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An Essay on Texas v. Lesage

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by Christina B. Whitman*

When I was invited to participate in this symposium,[1] I was asked to discuss whether the causation defense developed in *Mt. Healthy City School District Board of Education v. Doyle*[2] applied to cases challenging state action under the Equal Protection Clause of the Fourteenth Amendment. As I argue below, it seems clear that *Mt. Healthy* does apply to equal protection cases. The Supreme Court explicitly so held last November in *Texas v. Lesage*.[3] But the implications of *Lesage* go beyond questions of causation. The opinion suggests that the Court may be rethinking (or ignoring) its promise in *Carey v. Piphus*[4] that section 1983[5] plaintiffs can recover nominal damages and, when actual injury can be established, damages for mental and emotional distress.[6]

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1. On Saturday, January 8, 2000, at its annual meeting in Washington, D.C., the Employment Discrimination Section of the Association of American Law Schools sponsored a program that treated the *Mt. Healthy* doctrine. Participating in a panel presentation at this program were Robert Belton, Sheldon H. Nahmod, Michael L. Wells, Christina Brooks Whitman, and Michael J. Zimmer.

2. 429 U.S. 274 (1977).

3. 120 S. Ct. 467 (1999).

4. 435 U.S. 247 (1978).

5. This statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (Supp. III 1997). This statute thus provides a cause of action for those who seek damages and other relief from "persons" who have violated their federal rights "under color of" state law. As such, it is the basis for most cases seeking redress for constitutional injuries.

6. 435 U.S. at 259-64, 266-67.

In *Mt. Healthy* the Supreme Court was presented with a claim by a public school teacher that his contract had not been renewed in violation of the First Amendment. The teacher established that the School Board's decision against renewal of his contract was motivated in part by its reaction to his communications with a local radio station about school matters. The teacher sought and won reinstatement from the lower federal courts.[7] The Supreme Court vacated his victory.[8] The Court held that, even accepting that plaintiff's communication with the radio station was protected First Amendment activity and that retaliation for this activity played a substantial part in the Board's decision not to renew the employment contract, such action by the Board would not amount to a constitutional violation justifying remedial authority if the Board could establish that it would have reached the same decision not to renew in the absence of the unconstitutional motivation.[9] In essence, *Mt. Healthy* established that defendants in "unconstitutional motivation" cases can prevail by proving that they would have reached the same decision even if they acted constitutionally.

The answer to the question of whether *Mt. Healthy*'s approach to causation applies to equal protection cases seems straightforward. On the same day in 1978 that the Court decided *Mt. Healthy*, it also decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[10] Plaintiffs in *Arlington Heights* challenged the refusal of the Village of Arlington Heights to rezone land to allow multiple-family (and thus more affordable) housing. Plaintiffs sought declaratory and injunctive relief, alleging that the racially discriminatory effect of the Village's refusal to rezone meant that its decision violated the Equal Protection Clause.[11] The Court ruled against plaintiffs on the ground that discriminatory effects were not enough to make out an equal protection violation.[12] A showing of racial animus by the Village decisionmaker was required, and plaintiffs failed to establish that such animus was a motivating factor in the Village's decision.[13] However, the Court said in a footnote that the approach to causation articulated in *Mt. Healthy* might bar recovery even if a showing of racial animus

7. 429 U.S. at 276, 282-83.
8. *Id.* at 287.
9. *Id.* at 285.
10. 429 U.S. 252 (1977).
11. *Id.* at 254, 258.
12. *Id.* at 264-71.
13. *Id.* at 270; *see also* Washington v. Davis, 426 U.S. 229, 238-45 (1976) (holding that a showing of discriminatory purpose is essential to establishing a claim of racial discrimination under the Equal Protection Clause of the Fourteenth Amendment).

had been made.[14] If plaintiffs had proven that the Village had been motivated by a racially discriminatory purpose, the Court said, the burden of proof would have shifted to the Village to establish that "the same decision would have resulted even had the impermissible purpose not been considered."[15] If a same-decision showing had been made by the Village, plaintiffs' injury could no longer be fairly attributed to the discriminatory purpose that was the basis of the constitutional violation and "there would be no justification for judicial interference with the challenged decision."[16] For this proposition the Court cited *Mt. Healthy*. Thus, from the very conception of the *Mt. Healthy* causation doctrine, the Court has understood it to apply to equal protection cases.

Just last November, in its puzzling, brief opinion in *Texas v. Lesage*, the Supreme Court reiterated that there is no distinction between First Amendment cases and Equal Protection Clause cases for purposes of the *Mt. Healthy* doctrine.[17] Plaintiff in *Lesage*, "an African immigrant of Caucasian descent,"[18] brought an action under sections 1981[19] and 1983 and Title VI of the Civil Rights Act of 1964[20] in which he raised a claim of race discrimination in graduate school admissions. Specifically, Lesage claimed that the University of Texas's Department of Education considered race in deciding whom to admit to its doctoral program in counseling psychology. He sought both damages and declaratory and injunctive relief.[21]

The district court dismissed the entire action on a motion for summary judgment. It concluded that Lesage would not have been admitted even

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14. 429 U.S. at 270 n.21.
15. *Id.* at 271 n.21.
16. *Id.*
17. 120 S. Ct. at 467.
18. *Id.* at 468.
19. This statute provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994). The Court has interpreted this statute to permit white plaintiffs to sue for race discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976).

20. 42 U.S.C. §§ 2000d to 2000d-7 (1994). Title VI provided the basis for the Fifth Circuit's rejection of an Eleventh Amendment sovereign immunity defense raised by Texas in *Lesage*. Lesage v. Texas, 158 F.3d 213, 216-19 (5th Cir. 1998).
21. 120 S. Ct. at 467.

if the program had been race-blind.[22] The Fifth Circuit Court of Appeals, which previously held affirmative action programs in institutions of higher education to be unconstitutional,[23] reversed.[24] The court of appeals said that the fact the University would have reached the same decision—the *Mt. Healthy* question—was irrelevant to a decision on a motion for summary judgment.[25] The proper order in which to consider plaintiff's claim was to begin by asking whether his application had been rejected as part of a race-conscious process.[26] If the answer to that question was yes, the court said, a showing by the University that it would have reached the same decision had it not considered race may well mean that Lesage could not recover compensatory damages, but it would not foreclose other relief.[27] A motion for summary judgment, under this analysis, raises only the question of liability. Once liability for a constitutional violation has been found, *Mt. Healthy* might foreclose certain remedies.

The Supreme Court refused to cordon off questions of relief at the summary judgment stage. It held that the Fifth Circuit's decision reversing the district court's grant of summary judgment on Lesage's damages claim contradicted the *Mt. Healthy* framework for analyzing same-decision claims.[28] The *Mt. Healthy* framework applies at the summary judgment stage because the same-decision showing goes to the ultimate issue of liability under section 1983.[29] Under *Mt. Healthy* a government defendant "can . . . defeat liability," in race discrimination cases as in First Amendment retaliation cases, by proving that it would have made the same decision without considering the forbidden factor.[30] If such a showing is made, the Court concluded, "there is no cognizable injury warranting relief under section 1983."[31]

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22. *Id.* at 468.

23. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996). The Fifth Circuit decided *Hopwood* while the Department was in the process of accepting applications to the class that Lesage sought to enter. *Lesage*, 158 F.3d at 215.

24. 158 F.3d at 222.

25. *Id.*

26. *Id.* The court of appeals disagreed with the district court's conclusion that there was no factual dispute on this issue. It thought that the deposition of the chair of the admissions committee offered some evidence to support Lesage's allegation that race had been considered at the stage of the process at which his application had been rejected. *Id.* at 219-22.

27. *Id.* at 222.

28. 120 S. Ct. at 469.

29. *Id.* at 468.

30. *Id.*

31. *Id.*

On the particular issue of whether *Mt. Healthy* applied to this equal protection case, the Court could not have been more clear:

> Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive.[32]

The Court has thus returned to where it began and treated the causation doctrine of *Mt. Healthy* as applicable to all mixed-motive claims arising under the Constitution. But *Lesage* confuses a different issue. Despite its reversal of the ruling on Lesage's summary judgment motion and the apparent conclusiveness of the language stating that "[t]he government can avoid liability," the Court's opinion suggests that a *Mt. Healthy* same-decision showing by the defendant is *not* a complete defense to liability, for it distinguished the case before it from one in which the plaintiff "challenges an ongoing race-conscious program and seeks forward-looking relief."[33]

The Fifth Circuit's error, it appears, was that it did not distinguish among forms of relief when it considered the question of liability at the summary judgment stage.[34] The Supreme Court saw Lesage's case as, at bottom, simply a request for damages relief and therefore dismissible if *Mt. Healthy* eliminated the damage claim.[35] It is true that Lesage also asked for declaratory and injunctive relief, but the Court assumed that he was no longer seeking forward-looking relief.[36] This conclusion was based on his failure to contest the University's claim in its petition for certiorari that it had ceased considering race after the Fifth Circuit's decision in *Hopwood v. Texas*.[37]

In what follows I address two questions raised by these cases. First, why had it seemed, despite *Arlington Heights*, that equal protection cases might be treated differently from retaliation cases? Second, what is troubling about the dismissal of plaintiff's damages claim in *Lesage*? Both inquiries shed light on the Court's view of what it means to be discriminated against on the basis of race and, more broadly, on its view of the appropriate scope of remedies for constitutional wrongs.

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32. *Id.*
33. *Id.*
34. *Id.* at 469.
35. *Id.*
36. *Id.*
37. *Id.*

In both *Arlington Heights* and *Mt. Healthy*, as in *Lesage*, plaintiffs sought to challenge and reverse specific government decisions. Unlike *Lesage*, the earlier cases did not seek to challenge the general policies that underlie those decisions. Indeed, in both *Arlington Heights* and *Mt. Healthy* it appeared that the decisions were made ad hoc, perhaps unconstitutionally motivated but not based on explicit unconstitutional policies reaching beyond the situation before the court. Plaintiffs in *Arlington Heights* sought to reverse a particular decision, not to change the zoning for a specific plot of land.[38] Applying *Mt. Healthy*'s same-decision causation doctrine seemed sensible because there seemed to be "no justification for judicial interference with [a] challenged decision" that could, at least theoretically, simply be remade with more pure motivation.[39] Plaintiff in *Mt. Healthy* sought damages as well as injunctive relief that would have restored him to his teaching position, but the damages he sought, based on lost income, were linked to his claim that he should have retained his job all along.[40] Again, the claim was not so much for retroactive relief as it was for reversal of a government decision, and again the Court concluded that it would be inappropriate to reverse a decision that could be remade to the same result with a nonretaliatory motive.[41] In both cases the Court seemed concerned that granting relief either would be meaningless or would force the government to live with an incorrect decision.

The causation analysis in *Mt. Healthy* has been criticized as reflecting a faulty conception of cause-in-fact analysis in tort. Although the Court cited no tort cases, it seems to have been using a concept of but-for causation that, in tort, requires the plaintiff to establish that but for the defendant's wrongful conduct the plaintiff would have suffered no injury. Another way to articulate the test is as follows: If the plaintiff would have suffered the injury even if the defendant had acted properly, there is no recovery in tort.[42] Justice Rehnquist, in *Mt. Healthy*, cast this argument as a defense rather than as part of plaintiff's case,[43] but the resemblance is clear.

Critics of *Mt. Healthy* argue that Justice Rehnquist overlooked the development in tort of an alternative approach to causation that is more suited to mixed-motive cases. In certain tort cases involving multiple

38. 429 U.S. at 254.
39. *Id.* at 271 n.21.
40. 429 U.S. at 277.
41. *Id.* at 287.
42. *See, e.g.*, New York Cent. R.R. Co. v. Grimstad, 264 F. 334, 335 (2d Cir. 1920); *see also* DAN B. DOBBS, THE LAW OF TORTS § 168 (2000).
43. 429 U.S. at 284-87.

defendants when each tortfeasor's behavior was sufficient to cause the injury, the but-for test leads to the troubling result that an innocent, injured plaintiff cannot recover because neither tortfeasor's conduct was necessary to the result. The classic example is the destruction of property by a fire created by the commingling of two separate fires, each set independently and each sufficient to destroy the plaintiff's property.[44] The plaintiff cannot, in such a case, prove that but for each particular defendant's conduct he would not have been injured. The result under the but-for test is that the injured victim has no remedy, and two wrongful actors escape liability. To avoid this result, tort law developed an alternative rule. This alternative, which has been called the substantial factor test, holds a defendant liable when his tortious conduct is a substantial factor in causing the destructive result.[45] If both fires are substantial, both negligent defendants will be required to contribute, and the plaintiff will be fully compensated. The substantial factor test has been extended to situations in which one source is tortious and the other is unknown,[46] and also to situations in which one source is tortious and the other is known and innocent.[47] The rationale in all these cases is that it would be unfair to require an innocent plaintiff to bear a loss when there is an available wrongdoer who played a substantial causal role.

In the *Mt. Healthy* context, the argument goes, a similar substantial factor approach should have been adopted. If plaintiff established that an unconstitutional motive played a substantial role in the government decision not to renew his employment contract, the Court should have awarded relief. Justice Rehnquist's rejection of that approach is telling:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[48]

Justice Rehnquist did not see plaintiff as an innocent victim who would have been left unfairly destitute if he was denied a remedy. If a defendant can make a same-decision showing, the plaintiff could have

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44. *See, e.g.*, Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 74 N.W. 561, 566 (Wis. 1898).

45. *See, e.g.*, Vincent v. Fairbanks Mem'l Hosp., 862 P.2d 847, 851 (Alaska 1993); *see also* RESTATEMENT (SECOND) OF TORTS § 431 (1965).

46. *See, e.g.*, Kingston v. Chicago & N.W. Ry. Co., 211 N.W. 913, 914 (Wis. 1927).

47. *See, e.g.*, Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45, 49 (Minn. 1920).

48. 429 U.S. at 285.

been justifiably discharged from the position he seeks to reclaim. To reinstate a plaintiff under those circumstances either would be futile, because he would be shortly discharged again, or, if a second discharge is forbidden, would require the government to retain a worker who should be dismissed.

It is significant that the Court saw both *Arlington Heights* and *Mt. Healthy* as requests for specific judicial interference in a current and ongoing dispute between the parties. That is not the situation in the tort cases in which the plaintiffs seek only compensatory damages. Even if the analogy between multiple defendants (in the tort context) and multiple motives (in the constitutional contexts) holds, plaintiffs in *Arlington Heights* and *Mt. Healthy* were asking for more than damages. In a sense they were even asking for more than they would be seeking had they requested an injunction to require the government to act constitutionally in future cases. Plaintiffs in *Arlington Heights* and *Mt. Healthy* were asking the Court to require the government to live with a decision that the government correctly believed was wrong. That is more than tort law requires of negligent actors.

In both *Arlington Heights* and *Mt. Healthy*, the Court said that a same-decision showing by the defendant bars injunctive relief that would change the status quo.[49] The Court refused to overturn the specific decisions upon which plaintiffs based their claims of injury. In *Arlington Heights* the Court spoke only to that point: If defendant carried its burden of proof on causation, "there would be no justification for judicial interference with the challenged decision."[50] The language of *Mt. Healthy* is more ambiguous, suggesting that defendant's showing might mean that there was no "constitutional violation justifying remedial action."[51]

The ambiguity became problematic when plaintiffs sought broader remedies in improper-motive cases. Just a year after *Mt. Healthy*, the Court issued the first in a series of opinions addressing a very different sort of race discrimination claim from that raised in *Arlington Heights*.

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49. Something similar may have motivated Congress when, in the 1991 amendments to Title VII, it overruled one aspect of the plurality's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and explicitly provided that a defendant who establishes that it would have reached the same decision even in the absence of discriminatory intent does not avoid liability completely. Civil Rights Act of 1991, § 107(b), 42 U.S.C. § 2000e-5(g)(2)(B) (1994). After the 1991 amendments, establishing this defense bars damages, not declaratory or injunctive relief, except that orders "requiring any admission, reinstatement, hiring, promotion, or payment [of back pay]" are also barred if this defense is established. *Id.*

50. 429 U.S. at 271 n.21.

51. *Id.* at 285.

These cases, like *Lesage*, challenged race-conscious government programs designed to benefit minorities who were victims of past discrimination. Unlike the earlier cases, plaintiffs typically sought both to reverse particular employment or admission decisions and to obtain injunctions that would change ongoing, generally applicable government policies.

The first of these cases to be addressed on the merits was *Regents of the University of California v. Bakke*,[52] which presented a challenge to the race-conscious admissions program at the Medical School of the University of California at Davis. The University stipulated that it could not prove that it would have reached the same decision on Bakke's application for admission if it had ignored race.[53] In dicta the Court addressed the argument that Bakke would have lacked standing to bring the suit had he failed to establish that a victory in court would have led to his admission to medical school.[54] Not only was this argument foreclosed by the University's stipulation, but, the Court added, Bakke would have had standing in any case.[55] The trial court found evidence of an injury in fact (in addition to his failure to be admitted) that would have been redressed by a decision in his favor.[56] According to the trial court, Bakke was injured by the University's "decision not to permit [him] to compete for all 100 places in the class, simply because of his race."[57] So long as the plaintiff alleges that he will try again, an injury so defined would be redressed by an injunction prohibiting a race-conscious policy.

Subsequent cases reiterated and refined this definition of an equal protection injury, and each of them involved a challenge to government consideration of race in a program designed to benefit minorities. In *City of Richmond v. J.A. Croson Co.*,[58] Justice O'Connor said that the white plaintiffs had been personally injured because they were denied the "opportunity to compete for a fixed percentage of public contracts based solely upon their race."[59] In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,[60] the Court explained this kind of injury more fully:

52. 438 U.S. 265 (1978).
53. *Id.* at 280.
54. *Id.* at 280 n.14.
55. *Id.*
56. *Id.* at 281 n.14.
57. *Id.*
58. 488 U.S. 469 (1989).
59. *Id.* at 493.
60. 508 U.S. 656 (1993).

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "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.[61]

The link between this approach to causation and the particular remedy sought by plaintiff was emphasized in *Adarand Constructors, Inc. v. Pena*.[62] Like *Northeastern Florida*, *Adarand* was brought by a plaintiff who sought to enjoin a system for awarding government contracts that gave an advantage to businesses owned by members of historically disadvantaged groups.[63] Having been denied a contract in the past, the Court said, did not entitle plaintiff in *Adarand* to an injunction against "any future use" of the preferential clause, but neither was plaintiff required to "demonstrate that it . . . will be . . . the low bidder on a Government contract" to obtain such relief.[64] To establish standing plaintiff was required only to show "that sometime in the relatively near future it will bid on another Government contract" under the challenged system.[65]

This broader definition of the injury—a definition that focuses on the possibility that the plaintiff will be subjected to the same tainted decision-making process in the future, rather than on whether the same negative decision will be reached—overcomes the causal problem identified in *City of Los Angeles v. Lyons*.[66] The Court in *Lyons* denied standing to a plaintiff who sought to enjoin the use of life-threatening choke holds by police officers who were not threatened with deadly force.[67] Lyons had been subjected to such a choke hold in the past, but the Court denied injunctive relief against the practice because he could not satisfy the Court that he would be subjected to the same practice in the future.[68] Seen in this light, the redefinition of standing in *Bakke*

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61. *Id.* at 666.
62. 515 U.S. 200 (1995).
63. *Id.* at 204.
64. *Id.* at 210-11.
65. *Id.* at 211.
66. 461 U.S. 95 (1983).
67. *Id.* at 105.
68. *Id.* at 105-13. It is not clear why an argument similar to that accepted in *Bakke*, *Northeastern Florida*, and *Adarand* could not be made by the plaintiff in a case like *Lyons*. Such a plaintiff could allege that he has been deprived of an opportunity to live in a community free from the fear of encountering an abusive police practice. The Court in

and its progeny addresses a different problem and a different sort of claim than that made in *Mt. Healthy*. The Court in *Mt. Healthy* refused to grant an injunction that would have overturned a single, allegedly tainted decision that could have been justified on alternative grounds. The equal protection cases permitted injunctions that remove one factor from future decision-making processes. Neither line of cases addressed the question of whether compensatory damages would be appropriate.

However, if the most expansive language of *Mt. Healthy* is read to say that there is no constitutional violation at all when the defendant would have reached the same decision had it relied only on permissible reasons, the preferential-treatment cases suggest that proof of causation may be less of a problem in Equal Protection Clause mixed-motive cases than in First Amendment cases. If an equal protection injury is complete at the point that an individual is subjected to a discriminatory practice, the causal connection found lacking in *Mt. Healthy* exists, for there is a link between the defendant's conduct and the injury to the plaintiff. Under this approach, the dicta in *Arlington Heights* may have been too hastily drafted. Potential residents excluded by the Village's decision could be said to be injured by being subjected to a decision-making process tainted by race. Or, perhaps *Arlington Heights* could be distinguished from *Adarand* in that plaintiffs in *Arlington Heights* were not individually subjected to a competition for scarce resources of the sort that would support a claim of personal injury.

This is the analysis that led to the proposition that equal protection cases might not be subject to *Mt. Healthy*. Under *Mt. Healthy* the defendant is allowed to introduce evidence that there is no causal connection between the constitutional violation and the plaintiff's injury. In retaliatory discharge cases after *Mt. Healthy*, it might plausibly be thought that a defendant's same-decision showing means that there was no constitutional violation because there was no termination *because of* the employee's speech. The *Mt. Healthy* requirement would not be avoided in equal protection cases, but it would be satisfied by a redefinition of the injury suffered by the plaintiff. Even if the plaintiff would not be hired under a program that paid no attention to race, there would be a constitutional violation when he was not considered on the same grounds as other candidates *because of* his race.

Lyons appeared to believe that the odds of plaintiff actually having such an encounter were so remote that such a fear would be irrational. *Id.* at 105-06. An allegation by a disappointed bidder that he will bid again on a government contract is more specific and apparently more credible. Or, perhaps the Court in *Lyons* saw plaintiff as actually challenging a discrete decision of individual police officers rather than seeking an injunction against an ongoing policy. *Id.* at 110.

It now appears that the relief sought in the mixed-motive and equal protection cases is more significant to their conclusions than this argument suggests. The usual mixed-motives plaintiff, as described above, seeks to reverse the specific decision in his individual case. Retaliation claims, unlike equal protection claims, usually grow out of discrete, isolated incidents. It is not typical for employers who impose job sanctions for speech to record their practice explicitly in a policy that might apply to future cases, retaliation plaintiffs seldom ask for broad-based, forward-looking relief against such policies. But in every equal protection case that has articulated a redefinition of the plaintiff's injury, the relief sought has been prospective relief against an ongoing program based on race. None of these cases order that a particular plaintiff be promoted or admitted or given back pay when the defendant can establish it would have reached the same, individual decision without considering race. Under this interpretation the causation analysis focuses not on the link between defendant's decision and *some* injury to the plaintiff, but on the link between the decision and an injury that would be redressed by the specific relief sought. *Mt. Healthy*, then, is about standing, not simply causation, and the suggestion in *Lesage* that a claim for forward-looking relief against "an ongoing race-conscious program"[69] would be treated differently under *Mt. Healthy* becomes unremarkable.

However, it is not clear why the framing of the injury in the equal protection cases challenging race-conscious governmental programs does not support the damages claim made by plaintiff in *Lesage*, and the Supreme Court's abrupt order requiring summary judgment on that claim is quite remarkable. Taken seriously, the Supreme Court's disposition of the damages claim indicates that it may be rethinking its commitment to the basic rules for compensatory damages in section 1983 actions laid out two decades ago in *Carey v. Piphus*.[70]

In cases like *Lesage*, which challenge government decision-making programs and policies on the ground that they incorporate a constitutionally impermissible factor, the precedent described above indicates that plaintiffs who would not have been selected under a constitutional program will not receive reinstatement or back pay but are entitled to declaratory and injunctive relief against the continuing use of the policies or programs. The troubling question after *Lesage* is whether plaintiffs are also entitled to damages that do not represent the reversal of the government decision but do compensate for the personal injury

69. 120 S. Ct. at 468.
70. 435 U.S. 247 (1978).

(that is, loss of opportunity to be considered under a fair program) that they suffered.

Under *Carey* some damages for loss of opportunity would seem to be appropriate. *Carey*, which the Court decided the year after *Mt. Healthy*, involved a procedural due process claim brought by public elementary and secondary school students who had been suspended for infractions of school rules. There was no challenge to rulings on declaratory or injunctive relief before the Supreme Court.[71] The question was whether the students "[were] entitled to recover substantial nonpunitive damages even if their suspensions were justified."[72] Justice Powell, writing for the Court, rejected plaintiffs' argument that they should be able to recover substantial damages without proof of actual injury simply because their constitutional rights had been violated.[73] Explicitly limiting its ruling to the procedural due process context, the Court held that presumed damages could not be awarded, but it did allow "nominal damages without proof of actual injury"[74] and left open the possibility that plaintiffs in particular cases could establish actual damages in the form of "mental and emotional distress . . . caused by the denial of procedural due process itself."[75] Applying the *Carey* analysis to retaliation and equal protection cases, commentators have understandably assumed that nominal damages and substantiated actual damages can be recovered even when the defendant makes a same-decision showing, and that a plaintiff who is awarded either of the forms of damages that survive *Carey*, or punitive damages, may well be eligible for an award of attorney fees.[76] To be specific, in the equal protection context, actual damages, such as emotional distress, attributable to the deprivation of the opportunity—defined in *Bakke*, *Northeastern Florida*, and *Adarand*—to compete for government benefits in a constitutionally run program might support a substantial award in an appropriate case. Nominal damages, which ought to be awarded for the deprivation of such an opportunity, might themselves support attorney fees.

Yet plaintiff's damages claim in *Lesage* was dismissed on the ground that defendant would have denied him admission even if it had adopted

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71. *Id.* at 249-53.
72. *Id.* at 248.
73. *Id.* at 266.
74. *Id.*
75. *Id.* at 263.
76. *See, e.g.*, 1 HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, LITIGATING CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION CASES § 2.26 (2d ed. 1999); 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 4:10 (4th ed. 1997).

The "prevailing party" in a § 1983 action may be awarded "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (Supp. III 1997).

a race-neutral program.[77] The Supreme Court's opinion in *Lesage* is consistent with prior case law in recognizing that prospective relief should not be foreclosed by a defendant's same-decision showing, whether the case is a First Amendment retaliation case or an equal protection challenge to a government's motive. Although such relief is rare in the First Amendment context because few governments adopt explicit, ongoing programs of retaliation, the deprivation of an equal opportunity to consideration in the distribution of government benefits satisfies the requirements of *City of Los Angeles v. Lyons*, and that deprivation endures even when the government is able to make a same-decision showing. But why was the district court in *Lesage* so quick to dismiss plaintiff's damages claim at the summary judgment stage? Under *Carey* he ought to have been able to recover at least nominal damages, and, upon proper proof, actual damages as well.

There are several possible explanations for the Court's ruling on damages in *Lesage*. One is simply that plaintiff's framing of his case did not sufficiently alert the Court to the possibility that he might claim nominal damages or actual damages that were not linked to his failure to gain admission, but rather to his distress at being subjected to a race-conscious selection program. Lesage sought monetary relief, but the Court may have assumed that he was seeking to be placed, financially, in the position he would have been in had he been admitted. *Mt. Healthy* bars such relief.

Perhaps the Court was signaling its understanding that the affimative implications of *Carey* are limited to procedural due process claims and that equal protection plaintiffs will not be allowed to recover either nominal damages or actual emotional distress damages. The Court in *Carey*, responding to plaintiffs' citation of voting rights and racial discrimination cases, said that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another."[78] But it seems perverse to allow proof of actual emotional distress in procedural due process cases and not in racial discrimination cases. The likelihood that an African-American plaintiff foreclosed from admission to professional or graduate school because of his race will suffer emotional distress entirely attributable to the race-conscious nature of the admissions process seems both plausible and high—much more likely than that a student will be distressed by the inadequacy of procedural protections attendant to his suspension. One of the most resonant

77. 120 S. Ct. at 468.
78. 435 U.S. at 264-65.

aspects of *Brown v. Board of Education*[79] is its recognition of the psychological impact of racial segregation even in the absence of material injury.

Perhaps it is salient that many modern race discrimination cases—including *Bakke*, *Northeastern Florida*, *Adarand*, and *Lesage*—are challenges brought by white plaintiffs against programs designed to benefit previously excluded groups. It may be that the Court regards the loss of the opportunity to compete in a race-neutral selection process vindicated by those cases as less likely to result in actual personal injury of the sort compensated after *Carey*. Programs that benefit members of minority races at the expense of whites, unlike those that burden historically excluded races, cannot be so easily read as expressing a personal judgment about the presumed worth and capacities of members of the disadvantaged group. The emotional injury to plaintiffs, if any, would be distress caused by outrage at how the game is played: "[that they] were not competing on a level playing field—the cards were unlawfully stacked against them."[80] Yet there is nothing in the Court's opinions striking down race-conscious programs that benefit minorities that suggests such a distinction. The very language defining plaintiffs' loss of an opportunity to compete equally suggests that the Court takes such claims seriously and is not merely creating a fictional injury to avoid the strictures of *Lyons*.

What *Lesage* might mean is that the Court is backing away from the affirmative promise of *Carey* in all section 1983 cases. Although section 1983 plaintiffs have understandably tried to make as much as they can of the damage possibilities that survived *Carey*, the Court's opinion in *Carey* itself seems designed to discourage plaintiffs as much as possible. The routes to damage recovery that remain are narrow and are apparently designed to offer little incentive to litigate. *Carey* permits nominal damages but makes no connection between them and attorney fees. Its acknowledgment that plaintiffs might be able to offer evidence of actual damages attributable to emotional distress, while not totally foreclosing the possibility that such damages can be proven, is extremely skeptical. The Court "fore[saw] no particular difficulty in producing

79. 347 U.S. 483 (1954).

80. Price v. City of Charlotte, 93 F.3d 1241, 1248 (4th Cir. 1996). In *Price* the court of appeals affirmed an injunction against a race-based promotion program and held that plaintiffs who would not have been promoted in a race-neutral program had standing to claim compensatory damages. *Id.* at 1245. However, the court found that the evidence offered by plaintiffs in support of their claims of emotional distress was insufficient. *Id.* at 1254-57. For example, in characterizing some claims, the court said, "[T]heir injuries, if any, are properly characterized as disappointment with their superiors, rather than emotional distress." *Id.* at 1256.

evidence that mental and emotional distress actually was caused by"[81] the constitutional violation because "[d]istress is a personal injury familiar to the law."[82] But that statement follows several paragraphs in which the Court elaborates its view that "there may well be those who suffer no distress over the procedural irregularities. Indeed, . . . a person may not even know that procedures *were* deficient until he enlists the aid of counsel to challenge a perceived substantive deprivation."[83] Moreover, the Court was concerned that a plaintiff's much greater sense of distress at the (justifiable and thus noncompensable) result of a flawed decision-making process will be impossible to separate from the more refined distress caused by the (unconstitutional and thus compensable) process by which the result was reached.[84] *Carey* does not promise plaintiffs the hope of significant compensatory relief.

When the Court realized that significant financial recovery could be obtained despite *Carey*, it took steps to ensure that the incentives to litigate remained low. Plaintiffs who used nominal damages as the basis for a claim of attorney fees were rebuffed in *Farrar v. Hobby*.[85] The Court in *Farrar* held that, even though plaintiffs who recover nominal damages are "prevailing parties" under section 1988(b), the "reasonable" fee award will ordinarily be nothing when the relief granted is very small.[86] The effect of the ruling in *Lesage* is part of the same trend, but it is even more discouraging. If summary judgment on a damages claim is appropriate simply because the defendant has made a same-decision showing, any opportunity to try to prove actual substantial damages will be foreclosed, and those hardy plaintiffs who are willing to absorb the costs of litigation to achieve at least "nominal" vindication will be dismissed.

Lesage indicates that the Court takes very seriously its traditional preference for equitable relief in constitutional cases. Read most narrowly, *Lesage* treats the definition of constitutional injury in cases challenging race-conscious programs as simply a way to support standing to seek injunctive relief. Read broadly, it suggests that the Court is no longer comfortable with the possibility that civil rights plaintiffs can seek nominal or emotional distress damages when their material situation would be unaffected by a change in government behavior.

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81. 435 U.S. at 263.
82. *Id.* at 263-64.
83. *Id.* at 263.
84. *Id.*
85. 506 U.S. 103 (1992).
86. *Id.* at 115.