ex parte Young, 209 U.S. 123 (1908), which allows injunctive suits for unconstitutional acts, does not apply because resp's complaint did not list individuals as defendants.

Petr primarily seeks review of the CA6's decision that the Constitution creates substantive limits on a medical school's decision to dismiss a student on academic grounds. Petr quotes from Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), where the Court noted that "a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or

capricious.'" Id., at 91 (citing cases). The Court neither accepted nor repudiated those decisions, and since then the lower courts have acted aimlessly. Two district courts have declined to perform substantive judicial review. See Lavish v. Kountze, 472 F. Supp. 868, 872 (D. Mass. 1979) ("judicial intrusion into ... academic area is not warranted"); Hubbard v. John Tyler Community College, 455 F. Supp. 753, 756 ("substantive due process right does not involve a review of academic decisions"); contra Bleicker v. Board of Trustees of the Ohio State University, 485 F. Supp. 1381, 1387 (S.D. Ohio 1980) (Horowitz approved lower court dicta that academic dismissals may be enjoined upon showing that they are arbitrary and capricious). In Hines v. Rinker, 667 F.2d 699 (1981), the Eighth Circuit avoided the question by holding that, regardless whether such judicial review is mandated, no arbitrary or capricious conduct was demonstrated. And the CA6 stands alone in ordering a university to readmit someone who was dismissed on academic grounds.

As one might expect, petr also challenges the wisdom of judges making decisions about who is qualified to remain in medical school. According to petr, the CA6 "did not even allude to the unanimous decisions of those best trained and qualified to assess resp's qualifications, or to the numerous academic factors on which their decision to dismiss was based." Pet. for Cert. 22.

Resp notes that Pennhurst does not preclude injunctive relief against state officials who violate federal law. Perhaps resp should have named the individual members of the Board of Regents; however, as the Court held recently in Brandon v. Holt, (Jan. 21,

1985), this pleading defect may be remedied under Fed. R. Civ. P. 15. In any event, resp has waived this argument. For example, in its Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction, petr stated that "the only relief which plaintiff can obtain if he is successful is equitable."

Resp asserts that there is no conflict in the circuits over the question whether an arbitrary and capricious dismissal violates the Constitution; no circuit has declined to afford such limited judicial review. Morevoer, the "arbitrary and capricious" standard is appropriately deferential, but any less stringent rule "would place school officials beyond the law's reach." Br. in Opp. 23. And applying this standard here, the CA6 did not err; since 1975 resp is the only Michigan student not allowed a second chance to pass the NMBE Part I.

DISCUSSION: In light of *Ex parte Young*, Brandon v. Holt, and petr's concessions that equitable relief was available, petr's Eleventh Amendment claim should not interest the Court. However, petr's other question -- whether the Due Process Clause imposes substantive constraints on a public school's decision to dismiss a student for academic reasons -- is substantial.[2]

To be sure, petr has not identified a clear circuit conflict. But as noted above, several district courts have rejected invitations to decide whether a student's dismissal for poor

---

[2]This case does not concern a dismissal based on racial or some other impermissible ground. It only raises the issue whether a decision motivated by academic reasons is unconstitutional if arbitrary or capricious.

academic performance was justified. And circuit courts have declined to review substantively a public school's decision not to award tenure. See, e.g., Clark v. Whiting, 607 F.2d 634, 640 (CA4 1979). Thus, although there is no sharp conflict, the CA6's decision does seem out of step.

On the merits, the CA6's judgment is very hard to defend. The Court in Horowitz left open the substantive due process question, but did not hide its view. The Court remarked:

> "Courts are particularly ill-equipped to evaluate academic performance. The factors discussed [above] with respect to procedural due process speak a fortiori here and warn against any such judicial intrusion into academic decisionmaking." 435 U.S., at 92 (emphasis added).

Without any textual base, however, the CA6 read an Administrative Procedure Act into the 14th Amendment. And public universities in the Sixth Circuit must now be prepared to satisfy federal judges that their academic dismissals are justified. The questionable importance of this case makes it a close call, but I recommend a "grant."

There is a response.

March 9, 1985 Martin (CJ) Opn in petn

March 22, 1985

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 84-1273

REGENTS, UNIVERSITY OF MICHIGAN

vs.

EWING

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.	Grant & reverse												
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.													
Rehnquist, J.		✓											
Stevens, J.	Summ. reverse		✓										
O'Connor, J.		✓											

File copy

LFP/djb 8/21/85

No. 84-1273, Regents of the University of Michigan v. Ewing (CA 6)

Memorandum to File:

This is a case of vast importance to the institutions of higher learning of our country. It can be argued also that the case is important to students who may have cause for believing that their dismissal from a college or university was arbitrary and capricious.

The facts are summarized in detail in the brief of the University of Michigan (the University), as well as the opinions of the courts below and other briefs. The SG has filed an amicus brief urging reversal of CA 6, and I think its factual summary is entirely adequate.

Respondent is a former student at the University who alleges that his dismissal for substandard academic performance violated substantive due process. The University has a special "Inteflex" six-year program that combines both undergraduate and medical courses in a rigorous six-year curriculum. Respondent enrolled in this program in the fall of 1975. Inteflex students, since they are in this special course, are graded and evaluated separately from students who take other types of programs in the Medical School - including the standard four-year MD program. The Inteflex program consists of three two-year phases, each of which a student must complete satisfactorily before being allowed

to move to the next phase and to graduate. Respondent was in trouble his first semester, and continued to be in trouble until finally he was dismissed. See the briefs for details. As a result of various deficiencies, and of leaving the University for a period, he finally concluded the first two phases (normally done in four years) in six years. Before the University permitted students in this program to begin the final two-year clinical phase, the student is required to pass Part I of the National Board of Medical Examiners Test, a two day multiple choice examination. Respondent not only flunked this test; he received the lowest score ever recorded by a University of Michigan student.

The Medical School's Promotion and Review Board voted unanimously to dismiss respondent from the program. After granting respondent's request for reconsideration, the Board held a hearing, heard respondent's various reasons for his poor performance (See n. 2, p. 3 of the SG's brief), the Board again voted unanimously to dismiss him. In the course of this hearing, respondent admitted that he had received and understood a letter advising him that he was on probation and could be dismissed for further deficiencies. Respondent next appealed to the medical school's Executive Committee. After meeting with respondent, that committee also unanimously affirmed his dismissal. Respondent then filed this suit in the DC seeking injunctive relief and

damages under §1983. He also alleged a state law breach of contract and promissory estoppel claims. Respondent did not claim that he had been denied procedural due process. Rather, he alleged that he had a "property interest" in his status as a medical school student, and had been denied substantive due process in an arbitrary and capricious manner when he was not permitted to retake the exam he flunked so badly. He attached primary ~~support on~~ significance to the conceded fact that the University had allowed every other student - a total of 40 - who had failed this test to take it again.

After a four day bench trial, the DC ruled against respondent on all counts. It noted that in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, this Court had left open the question "whether courts can review academic qualification decisions on substantive due process grounds". The DC concluded that academic dismissals are not subject to substantive due process review. The DC noted the statement in Horowitz that judges are "ill-equipped to evaluate academic performance." Id. at 92. The DC also dismissed respondent's breach of contract and promissory estoppel claims, finding no factual basis for either one.

The Court of Appeals reversed. It relied to some extent on Roth and Sindermann although these cases involved procedural due process only. Relying on a Michigan decision in 1909, CA 6

concluded that under state law "an implied understanding that a student shall not be arbitrarily dismissed from his University is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections." Finally, CA 6 concluded that the University acted "in an arbitrary and capricious manner by not allowing respondent a second opportunity" to take the NBME test.

The University's Arguments

Its first argument is that a suit against the Regents of the University of Michigan is against the state itself, and therefore is barred by the Eleventh Amendment. It is argued that CA 6's injunction order with respect to retaking the examination conflicts directly with our decision in Pennhurst v. Halderman. Although, as I dictate this, I do not recall whether the courts below addressed this Eleventh Amendment claim, it was raised by the state as an affirmative defense and was not waived. Respondent is a California citizen. The University therefore argues that the Eleventh Amendment bars a citizen of one state from bringing suit in federal court against another state for both damages and equitable relief. Reliance is placed on the statement in Pennhurst as follows:

> "When the State itself is named as the defendant, a suit against state officials that is in fact a suit against a state is barred regardless of whether it seeks damages or injunctive relief." Pennhurst, 104, S.Ct. at 909 (1984)

I must reread Pennhurst (despite having worked on it during two different Terms!), but I believe that the Eleventh Amendment does bar injunctive relief against the state itself rather than against individual state officials and that this is indicated in Edelman v. Jordan. This is an exception to ex parte Young. Whatever the decisions hold, it is clear to me that permitting federal courts to review academic decisions by state universities on substantive due process grounds would be a serious intrusion on state sovereignty. But I do not think we granted this case to address the state sovereignty issue, although if it is a valid defense we would not reach the substantive due process issue. I need to do some thinking about this, and will want my clerk's views.

The University's primary argument focuses on the substantive due process issue, and the SG only addressed this issue. The University's brief argues - perhaps in extreme terms - that the decisions below "sounded a shock wave throughout the community of Medical Schools in the United States", and that the injunction

granted by CA 6 is a "dangerous precedent that threatens all Medical School education". Apart from such statements, the University properly relies - as I view it - on the academic freedom argument that has been mentioned in a number of our decisions. See its brief, p. 26 et seq. The University's brief also states that it is clear under Michigan law that an individual does not possess a property interest in the practice of a particular business or profession, and cites a number of cases. See p. 39.

I find the SG's argument - much briefer than that of the University - to be more persuasive. Dismissal for academic deficiencies should not be viewed as violating substantive due process rights. Even if there were under Michigan law a contract between the University and respondent, this should not give rise to a substantive due process federal claim against the University. Of course there is procedural due process protection - a protection not created by the constitution but derived rather from independent sources such as state law. Board of Regents v. Roth. Substantive due process rights, in contrast, are created by the constitution itself. At most, respondent's claim is nothing more than that the University breached its contract with him.

The SG finally addresses the holding of CA 6 that the University acted arbitrarily and capriciously. Although I do not believe the SG is explicit, I believe he would not concede that even if it were arbitrary and capricious ~~that~~ a constitutional claim in federal court would arise. In any event, the SG argues that CA 6 clearly erred in concluding that the University had acted arbitrarily and capriciously in dismissing this respondent from medical school. Although I hesitate to express more than a tentative view at this stage of my consideration of a case, I agree with the SG on this argument. If there ever was a student who deserved to be dismissed, respondent's dismal record almost speaks for itself. There is no evidence that any of the other 40 students who were given the opportunity to retake the exam had a record at all comparable to that of respondent. It also seems to me that the University abundantly provided procedural due process in the care with which its decision was reached and administratively reviewed.

Finally, as perhaps could be anticipated from what I wrote in Bakke, I think - as Justice Frankfurter did - that academic freedom is a special concern of the First Amendment. See Keyishain v. Board of Regents, 385 U.S. 589, 603, and Bakke, 438 U.S. 265, 312; and Sweezy v. New Hampshire, 354 U.S. 234, 263.

Arguments of Respondent

His arguments are interestingly stated in the "summary of argument" in his brief, p. 8-10. He "substantially agrees" that courts are ill-equipped to set academic standards "... or otherwise oversee faculty determinations of grades or test scores." Nevertheless, respondent contends that the University, in effect, had adopted a rule allowing students who flunked this particular examination to retake it - citing ~~that~~ the 40 cases in which this had been permitted. Therefore, according to respondent, a "rule" had been established that was violated arbitrarily and capriciously in this case. The essence of respondent's position is that fundamental fairness requires federal court review where a dismissal decision is found to be "arbitrary and capricious."

I will want a brief bench memo from my clerk.

L.F.P., Jr.

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

12/05

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

From: **Justice Powell**

Circulated: 12/5/85

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

judgment that "certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Id.*, quoting *Poe* v. *Ullman*, 367 U. S. 497, 543 (Harlan, J., dissenting). In the context of liberty interests, this Court has been careful to examine each asserted interest to determine whether it "merits" the protection of substantive due process. See, *e. g.*, *City of East Cleveland*, *supra*; *Roe* v. *Wade*, 410 U. S. 113 (1973); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe*, *supra*, at 544 (Harlan, J., dissenting).

The interest asserted by respondent—an interest in continued enrollment from which he derives a right to retake the NBME—is essentially a state law contract right. It bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution. It certainly is not closely tied to "respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms," *Griswold*, *supra*, at 501 (Harlan, J., concurring in the judgment). For these reasons, briefly summarized, I do not think the fact that Michigan may have labelled this interest "property" entitles it to join those other, far more important interests that have heretofore been accorded the protection of substantive due process. Cf. *Harrah Independent School District* v. *Martin*, 440 U. S. 194 (1978).

II

I agree fully with the Court's emphasis on the respect and deference that courts should accord academic decisions made by the appropriate university authorities. In view of Ewing's academic record that the Court charitably character-

izes as "unfortunate," this is a case that never should have been litigated. After a four-day trial in a District Court, the case was reviewed by the Court of Appeals for the Sixth Circuit, and now is the subject of a decision of the United States Supreme Court. Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed—as in this case.*

---

*See *Board of Curators, University of Missouri* v. *Horowitz*, 435 U. S. 78, 96, n. 6 (1978) (opinion of POWELL, J.), cited *ante*, at ——, n. 11. See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (1978) (opinion of POWELL, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"). See also *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967).

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

From: **Justice Stevens**

Circulated: _____

Recirculated: DEC 3 1985

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.

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 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.

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

In the spring of 1981, after overcoming certain academic and personal difficulties, Ewing successfully completed the courses prescribed for the first four years of the Inteflex program and thereby qualified to take the NBME Part I. Ewing failed five of the seven subjects on that examination, receiving a total score of 235 when the passing score was 345. (A score of 380 is required for state licensure and the national mean is 500.) Ewing received the lowest score recorded by an Inteflex student in the brief history of that program.

On July 24, 1981, the Promotion and Review Board individually reviewed the status of several students in the Inteflex program. After considering Ewing's record in some detail, the nine members of the Board in attendance voted unanimously to drop him from registration in the program.

In response to a written request from Ewing, the Board reconvened a week later to reconsider its decision. Ewing appeared personally and explained why he believed that his score on the test did not fairly reflect his academic progress or potential.[2] After reconsidering the matter, the nine voting members present unanimously reaffirmed the prior action to drop Ewing from registration in the program.

In August, Ewing appealed the Board's decision to the Executive Committee of the Medical School. After giving Ewing an opportunity to be heard in person, the Executive Committee unanimously approved a motion to deny his appeal for a leave of absence status that would enable him to retake Part I of the NBME examination. In the following year, Ewing reappeared before the Executive Committee on two separate occasions, each time unsuccessfully seeking re-

---

[2] At this and later meetings Ewing excused his NBME Part I failure because his mother had suffered a heart attack 18 months before the examination; his girlfriend broke up with him about six months before the examination; his work on an essay for a contest had taken too much time; his make-up examination in pharmacology was administered just before the NBME Part I; and his inadequate preparation caused him to panic during the exam.

admission to the medical school. On August 19, 1982, he commenced this litigation in the United States District Court for the Eastern District of Michigan.

II

Ewing's complaint against the Regents of the University of Michigan asserted a right to retake the NBME Part I test on three separate theories, two predicated on state law and one based on federal law.[3] As a matter of state law, he alleged that the University's action constituted a breach of contract and was barred by the doctrine of promissory estoppel. As a matter of federal law, Ewing alleged that he had a property interest in his continued enrollment in the Inteflex program and that his dismissal was arbitrary and capricious, violating his "substantive due process rights" guaranteed by the Fourteenth Amendment and entitling him to relief under 42 U. S. C. § 1983.

The District Court held a 4-day bench trial at which it took evidence on the University's claim that Ewing's dismissal was justified as well as on Ewing's allegation that other University of Michigan medical students who had failed the NBME Part I had routinely been given a second opportunity to take the test. The District Court described Ewing's unfortunate academic history in some detail. Its findings, set forth in the margin,[4] reveal that Ewing "encountered imme-

[3] A fourth count of Ewing's complaint advanced a claim for damages under 42 U. S. C. § 1983. The District Court held that the Board of Regents is a state instrumentality immunized from liability for damages under the Eleventh Amendment, and dismissed this count of the complaint. *Ewing* v. *Board of Regents*, 552 F. Supp. 881 (ED Mich. 1982).

[4] "In the fall of 1975, when Ewing enrolled in the program, he encountered immediate difficulty in handling the work and he did not take the final examination in Biology. It was not until the following semester that he completed this course and received a C. His performance in his other first semester courses was as follows: a C in Chemistry 120, a C in his writing course, and an incomplete in the Freshman Seminar. In the next semester he took Chemistry 220, a Freshman Seminar, and Psychology 504. He was advised at that time that he could not take the Patient Care

diate difficulty in handling the work," *Ewing* v. *Board of Regents*, 559 F. Supp. 791, 793 (ED Mich. 1983), and that his difficulties—in the form of marginally passing grades and a number of incompletes and make-up examinations, many ex-

---

Course, usually given during the fall of an Inteflex student's second year, and he was placed on an irregular program. Because of these difficulties, at the July 14, 1976 meeting of the Promotion and Review Board he requested a leave of absence, and when this was approved, he left the program.

"During the summer of 1976 while on leave, he took two Physics courses at Point Loma College in California. He reentered the Inteflex program at the University of Michigan in the winter 1977 term. In that term he repeated Chemistry 220 in which he received an A−. In the spring of 1977, he passed the Introduction to the Patient Care course.

"In the 1977–78 year, he completed the regular Year II program. But then he encountered new difficulty. In the fall of 1978 he received an incomplete in Clinical Studies 400, which was converted to a Pass; a B in Microbiology 420; and an incomplete in Gross Anatomy 507. The Gross Anatomy incomplete was converted to a C− by a make-up examination. During the winter of 1979 he received a C− in Genetics 505, a C in Microbiology 520, an E in Microanatomy and General Pathology 506, a B in Creative Writing, and a Pass in Clinical Studies 410. He appealed the Microanatomy and General Pathology grade, requesting a change from an E to a D, and a make-up exam to receive a Pass. His appeal was denied by the Grade Appeal Committee, and he was again placed on an irregular program; he took only the Clinical Studies 420 course in the spring 1979 semester.

"In July 1979, Ewing submitted a request to the Promotion and Review Board for an irregular program consisting of a course in Pharmacology in the fall and winter 1979–80 and a course in Human Illness and Neuroscience in 1980–81, thus splitting the fourth year into two years. The Board denied this request and directed him to take the fourth year curriculum in one academic year. He undertook to do so. He removed his deficiency in Microanatomy and General Pathology 506 by repeating the course during the winter 1980 semester and received a C+. In the spring term of 1980 he passed Developmental Anatomy with a B− grade, and he received a C grade in Neuroscience I 509 after a reexamination. In the fall of 1980, he received a passing grade in Neuroscience 609 and Pharmacology 626, and in the winter term of 1981, he received a passing grade in Clinical Studies 510 and a deficiency in Pharmacology 627. He was given a make-up examination in this course, and he received a 67.7 grade.

perienced while Ewing was on a reduced course load—persisted throughout the 6-year period in which he was enrolled in the Inteflex program.

Ewing discounted the importance of his own academic record by offering evidence that other students with even more academic deficiencies were uniformly allowed to retake the NBME Part I. See App. 107–111. The statistical evidence indicated that of the 32 standard students in the Medical School who failed Part I of the NBME since its inception, all 32 were permitted to retake the test, 10 were allowed to take the test a third time, and 1 a fourth time. Seven students in the Inteflex program were allowed to retake the test, and one student was allowed to retake it twice. Ewing is the only student who, having failed the test, was not permitted to retake it. Dr. Robert Reed, a former Director of the Inteflex program and a member of the Promotion and Review Board, stated that students were "routinely" given a second chance. 559 F. Supp., at 794. Accord, App. 8, 30, 39–40, 68, 73, 163. Ewing argued that a promotional pamphlet released by the medical school approximately a week before the examination had codified this practice. The pamphlet, entitled "On Becoming a Doctor," stated:

> "According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." App. 113.

The District Court concluded that the evidence did not support either Ewing's contract claim or his promissory estoppel claim under governing Michigan law. There was "no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give

---

"He then took Part I of the NBME . . . ." *Ewing* v. *Board of Regents*, 559 F. Supp. 791, 793–794 (ED Mich. 1983).

Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. With reference to the pamphlet "On Becoming A Doctor," the District Court held that "even if [Ewing] had learned of the pamphlet's contents before he took the examination, and I find that he did not, I would not conclude that this amounted either to an unqualified promise to him or gave him a contract right to retake the examination." *Ibid.*

With regard to Ewing's federal claim, the District Court assumed that Ewing had a constitutionally protected property interest in his continued enrollment in the Inteflex program and that a State University's academic decisions concerning the qualifications of a medical student are "subject to substantive due process review" in federal court. *Id.*, at 798. The District Court, however, found no violation of Ewing's due process rights. The trial record, it emphasized, was devoid of any indication that the University's decision was "based on bad faith, ill will or other impermissible ulterior motives"; to the contrary, the "evidence demonstrate[d] that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration." *Id.*, at 799. To "leave no conjecture" as to his decision, the District Judge expressly found that "the evidence demonstrate[d] no arbitrary or capricious action since [the Regents] had good reason to dismiss Ewing from the program." *Id.*, at 800.

Without reaching the state-law breach-of-contract and promissory-estoppel claims,[5] the Court of Appeals reversed the dismissal of Ewing's federal constitutional claim. The Court of Appeals agreed with the District Court that Ewing's implied contract right to continued enrollment free from arbitrary interference qualified as a property interest protected

---

[5] In a footnote, the Court of Appeals stated: "Because we believe this case can be disposed of on the § 1983 claim, this court does not expressly reach the breach of contract or promissory estoppel claims." *Ewing* v. *Board of Regents*, 742 F. 2d 913, 914, n. 2 (CA6 1984).

by the Due Process Clause, but it concluded that the University had arbitrarily deprived him of that property in violation of the Fourteenth Amendment because (1) "Ewing was a 'qualified' student, as the University defined that term, at the time he sat for NBME Part I"; (2) "it was the consistent practice of the University of Michigan to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest"; and (3) "Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest." *Ewing* v. *Board of Regents*, 742 F. 2d 913, 916 (CA6 1984). The Court of Appeals therefore directed the University to allow Ewing to retake the NBME Part I, and if he should pass, to reinstate him in the Inteflex program.

We granted the University's petition for certiorari to consider whether the Court of Appeals had misapplied the doctrine of "substantive due process."[6] —— U. S. —— (1985). We now reverse.

---

[6] The University's petition for certiorari also presented the question whether the Eleventh Amendment constituted a complete bar to the action because it was brought against the "Board of Regents of the University of Michigan," App. 13, a body corporate. Cf. *Florida Department of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981) *(per curiam)*; *Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam)*. After the petition was granted, however, respondent Ewing filed a motion to amend the complaint by joining the individual members of the Board of Regents as named defendants in their official capacities. The University did not oppose that motion. Tr. of Oral Arg. 12–13.

Granting the motion merely conforms the pleadings to the "course of proceedings" in the District Court. Cf. *Kentucky* v. *Graham*, 473 U. S. ——, ——, n. 14 (1985) (slip op. 7–8, n. 14); *Brandon* v. *Holt*, 469 U. S. ——, —— (1985) (slip op. 5). The record reveals that the Regents frequently referred to themselves in the plural, as "defendants," indicating that they understood the suit to be against them individually, in their official capacities, rather than against the Board as a corporate entity. App. 11. Likewise, the District Court held that "defendants did not act in violation of Ewing's due process rights," 559 F. Supp., at 799, and accordingly found

III

In *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 91–92 (1978), we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his continued enrollment in the Inteflex Program.[7] But remembering Justice Brandeis' admonition not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (concurring opinion), we again conclude, as we did in *Horowitz*, that the precise facts disclosed by the record afford the most appropriate basis for decision. We therefore accept the University's invitation to "assume the existence of a constitutionally protectible prop-

---

"in favor of the defendants," *id.*, at 800. 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*, 457 U. S. 496, 516, n. 19 (1982). 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.

[7] Ewing and the courts below reasoned as follows: In *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972), this Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." See *Goss* v. *Lopez*, 419 U. S. 565, 572–573 (1975). In a companion case, *Perry* v. *Sindermann*, 408 U. S. 593, 601–602 (1972), we held that "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" could be independent sources of property interests. See *Bishop* v. *Wood*, 426 U. S. 341, 344 (1976) (implied contracts). According to an antiquated race discrimination decision of the Michigan Supreme Court (whose principal holding has since been overtaken by events), "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 99–100, 120 N. W. 589, 591 (1909). From the foregoing, Ewing would have us conclude that he had a protectible property interest in continued enrollment in the Inteflex program.

erty right in [Ewing's] continued enrollment,"[8] and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.

As a preliminary matter, it must be noted that any substantive constitutional protection against arbitrary dismissal would not necessarily give Ewing a right to retake the NBME Part I. The constitutionally-protected interest alleged by Ewing in his complaint, App. 15, and found by the courts below, derives from Ewing's implied contract right to continued enrollment free from arbitrary dismissal. The District Court did not find that Ewing had any separate right to retake the exam and, what is more, explicitly "reject[ed] the contract and promissory estoppel claims, finding no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. The Court of Appeals did not overturn the District Court's determination that Ewing lacked a tenable contract or estoppel claim under Michigan law,[9] see *supra*, at 6, and n. 5, and we accept its reasonable

---

[8] Tr. of Oral Arg. 3. Consistent with this suggestion, petitioner's answer to Ewing's complaint "admit[ted] that, under Michigan law, [Ewing] may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program." App. 21.

[9] Although there is some ambiguity in its opinion, we understand the Court of Appeals to have found "clearly erroneous" the District Court's rejection of Ewing's federal substantive due process claim solely because of the "undisputed evidence of a consistent pattern of conduct"—namely, the "substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it." 742 F. 2d, at 915. The Court of Appeals found no "rule" to the effect that medical students are entitled to retake failed examinations. Indeed, it relied on the University's "promotional pamphlet entitled 'On Becoming a Doctor'" only to the extent that it "memorialized the consistent *practice* of the medical school with respect to students who initially fail that examination." *Id.*, at 916 (emphasis added).

rendering of state law, particularly when no party has challenged it.[10]

The University's refusal to allow Ewing to retake the NBME Part I is thus not actionable in itself. It is, however, an important element of Ewing's claim that his dismissal was the product of arbitrary state action, for under proper analysis the refusal may constitute evidence of arbitrariness even if it is not the actual legal wrong alleged. The question, then, is whether the record compels the conclusion that the

---

A property interest in a second examination, however, cannot be inferred from a consistent practice without some basis in state law. Yet in this case the Court of Appeals did not reverse the District Court's finding that Ewing was not even aware of the contents of the pamphlet and left standing its holding that the statements in this promotional tract did not "amoun[t] either to an unqualified promise to him or . . . a contract right to retake the examination" under state law. 559 F. Supp., at 800. We recognize, of course, that "mutually explicit understandings" may operate to create property interests. *Perry* v. *Sindermann*, 408 U. S., at 601. But such understandings or tacit agreements must support "a legitimate claim of entitlement" under "'an independent source such as state law . . . .'" *Id.*, at 602, n. 7 (quoting *Board of Regents* v. *Roth*, 408 U. S., at 577). The District Court, it bears emphasis, held that the University's liberal retesting custom gave rise to no state law entitlement to retake the NBME Part I. We rejected an argument similar to Ewing's in *Board of Regents* v. *Roth*. In that case Dr. Roth asserted a property interest in continued employment by virtue of the fact that "of four hundred forty-two non-tenured professors, four were not renewed during [a particular] academic year." Brief for Respondent in *Board of Regents* v. *Roth*, O. T. 1971, No. 71–162, p. 28 (footnote and citation omitted). Absent a state statute or university rule or "anything approaching a 'common law' of re-employment," however, we held that Dr. Roth had no property interest in the renewal of his teaching contract. *Board of Regents* v. *Roth*, 408 U. S., at 578, n. 16.

[10] "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949). Accord, *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181, n. 11 (1979); *Butner* v. *United States*, 440 U. S. 48, 58 (1979); *Bishop* v. *Wood*, 426 U. S., at 345–347.

University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination.

It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.

Ewing's claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.[11] Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. *Youngberg* v. *Romeo*, 457 U. S. 307, 323 (1982).

Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. As JUSTICE WHITE has explained:

> "Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth

[11] "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 96, n. 6 (1978) (POWELL, J., concurring). See *id.*, at 90–92 (opinion of the Court).

> Amendments. This is . . . only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." *Moore* v. *East Cleveland*, 431 U. S. 494, 543–544 (1977) (WHITE, J., dissenting). See *id.*, at 502 (opinion of POWELL, J.).

Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967).[12] If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop* v. *Wood*, 426 U. S., at 349, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators, Univ. of Missouri* v. *Horowitz*, 435 U. S., at 89–90.

This narrow avenue for judicial review precludes any conclusion that the decision to dismiss Ewing from the Inteflex program was such a substantial departure from accepted aca-

---

[12] Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian* v. *Board of Regents*, 385 U. S., at 603; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (opinion of Warren, C. J.), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (1978) (opinion of POWELL, J.); *Sweezy* v. *New Hampshire*, 354 U. S., at 263 (Frankfurter, J., concurring in the result). Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university. *University of California Regents* v. *Bakke*, 438 U. S., at 312 (opinion of POWELL, J.) (quoting *Sweezy* v. *New Hampshire*, 354 U. S., at 263 (Frankfurter, J., concurring in the result)) (internal quotations omitted).

demic norms as to demonstrate that the faculty did not exercise professional judgment. Certainly his expulsion cannot be considered aberrant when viewed in isolation. The District Court found as a fact that the Regents "had good reason to dismiss Ewing from the program." 559 F. Supp., at 800. Before failing the NBME Part I, Ewing accumulated an unenviable academic record characterized by low grades, seven incompletes, and several terms during which he was on an irregular or reduced course load. Ewing's failure of his medical boards, in the words of one of his professors, "merely culminate[d] a series of deficiencies. . . . In many ways, it's the straw that broke the camel's back." App. 79. Accord, *id.*, at 7, 54–55, 72–73.[13] Moreover, the fact that Ewing was "qualified" in the sense that he was eligible to take the examination the first time does not weaken this conclusion, for after Ewing took the NBME Part I it was entirely reasonable for the faculty to reexamine his entire record in the light of the unfortunate results of that examination. Admittedly, it may well have been unwise to deny Ewing a second chance. Permission to retake the test might have saved the University the expense of this litigation and conceivably might have demonstrated that the members of the Promotion and Review Board misjudged Ewing's fitness for the medical profession. But it nevertheless remains true that his dismissal from the Inteflex program rested on an academic judgment that is not beyond the pale of reasoned academic decisionmaking when viewed against the background of his entire ca-

[13] Even viewing the case from Ewing's perspective, we cannot say that the explanations and extenuating circumstances he offered were so compelling that their rejection can fairly be described as irrational. For example, the University might well have concluded that Ewing's sensitivity to difficulties in his personal life suggested an inability to handle the stress inherent in a career in medicine. The inordinate amount of time Ewing devoted to his extracurricular essay writing may reasonably have revealed to the University a lack of judgment and an inability to set priorities.

reer at the University of Michigan, including his singularly low score on the NBME Part I examination.[14]

The judgment of the Court of Appeals is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

---

[14] Nor does the University's termination of Ewing substantially deviate from accepted academic norms when compared with its treatment of other students. To be sure, the University routinely gave others an opportunity to retake the NBME Part I. But despite tables recording that some students with more incompletes or low grades were permitted to retake the examination after failing it the first time, App. 105–111, and charts indicating that these students lacked the outside research and honor grade in clinical work that Ewing received, *id.*, at 119–120, we are not in a position to say that these students were "similarly situated" with Ewing. The Promotion and Review Board presumably considered not only the raw statistical data but the nature and seriousness of the individual deficiencies and their concentration in particular disciplines—in Ewing's case, the hard sciences. The Board was able to take into account the numerous incompletes and make-up examinations Ewing required to secure even marginally passing grades, and it could view them in connection with his reduced course loads. Finally, it was uniquely positioned to observe Ewing's judgment, self-discipline, and ability to handle stress, and was thus especially well-situated to make the necessarily subjective judgment of Ewing's prospects for success in the medical profession. The insusceptibility of promotion decisions such as this one to rigorous judicial review is borne out by the fact that 19 other Inteflex students, some with records that a judge might find "better" than Ewing's, were dismissed by the faculty without even being allowed to take the NBME Part I a first time. App. 165–166. Cf. *id.*, at 66 (nine Inteflex students terminated after suffering one deficiency and failing one course after warning).

84-1273 Regents v. Ewing (Mike)

JPS for the Court 10/14/85
1st draft 11/14/85
2nd draft 11/20/85
3rd draft 12/5/85
Joined by WJB 11/14/85
BRW 11/15/85
HAB 11/19/85
TM 11/20/85
SOC 11/20/85
WHR 11/25/85
CJ 11/25/95

LFP concurring
1st draft 12/5/85

Reviewed: Interesting & added a great deal to my superficial memo to file after my preliminary reading of Briefs.

Mike would allow Resp. to amend her complaint now to sue Regents individually, & thereby avoid the 11th amend bar to juris. (But check relief Resp seeks in her amended complaint).

If there is no 11th Amend bar, Mike thinks DC was right in holding (1) a student has a prop. right in her education & if dismissed he may assert a substantive D/P claim for damages & injunctive relief. But no recovery absence proof of arbitrary or capricious (non-academic) conduct - p 9

BENCH MEMORANDUM

To: Mr. Justice Powell September 17, 1985

From: Mike

No.84-1273 REGENTS OF THE UNIVERSITY OF MICHIGAN v. EWING

(CA6)

QUESTIONS PRESENTED

1. Is the Eleventh Amendment a bar to federal court jurisdiction in this case?

2. Is a state medical school's decision to dismiss an academically deficient student subject to substantive due process review under 42 U.S.C. 1983?

I. BACKGROUND

A. Facts

In the fall of 1975 resp entered a special program at the University of Michigan ("Michigan") called Inteflex, leading to an undergraduate degree and a medical degree in six years. From the very beginning resp experienced

serious academic difficulties, taking incompletes, leaves of absence and being put on probation. Six years later resp completed the four year course of study preparatory to entering clinical study. Before entering clinical study resp, like other med students, was required to take Part I of the NBME. Because of his dismal record, and pursuant to prior warnings, resp was informed that a less than satisfactory performance on the NBME would be grounds for dismissal. Resp received the lowest score ever received by a Michigan student on the test. The med school's Promotion and Review Board voted unanimously to dismiss resp from the program. Resp requested reconsideration, and the Board held a hearing and listened to resp's excuses. At the hearing resp admitted that he understood a letter sent to him prior to the test warning that he was on probation and that further deficiencies could result in dismissal. The Board again voted unanimously to dismiss him. Resp appealed to the medical school's Executive Committee. After meeting with resp the Committee voted unanimously to affirm the dismissal.

B. Decisions Below

(vs Regents of U. of Mich.)

Resp filed suit in EDMich under §1983 seeking injunctive relief and damages. He also alleged state law contract claims. His §1983 claim was based on his contention that he had a "property interest" in his status as a med student. He made no claim of deprivation of that interest by procedural due process violations; instead he

claimed that he had been denied substantive due process because the decision to dismiss him was arbitrary and capricious. The DC dismissed all claims. While the DC reasoned that academic dismissals were subject to substantive due process review, it held that such review is limited to "whether the decision was based on arbitrary or capricious factors which are not reasonably considered to be academic criteria." (Pet. App. 25a). The state claims of breach of contract and promissory estoppel were dismissed. Resp's damages claims were also dismissed as a violation of the Eleventh Amendment. The Regents apparently accompanied their Eleventh Amendment argument against damages with statements that the plaintiff (resp) would still be entitled to equitable relief. In other words, instead of relying on the fact that plaintiff had sued the Regents as a state government body, which would preclude any claim, the Regents were relying on Edelman v. Jordan's prohibition against damages. 415 US 651 (1974)

CA6 rev'd. The CA decided that resp did have a property right in his status as a student, that substantive due process was applicable, and that the dismissal of resp had been arbitrary and capricious. The sole factual basis of the CA holding was that it was the consistent practice of the med school to allow students a second chance to pass the NBME. Of the forty students who had taken and failed the test since 1975, resp was the only one who had been refused a second chance, although other students had been

denied permission even to take the test. The CA ordered resp reinstated and allowed to retake the test.

II. DISCUSSION

A. The Eleventh Amendment Issue

As is clear from the face of the briefs, resp has sued the Regents of the University of Michigan as a state government body and not as individuals. Resp is a resident of California. That appears to be the paradigm case prohibited by the Eleventh Amendment. But, as is often the case with Eleventh Amendment jurisprudence, things are not as they seem. Two factors make it possible that this case can be heard in federal court despite its facial violation.

1. Waiver. Resp contends that petr has always treated this case as though the Regents had been sued individually. In the DC, the Regents pressed for dismissal of the monetary damages on Eleventh Amendment grounds, but did not do so as to the injunctive relief sought. In fact, the Regents stated to the DC that even if they prevailed on the dismissal of the monetary relief, resp would still be entitled to equitable relief. See Brief in Opp. to Pet. for Cert. at 17-18. Resp claims that this and other actions amount to a waiver of the Eleventh Amendment defense, citing Toll v. Moreno, 458 US 1, 18 (1982).

Toll does not support resp's contention that petr should be deemed to have waived its Eleventh Amendment immunity. Toll involved a specific waiver of immunity by the University of Maryland. The University unsuccessfully

tried to argue that this Court's subsequent GVR of the case had so altered the case that the prior waiver was no longer in effect. In contrast, the present case presents no such specific waiver. At most, petr misunderstood the scope of its immunity. Following the decision in Pennhurst State School and Hospital v. Halderman, 104 SCt 900 (1984), petr rethought its position and renewed its Eleventh Amendment argument. In other contexts the Court has required that Eleventh Amendment waivers be very clear, see Edelman, supra, at 673; see also Parden v. Terminal R. Co., 377 US 184 (1964) (waiver by congressional enactment). I do not think that any of the actions cited by resp amount to a waiver of petr's Eleventh Amendment immunity.

a. Pennhurst. Both parties cite to Pennhurst to support their Eleventh Amendment positions. Resp says that this case is distinguishable from Pennhurst because this case is grounded on a claim of federal law, while Pennhurst was based on requiring states to adhere to state law. True enough, but what resp neglects to mention is that petr does not need Pennhurst for protection if it has not waived its immunity, since the Eleventh Amendment bars any suit on any claim against petr in federal court, so long as resp continues to make his claim against the State of Michigan itself, through a state agency known as the Regents. Resp also fails to deal with the SG's argument that resp's claim is in reality only a state law claim once the substantive due process claim is properly understood. If that argument

is accepted, then certainly Pennhurst will be directly applicable, because federal courts would be in the position of telling the state to abide by principles of state law, a result foreclosed in Pennhurst. This would be so even if resp's complaint is amended to include individual Regents, since Pennhurst involved a suit against state officers in their official capacities.[1]

---

[1] Shortly after finishing this memo, resp filed with this Court a motion to amend his complaint to name individual Regents. The motion is attached with my recommendation to grant. This footnote on amending the complaint focuses on the jurisdictional issues that would exist if the complaint were not amended, and should be read only if you intend to deny leave to amend the complaint. Amending the Complaint: Resp argues that even if there is a technical defect in the pleadings, under present law he should be allowed simply to amend his complaint, even at this late date, and have the judgment upheld on the merits. He cites two Supreme Court cases for that proposition. The first is Brandon v. Holt, 105 SCt 873 (1985). In Brandon, the plaintiff sued the Director of the Memphis Police, but did not name the City of Memphis. Brandon began as a §1983 case before Monroe v. Pape was overruled in Monell v. New York City Dep't of Social Services, 436 US 658 (1978), which explains why the city was not sued. Both the proof offered and the DC findings of fact demonstrated an understanding that the Director was being sued in his official capacity as an agent of the City. The Court recognized that the plaintiff would probably be allowed to amend the pleadings to conform to the proof, and proceeded to decide the case on the merits. Based on Brandon, resp would have the Court recognize that he will be allowed even at this late date to amend his complaint to name individual Regents, and to decide the case on the merits. I think that resp's argument dilutes Ex Parte Young, 209 US 123 (1908) and does serious harm to the Eleventh Amendment. However, based on Patsy v. Board of Regents, 457 US 496, 515-516 n. 19 (1982) I do not think a majority of the Court will decline to take jurisdiction in this case based on these Eleventh Amendment considerations. Patsy involved a §1983 action against Florida International University for denial of employment advancement based on race and sex. The Court, while noting that the University was an arm of the state, inexplicably included the Eleventh Amendment issue in its remand to the DC. Your dissent expressed your views on that issue very clearly. I do not know whether those views would lead you to deny leave to amend the complaint in this case on a motion properly before the

(Footnote continued)

Resp moves to amend complaint

I should read only if we deny leave to amend

Yes

Dissent in Patsy

B. Substantive Due Process

Resp's only claim on the merits is his contention that he had a "property interest" in his status as a medical student, and that he was deprived of that interest by a violation of substantive due process in that his dismissal was arbitrary and capricious. The factual basis of the argument is the fact that it was the normal practice of the medical school to allow its students a second chance at passing the NBME test. His claim is clearly without merit. The only issue for the Court is on what basis it will reverse the CA6. There are several possibilities, listed below in order of attractiveness.

1. Limited Review. The strongest position, both in terms of its base in authority and its likelihood of capturing the votes of this Court, is the position taken by the DC below that substantive due process is available for academic dismissals, but that such determinations will be overturned only when they are arbitrary or capricious, such as dismissals based on ill will or other bad motive. That position finds support in a long line of cases that reflect

---

(Footnote 1 continued from previous page)
Court. If so, you may wish to concur in the judgment only and cite to your dissent in Patsy, or you may choose actually to dissent based on these jurisdictional considerations. In any event, until the complaint is amended it is clear that the Court lacks jurisdiction. Whether that ought to be solved by the simple expedient of allowing amendment of the complaint troubles me, but in the end my view is that leave to amend ought to be granted.

Mike would grant leave to amend to name Regents individually rather than as a State body. But the relief sought (right to retake exam) could not be granted by individuals. Damages might be obtained

this Court's deference to educators on academic matters[2] and the fact that academic freedom is a special concern of the First Amendment[3]. The DC based the availability of substantive due process review itself on numerous lower court opinions, some of them cited in Board of Curators v. Horowitz, 435 US 78 (1978), and the fact that the Horowitz opinion left the question open, deciding only that petr in that case was not entitled to relief even if such review were available.[4] It also is clear that substantive due process review is available for deprivation of liberty interests.[5]

In this case, the Court could take either of two approaches consistent with the DC opinion. It could do just as it did in Horowitz, and leave open the question of

---

2 See, e.g., Board of Curators of the University of Missouri v. Horowitz, 435 US 78, 90-92 (1978)

3 See, e.g., Regents of the University of California v. Bakke, 438 US 265, 312 (1978) (opinion of Powell, J.); Sweezy v. New Hampshire, 354 US 234, 263 (1957) (Frankfurter, J., concurring in the result).

4 In addition, amici NEA, et al., cite Harrah Independent School District v. Martin, 440 US 194 (1979), for the proposition that this Court has engaged in substantive due process review of state property right deprivations. The Court in Harrah denied a tenured teacher's claim that she had been deprived of a property interest by arbitrary action in violation of her substantive due process rights. The short per curiam opinion does not make it clear whether the Court was accepting the notion of substantive due process review of academic decisions, or whether it was just explaining the lack of merit of that claim in a generally meritless petition.

5 Kelley v. Johnson, 425 US 238, 244 (1976).

whether such review is available, while at the same time deciding that even if it were available, resp would not have a valid claim. Or it could expressly decide that such review is available in exceptional cases in federal courts, but that resp did not have such a case. In either event, the Court could make clear that the CA had misapplied the legal standard, and that review of academic dismissals on substantive due process grounds is available only for dismissals based on nonacademic reasons, ill will or other bad motive, but that the sufficiency of the academic reasons for the dismissal will not be subject to review in federal court.[6]

2. The SG's Position. The SG has advanced a theory of the case that deserves an "A" for effort. Because of its novelty and lack of support in authority, it is less likely to garner a majority, but it merits a close look. The SG argues that even if resp has a legitimate property interest in his status as a student, not every property interest rises to the level of meriting substantive due process protection. Property interests protected by procedural due process are not created by the Constitution, but are derived from independent sources such as state law.

---

[6] This was the approach taken in the DC below, although the DC improperly required a long bench trial following lengthy discovery to arrive at that conclusion. It is also the test employed in an important DC opinion summarizing existing lower federl court case law, Connelly v. University of Vermont, 244 F.Supp. 156, 160 (D. Vt. 1965).

Substantive due process rights are created by the Constitution. Substantive due process is founded on the idea that the Supreme Court has interpreted the due process clause of the Fourteenth Amendment to confer certain substantive rights based mainly on the Bill of Rights. This creates an important distinction between deprivations of property rights and deprivations of life or liberty interests. Life and liberty interests, in almost every case, are created by the Constitution. Almost by definition, every judicially cognizable life or liberty interest is accompanied by substantive due process protection. But property rights are created by state law. There should be no presumption that by virtue of the fact that a state has defined some interest as a property interest, the Constitution must automatically be interpreted to mean that such state property rights are clothed with substantive due process protection. Instead, state property rights must be examined to see whether the state-created right merits substantive federal constitutional protection. To do otherwise would allow the state tail to wag the federal constitutional dog. In addition, property rights already enjoy certain protections that life and liberty interest do not enjoy, e.g., just compensation for taking. The SG would have this Court decide that any property rights associated with academic dismissals do not rise to the level of meriting substantive due process protection. By distinguishing the nature of

substantive due process rights in property from substantive due process rights to life and liberty, the SG's position allows the Court narrowly to define those property rights that will be accorded substantive due process protection without affecting the many cases dealing with substantive due process rights in life and liberty.

The argument is facially very appealing. Like most novel arguments, it is supported only weakly by existing authority. The only direct support for the proposition is a case from the CA7.[7] But nothing forecloses the argument. The NEA in an excellent brief attempted to rebut the SG's position by showing that the SCT had already decided cases involving deprivations of property interests on substantive due process grounds. See Amicus Brief of NEA at pp. 5-8. None of the cases cited would foreclose adoption of the SG's arguments. The NEA also cites to cases involving substantive due process review of deprivations of liberty interests, but the very nature of the SG's arguments rebuts those cases.

The SG's position would mean that resp is left with essentially a state law claim. As such, this Court would lack further jurisdiction under Pennhurst.

---

7 Brown v. Brienen, 722 F.2d 360 (1983).

III. CONCLUSION

1. Once amendment of the complaint is allowed, the Eleventh Amendment is not a bar to jurisdiction in this suit, nor does it immunize petr. But if the Court subsequently adopts the argument of the SG, then jurisdiction would be improper under Pennhurst, since the Court would be in the position of ordering a state court to abide by its own laws.

2. Petr's substantive due process claim is without merit. There are two main approaches that could be taken to overturn the CA6. Although the SG's position is facially very appealing, the DC's approach has greater support in the case law.

NOTE: Resp's Motion to Amend Complaint is attached. Where?

TO: MIKE

JUSTICE POWELL— This should accompany my bench memo in EWING. Mike

I'll probably vote to Deny after argument

Fill

Yes

HOLD for consideration after oral argument

September 30, 1985 Conference
Summer ~~List 19~~, Sheet 3

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN

v.

EWING

Motion of Respondent for Leave to Amend the Amended Complaint

[This case is scheduled for oral argument on October 8, 1985]

SUMMARY: Resp seeks leave to amend his complaint to sue petrs as individuals in their official capacities. Petrs have, inter alia, challenged the CA 6's judgment on the ground that the Eleventh Amendment bars injunctive relief against the regents of the university unless they are sued individually in their official capacities. Resp asserts that his proposed changes will conform the pleadings to the evidence presented below and will "eliminate needless controversy between the parties" by removing the Eleventh Amendment problem.

BACKGROUND: In 1981, resp filed suit in DC (ED Mich.) against petrs for injunctive relief and money damages under

Hold, then grant

Mike

42 U.S.C. §1983 alleging that he had been dismissed from medical school in violation of his substantive due process rights. After a bench trial, the DC ruled in favor of petrs finding that resp had failed the standardized written test administered by the National Board of Medical Examiners (NSME). The DC concluded that petrs' decision to dismiss resp had been based on academic grounds and was not influenced by "ill will or ulterior motives."

The CA 6 reversed, noting that because of resp had a "property interest" in his education, he could not be arbitrarily dismissed from medical school. The CA 6 found that in seven years no student had been dismissed from the medical school without being given a second chance to pass the NBME's test. On this basis, the CA 6 concluded that petrs' action was "arbitrary and capricious." The court ordered resp reinstated, so that he could again sit for the exam. If resp passed the exam, the CA 6's judgment required that resp be allowed to continue in medical school.

In January 1985, the medical school petitioned the Court for cert arguing, inter alia, that the CA 6 lacked the authority to order resp's reinstatement because (1) resp had failed to sue the regents of the university as individuals in their official capacities and (2) this Court's decision in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), bars the federal courts from "second guessing" the regents' decision to dismiss a student for academic reasons. The Court granted cert to review petrs' claims on March 25, 1985.

The instant motion was filed August 12, 1985. The matter is presently set for oral argument on October 8, 1985.

CONTENTIONS: Resp alleges that Eleventh Amendment issue is not new to the parties. Resp notes that petrs successfully asserted the Eleventh Amendment as a defense to resp's claim for money damages. However, at the same time, petrs conceded that resp's claims for injunctive relief were not barred by the Eleventh Amendment. (See Joint Appendix pp. 5-6). Resp, without specific citations to the record, alleges that at trial he produced evidence of each regent's arbitrary conduct without objection from petrs' counsel. Resp therefore asserts that he proved his case against each regent for purposes of §1983, and complains that now, for the first time, "in an effort to avoid liability, [petrs]. . .argue that [resp] has not sued [the regents] individually in their official capacities."[1]

Resp, citing arguments from his brief in opposition to cert, contends that petrs' Eleventh Amendment claim is not dispositive of the case for at least three reasons. He argues that (1) petrs, by their conduct, have waived whatever immunity they might have had under §1983, (2) even if they have not waived their immunity, petrs are properly sued as "The Regents," and (3) even if the complaint is defective, resp should be allowed to amend his complaint to conform to proof at trial. As to this last point, resp states that the Eleventh Amendment issue is "readily curable" by amendment to the pleadings. He also asserts that petrs will suffer no prejudice because the

[1]Petrs apparently did not argue the Eleventh Amendment issue to the CA 6 on appeal or in their petn for rehearing en banc.

amendment merely conforms the pleadings to the proof at trial. In support of his request, resp cites this Court's decision in Brandon v. Holt, 469 U.S. ___, 105 S.Ct. 873 (1985) and several circuit court opinions[2] allowing "late" amendments under F. R. Civ. P. 15(b).

DISCUSSION: Fed. Rule Civ. Pro. 15(b) states in pertinent part as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

In Brandon v. Holt, supra, petrs failed to name a municipality as a defendant in their §1983 action because their complaint was filed before this Court's decision in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).[3] However, the Court found that recovery against the city was justified because it was "abundantly clear" from the record that the resp had been sued in his official capacity. Relying on F.R. Civ. P. 15(b), the Court stated that petrs were "entitled" to amend their pleadings to conform to proof even at such a "late stage in the proceedings." 53 U.S.L.W. at 4124.

---

[2]Resp cites Arthur v. Nyquist 573 F.2d 134 (CA 2 1978), cert denied 439 U.S. 860; Jackson v. Hayakawa, 682 F.2d 1344 (CA 9 1982); Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (CA 1 1974). Resp also cites additional Supreme Court authority in Patsy v. Board of Regents, 457 U.S. 496, 515-16, n. 19 (1982); Moreno v. Toll, 458 U.S. 1, 18 (1982).

[3]Monell overruled the Court's previous decision in Monroe v. Pape, 365 U.S. 167 (1961), thus permitting §1983 suits against municipalities.

Nevertheless, the Court decided to "proceed to decide the legal issues without first insisting that such a formal amendment be filed." Id.

Although this case can be distinguished from Brandon on the ground that resp's failure to properly name petrs in his complaint is not excused by any recent change in the law regarding liability under §1983, it does appear that the Court may in its discretion permit resp to amend his complaint at this stage of the proceedings. F. R. Civ. P. 15(b) clearly gives the Court the authority to allow such an amendment "at any time." This authority is not dependent upon the existence of an intervening change in the law.

However, because the motion is addressed to the Court's discretion and because argument in the case is imminent (October 8, 1985), the Court need not separately consider this matter. Rather, the motion may be considered and decided along with the merits of the case. A formal amendment of the complaint may not be necessary, if the Court decides to address resp's claims that petrs were properly named and/or waived their immunity by their conduct. After full deliberation on the Eleventh Amendment issue and a complete review of the relevant portions of the record, the Court will be better able to determine whether formal amendment to the pleadings is necessary and appropriate. If the Court accepts resp's amended pleading, an appropriate reference could be inserted in the opinion.

CONCLUSION: The Court may, in its discretion, permit resp to amend his complaint to conform to proof. However, because argument in the case is imminent (October 8, 1985), the Court

need not consider the motion separately. The motion should be considered along with the merits of the case. After full deliberation and review of the record, the Court will be better able to determine whether formal amendment is necessary and appropriate.

There is no response.

9/12/85 Niddrie

September 30, 1985

Court	*Voted on*....., *19*...		
Argued ....., *19*...	*Assigned* ....., *19*...	No.	84-1273
Submitted ....., *19*...	*Announced* ....., *19*...		

REGENTS OF THE UNIV. OF MI

vs.

EWING

Motion to amend the amended complaint.

Defer to argument

TM
WHB
(agree we should let allow amend now

(I'm inclined to ~~to~~ deny after argument)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Excellent memo.

To: Justice Powell

From: Mike 10/1/85

Re: Eleventh Amendment issue in Regents, Univ. Mich. v. Ewing

CF 84

This memo refers to your concerns about the eleventh amendment issues in Ewing. I should say that I think my memo was unnecessarily confusing because my analysis pointed to an Eleventh Amendment bar to jurisdiction, but my recommendation was to allow amendment of the complaint. That recommendation was based on my impression from reading Patsy and from the grant of cert in this case that your fellow Justices were not interested in being diverted from consideration of the merits by a latent Eleventh Amendment issue. I now think that recommendation was ill-advised. I am pleased to see that you are still interested in pursuing the concerns you expressed in your dissent in Patsy, and I would like to reverse myself and recommend that you deny leave to amend the complaint. My reasons for doing so were vaguely foreshadowed in my earlier bench memo; I will make them explicit here.

I. DISCUSSION

A. The Eleventh Amendment as a Bar to the Relief Sought

There are two Eleventh Amendment issues in this case. The first is the straightforward issue of whether the Eleventh Amendment is a bar to this case. That is clouded somewhat by the fact that the petr (University) completely misunderstands its Eleventh Amendment claim. Perhaps that is why the Court voted to grant cert despite the Eleventh Amendment issue; the Eleventh Amendment

issue raised by the petr is weak. Petr relies on Pennhurst, 104 S. Ct. 900. Actually, the best claim derives from a simple application of Ex Parte Young, 209 US 123, and Edelman v. Jordan, 415 US 651. The combination of those cases means that a party is not suing the state, for Eleventh Amendment purposes, if he is only seeking prospective injunctive relief. This is true even if the party is suing state officials. The rationale is that in such a case the party is only seeking to require the official to conform his future conduct to the requirements of federal law, and that as long as such an official is not acting in accordance with federal law, his actions cannot be attributed to the state. The two key factors are that (1) the relief sought must be prospective, and (2) must not directly seek money damages (although an award of prospective equitable relief may have an impact on the state treasury). It is clear after Edelman and Cory v. White, 457 US 85, 90-91 (1982) that no form of retroactive relief is available against state officials in their official capacities. While Ex Parte Young authorizes some forms of prospective relief against state officials in their official capacities in order to vindicate federal supremacy, the Court has declined "to extend the fiction of Young to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the states." Pennhurst at 911.

Given the above principles, it is a little surprising that resp Ewing could have gotten this far with his case, because it clearly seeks to remedy a "past violation." Ewing alleges that it was a violation of federal law not to let him retake the test,

Pennhurst stands for the proposition that the Eleventh Amendment bars suits in federal court that seek to require state officials to conform their conduct to state law. Under Pennhurst it is not important whether the relief sought is prospective or retroactive; the issue is whether the harm complained of is a violation of state law. Thus, if one accepts resp's contention that the University has violated his federal substantive due process rights, then resp has a valid federal law claim under §1983 and petr's argument that this suit is foreclosed by Pennhurst is not accurate. However, if one accepts the SG's argument that this case does not even present a violation of substantive due process, then Ewing is left without a federal claim. At most, he is left with a claim that the University did not comply with its own policies, a case clearly foreclosed by Pennhurst. Acceptance of the SG's argument deprives resp of federal question jurisdiction. [I would like to clear up another point of confusion in my bench memo. I stated that the approach of the DC to the merits of this case was the stronger approach. By that I meant that it had more support in the case law and was more likely to garner a majority. But I actually prefer the SG's approach because it prevents such suits from ever being filed, thus saving universities from the enormous burden and expense of discovery and pretrial motions necessary to obtain summary judgment.]

II. CONCLUSION

(1) Resp seeks relief for a past violation of federal law, and does not allege any ongoing violation or otherwise seek

prospective relief. Even if his suit were against state officials and not a state agency, Edelman establishes that suits against state officials seeking retroactive relief are in actuality suits against the state and are barred by the Eleventh Amendment.

(2) In addition to the above bar, resp's suit is also barred irrespective of the relief sought because he named a state agency as the defendant. That error deprived the courts below, and consequently this Court, of jurisdiction. If that were the only jurisdictional problem with the case, then the Court in Patsy has indicated that it might be willing to decide the merits anyway in anticipation of leave to amend being granted freely below. But in this case leave to amend ought to be denied, both because there are other more serious jurisdictional problems with the case, and because the Court does not presently have jurisdiction over the case.

III. Questions for Oral Argument

1. How does this Court have jurisdiction over this case?

2. How would you characterize the relief being sought by resp? Does he allege any ongoing violation of federal law, or does he in any way seek to require these state officials to conform their future conduct to the requirements of federal law?

3. How do you reconcile the retroactive relief sought in this case with our statements in Edelman and Pennhurst that retroactive relief violates the Eleventh Amendment?

and seeks an order requiring the Regents to let him retake the test. He does not allege any ongoing violation, but only seeks relief for a past violation. The relief he seeks is clearly foreclosed by the Eleventh Amendment.

Both parties may have been confused by cases which appear to award retroactive relief against state officials in their official capacity. See, e.g., Milliken v. Bradley, 433 US 267 (1977). Those cases award retroactive equitable relief only when it is "ancillary" to the primary award of prospective equitable relief. The Court's decision in Patsy v. Florida Board of Regents, 457 US 496 (1982) also is troubling. In that case, the petr alleged employment discrimination and sought an order "requiring Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for which she is qualified." Record at 47. While that sounds very much like retroactive relief, the issue is a close one and it was not brought to the Court's attention. In the present case, however, the primary relief sought is unarguably retroactive. There is no prospective relief sought on which to hang retroactive relief.

The above analysis means that resp's suit is barred by the Eleventh Amendment. Despite the language of the majority in Patsy, I think that the Eleventh Amendment bar is jurisdictional and deprives the courts below and this Court of jurisdiction over the case. The plain language of the Amendment so requires: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

against one of the United States by Citizens of another State ..." The footnote in Patsy that the Eleventh Amendment is not jurisdictional in the sense that it may be raised and decided by the Court on its own motion is simply wrong. The case cited, Mt. Healthy City Bd. of Ed. v. Doyle, 429 US at 279, is inapposite. It simply holds that a Board of Education is not an arm of the state. Patsy's comments about the nonjurisdictional nature of the Eleventh Amendment were wrong, and can only be explained by the fact that there was a latent issue of waiver that may have prompted a remand.

B. Amendment of the Complaint

The fact that resp seeks a remedy for a past violation of federal law means that his suit is barred whether or not his complaint is amended. That is, his suit is barred if he sues the state directly and it is also barred if he sues individual officers in their official capacities. For that reason, the motion to amend the complaint is somewhat academic. Even so, it ought to be denied not only because granting it does not cure the Eleventh Amendment bar, but also because this Court would not have jurisdiction to consider it even if the relief sought were proper. The entire analysis of Ex Parte Young and Edelman focuses on when individual officers can be sued in their official capacities without suing the state. No opinion of this Court allows any person directly to sue the state. Because of plaintiff's admittedly technical mistake of naming "the Regents", an official state agency, in his complaint, instead of suing the individual Regents, no federal court ever had jurisdiction over

this case. This Court's potential jurisdiction over the case is appellate. 28 USC § 1254(1) If the courts below lacked jurisdiction, so does this Court. See Shanferoke Coal & Supply Corp. v. Westchester Corp., 293 US 449 (1935). Resp argues that this whole issue is merely semantical, and cites Patsy and Brandon v. Holt, 105 S. Ct. 873 (1985) for the idea that the Court has expressed a willingness to overlook such "technical" violations when it is clear that leave to amend would be freely granted below, and proceed to decide the merits. Brandon involved municipal immunity under §1983 and therefore did not implicate Eleventh Amendment concerns. The party was merely allowed to amend the pleadings to conform to the proof offered below and to take into account intervening decisions that made municipalities liable under §1983. Patsy did not grant a motion to amend, but simply decided the merits based on the Court's feeling that leave to amend would be freely granted on remand. Also, it can be argued that Patsy involved only the technical issue of naming the wrong party in the complaint, and not the substantive issue of a party seeking an improper remedy that this case raised. If the only issue is whether the complaint can be amended, then it does seem harsh to dismiss the case and force the entire thing to be retried upon filing of a new complaint naming the correct parties. But much more than that is involved here, since even if amendment is allowed, the case is still barred by the Eleventh Amendment.

C. Pennhurst

To: Justice Powell

From: Mike

Re: Regents, University of Mich. v. Ewing

Oct 31

This short note deals with an additional reason in favor of accepting the SG's argument. The gist of the SG's argument is that resp has not stated a valid substantive due process violation. If that is accepted, then Ewing is left without a federal law claim, because his §1983 claim is premised on a violation of his substantive due process rights. His only remaining claims are that the University has failed to abide by its own rules or by state contract law. A claim seeking to force state officials to conform their conduct to the requirements of state law is foreclosed by Pennhurst. Thus, by accepting the SG's argument the Court can dispose of the case on the merits and deal with the Eleventh Amendment issue.

The other possible approaches (such as the approach of the DC below) at least implicity admit that resp has stated a colorable federal claim. Once you admit that, then it is also logically necessary to admit that the case is barred by the Eleventh Amendment, since the federal claims seek retroactive relief. But it seems to me that the Court can conclude that no valid substantive due process claim has been stated without directly running afoul of the fact that the Court lacks jurisdiction to deal with the merits of this case.

lfp/ss 09/30/85

MEMORANDUM

TO: Mike FROM: Sept. 30, 1985

FROM: Lewis F. Powell, Jr.

84-1273 Regents University of Michigan v. Ewing

This refers to our brief discussion on Friday of the effect of the proposed amendment by the respondent medical student to his complaint. An amendment that simply changed the name of the defendant (petitioner) from the Board of Regents to the member of the Board acting in their "official capacities". My understanding is that precisely the same remedy is sought: the right to retake the examination - in effect an alleged "property right" in education provided by the state.

Since our talk I have read Bill's bench memo in Green v. Mansour, 84-6270, an Eleventh Amendment case of some interest. Note p. 15 of Bill's memo in which he states:

> "Even though this is a suit against state officials and not the state itself, the Eleventh Amendment applies if the state is the real party in interest. Pennhurst, supra, at 908; Ford Motor Company v. Dept. of Treasury, 323 U.S. 459, 464.

This is my understanding of the law, but if I am correct you have a different view. You might take a look at Bill's memo and discuss this with him. I must be missing something critical.

* * *

You might suggest a few questions for me to consider asking counsel at argument relating to whether the Eleventh Amendment can be evaded simply by suing individual state officials in their official capacity? This would apply to every state agency. I suppose a motorist could claim a federal property right under the Constitution to use all state roads, and could sue the members of the state highway department in their officials capacities for injuries sustained because of potholes. I mentioned bringing a suit against the members individually of a state's legislative body. Concededly examples are not easy to think of. Assume, as I believe is true in many states, that a judge may be impeached in proceedings somewhat similar to those provided for federal judges. Would a sitting judge impeached by the vote of a state senate be entitled to bring a federal court action, claiming a constitutional property right in his job, and naming as defendants members of the state senate acting in

their official capacity. If such suits as these may be brought, there is not much left of the Eleventh Amendment.

The foregoing suggests that I still probably do not understand distinctions that I am sure you have thought through. Nor have I read Patsy. In sum, let me have the benefit of your further thinking - in a brief memo that can be supplemented by discussion.

L.F.P.

L.F.P., Jr.

ss

Intatur Outline 10/5

84-1273 Regents, U. of Mich v. Ewing (CA6)

Reverse

1. Deny motion to Amend Complaint { Case tried + DC + CA6 considered case as pled.

2. Barred by 11th Amend (we have no juris.)

Ex parte Young permits suit vs State officers only for prospective injunctive relief — compel officer to conform to Fed law.

Edelman v. Jordan ~~[illegible]~~ made clear Young does not apply where retroactive relief is sought — whether for damages or injunction. See Cory v. White 457 U.S. 85, 90-91.

Possibly waived

3. Ewing seeks only to remedy an alleged past violation of Fed substantive D/P law.

(If Patsy is mentioned this issue was not addressed. Also the required action = (employ Patsy on first job opening) ~~was~~ arguably was prospective & uncertain — Patsy might have found other jobs)

4. Apart from ~~[illegible]~~ the Young/Edelman juris issue, did Hold no "Fed substantive D/P right" — called a "prop. right"

~~[illegible]~~ At most, Ewing had a "contract" (implied) with State — a matter of State law. Const. does not convert a mere att for an education into a property right. Even if it did, Ewing was not deprived of such a right.

Leave University free to make academic decisions

Mike

84-1273 REGENTS v. EWING

Argued 10/8/85

Ex Parte Young - prospective relief only. Edelman

In this case, DC held academic dismissal are not subject to substantive D/P review. CA6 Rev.

This is suit vs State for retroactive relief. Resp wants to be readmitted.

Daane (Petr) (extremely poor advocate!)

Astonishing "Assumed" there is a "prop. right"!!!

Argued that even if prop. right there was no violation. Decision not arbitrary & capricious.

Relies on 14th Amend. (Counsel tried had to give case away)

Brief is far better than oral argument

Conway (Resps)

"Prop. interest" under Mich. case law that arises out of ctt. between University & student.

Relies on Pl's Ex. No 1 (JA p 113) for view that Petr. had a Rule requiring a second exam. SDC permissively assumed that this was a "statement" - not a Rule formally adopted. (Also statement was issued after Resp entered Med. School - thus no ctt)

Regents did not waive 11th amend. imm. But see the DC & 1982 decision

Mike

(The lawyer for [redacted] U of Mich. tried to give him a race away!)

Post-Argument Notes

84-1273 Mich Regents v. Ewing

Reverse

1. Waived 11th Amend argument.

2. "Assumed" (did not waive) Resp. had a sub. D/P prop right.

Agree with SG. At most Ewing had an implied contract rt. vs State – matter of State law.

3. Even if a sub. D/P prop. right, the conduct of Petr was not "arbitrary or capricious".

Reverse 9-0

No. 84-1273, Regents v. Ewing Conf. 10/11/85

The Chief Justice Reverse

CA found a state law prop. right. CA tried case de novo - ignoring DC's findings

* Decision not arbitrary or capricious.

Justice Brennan ~~R~~ Reverse

Assume - as we did in Horowitz - a prop. right.

Justice White Reverse

Assume there is a prop. interest - but ~~no~~ no violation.

Justice Marshall Reverse

No discussion

Justice Blackmun Reverse

Assume prop. interest

Would allow motion to amend

Justice Powell Reverse

See my notes.

I'll write on prop. right issue

Justice Rehnquist Reverse

Agree with LFP (I used my notes to state my position)

Would agree to amend & ~~rem~~ decide case on 11th Amend.

Justice Stevens Reverse

Must address 11th Amend issue
Could treat ≠ issue as moot - relief prospective

In Mich., State cases spoke of prop right. Right is not to be ~~th~~ thrown out of College arbitrarily.

Faculty has broad deference - we should ~~em~~ emphasize.

Justice O'Connor Reverse

Should grant motion to amend complaint.
No 11th amend violation - relief prospective

No substantive prop. right to take the exam? There may be some right not to be thrown out of College ~~at~~ arbitrarily - but facts should be determined.

Said she agrees with me

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 SANDRA DAY O'CONNOR

November 15, 1985

I agree & unless John conforms to SDC suggestions, I will address them

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 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 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 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

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

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 WILLIAM H. REHNQUIST

November 25, 1985

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

Dear John,

Please join me.

Sincerely,

WHR

Justice Stevens

cc: The Conference

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

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,

Justice Stevens

lfp/ss

cc: The Conference