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Ashutosh Bhagwat

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Essay

Injury Without Harm: *Texas v. Lesage and* the Strange World of Article III Injuries

BY ASHUTOSH BHAGWAT*

On November 29, 1999 the Supreme Court issued its unanimous *per curiam* opinion in *Texas v. Lesage*,[1] summarily reversing an opinion of the United States Court of Appeals for the Fifth Circuit. *Lesage* is by all indications an obscure and seemingly insignificant constitutional decision. The opinion deals with a relatively narrow issue of the law of constitutional remedies: whether a plaintiff denied admission at a state university whose admissions process makes unconstitutional use of race is entitled to monetary damages under 42 U.S.C. §1983 if the defendant school can demonstrate that the plaintiff would have been denied admission even if race had not been used as a criterion. The Supreme Court answered "no," and reversed the Fifth Circuit,[2] but apparently did not consider the issue sufficiently interesting or important to merit full briefing and argumentation. Indeed, the Court claimed to be making no new law, but rather simply applying in a new context its twenty-two year-old decision in *Mt. Healthy City School District Board of Education v.*

* Professor of Law, University of California, Hastings College of the Law <bhagwata@uchastings.edu>. Thanks to Bill Dodge, Evan Lee, and David Levine for extremely helpful comments and suggestions.

1. 528 U.S. 18 (1999).

2. As discussed further below, *infra* Part III, the Court's holding did not preclude such a plaintiff from seeking injunctive relief.

Doyle,[3] which similarly restricted damages claims by public employees for violations of their First Amendment rights.

On its face, therefore, the *Lesage* decision appears both humdrum and unproblematic. After all, it seems obvious that a plaintiff should *not* be entitled to money damages if the defendant can prove, in the words of the Court, "that the government would have made the same decision regardless," since then "there is no cognizable injury."[4] There is, however, something odd and frankly perplexing about the Court's holding in *Lesage*, when considered in light of the Court's extant jurisprudence regarding Article III standing and the nature of the constitutional "injury in fact" suffered by plaintiffs who allege violations of the Equal Protection Clause. As it turns out, the result in *Lesage* is not unproblematic at all; rather, when examined closely the case reveals deep fissures and internal contradictions within the Court's opinions in this area. Indeed, the language of the *Lesage* opinion itself highlights these contradictions, without addressing or resolving them. This essay has the modest objectives of exposing these internal contradictions in the Court's Equal Protection/Standing jurisprudence, and to offer some tentative thoughts as to a few possible resolutions.

I. Standing, Article III, and Injuries-in-Fact

It is well-accepted, black-letter law today (no matter how controversial in academic circles) that in order to meet the strictures of the "case and controversy" requirement of Article III, a plaintiff in federal court must, at a constitutional minimum, prove that she has suffered "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[5] At the core of this rule is the requirement of "injury in fact": "an invasion of a legally-protected interest which is (a) concrete and particularized . . . , and (b) 'actual or imminent.'"[6] Despite this seemingly settled definition, however, the Court has continuously struggled with the exact meaning of the term "injury in fact." The following are just some issues that, in the past few years, the Court has considered, and often sharply disagreed about: whether members of Congress (and other legislators) have suffered a cognizable "injury

3. 429 U.S. 274 (1977).

4. 528 U.S. at 20.

5. Allen v. Wright, 468 U.S. 737, 751 (1984).

6. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

in fact" when the power of Congress as an institution is reduced, thereby reducing the effective power of individual legislators;[7] whether denial of information sought by individuals pursuant to the Federal Election Campaign Act constitutes an injury in fact;[8] whether *qui tam* plaintiffs have suffered injury in fact;[9] and whether an environmental plaintiff continues to suffer injury in fact when a defendant ceases its polluting activities during the course of litigation.[10]

One question in the standing area which the Court has had particular difficulty coming to grips with is the extent to which the concept of an "injury" has some sort of a natural, prelegal meaning, or is instead a purely legal concept. This is an issue of great importance because it has tremendous implications for the power of Congress to authorize lawsuits by creating and defining newly actionable injuries. The Court's internal divisions on this question, and their practical importance, are displayed sharply in the important decision in *Lujan v. Defenders of Wildlife*.[11] The majority opinion by Justice Scalia, the Court's foremost proponent of the standing doctrine and of a naturalistic approach to "injury," clearly understands injury in fact as something *real*, which exists, or does not exist, quite independent of legal context or underlying, substantive law. Thus, Justice Scalia states that to satisfy the injury in fact requirement, a plaintiff must make "a factual showing of perceptible harm,"[12] and that Congress cannot eliminate the minimum requirement that federal plaintiffs have actually suffered a "de facto," "concrete" injury -- that they have been "injured *in fact*."[13] Justice Kennedy's concurring opinion, in contrast, takes quite a different approach to injuries: "In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case

7. Raines v. Byrd, 521 U.S. 811 (1997).

8. Federal Election Comm'n v. Akins, 524 U.S. 11 (1998).

9. *See* Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765 (2000).

10. *See* Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000).

11. 504 U.S. 555 (1992).

12. *Id.* at 566.

13. *Id.* at 566, 576, 578 (emphasis added). Justice Scalia's recent opinion for the Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), upholding standing in *qui tam* cases, is not inconsistent with this position, because the basis for the holding in that case was assignment to the *qui tam* plaintiff of the *government's* claim (based on an uncontroverted injury in fact), not recognition of injury to the plaintiff himself. *See id.* at 771-75.

or controversy where none existed before."[14] The notion expressed here, that Congress can *create* an injury which would satisfy constitutional standing requirements, is anathema to the idea expressed by Justice Scalia that the concept of an injury has a minimum, natural component which has been incorporated into Article III. As Cass Sunstein has nicely put it, the underlying disagreement here is whether "there is a way, entirely independent of law, of figuring out whether a litigant has been 'injured' at all."[15] Sunstein argues, convincingly in my view, that in fact (pun intended) there is no way to distinguish without some legal framework between injuries which exist "in fact," and those that do not.[16] He goes on to argue that in its 1998 decision in *Federal Election Commission v. Akins*,[17] the Supreme Court moved far towards adopting just such an approach towards injury.[18] Ultimately, as Sunstein and many other scholars have noted, if one rejects the naturalistic view of injury in fact, then the question of standing largely folds into the *legal* question of whether the plaintiff has a cause of action rooted in the common law or a statute.[19] Of course, such a view of standing entirely eliminates its significance as a doctrine, grounded in the doctrine of separation of powers, which imposes important limits on *Congress'* power to shift authority between the branches of government. This, no doubt, explains the resistance of at least some members of the Court to adopt such an approach.[20]

II. Affirmative Action and the "Opportunity to Compete"

The struggle over the nature of justiciable injuries has been especially important in cases involving the Equal Protection Clause of

14. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

15. Cass Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 640 (1999).

16. *Id.* at 641.

17. 524 U.S. 11 (1998).

18. *See* Sunstein, *supra* note 15, at 641-43.

19. *Id.* at 638-39; *See* William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988); David Currie, *Misunderstanding Standing*, 1981 S. CT. REV. 41; Lee Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 485-86 n.290, 491-92 & n.317 (1974); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1381 (1973).

20. *See* Allen v. Wright, 468 U.S. at 750-52 (O'Connor, J.); Federal Election Commission v. Akins, 524 U.S. at 36-37 (Scalia, J., dissenting); Antonin Scalia, *The Doctrine of Standing as an Essential Part of Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

the Fourteenth Amendment and, in particular, in cases where white plaintiffs have challenged affirmative action programs and other benign, race-conscious government programs. This is because in the leading cases challenging such programs, the plaintiff is typically unable to prove that he or she would have received the benefits being dispensed by the challenged program if the government had not considered race, and thus has been unable to prove that the use of race in these programs actually deprived the plaintiff of some tangible benefit. The Court, however, has consistently and flatly rejected the argument that this is an impediment to standing.

Thus, in the leading case of *Regents of the University of California v. Bakke*, the Court faced an argument that Bakke, an applicant to the University of California at Davis Medical School, lacked standing to challenge the school's affirmative action program because he could not demonstrate that he would have been admitted absent the program. The Court responded (albeit off-handedly, in a footnote) as follows:

> The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Hence the constitutional requirements of Art. III were met. The question of Bakke's admission vel non is merely one of relief.[21]

The Court was faced squarely with the standing issue in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,[22] involving an association of general contractors suing to challenge a minority set-aside program for city contracts. Once again, the standing problem arose because the plaintiffs could not prove that they would have been awarded any contracts absent the program, and on this basis the Court of Appeals had rejected standing, finding that the plaintiffs had suffered no injury. The Supreme Court squarely rejected this argument, holding that:

> [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.... And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in

21. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

22. 508 U.S. 656, 666 (1993).

the bidding process, not the loss of a contract.[23]

Finally, in *Adarand Constructors v. Pena*,[24] the Court relied on its holding in *Jacksonville* once again to permit a contractor to challenge a race-conscious preference program for government contracts (in this instance, a federal program), despite the fact that the plaintiff contractor could not prove that it would actually receive any contracts absent the program.

Together, these cases establish that at least in the equal protection context, in order to establish standing and injury in fact, a plaintiff need not allege the loss of a *tangible* benefit. Instead, the loss of opportunity to compete equally itself constitutes a sufficient injury. It should be noted that the injury in these cases was *not* the denial of an opportunity to apply or compete for a benefit at all, because in none of these cases was the plaintiff completely excluded from applying for, and being considered for, the benefit at issue. Indeed, the *Adarand* case did not involve any sort of a numerical set-aside, so the plaintiff was not prevented from competing for any particular contract. Instead, the injury was the loss of opportunity to compete *equally*, the deprivation of equality itself.

Two important results follow from the Court's holdings in this area. First, it becomes clear that the nature of constitutionally cognizable injuries must depend on the substantive area of law at issue. It seems quite obvious that loss of equal opportunity alone would *not* constitute a sufficient injury in fact in areas of law other than equal protection. In the First Amendment context, for example, it is hard to imagine the Court permitting a challenge to proceed against a city's licensure program for the use of its parks, streets, or sidewalks unless the plaintiff demonstrates that it actually intends to use the space for First Amendment-protected activities and has a reasonable probability of being permitted to do so. Loss of "opportunity," or even "equal opportunity" to use the property would not be enough, if it was reasonably clear that ultimately no expressive activity would occur.[25] Similarly, in the environmental context the Court will not permit a plaintiff to sue to stop a defendant from polluting a particular piece of land on the grounds that the plaintiff has lost the opportunity to use the land because of the pollution; the plaintiff must demonstrate that she actually intends to

23. *Id.* at 666.

24. 515 U.S. 200, 211 (1995).

25. *Cf.* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

use the particular, affected area.[26]

Second, the Court's affirmative action decisions demonstrate that language in the *Lujan* opinion and other cases indicating that Article III requires plaintiffs to suffer a "concrete" rather than an abstract injury cannot be taken too literally. After all, "the denial of equal treatment" and "the inability to compete on an equal footing" seem on their face to be quite abstract injuries. But, presumably because of the constitutional significance of the equality concept, as expressed in the Equal Protection Clause, they are sufficiently concrete for Article III purposes.[27]

III. *Lesage*: Injury Without Compensation

Now we come to the Court's decision in *Texas v. Lesage*.[28] In *Lesage*, the Court held that when a plaintiff challenges an affirmative action program (in this instance, a graduate school which used race as a criterion in student admissions), he cannot recover any money damages if the government defendant can prove that the plaintiff would not have received the benefit at issue (in *Lesage*, admission) even if the government had used a race-neutral decision process. The Court summarized its holding as follows:

> Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.[29]

The Court goes on to note, however, that

> [o]f course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in

26. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

27. The standing issues raised in affirmative action cases have important and obvious parallels with the Court's jurisprudence, and academic debate, regarding whether white voters should have standing to challenge so-called "racial gerrymandering," the intentional creation of legislative districts where minority voters constitute a majority. *Compare* David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases – Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123 (1997) (arguing against granting standing to white voters to challenge the creation of majority minority electoral districts) *with* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997) (suggesting that the Court's decisions granting such voters standing are defensible, and indeed clearly correct).

28. 528 U.S. 18 (1999).

29. 528 U.S. at 20.

such cases is "the inability to compete on an equal footing."[30]

Of course. Notice what the Court is saying in *Lesage* (in its inimitably terse manner): Article III permits a plaintiff to seek an injunction to stop an on-going affirmative action program even if the injunction will *not* result in the plaintiff acquiring any tangible benefit. The relevant injury in such cases is

> the inability to compete on an equal footing. But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.[31]

In the latter type of case, where the only remedy sought is damages, "there is no cognizable injury."[32] This last phrase highlights the mystery of the *Lesage* decision because, despite what the Court says here, Francois Lesage *had* been denied "equal treatment" by the University of Texas when it took account of his race in considering and denying his application, regardless of whether he was planning to reapply to the University in the future. The past injury he had suffered was no different from the threatened injury which, according to the Court, would have permitted him to seek injunctive relief. Nonetheless, the Court held that he was not entitled to damages because his injury was not "cognizable." Lesage may have had a right but he had no remedy, proving John Marshall wrong again.[33]

The Court is thus defining cognizable "injury" in two completely different and inconsistent ways in *Lesage*. The "inability to compete on an equal footing," or in the language of *Associated General Contractors v. Jacksonville*, "the denial of equal treatment"[34] *is* an injury for Article III purposes, at least when the plaintiff is seeking injunctive relief. But it is not an injury for the purposes of damages liability under §1983. The question is, why?

One possibility is that the disjunction reflects some peculiarity

30. *Id.* (quoting Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 666 (1993)).

31. *Id.* at 19-22 (quoting Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. at 666 (1993)).

32. *Id.* at 20.

33. *Cf.* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

34. Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. at 666.

about 42 U.S.C. §1983, the statutory basis for *Lesage*'s damages action. After all, the Court did say that Lesage had not suffered a 'cognizable injury *warranting relief under § 1983*."[35] This, however, is an unlikely explanation for the Court's holding. There is nothing in the text of § 1983 indicating that Congress intended to narrow the range of otherwise actionable injuries which would be compensable through damages under § 1983.[36] Furthermore, when a plaintiff seeks injunctive relief against a state affirmative action program, § 1983 is also the basis for the suit, and there is *nothing* in the text of § 1983 suggesting that the nature of the relief sought should affect a plaintiff's ability to invoke the statute — the statute authorizes "an action at law, suit in equity, or other proper proceeding for redress" without distinguishing between the various forms of relief.[37] Finally, when plaintiffs challenge *federal* affirmative action programs, §1983 will *not* normally provide a basis for relief. Rather, any damages liability must presumably be based on some sort of a *Bivens* type of action.[38] Yet it seems extraordinarily unlikely that the Court will permit money damages against the federal government in situations, such as in *Lesage*, where a state government would be able to avoid liability by showing that it would have made the same decision regardless of race.

So, the result in *Lesage* is not the product of some peculiarity in the underlying statute. We thus need some way to reconcile *Lesage* with cases like *Associated General Contractors v. Jacksonville*.[39] As noted above, according to the *Lesage* Court there are some injuries which are adequate "injuries in fact" for the purposes of Article III, but which do not injure people in a way which entitles them to money

35. 528 U.S. at 18.

36. Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983 (1991).

37. *Id.*

38. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

39. In searching for doctrinal coherence, I am of course rejecting the cynical view that the Court's holding in *Lesage*, or more accurately the expansive view of standing the Court has taken in cases such as *Bakke, Associated General Contractors v. Jacksonville,* and *Adarand*, is simply a product of the Court's crusade against affirmative action, otherwise irreconcilable with its standing doctrine. For a detailed exposition of such a view, see Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995).

damages. They are pseudo-injuries, sufficient to permit a plaintiff to sue the government for injunctive relief, but not sufficiently tangible to create *any* right to money damages, not even nominal relief or attorneys fees (remember, the government was granted summary judgment on Lesage's damage claim). As Christina Whitman has recently pointed out, however, this is peculiar. Existing caselaw, including notably the Court's decision in *Cary v. Piphus*,[40] suggests that a constitutional injury *is* compensable with damages under § 1983, albeit perhaps only nominal damages, if a true injury has occurred regardless of whether the ultimate, substantive decision by the government was caused by the unconstitutional action.[41] *Cary* involved a violation of procedural due process rights, and its holding was explicitly limited to that setting. There is, however, an obvious parallel between the injury caused by deprivation of procedural rights and the deprivation of equal treatment at issue in the affirmative action cases. Nonetheless, in *Lesage* the Court did not extend the reasoning of *Cary* to equal-protection cases, and indeed did not even cite the decision.[42] Thus according to the Court, the deprivation of a hearing in *Cary* was actionable, and compensable with nominal and potentially emotional distress damages, while the deprivation of equal treatment in *Lesage* was not. Apparently, despite their obvious similarities, the difference in the substantive bases for the injuries in *Cary* and *Lesage* — procedural due process versus equal protection — in the Court's view justified quite different treatment.

Lesage thus indicates that whatever the language of previous opinions such as *Lujan,* legal context, including both the substantive law at issue and the nature of the relief sought, does matter when defining injury in fact. Furthermore, this conclusion is perfectly consistent with the general tone of the Court's affirmative action/standing decisions, where, as noted above, legal context has *clearly* mattered in deciding what sorts of injuries are actionable. Put differently, the *Lesage* decision, along with earlier decisions such as *Bakke* and *Associated General Contractors v. Jacksonville*, indicate that the concepts of cognizable injury and injury in fact, as used in *Lesage* and the Court's standing cases, do not refer to some natural

40. 435 U.S. 247 (1978).

41. *See* Christina Whitman, *An Essay on* Texas v. Lesage, 51 MERCER L. REV. 621, 632-35 (2000); *see also* Sheldon Mahmoud, Mt. Healthy *and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 611-12 (2000).

42. Though admittedly, the failure to cite *Cary* may have been a product of the summary nature of the *Lesage* decision.

condition, but rather are simply about a plaintiff's legal ability to sue, which is a proposition of substantive law.

The notion that the standing inquiry under Article III is ultimately rooted in issues of substantive law is not unique to the equal protection or even the constitutional context. As Cass Sunstein has noted, this idea forms an important strand in the Court's standing cases.[43] In *International Primate Protection League v. Administrators of Tulane Education Fund*, for example, the Court explicitly stated that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents,"[44] and went on to hold that a plaintiff had standing to challenge removal of its case from state to federal court, even if the plaintiff lacked standing to pursue the substantive claim in federal court, thus confirming that the nature of a legal dispute shapes in important ways whether a particular alleged injury is sufficient for Article III purposes. Furthermore, in the *Federal Election Commission v. Akins* case, the Court also quite clearly indicated that the reason that the injury-in-fact in *Akins* — the denial of information sought by plaintiffs — was sufficient for Article III purposes was because a statute gave the plaintiffs the right to the information, once again indicating that substantive law is critical in defining cognizable injury.[45] Finally, as noted above, Justice Kennedy's concurring opinion in *Lujan* quite clearly adopts this approach.[46] Of course, this approach to standing remains in tension with the statements made by the Court in *Allen v. Wright* and *Lujan* suggesting that injury in fact is a real, nonlegal concept. Ultimately, then, one must choose between these two approaches to injury, and it is my contention that cases like *Lesage* and the rest of the Court's affirmative action/standing jurisprudence provide strong support for the view that the legal view of injury, as an issue of substantive law, is the dominant one in the Court's jurisprudence.[47]

43. *See* Sunstein, *supra* note 15 at 641-43. This is also the position of Professors Fletcher and Albert. *See* Fletcher, *supra* note 19 at 229-39; Albert, *supra* note 19 at 491-92. For a recent judicial decision emphasizing the interplay between substantive law and Article III injury, see Kyles v. J.K. Guardian Security Services, 222 F.3d 289, 294-99 (7th Cir. 2000) (upholding standing for "testers" under Title VII, based on congressional intent to create broadly-defined, cognizable injuries in civil rights statutes).

44. 500 U.S. 72, 77 (1991). The Court's broad, unanswered language in *International Primate* is perhaps explained by the fact that Justice Scalia recused himself from the case.

45. *Akins*, 524 U.S. at 21; *see generally* Sunstein, *supra* note 15 at 641-43 (supporting this reading of *Akins*).

46. *See Lujan*, 504 U.S. at 579-81.

47. In particular, in assessing the force of the Court's language in *Lujan*, which is probably the strongest exposition of the naturalistic approach towards injury, it must be

IV. Conclusion: Congress' Power to Define Article III Injuries

After *Lesage*, it would appear that whether or not a particular injury is sufficient for Article III purposes depends on the nature of the plaintiff's substantive claim, and not simply on the factual nature of the injury. In cases like *Lesage* the Court has created a shifting definition of injury in fact which turns on substantive law, and thus has effectively arrogated to itself the power to create substantive law. When the underlying substantive law is constitutional, as in *Lesage* and other affirmative action cases, this seems fine. After all, the Court does have the final word (or so the Court says) in determining the content of constitutional law,[48] and thus it makes sense that the Court should have the preeminent role in determining what sorts of constitutional injuries are redressable by the federal judiciary.[49] Even then, one might question why the Court should restrict Congress' power to *expand* the category of cognizable, constitutional injuries beyond the minimum set by the judiciary; but perhaps the answer can be found in the same federalism- and separation-of-powers-based concerns which have convinced the Court that Congress may not use its powers under section 5 of the Fourteenth Amendment to expand the substantive reach of the Due Process Clause and the Bill of Rights.[50] When the substantive law at issue is *statutory*, however, the calculus changes entirely. As Justice Brennan said in *Davis v. Passman* (in the course of recognizing a judicially-created cause of action to remedy constitutional violations), "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner."[51] And that

noted that Justices Kennedy and Souter (who joined Justice Kennedy's concurring opinion) provided the crucial fifth and sixth votes for Justice Scalia's majority opinion, yet in their separate opinion indicated that they did *not* view the Court as adopting a purely naturalistic view of injury in fact. *See id.*

48. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997); Cooper v. Aaron, 358 U.S. 1 (1958); Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending the Court's view of its own authority).

49. This view of the Court's power is consistent with the fact that the Court has long recognized its power to create judicial causes of action, for both injunctive and legal relief, to vindicate federal constitutional rights. *See* Davis v. Passman, 442 U.S. 228, 241-44 (1979); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

50. *See* City of Boerne, 521 U.S. at 521-25, 534-36.

51. *Davis*, 442 U.S. at 241.

seems right. What constitutes "a legally protected interest,"[52] invasion of which constitutes injury in fact, is a matter of substantive law. It would seem to follow that the power to create the substantive law — which in the case of statutory law Congress clearly possesses — includes the power to define what legal interests the law protects.[53] Thus in areas of statutory law such as environmental law, information disclosure, and a wide assortment of other regulatory schemes, Congress should possess the power to define what constitutes a cognizable injury for the purposes of Article III.

Of course, Congress does not always speak with great clarity, especially when dealing with arcane legal issues like standing which even members of the Court (not to mention most lawyers) do not fully understand. Thus just as statutes are often silent regarding who may sue to enforce the obligations they create,[54] statutes are usually silent about precisely what legal interests they seek to protect. In that situation, the Court's interpretive role of course requires it to fill in the gaps, and determine the scope of cognizable injuries. Indeed, that is precisely how Justice Kennedy's concurring opinion in *Lujan* explains the Court's decision in that case.[55] Perhaps that is also how one can explain the result in *Lesage*: as an unexceptional example of the Court interpreting a statute, § 1983 (though it should be noted that the underlying issue in *Lesage* was constitutional, suggesting that the Court was exercising its independent power to interpret the Constitution in denying standing to sue). But if a claim is clearly statutory, and if Congress does speak to the question of injuries and protected legal interests, presumably the Court must effectuate its will.

52. *Lujan*, 504 U.S. at 560.

53. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1974) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

54. A fact which has created an extensive, complicated, and controversial jurisprudence regarding when the courts should "imply" private rights of action into statutes. *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975); Cannon v. University of Chicago, 441 U.S. 677 (1979); Superintendent of Ins. of N. Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971).

55. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). In *Lujan*, the Court denied environmental plaintiffs standing despite the existence of a seemingly broad citizens' suit provision in the relevant environmental statute, suggesting that the Court's decision identified a clear outer limit on Congress's power to create new injuries. Justice Kennedy, however, suggested that if Congress has spoken with more clarity in the statute, the Court might have been willing to recognize a new type of injury in fact.

The question that remains is whether there are any limits on Congress' power to recognize and create judicially enforceable injuries in statutes — *i.e.*, whether there is any minimum below which Congress cannot go. Justice Scalia is firmly of the view that there must be such a limit — to wit, that any injury recognized by Congress must be "concrete." Otherwise, if Congress' power were unlimited, by creating new injuries Congress would be able "to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."[56] Furthermore, Justice Kennedy seems to agree with this position.[57] Though a complete answer is far beyond the scope of this paper, I must say that I am more doubtful. To begin with, the expansive view of executive authority championed by Justice Scalia here and elsewhere[58] strikes me as questionable at best. After all, nowhere in the Constitution does it say or suggest that the President's power to enforce the laws is *exclusive*, nor is it obvious how congressional creation of new injuries, and new causes of action, reduces the President's power to enforce the laws. Indeed, since in most cases where standing is controverted the Executive Branch is the defendant, the real effect of congressional action creating new injuries and causes of action is to force the Executive Branch to follow the law, which does not strike me as being an intrusion on the President's legitimate authority (unless, of course, the legal restriction on the Executive Branch being enforced in the lawsuit is itself unconstitutional, in which case the lawsuit will fail on the merits). I suppose that if Congress defined an injury, cessation of which would have absolutely no tangible effect on a plaintiff's life, then the Court might be justified in concluding that Congress has crossed the line into authorizing lawsuits which are purely ideological, and therefore not a "case or controversy."[59] But even then I am not sure — it is not obvious to me why the fact that a plaintiff's motivation is purely "ideological" prevents a real, litigated case from being a case or controversy.[60] Furthermore, the "denial of equal treatment"

56. *Id.* at 577.

57. *See id.* at 580-81.

58. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697-734 (1988); Smiley v. Citibank, 517 U.S. 735, 740-41 (1996).

59. *Cf.* Sunstein, *supra* note 15 at 643 & n.154 (recognizing this ambiguity in the Court's opinions, but not resolving it).

60. For a partial defense of this position, see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 636-41 (1992).

legitimized by the Court itself in the affirmative action cases comes awfully close to being such an injury, suggesting that the Court does not take this limitation on judicial authority terribly seriously.

None of this is to suggest that as a *prudential* matter the Court is not wise to interpret injury and standing narrowly to avoid having itself drawn into ideological disputes. All of the well-known concerns about the appropriate role of the judiciary in our government, rooted in the countermajoritarian difficulty, push towards the Court taking a narrow view of the judiciary's power when the Court is acting on its own. Thus the Court acts quite properly when it refuses, in cases like *United States v. Richardson*,[61] to recognize direct taxpayer or voter standing to enforce constitutional provisions. It may even be that these concerns justify a interpretive presumption against expansion of judicially cognizable injuries. But those concerns disappear when Congress passes a statute explicitly authorizing judicial action, either with presidential approval or over a presidential veto.[62] There is then no countermajoritarian difficulty, since there has been a clear delegation of power to the courts by the most democratic branch. And presumably Congress has acted because it believes there is a need for judicial involvement in that substantive area of law. In those situations, exemplified by cases such as *Akins* and by the many citizen suit provisions Congress has incorporated into environmental statutes, the courts should be willing to shoulder the responsibilities that have been placed upon them.

61. 418 U.S. 166 (1974).

62. *See* Flast v. Cohen, 392 U.S. 83, 131-32 (1968) (Harlan, J., dissenting).