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Simple Justice

Girardeau A. Spann
Georgetown University Law Center, spann@law.georgetown.edu

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The easiest way to deal with unjust discrimination is to ban it. We could simply adopt a rule that says “unjust discrimination is prohibited” and use it to resolve any discrimination case that happened to arise. Certainly, no one would object to the sentiment expressed in such a rule. But some might find the prohibition too imprecise to be of much help in resolving particular cases. Such a rule would leave judges with no choice but to fall back on their subjective values in deciding whether given instances of discrimination were or were not “unjust.” Indeed, because resolution of legal disputes based upon nothing more than the subjective preferences of judges is inconsistent with our conception of justice, we have chosen to rely on more elaborate doctrinal rules in order to facilitate principled resolution of our legal disputes. In theory, conscious recourse to doctrine permits judges to decide cases in accordance with neutral principles. The principles, in turn, serve as generally agreed-upon bases for decision, which are sufficiently objective to guard against potential judicial bias.¹

² The theory never works perfectly, of course, and it is now widely recognized that even the most neutral-sounding principles both reflect normative preferences and frequently fail to prevent bias from intruding into the decision making process. In fact, some of the most erudite legal scholarship has traditionally

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¹ See Bork, supra note 1, at 12 (“cases cannot be reconciled on any basis other than the Justices’ personal beliefs”). Professor Wechsler recognized this, but insisted on neutral application of whatever principles judges select as rules of decision. Wechsler, supra note 1, at 14-15. Other commentators, however, have focused on the dubious desirability or feasibility of the neutral-principle mode of decision making itself. See, e.g., Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 205-24 (1980) (“we are hopelessly imprisoned in our own world views”); Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 Ind. L.J. 399, 412-48 (1978) (“If a principled approach . . . cannot be developed . . . the courts should stay away”); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 804-24 (1983) (asserting that neutral-principle theory can constrain judicial choices only on basis of presumed shared understandings); Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 775-83 (1971) (suggesting that requirements of principled decision making are fatally unrealistic).

² The principle of equality, which tends to be the starting point for much legal analysis of discrimination problems, has recently come under heavy attack. See Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982) (suggesting that concept of equality is devoid of meaning and can acquire meaning only through reference to normative theories of substantive rights). For reactions to the Westen thesis, see Chemerinsky, In Defense of Equality: A Reply to Professor Westen, 81 Mich. L. Rev. 575, 576 (1983) (arguing that concept of equality is morally, analytically, and rhetorically necessary); D'Amato, Is Equality a Totally Empty Idea?, 81 Mich. L. Rev. 600, 603 (1983) (arguing that Westen's theory presupposes concept of equality to provide point of comparison of substantive rights); Greenawalt, How Empty is the Idea of Equality, 83 Colum. L. Rev. 1167, 1169 (1983) (suggesting that concept of equality is coherent and best conveyed by language of equality). For Professor Westen's reply, see Westen, The Meaning of
been directed at the question of how to reconcile our continuing desire for neutral objectivity with the seemingly inevitable influence of subjective values on legal analysis. Generally, the starting assumption appears to be that the system, although flawed, is conceptually sound and can be improved through various proposed refinements, usually by uniting legal doctrine with one or another school of social science or moral philosophy. More recent commentary, however, has begun to question the concept of principled decision making itself. Viewed from at least one perspective, the nature of principled decision making is such that legal decisions can be made only through recourse to the very subjective values against which legal doctrine is designed to guard. My thesis is that no matter how elaborate we make our legal rules, judges are necessarily doing the same thing that they would do if we told them nothing more specific than to prevent unjust discrimination.

If there is an area in which judicial bias is particularly inappropriate, it is in dealing with the problem of discrimination. This article, however, examines a recent Supreme Court race discrimination case in order to demonstrate how the subjective values that might initially determine one's view of the case continue to control even when one undertakes a rigorous doctrinal analysis. Part One analyzes each of the major legal issues presented by the case and evaluates the degree to which the Justices' opinions appear to stem from subjective preferences, rather than any principles that the opinions purport to apply. Part Two then considers whether doctrine serves any useful purpose at all, or whether our judges would be better advised merely to go forth and dispense simple justice.


3. The most recent effort I have seen is Bennett, Objectivity in Constitutional Law, 132 U. Pa. L. Rev. 445 (1984), which discusses many of the more established efforts.


5. Distrust of principled decision making is the legacy of the legal realists. See In re J.P. Linahan, Inc., 138 F.2d 650, 652-53 (2d Cir. 1943) (Frank, J.) (arguing that prejudices and preconceptions shared by society, as well as idiosyncratic sympathies of judges, find expression in society's legal system); J. Frank, Law and the Modern Mind xiii, 115 (6th ed. 1965) (arguing that judges' temperament, training, biases, and predilections influence decisions); K. Llewellyn, The Common Law Tradition: Deciding Appeals 3-4, 11-18, 393 (1960) (arguing that human psychology, particular circumstances, and inherent probabilities create nonuniform pattern of decisions); cf. Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429, 435-38 (1934) (recognizing that judges often decide cases on policy grounds, then "wring" from legal doctrine legally acceptable basis for decision). Some current commentators, however, are prepared to carry realist perceptions to their logical extreme and concede total indeterminacy with respect to both strict legal doctrine and any underlying policy justifications that might be offered for particular applications of legal rules. See generally Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669, 1670-76 (1982). There are many examples, but it is probably easiest to get the bittersweet flavor of what is going on from Kelman, Trashing, 38 Stan. L. Rev. 293 (1984).
I. Analytical Subjectivity

In *Firefighters Local Union No. 1784 v. Stotts*, a Title VII class action alleging race discrimination in municipal employment, the Supreme Court held that an employer confronting an economic recession could lay off employees on the basis of seniority, notwithstanding the adverse effect that such layoffs would have on an affirmative action plan to which the employer had committed itself by signing a consent decree. Although the technical holding of the case may be quite narrow, the case has been read to stand for the proposition that Title VII prohibits affirmative action initiatives that interfere with bona fide seniority plans, and even for the broader proposition that affirmative action itself is now prohibited.

In fact, the case has been characterized as "the most important civil rights ruling of the decade." Moreover, it is likely that the Court not only foresaw the broader significance that would be attached to its ruling, but that the Court even intended it. The Court's opinion reads as if it followed logically from the language of Title VII and from prior Supreme Court decisions construing that statute—as if the Court had been led passively to its conclusion by prevailing doctrinal considerations, rather than actively choosing to rule the way it did. But the doctrinal guidance that the statute and precedents provide is so imprecise that, realistically, it is difficult to view the decision as anything other than an expression of the subjective values of the Justices.

A. FACTS OF STOTTS

In 1977, Carl Stotts, a black firefighter employed by the municipal fire department in Memphis, Tennessee, filed a class action against the City alleging that it had engaged in a pattern and practice of racial discrimination in the hiring and...
promotion of firefighters. The suit was not the first discrimination case that had been filed against the City of Memphis. In fact, three years earlier, in 1974, the United States Department of Justice had filed suit against the City alleging both race and gender discrimination violative of Title VII of the Civil Rights Act of 1964 and the fourteenth amendment to the United States Constitution. The Justice Department suit encompassed hiring and promotions in the City’s fire department as well as in its other employment divisions.

When the Justice Department suit was filed, the statistical discrepancies in the City’s hiring and promotion practices were striking. Although in 1974, the City of Memphis was approximately 35% black, only 4% of its firefighters were black. Between 1950 and 1976, two years after the Justice Department filed suit, the Memphis Fire Department hired 94 black firefighters and 1683 white firefighters. The statistics relating to promotions were similar. Between 1969 and 1974, the Memphis Fire Department promoted 371 whites and only 7 blacks. In 1975, the year after the Justice Department suit was filed, the City’s promotion practices still had not improved. That year, the City promoted 15 white firefighters but no blacks.

The Justice Department suit was never adjudicated. Rather, the Attorney General and the City of Memphis settled the case by entering into a consent decree later in 1974. In the decree, the City denied having engaged in race or gender discrimination but admitted that its past practices could give rise to an inference of such discrimination. The stated purposes of the decree were to prohibit prospective discrimination on the basis of race or gender and to remedy through long-term hiring goals the effects of what the decree referred to as past discrimination.

Over the course of the next several years, black firefighters remained dissatisfied with the City’s progress and eventually began to take additional legal actions. In February 1977, Carl Stotts filed his suit, which, like the prior Justice Department suit, alleged both Title VII and constitutional violations arising out of the Fire Department’s hiring and promotion practices. In addition, a minority firefighter’s group moved to intervene in the Stotts suit. Although the trial court denied that motion, it did certify the Stotts suit as a class action. The suit

13. Id. at 550 n.5.
14. 104 S. Ct. at 2582.
15. 679 F.2d at 550 n.5.
16. Id.
17. Id. The court of appeals never explains why the statistics that it cites do not cover precisely the same time period, but there seems to be no dispute whatsoever concerning the broad scope of the City’s racially disparate employment practices prior to initiation of the Justice Department suit.
18. Under the terms of the decree, the City agreed to the long-term goal of hiring enough minorities and women in each job classification to reflect the proportional representation of minorities and women in the local civilian work force. The City also agreed to engage in affirmative recruitment efforts in order to meet those goals. With respect to blacks, the decree required, as an interim hiring goal, that 50% of all vacancies be filled by qualified black applicants. The decree also authorized the imposition of more specific numerical ratios and quotas for both hiring and promotion if the City’s voluntary efforts failed to provide adequate progress in meeting the long-term goals embodied in the decree. Id. at 547, 570-72 app.
19. By 1980, the percentage of blacks in the Fire Department had grown from 4 to 11%, 104 S. Ct. at 2582, but it was still less than one-third of the 35% long-term goal that the 1974 consent decree had established. But see id. (between 1974 and 1977, 56% of firefighters hired were black).
20. 679 F.2d at 547.
generated extensive press coverage, and discovery proceeded for the next two years. Then, in 1979, a second suit was filed against the City by a black firefighter, alleging racial discrimination in the denial of his application for a promotion. That suit, *Jones v. Memphis Fire Department*, was consolidated with the *Stotts* case. Discovery continued, and on April 25, 1980, the consolidated *Stotts* cases were also settled with a consent decree.21

The explicit purpose of the 1980 *Stotts* decree was to “parallel and supplement” the relief provided by the 1974 Justice Department decree.22 Again, the City denied any legal liability, but again the decree stated that its purpose was to remedy the effects of the City’s past employment practices.23 The decree also prescribed a procedure by which the parties could seek to resolve any ambiguities or remedy any unintended consequences produced by the decree, and the court specifically retained jurisdiction to settle disputes regarding such matters that the parties were not themselves able to resolve.24 Then the problem arose.

In May 1981, the City announced that it was facing a deficit in its projected operating budget and, for the first time in its modern history, would lay off municipal employees in all divisions of the City government, including the Fire Department. The layoffs were to be based on citywide union seniority, calculated in the manner prescribed by the 1974 Justice Department decree, with the most recently hired employees to be laid off first. In addition, senior employees who were otherwise to be laid off were given the right to “bump” less senior employees in lower job classifications. As a result, the City’s announced layoffs were to produce rank reductions in higher job categories and actual loss of jobs in lower categories.25

Because blacks, whom the City hired and promoted primarily under the consent decrees, tended to have less seniority than whites, whom the City had historically favored in making hiring and promotion decisions, the seniority-based layoff program would have adversely affected black firefighters by eroding gains that they had made under the consent decrees. Approximately sixty percent of the firefighters who would have been affected by the City’s layoff program were black. As a result, the plaintiffs in *Stotts* sought to enjoin the City from implementing the layoffs in a manner that would adversely affect black firefighters to the degree contemplated by the layoff program. The trial court first issued a temporary restraining order. Then, after a hearing in which the firefighters’ union was permitted to intervene, the trial court issued a preliminary injunction.

21. *Id.* at 547-48.

22. *Id.* at 548.

23. The long-term goals of the 1974 decree were once again adopted, as was the 50% interim goal for hiring. This time, however, an interim goal was also established with respect to promotions. Until the long-term goal of proportional representation of blacks in each job classification had been attained, the City agreed that qualified blacks would receive at least 20% of the promotions made at each classification level. In addition, the City specifically agreed to promote certain individual firefighters and to provide a total of $60,000 in back-pay awards to various class members. *Id.* at 548, 573-76.

24. *Id.* at 578. After the parties had agreed to the terms of the consent decree, the decree was posted in Memphis fire stations for a 15-day comment period. Neither the firefighters’ union nor any members of the class objected to the decree. Eleven nonminority firefighters, however, acting independently from the union, did object and moved to intervene in the *Stotts* case for the purpose of suggesting alternative remedies that would have a less adverse impact on nonminority firefighters. After a hearing, the court denied the motion to intervene, rejected the alternative remedies, and approved the consent decree. *Id.* at 548-49.

25. See *id.* at 549-51.
prohibiting the City from conducting layoffs based on seniority, to the extent that such layoffs would decrease the percentage of black firefighters in the pertinent job categories. The court found that the layoffs and demotions resulted from an unanticipated change in circumstances that had not been provided for by the text of the Stotts decree, that seniority-based layoffs would have a discriminatory impact on blacks, and that the seniority system was not bona fide.26

In response to the injunction, the City developed and implemented a modified layoff program that did not reduce the percentages of black firefighters.27 Ultimately, the City laid off twenty-four firefighters, three of whom were black. If the original seniority-based layoff program had been implemented, a total of six blacks would have been laid off and three additional whites would have retained their jobs. The record does not indicate how the preliminary injunction affected the demotions caused by the City's layoff program.28 The layoffs turned out to be short-lived. All laid-off or demoted firefighters were offered restoration of their jobs and ranks within one month after the layoff program commenced.29

In addition, because the City had hired all of the affected firefighters on the same day, the layoffs called for under both the original and modified programs were actually determined alphabetically rather than on the basis of seniority.30

The City and the firefighters' union appealed the district court's preliminary injunction, and the Court of Appeals for the Sixth Circuit affirmed.31 The court of appeals held that the consent decree had been properly approved and that the district court had properly issued a preliminary injunction to prevent that decree from being undermined. The court of appeals further held that the district court had the authority under three alternative theories to modify the decree in a way that would bar seniority-based layoffs. First, under contract principles, the decree itself contemplated any modifications that might be necessary in light of changed circumstances. Second, rule 60(b) of the Federal Rules of Civil Procedure authorized modification in order to prevent the decree from producing harsh consequences. Finally, the court's traditional equity powers gave the court continuing jurisdiction to modify the decree in light of changed circumstances.32 The court of appeals also held that even though the district court had erred in ruling that the City's seniority plan was not a bona fide plan, the provision of Title VII that specifically protects bona fide seniority plans did not apply in a way that prohibited modification of the consent decree.33

The Supreme Court granted certiorari34 and reversed the two lower courts.35
Justice White wrote the opinion of the Court for a five-person majority. Although Justice O'Connor signed the majority opinion, she wrote a separate concurrence explaining her interpretation of the Court's action. Justice Stevens wrote a separate opinion concurring in the judgment but did not sign the majority opinion. Justice Blackmun wrote a dissenting opinion, which Justices Brennan and Marshall also signed. Thus, the Court ruled 6-3 to set aside the trial court's preliminary injunction.

B. HOLDINGS OF STOTTS

The Stotts case presented two major issues. The first was whether the case was moot because the City offered to restore all jobs and rank within one month after the City implemented its layoff program—well before the case was presented to the Supreme Court for review. The second issue concerned the merits of the case and can be broken down into two subissues: whether the consent decree precluded seniority-based layoffs; and, if not, whether Title VII permitted modification of the decree so that it would preclude such layoffs. The Supreme Court resolved these issues in certain ways, but each issue could just as easily have been resolved the opposite way without any additional strain on the governing precedents or doctrinal rules.

1. Mootness

When the City of Memphis offered to restore the jobs and ranks of all firefighters who had been affected by the City's layoff program within a month after that program had taken effect, the Stotts case may well have become moot. In fact, a year before the Supreme Court decided Stotts, the Court vacated the judgment in a strikingly similar action, when the rehiring of laid-off municipal employees suggested that the case had become moot. The doctrine of mootness is one of the justiciability doctrines rooted in the article III case or controversy provision that limits the jurisdiction of federal courts to the resolution of live, ongoing legal disputes between the parties. According to conventional wisdom, justiciability restrictions preclude the adjudication of disputes that have expired or not yet become sufficiently immediate to warrant judicial resolution. If a federal court were to address the legal questions presented in a case that had become moot, it would be exceeding the proper scope of the judicial function and issuing a constitutionally prohibited advisory opinion. As a strict doctrinal matter, therefore, the Supreme Court did not possess article III jurisdiction to resolve the Stotts appeal unless a live controversy continued to exist at the time that the Supreme Court decided the case.

The Court's Analysis.

Justice White's majority opinion holds that, although the laid-off firefighters had been offered the return of their jobs and

37. See 104 S. Ct. at 2596 (Blackmun, J., dissenting) and cases cited therein; see also City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (no case or controversy where individual sought injunction against use by police of choke holds because no real and immediate threat of choke hold use on claimant). For a discussion of, inter alia, mootness and its relationship to the article III case or controversy requirement, see Spann, Expository Justice, 131 U. PA. L. REV. 585, 617-32 (1983).
ranks, a controversy continued to exist because the trial court's preliminary in-
junction continued to prohibit the City of Memphis from implementing senior-
ity-based layoffs if it should wish to do so in the future. 38 The most striking 
aspect of this holding is its circularity. The Court holds that the preliminary 
injunction had continuing effects because it had not been reversed or vacated. 
As the Court had previously held in United States v. Munsingwear, 39 however:

The established practice of the [Supreme] Court in dealing with a civil 
case from a court in the federal system which has become moot while 
on its way here or pending our decision on the merits is to reverse or 
vacate the judgment below and remand with a direction to dismiss. 40

Accordingly, if the case had been dismissed as moot, the trial court's preliminary 
injunction would have been vacated, thereby depriving the case of precisely those 
continuing effects that the majority relied on to avoid a finding of mootness. 
Justice White certainly must have been aware of the cases, dating back to at least 
1896, that call for vacation of the judgment below after a finding of mootness. 41 
And even if he was not, those cases are emphatically called to his attention by 
both Justice Blackmun's dissent 42 and Justice O'Connor's concurrence. 43 
Accordingly, this portion of the majority's mootness discussion is mysteriously 
inapposite.

A slightly more serious argument offered by Justice White in support of the 
Court's mootness holding is that the case continued to present a live controversy 
because laid-off firefighters might possess claims for back pay and lost seniority 
resulting from their layoffs. 44 Again, however, the defects in this argument are 
readily apparent. As the dissent points out, the Stotts case simply does not in-
volve any claims for back pay or lost seniority, 45 and the mere possibility that 
firefighters would raise such claims in the future is normally insufficient to keep 
an otherwise moot action alive. And again, it is unlikely that Justice White over-
looked this observation. Not only is it called to his attention by the dissent, 46 but

38. 104 S. Ct. at 2583-84.  
40. Id. at 39 (footnote citing 32 cases in support of this proposition omitted).  
41. See New Orleans Flour Inspectors v. Glover, 161 U.S. 101, 103 (1896) (vacating injunction against 
enforcement of repealed law).  
42. 104 S. Ct. at 2596 (Blackmun, J., dissenting).  
43. Id. at 2591 (O'Connor, J., concurring).  
44. Id. at 2584.  
45. Id. at 2597-98 (Blackmun, J., dissenting). With an amusing sleight of hand, the dissent goes on to 
argue that the case not only fails to involve any claim for back pay or lost seniority, but that it could not 
involve such claims. The adversary parties to such a suit would have to be the union, representing its 
members who wished to assert such claims, and the City, seeking to resist those claims. Because the union 
and the City were on the same side of the case in Stotts, they did not possess the adversity necessary to 
permit adjudication of the back-pay and lost seniority issues. Id. at 2598 (Blackmun, J., dissenting). 
Presumably, Justice Blackmun was making oblique reference to those justiciability cases that require ad-
versity for the existence of article III jurisdiction. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 
101-05 (1983) and cases cited therein (adversity needed to sharpen presentation of constitutional issues). 
Although clever, the argument adds nothing to Justice Blackmun's initial observation that the Stotts case 
simply did not involve the issues of back pay or lost seniority. If the parties had wished to include such 
claims, it would have been a simple matter to add a cross-claim on the part of the union against the City. 
Indeed, if such a claim had been filed in a separate action, that action might well have been consolidated 
with Stotts, in light of the similarity of the operative legal issues, just as the Jones case was consolidated 
with Stotts in the present action.  
46. 104 S. Ct. at 2597-99 (Blackmun, J., dissenting).
Justice White himself cites cases in which the presence or absence of a back-pay claim in the case before the court was dispositive of the mootness issue.47 One other aspect of the majority's resolution of the mootness issue is puzzling. Two years before the Supreme Court decided Stotts, the Court granted certiorari in Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP.48 That case also involved a conflict between the City's affirmative action obligations under a consent decree and its obligations under a seniority-based layoff program implemented by the City in response to a fiscal crisis, the precise conflict presented in Stotts. The trial court had modified the pertinent consent decrees and issued a preliminary injunction prohibiting the City from implementing its seniority-based layoff program in a manner that would reduce the percentages of minority workers employed in the police and fire departments.49 The court of appeals had affirmed the trial court's ruling.50 Ultimately, however, the Supreme Court did not resolve the merits, but chose rather to vacate the judgment below when rehiring of the laid-off municipal workers suggested that the case had become moot.51 The puzzling thing is that, despite the striking similarity between the cases, the Court does not even mention the Boston Firefighters case in discussing the mootness issue in Stotts. It is as if the precedent most closely on point did not exist.52

Justice Stevens did not sign the majority opinion in Stotts, but he did concur in the Court's conclusion that the case was not moot.53 In a brief discussion, Jus-

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47. Justice White cites Powell v. McCormack, 395 U.S. 486 (1969), for the proposition that a back-pay claim can preclude a finding of mootness. See 104 S. Ct. at 2584. Powell v. McCormack, however, unlike Stotts, involved a claim for back pay. See 395 U.S. at 494. Moreover, the opinion in Powell v. McCormack, which Justice White signed, expressly distinguished Alejandrino v. Quezon, 271 U.S. 528, 533-34 (1926), as a case that had become moot, precisely because it did not contain a back-pay claim, even though such a claim could have been asserted. See 395 U.S. at 497-98. Accordingly, it is Alejandrino v. Quezon, not Powell v. McCormack, that appears to control the mootness issue in Stotts.


51. 461 U.S. 477 (1983). The Supreme Court did not actually hold that the case was moot. Instead, it vacated and remanded to the court of appeals for consideration of mootness in light of the rehireings, and the court of appeals then held the case moot. Boston Chapter, NAACP v. Beecher, 716 F.2d 931 (1st Cir. 1983). Although mootness seemed clear enough at the time that the court of appeals rendered its decision on remand, the Supreme Court's decision in Stotts, of course, made matters much more ambiguous. In apparent recognition of this ambiguity, the Supreme Court granted a second petition for certiorari in the Boston Firefighters case and once again vacated the judgment below with another remand for reconsideration of mootness, this time in light of its decision in Stotts. See Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 104 S. Ct. 3576 (1984). Justice Blackmun, joined by Justices Brennan and Stevens, wrote an opinion dissenting from the grant of certiorari. Justice Marshall did not participate in the decision.

52. Indeed, even the dissent fails to cite the case. Some have suggested that the difference between Boston Firefighters and Stotts is that in Boston Firefighters the layoff problem would not recur because the state legislature had enacted a statute prohibiting future layoffs of firefighters and police officers for fiscal reasons. See, e.g., Petitioners' Joint Opposition to Respondents' Suggestion of Mootness at 1-2, 4, 6, Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984); cf. Boston Firefighters, 104 S. Ct. at 3576 (Blackmun, J., dissenting from second grant of certiorari) (arguing that portions of Stotts relevant to mootness issue in Boston Firefighters demonstrably wrong). This distinction, however, is not adequate. When the Supreme Court vacated the judgment in the Boston Firefighters case, the state statute granting the layoff protection was to expire in 45 days—a fact of which the Supreme Court was aware. 461 U.S. at 478. Thus, future layoffs were just as likely to occur in Boston as they were to occur in Memphis, the city involved in Stotts. Moreover, even if this were a viable distinction between the two cases with respect to mootness, it is certainly a distinction that one would have expected the Court to discuss, rather than tacitly assume.

53. 104 S. Ct. at 2594 (Stevens, J., concurring in the judgment).
Justice Stevens simply asserts that the case was not moot because, in the future, the City might again face the need to lay off firefighters, thereby giving it a continuing interest in resolution of the issue presented in Stotts.\textsuperscript{54} Such a generalized interest, however, is typically viewed as insufficient to ward off a finding of mootness,\textsuperscript{55} making it difficult to understand why Justice Stevens would offer this doctrinally tenuous assertion without any elaboration.

Justice Stevens' only justification for his resolution of the mootness issue consists of a footnote reference to two cases involving recognized exceptions to the rule that federal courts lack jurisdiction to resolve moot cases.\textsuperscript{56} One of these cases, City of Los Angeles v. Lyons,\textsuperscript{57} relates to the exception created for situations in which the defendant causes the case to become moot by voluntarily, but only temporarily, ceasing to engage in the allegedly illegal activity of which the plaintiff complains, thereby frustrating the plaintiff's efforts to have his or her claim adjudicated.\textsuperscript{58} That exception would appear to be inapplicable in Stotts because the City of Memphis appears to have permanently, rather than temporarily, rehired the laid-off workers and the City was certainly not motivated by any desire to preclude judicial review. Far from seeking to escape review, the City wished to avoid a finding of mootness precisely so that the Supreme Court would resolve the merits of its appeal.

The other case cited by Justice Stevens, Carroll v. Princess Anne,\textsuperscript{59} relates to the exception created for issues that are capable of repetition yet evade review, that is, issues that tend to be inherently short-lived but, nevertheless, recur with enough frequency to warrant review despite their mootness.\textsuperscript{60} Again, however, it is difficult to conclude that the issues surrounding the trial court's modification of the consent decree will evade review, because they can so easily be tested in an action to recover back pay or lost seniority.\textsuperscript{61}

Of those who thought that the Court should reach the merits, only Justice O'Connor makes any serious effort to deal with the issue of mootness. Unlike Justices White and Stevens, Justice O'Connor at least recognizes that Munsingwear exists and would cause the lower court judgment to be vacated if the case were found to be moot. She, however, believes that collateral consequences of the trial court's preliminary injunction would continue to exist even if the injunc-

\begin{footnotes}
\item[54] Id.
\item[55] See City of Los Angeles v. Lyons, 461 U.S. 95, 101-05 (1983) and cases cited therein (discussing need for real and immediate threat of repeated injury in order to escape finding of mootness).
\item[56] 104 S. Ct. at 2594 n.2 (Stevens, J., concurring in the judgment).
\item[57] 461 U.S. 95 (1983).
\item[58] Id. at 109. The "voluntary cessation" exception is discussed more fully in United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953).
\item[59] 393 U.S. 175 (1968).
\item[60] Id. at 178-79. The "capable of repetition yet evading review" exception is discussed more fully in Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-15 (1911).
\item[61] As if to enhance the mystery surrounding the Court's actions with respect to mootness, Justice Stevens chose to dissent from the Court's second grant of certiorari in the Boston Firefighters case. See supra note 51. If Justice Stevens believed that the Stotts case could withstand a mootness challenge, presumably he thought that the factually indistinguishable Boston Firefighters case could withstand such a challenge as well. Nevertheless, his treatment of the two cases is inconsistent. The Court of appeals, having failed to anticipate the mootness message of Stotts, held Boston Firefighters to be moot. Although Justice Stevens presumably disagreed with that result, as evidenced by his opinion in Stotts explicitly stating that the case was not moot, he nevertheless voted to deny certiorari in Boston Firefighters rather than correct the court of appeals' "erroneous" finding of mootness.
\end{footnotes}
tion were vacated, and that those consequences fit the case into a third mootness exception.\footnote{62} The “collateral consequences” exception to which Justice O’Connor refers is not really an “exception” at all. Rather, it merely authorizes review when incidental effects of the defendant’s conduct prevent the case from becoming moot even though the primary effect of that conduct has terminated.\footnote{63} The collateral consequences that Justice O’Connor cites as sufficient to give the case continuing vitality arise from the one-month enhanced seniority that blacks who were not laid off or demoted gained over whites who were. That enhanced seniority might enable the black firefighters to compete better with the white firefighters for promotions, job transfers, and protection from future layoffs\footnote{64} — but then again it might not. And that is the problem with Justice O’Connor’s argument.

Although Justice O’Connor may well have articulated a continuing consequence of the trial court’s preliminary injunction that was sufficient to overcome mootness problems, she does so only at the expense of creating ripeness problems. Like mootness, ripeness is rooted in the article III case or controversy restriction on federal court jurisdiction. It precludes the adjudication of cases in which the threatened harm that the court is asked to prevent is too remote or speculative to warrant judicial intervention.\footnote{65}

The threatened harm that Justice O’Connor cites seems to fall into this category of speculative danger because it is so contingent. The harm will be suffered only: if the City of Memphis decides to exclude the one-month layoff period from the seniority calculations for affected white firefighters under the particular circumstances involved in this case; and if a seniority contest happens to arise that involves one of the few firefighters affected by the layoffs; and if the relatively short, one-month seniority period at issue happens to determine the outcome of that seniority contest; and if the adversely affected firefighter cares enough about whatever loss results to undertake the expense and inconvenience of litigation in the hope of obtaining a remedy for that harm. Ripeness doctrine is specifically designed to prevent the adjudication of such speculative cases until they actually arise. Moreover, contingencies less attenuated than the one Justice O’Connor describes have been held to preclude adjudication on ripeness grounds.\footnote{66} Therefore, even if Justice O’Connor were correct that the case is not moot, the Court would apparently still lack jurisdiction because the case would not be ripe.

\textit{Doctrinal Play.} One might conclude from the foregoing discussion that, far from being ambiguous, mootness doctrine is quite precise and determinate; the \textit{Stotts} majority is simply wrong, and the dissent is correct that the case is moot. But that would understate the problem illustrated by the mootness issue in \textit{Stotts}. The problem stems from the fact that the dissent is no more correct

\begin{footnotes}
\item[62] See 104 S. Ct. at 2591-92 (O’Connor, J., concurring).
\item[63] The “collateral consequences” exception is discussed more fully in \textit{Sibron v. New York}, 392 U.S. 40, 53-58 (1968) (collateral legal consequences of conviction mean case not moot, although full sentence served).
\item[64] See 104 S. Ct. at 2591 (O’Connor, J., concurring).
\item[65] See \textit{City of Los Angeles v. Lyons}, 461 U.S. 95, 101-05 (1983) and cases cited therein (discussing ripeness doctrine).
\item[66] See \textit{id.} and cases discussed therein (arguing that ripeness doctrine demands real and immediate threat of harm).
\end{footnotes}
than the majority is. There is enough play in the doctrine of mootness to permit either result.

It is easy to imagine the mootness issue being resolved in the manner advocated by the dissent. Such a resolution would have been consistent with traditional mootness doctrine, and would have corresponded to the way that the court of appeals decided the virtually identical issue in *Boston Firefighters*. It is also easy, however, to imagine the mootness issue being resolved in the manner advocated by the majority—the way that it actually was resolved. Although the majority opinion is itself unsatisfactorily glib, doctrinally more tenable justifications for the majority result are readily available.

In order to determine how a doctrine of law properly applies, it is generally thought that the doctrinal rules should be construed in the way that best serves the functions for which they were fashioned. As indicated above, mootness is part of a complex of justiciability doctrines designed to serve the dual functions of limiting courts to the resolution of cases and controversies and preventing courts from issuing constitutionally offensive advisory opinions. The case or controversy restriction ensures that the pertinent legal issues are presented to the courts in an adversary context conducive to proper resolution of those issues, while the advisory opinion prohibition ensures that the courts will not abrogate constitutionally based separation of powers principles by “making” prospective law, a legislative function, rather than applying law retrospectively to the facts of a particular case.

Once the functional objectives of mootness are considered, it becomes much easier to understand how the majority could conclude that *Stotts* was not moot. The case arose from a specific factual context in which the parties were sufficiently motivated to present the issues with the requisite adversary clash. None of that changed simply because the laid-off workers were rehired. The City's continuing desire to clarify matters for potential back-pay claims or future layoffs provided the City with enough motivation to ensure vigorous advocacy, and the plaintiffs' continuing desire to retain the benefits—both practical and symbolic—of the trial court's ruling ensured vigorous adversary involvement by the plaintiff class. Indeed, no one—not even the dissent—has ever suggested that there was any lack of adversary vigor in the presentation of arguments to the Supreme Court.

67. See supra notes 48 to 51 and accompanying text (discussing relationship between *Stotts* and *Boston Firefighters*).


69. See supra note 37 and accompanying text (discussing purpose of justiciability restrictions).

70. The nature and functions of the various justiciability doctrines are discussed at greater length in Spann, supra note 37, at 632-60.

71. The plaintiffs also stood to recover litigation costs and attorneys fees if they prevailed. Such a stake in the outcome has been held sufficient to avoid a finding of mootness. See Deposit Guarantee Nat'l Bank v. Roper, 445 U.S. 326, 336-40 (1980) (class certification issue not moot, despite settlement of underlying claim, because named plaintiffs retained interest in recovering litigation costs).
Likewise, the nature and specificity of the legal issues involved in the case precluded any serious danger that the Court would transcend its proper role within our system of separated governmental powers. The issues were classic judicial issues: ascertainment of the parties’ intent with respect to the meaning of the consent decree; and construction of a statute with respect to the court’s authority to modify the consent decree. Because such issues do not fall within legislative or executive competence, the Court’s retrospective resolution of those issues posed very little risk of a separation of powers violation. Accordingly, a functional rather than mechanistic, case-oriented approach to mootness suggests that no useful purpose would have been served by dismissing the Stotts appeal and leaving the merits unresolved.

Notwithstanding the cases cited by the dissent, the Supreme Court precedents that have arguably been more sensitive to functional considerations have not let technical problems prevent resolution of a seemingly moot case when common sense and efficiency dictated a contrary result. The clearest example is provided by the so-called "headless class action" cases. A headless class action is a suit, pleaded as a class action, that has become moot as to the named plaintiff. In several instances, however, the Supreme Court has permitted headless class actions to proceed despite the absence of any party who presented a live, ongoing controversy. The Court has used a variety of theories to permit this result. Sometimes it has relied on the fiction that the certified class itself constitutes the plaintiff for whom a live controversy continues to exist. On other occasions, when a class has not yet been certified and cannot therefore serve as the fictitious plaintiff, the Court has relied on various exceptions to the mootness rule in order to obviate the problems caused by the absence of an actual plaintiff. By far the most revealing headless class action case, however, is United States Parole Commission v. Geraghty, where the Supreme Court reviewed the denial of a class certification motion made by a named plaintiff with respect to whom the case had become moot. In Geraghty, there was no "live" plaintiff before the Court, no certified class existed, and none of the traditional mootness exceptions applied. Nevertheless, the Court found the doctrine of mootness to be "flexible" enough, at least in the context of nontraditional forms of litigation such as class actions, to permit the Court to resolve the appeal.

The headless class actions demonstrate that technical niceties about mootness need not be dispositive. In each of those actions the context and adversary presentation concerns underlying the mootness doctrine were adequately accommodated, as were the separation of powers concerns that mootness also reflects. The Court chose to adjudicate the merits in those cases despite theoretical mootness problems. Accordingly, in Stotts—another "nontraditional" class action

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72. See Sosna v. Iowa, 419 U.S. 393, 397-403 (1975) (case challenging Iowa residency requirements for divorce not moot when controversy exists between defendant and unnamed members of class, even though named plaintiff's claim moot).

73. See, e.g., Deposit Guarantee Nat'l Bank v. Roper, 445 U.S. 326, 336-40 (1980) (case not moot when named plaintiff continued to suffer collateral consequences, including inability to recover litigation costs); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (case not moot when injury to named plaintiff capable of repetition and evades review).


75. See id. at 402-04 ("The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined.").
warranting “flexible” treatment, where mootness concerns would again appear to pose only theoretical problems—there is no logical reason to dismiss the appeal on mootness grounds.

The fact that a respectable argument can be made in support of the majority holding does not, of course, mean that the majority is correct in its resolution of the mootness issue. Rather, it demonstrates that proper resolution of the issue is uncertain. It is almost always possible to de-emphasize particular precedents, as the majority does in Stotts, and to redefine the pertinent issue in terms of its underlying functional objectives. Functional objectives, however, tend to be abstract and general, offering little guidance for resolution of the issue. For example, I have suggested\(^7\) that the rehiring of laid-off workers in Stotts did not reduce the motivation of the parties enough to cause adversary presentation problems. But it would have been just as easy to reach the opposite conclusion. The rehiring, by definition, reduced the motivation of the defendants to some degree; the entire law of mootness is premised upon this belief. If one views that degree of lost motivation as enough to cause adversary presentation problems, one must conclude that the case is moot after all. On a functional level, therefore, application of mootness doctrine is not much different from application of a rule prohibiting unjust discrimination; the doctrinal guidance provided is too sparse to be of much help.

One could argue that the ambiguity inherent in functional analysis shows why it is important to adhere to close case analysis, as the dissent does, rather than be distracted by functional considerations. Merely articulating such a proposition, however, is enough to demonstrate its inadequacy. The precedents and the rules that they contain are simply shorthand statements of our functional concerns. Why would we care whether a case was followed or not, except to the extent that it advanced our functional objectives? Indeed, given the fact that all cases are both alike and different in an infinite number of ways, we cannot know which similarities and differences are relevant without first determining whether they have any bearing on our functional objectives. Bare case analysis is too artificial to be convincing, but the introduction of functional considerations into the analysis makes almost any outcome possible.

How then does a judge resolve the legal issues presented in a case? In Stotts the Justices probably resolved the mootness issue in the way they thought best under the circumstances. The dissenters apparently viewed resolution of the nagging conflict between seniority and affirmative action as too controversial and divisive to warrant adjudication in the absence of any actual compulsion to address the issue—at least if the merits were to be resolved in the way that the majority wished to resolve them. The majority, however, appears to have viewed the issue as one that had lingered undecided long enough, and accordingly chose to provide guidance to lower courts and private parties by resolving it. It is difficult to view these positions as anything other than subjective preferences of the Justices who espoused them. Not only was mootness doctrine unable to prevent those subjective preferences from entering the analysis, but the doctrine itself rested upon ambiguities that could be resolved only through recourse to

\(^7\) See supra note 71 and accompanying text (discussing parties’ continuing interest in issues despite rehiring of workers).
those preferences. The subjective values of the Justices were, therefore, unavoidably involved in the decision. 77

2. The Merits

Little can be said with confidence about the Supreme Court's resolution of the merits in \textit{Stotts}, other than that it concerned the conflict between affirmative action and seniority. Technically, the case appears to have two holdings. First, it

77. The conflicting preferences of the Justices with respect to addressing the merits in \textit{Stotts} appear to have controlled the outcome of another threshold issue besides mootness. Before the merits could be reached, the Court had to determine the proper scope of its review over the lower court decision. The dissent argued that the proper scope of review was governed by the abuse-of-discretion standard normally applied to the issuance of a preliminary injunction. See 104 S. Ct. at 2596 (Blackmun, J., dissenting). Under this standard, the ultimate question of whether an affirmative action decree could take precedence over a seniority plan was not before the Court. Rather, the Court was merely presented with the question of whether the trial court had abused its discretion in issuing a preliminary injunction to preserve the status quo regarding minority employment until the court could undertake a final resolution of the merits, after the development of a full factual record. In support of its position, the dissent relied on University of Texas v. Camenisch, 451 U.S. 390, 393-98 (1981), which expressly states that the merits are not properly before an appellate court reviewing the propriety of issuing a preliminary injunction. See 104 S. Ct. at 2600-02 (Blackmun, J., dissenting).

The majority did not quarrel with the dissent's interpretation of \textit{Camenisch}. Instead, Justice White chose to characterize the issue in a different way. He reasoned that the trial court's issuance of a preliminary injunction in \textit{Stotts} was based on that court's analytically prior determination that the 1980 consent decree could be modified to supersede the seniority plan, and that the merits of that modification were properly before the Court on appeal. See \textit{id}. at 2585 n.8. Despite its superficial appeal, Justice White's characterization is less than completely convincing. \textit{Camenisch} holds that the underlying merits are not before a court reviewing a mere preliminary injunction, because the haste that typically surrounds the issuance of interlocutory injunctions makes the trial court's factual and legal determinations too tentative to warrant review. It is only after the trial court has given the issues plenary consideration and chosen to make the injunction permanent that appellate review of the merits is proper. 451 U.S. at 396-98. It follows, therefore, that any subsidiary legal conclusions that the trial court made in the process of ruling on the plaintiffs' motion for a preliminary injunction, including its conclusion about the propriety of modifying the consent decree, were also interlocutory in nature and not within the scope of appellate review under \textit{Camenisch}.

Again, it is possible to formulate a more realistic argument in favor of reviewing the merits than the argument relied on by the majority. The Supreme Court routinely decides some issues on appeal, notwithstanding the fact that they are raised in a preliminary injunction hearing. Suppose, for example, that the plaintiffs' standing had been an issue in \textit{Stotts}. Few would argue that standing was beyond the scope of Supreme Court review, even though the trial court's factual and legal determinations concerning standing would have been subject to the very same dangers of haste as the other determinations made in the expedited preliminary injunction proceeding. Accordingly, the \textit{Camenisch} rule cannot be as cut-and-dry as the dissent would have us believe. Rather, it must mean that appellate review is precluded only with respect to those issues arising in a preliminary injunction proceeding that require fuller factual or legal development by the trial court before the Supreme Court can safely resolve the issues. So stated, \textit{Camenisch} may well permit appellate review of the modification issue, as long as haste does not appear to have generated an unreliable or inadequate record below. But again, this argument does little to guard against bias. The argument simply shifts the focus to functional concerns, and once again, it becomes a simple matter for each Justice to assert that the outcome corresponding to his or her subjective preferences is the proper outcome.

It is, of course, possible to accept the dissent's statement of the proper scope of review and nevertheless reverse the lower court by finding that issuance of a preliminary injunction was an abuse of discretion, as Justice Stevens did, see 104 S. Ct. at 2595 (Stevens, J., concurring in the judgment), or that the plaintiffs were not sufficiently likely to prevail on the merits to warrant the issuance of a preliminary injunction, as Justice O'Connor did. See \textit{id}. at 2594 (O'Connor, J., concurring). One could also conclude that the balance of the equities did not weigh in favor of issuing a preliminary injunction or that an injunction was not in the public interest, as is required by the other preliminary injunction standards. See University of Texas v. Camenisch, 451 U.S. 390, 392 (1981) (discussing preliminary injunction standards); Doran v. Salem Inn, 422 U.S. 922, 931 (1975) (discussing public interest standard). But those standards are also broad ones that do little to control the outcome or deflect a judge's temptation to succumb to personal preferences.
holds that because the parties did not intend their consent decree to preclude seniority-based layoffs, principles of contract law do not prohibit such layoffs. Second, the case holds that Title VII bars modification of the decree in a way that would prohibit such layoffs, because the plaintiffs did not make the showing of intentional discrimination required for the type of relief being sought. The problem is that ambiguities in what the Court views as adequate proof of intentional discrimination make it difficult to ascertain the meaning of the decision. As was true of mootness, however, the legal doctrines governing resolution of the merits are not only too imprecise to provide effective insulation from judicial bias, but the doctrines actually depend upon the subjective values of judges in order to generate their results.

The Consent Decree. One theory that the court of appeals offered for affirming the trial court’s preliminary injunction was that the injunction was needed to enforce the Stotts consent decree as a matter of contract law. When the parties signed the decree, they agreed to settle their ongoing lawsuit in accordance with its terms. In addition to being a court order, therefore, the consent decree was also a contract, like any other settlement agreement. As a result, when the City announced its intention to lay off workers hired under the decree, it committed an anticipatory repudiation of that contract, which made traditional contract remedies available to the plaintiffs. Accordingly, the preliminary injunction was simply a court order providing for specific performance of the parties’ contract, issued in accordance with customary contract principles.78

The Supreme Court rejected this contract-enforcement theory after finding that the court of appeals had engaged in “improvident constructions” of the Stotts consent decree.79 The Court emphasized that the decree nowhere stated an intent to supersede seniority-based layoffs, that it expressly precluded any intent to conflict with the earlier Justice Department decree, which specified a method for calculating seniority,80 and that the City should not be deemed to have relinquished Title VII seniority protections for municipal employees, especially in an action to which neither the union nor white workers were parties. As a result, the Supreme Court concluded that the preliminary injunction did more than merely enforce the agreement of the parties and could not, therefore, be justified solely through recourse to contract principles.81

As a matter of contract law, the question of whether the consent decree precluded seniority-based layoffs ultimately turns on the intent of the parties. If the parties were serious enough about their affirmative action objectives that they intended to have affirmative action predominate over seniority concerns, the preliminary injunction was justifiable. If the parties’ intent was to subordinate affirmative action to seniority, however, the injunction was not warranted as a contract remedy. It is difficult to feel comfortable with either conclusion about the parties’ intent because there is ample evidence supporting each.

78. See 679 F.2d at 561-62.
79. 104 S. Ct. at 2585.
80. The Justice Department decree, however, said nothing about using seniority to make layoff determinations. Rather, it contemplated that seniority would be used for “purposes of promotion, transfer and assignment.” See 679 F.2d at 572 app.
81. See 104 S. Ct. at 2585-86.
The court of appeals’ conclusion, championed by Justice Blackmun in dissent, has much intuitive appeal. Why would the plaintiffs, who filed suit precisely because the earlier Justice Department decree had been ineffective, ever have entered into a second decree if that decree required them to relinquish those few jobs that they had secured whenever the economy deteriorated enough to produce layoffs? Why would blacks, traditionally thought to be among those who suffer most as the economy worsens, agree to give up their jobs at the very time when those jobs were most valuable? A construction of the consent decree suggesting that this was the plaintiffs’ intent is difficult to accept. A construction under which affirmative action was intended to supersede seniority, however, is easy to imagine. The plaintiffs would have desired such an agreement; the City, which was the defendant, had nothing to lose by making such an agreement; and white firefighters, the only group that might be adversely affected, never joined the lawsuit and were not parties to the consent decree.

The conclusion reached by the majority is also quite supportable. The clearest indication of the parties’ intent in entering into a contract is the language that they used. Here the language said nothing about supplanting seniority, the traditional method for making layoff determinations. Moreover, that omission takes on even more significance when one recalls the degree of specificity that the decree used in providing for hiring and promotion quotas, on both a long-term and an interim basis. Moreover, the customary inclusion of seniority as a subject for negotiation in Title VII decrees strongly suggests that the absence of an explicit retroactive seniority provision in the Stotts decree resulted from the plaintiffs’ inability to secure the City’s agreement to such a provision. When parties choose to address and provide for hiring and promotions but make no provision for firing—the third item in that natural trilogy—a court can easily conclude that the parties chose not to alter normal practices with respect to the unaddressed item. To conclude otherwise would ignore the best available evidence of the parties’ intent and would involve the court in the questionable practice of rewriting contracts.

As a formal matter, conclusions about the intent of the parties in Stotts can be drawn either way, but the focus on intent is itself difficult to justify. What makes contract litigation most interesting is that the parties, almost by definition, never have any relevant intent. Either they anticipated the pertinent contingency and

82. See id. at 2603-04 (Blackmun, J., dissenting).
83. This construction of the parties’ intent assumes that the City had the power voluntarily to enter into a consent decree adversely affecting the seniority of white firefighters. For Title VII purposes, the Supreme Court seems to have authorized such voluntary action in United Steelworkers v. Weber, at least where the decree would not “unnecessarily trammel the interests of the white employees,” or run afoul of other potential limitations. 443 U.S. 193, 208-09 (1979). At least five members of the Court appear to believe that Weber would have authorized a voluntary departure from the Memphis seniority plan. See 104 S. Ct. at 2595 (Stevens, J., concurring in the judgment); id. at 2592-95 (O’Connor, J., concurring); id. at 2605 n.9 (Blackmun, J., dissenting, with Brennan and Marshall, JJ.). However, the four other Justices, who were in the majority, may have reservations. The majority opinion states, “Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide.” Id. at 2590. This language may mean that the Justices in the majority are willing to rethink Weber; it may mean that they view the applicable equal protection standard as more protective of the white “victims” of affirmative action than is Title VII, but cf. General Elec. Co. v. Gilbert, 429 U.S. 125, 132-40, 145 (1976) (suggesting that Title VII and equal protection clause afford same protection against discrimination); or it may mean nothing at all.
84. See supra note 23 and accompanying text (discussing specific provisions of consent decree).
provided for it in the terms of their contract, or they did not. If they did, there is nothing to litigate; and if they did not, they failed to formulate any collective intent to be ascertained. In Stotts it is relatively clear that the parties did not anticipate and jointly allocate the risk of municipal layoffs; if they had, the consent decree would certainly have reflected the terms of their agreement. But each of the courts that considered the issue, nevertheless, purported to draw inferences about the intent of the parties. Because courts cannot ascertain a non-existent intent, they must have been doing something else.

Possibly, the courts were trying to determine what the parties would have agreed to if the parties had anticipated the layoff problem. It is unclear, however, why such an inquiry would be of any interest. Nominally, at least, courts are limited to enforcing contracts that the parties actually make, not contracts that the parties might have made. But, of course, courts frequently do intervene to impose contract terms to which the parties themselves did not agree. Indeed, the Stotts consent decree itself invited such judicial intervention by including a provision for judicial resolution of unanticipated problems.

Proper construction of the consent decree thus poses a doctrinally intractable problem. The parties formulated no intent with respect to layoffs because they did not anticipate them—or if anticipated, because they chose not to reach any agreement with respect to layoffs. The parties, however, did formulate an intent with respect to unanticipated problems: their intent was to have the court resolve them. But the way that the court resolves such problems is through recourse to the intent of the parties. In construing the consent decree, therefore, the Supreme Court was once again called upon to make legal determinations with little operative doctrinal guidance. Arguably, the most sensible way to escape this dilemma is through proper accommodation of the underlying concerns that are at stake.

Stotts is a difficult case, because it forces us to choose between two interests that are appealing yet conflicting. We want to remedy the effects of past discrimination through affirmative action, but we also want to protect the seniority rights earned by white workers. The customary way in which our contemporary legal system deals with competing interests is through balancing. The conflicting interests are identified, quantified, and compared, and the weightier interest prevails. The process of interest balancing, however, entails so many unconstrained judicial determinations that the subjective values of the judge are necessarily called into play on multiple occasions during the balancing process.

Before competing interests can be balanced they must be identified, and the

85. This analysis of intent illustrates a semantic paradox that lies at the core of the distinction between the objective and subjective theories of contract. The problem is almost grappled with in Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939 (1967).

86. Courts have even developed elaborate doctrinal rules relating to mistake, frustration, impracticability, and impossibility in order to legitimize this practice. See generally E.A. FARNSWORTH, CONTRACTS 647-705 (1982). Those doctrines, however, are no more precise than the doctrines the Court discusses in Stotts.

87. See 679 F.2d at 578 app.

88. Compare the phenomenon of analytical spin developed in Spann, Deconstructing the Legislative Veto, 68 MINN. L.R. 473, 516-27 (1984) ("When one of the terms in a formula for applying a principle is the very principle to be applied, the formula prescribes no result and the principle does not control the outcome.").

89. A thorough and systematic demonstration of the inability of interest balancing to constrain judicial
judge's subjective perceptions of a case are likely to affect the identification process. For example, it is not clear whether the consent decree in *Stotts* should be viewed as primarily a contract—the way the majority viewed it—which would then trigger our societal interest in preserving the autonomy of contracting parties, or whether it should be viewed as primarily a court order—the way the lower courts viewed it—which would trigger our societal interest in preserving the integrity of judicial orders in light of changed circumstances. The way in which the competing interests are identified will necessarily have an important effect on the way in which the balance is struck. It is unlikely, however, that the issue could be identified in any wholly objective manner. Rather, issue identification tends to be a function of how the parties brief the case, how the press covers it, what issues the judge understands well enough to feel comfortable adjudicating, and the like.

Once the competing interests are identified, they must be compared, but the task can be a difficult one because many interests are noncommensurable. Which, for example, is more important: an office building or a human life? The two are qualitatively different and, therefore, hard to compare. We do compare them, of course, because we build office buildings even though human lives are lost in construction accidents. However, it is difficult to argue that any particular comparison is objectively correct. A frequent method of comparison is through translation into a common standard of measure. Under this strategy, selection of the unit of measure is likely to be very important, if not dispositive. If dollars are used and an economic cost-benefit analysis is then conducted in order to strike the balance, a large office building will almost certainly outweigh a small number of lives lost in construction accidents. If, however, moral worth is selected as the standard of measure, a single human life could easily outweigh an entire city's worth of office buildings. Despite its importance, selection of the proper standard of measure is hard to view as something that can be correct or incorrect in any absolute sense. It is simply something about which reasonable people will differ.

Assuming that a proper standard of measure can somehow be selected, each of the competing interests must still be quantified in order to permit meaningful comparison. The quantification process, however, is obviously riddled with subjectivity. For the same reason that some people will pay hundreds of thousands of dollars for a painting that other people would never permit to be hung on their walls, some judges will give great weight to an interest that other judges will consider to be relatively unimportant. Many interests, like our interests in seniority and affirmative action, simply do not lend themselves to objective quantification. The weight to be accorded such interests is likely to be a function of things like the race, employment experience, economic status and political persuasion of the person doing the quantifying. Moreover, the quantification problem is further complicated by the fact that quantification must occur at some level of generality, but selecting a level of generality is largely an arbitrary process. For example, if a judge were to decide that *Stotts* involved our societal interest in protecting seniority, the judge would then have to determine whether decision making, from which the following analysis borrows heavily, is contained in Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 Mich. L. Rev. (1985) (forthcoming).
the importance of all seniority everywhere was to be considered in striking the balance, or whether just the interests of the three white firefighters who had been laid off for one month were pertinent. Again, it is difficult to view this as a question with an objective answer.

Judges cannot balance interests without recourse to their subjective preferences. Even judges with the best intentions will balance competing interests according to their views about both the relative importance of those interests and the degree to which each interest will be advanced or frustrated by particular outcomes in the case before the court. Because this activity is essentially unconstrained, however, it is difficult to see how a judge could possibly engage in it without recourse to subjective values. When legal doctrine calls for interest balancing, therefore, it does something that is seemingly counterproductive. Because particular doctrinal applications are utterly dependent upon how the balance is struck, the subjective preferences that doctrine is designed to guard against necessarily drive application of the doctrinal rules. Once again, asking a judge to balance competing interests is a lot like asking a judge to prevent unjust discrimination.

**Title VII.** Even if the parties did not “intend” for their consent decree to preclude seniority-based layoffs, the trial court’s injunction would, nevertheless, have been justified if issued to implement a proper modification of the decree. Because a consent decree is not just a contract, but is a court order as well, a court can modify such a decree by exercising its equity powers to effectuate the basic purpose of the original decree in light of changed circumstances.90 Like the court of appeals, the dissent believes that the trial court properly modified the decree to provide for the changed economic circumstances that produced unprecedented municipal layoffs.91 Justice Stevens believes that modification of the decree would have been proper under certain sets of facts, but that the actual facts of *Stotts* did not demonstrate a sufficient change in circumstances to warrant modification.92 The majority, however, held that regardless of whether there had been a change in circumstances, Title VII precluded modification—perhaps because of the special protections that Title VII accords seniority.93 Justice O’Connor agreed with the majority’s conclusion, thereby providing the fifth vote for the majority holding.94 In order to determine whether the majority’s holding is correct, therefore, it is necessary to determine whether Title VII permits the *Stotts* consent decree to override the Memphis seniority plan.

Title VII, which was enacted as part of the Civil Rights Act of 1964,95 prohib-

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91. See 104 S. Ct. at 2604-05 (Blackmun, J., dissenting).
92. See id. at 2595 (Stevens, J., concurring in judgment).
93. See id. at 2586-90.
94. See id. at 2592-94 (O’Connor, J., concurring).
its, inter alia, employment discrimination based on race.\textsuperscript{96} Section 706(g), the remedy provision of the Act, authorizes a court, after finding that an employer has intentionally engaged in unlawful employment discrimination, to order appropriate injunctive relief and other "affirmative action," including but not limited to reinstatement, rehiring, and awards of back pay.\textsuperscript{97} In \textit{Griggs v. Duke Power},\textsuperscript{98} the Supreme Court held that the substantive prohibitions of the Act could be violated either by intentional discrimination or by facially neutral actions having an unjustifiable discriminatory impact.\textsuperscript{99}

Section 703(h), which first emerged as part of a compromise bill during the Title VII enactment process, provides that, notwithstanding the other provisions of the Act, employers are permitted to apply different standards, terms, conditions or privileges of employment to workers as long as they do so pursuant to a bona fide seniority or merit plan in a way that is not intentionally discriminatory.\textsuperscript{100} Relatively strong statements in the legislative history indicate that Congress added section 703(h) in order to minimize interference with seniority rights, at least those seniority rights that had already vested on the effective date of the Act.\textsuperscript{101}

In 1972, Congress amended section 706(g) to ensure that courts had enough

\textsuperscript{96} Id. Section 703(a) of the Act provides:
   (a) It shall be an unlawful employment practice for an employer—
      (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
      (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as employee, because of such individual's race, color, religion, sex, or national origin.

\textit{Id.} at § 2000e-2(a).

\textsuperscript{97} Id. at § 2000e-5(g). Section 706(g) of the Act states:
   (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

\textit{Id.}

\textsuperscript{98} 401 U.S. 424 (1971).

\textsuperscript{99} Id. at 429-31.

\textsuperscript{100} 42 U.S.C. § 2000e-2(h). Section 703(h) of the Act states:
   (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

\textit{Id.}

\textsuperscript{101} See, e.g., 110 CONG. REC. 7213 (1964) (interpretive memorandum by two Title VII sponsors stating no intent to affect seniority rights); id. at 7207 (Justice Department statement that Title VII would not
discretion in fashioning remedies for Title VII violations to provide "the most complete relief possible," so that victims of employment discrimination could be "so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Congress authorized this make-whole relief by adding to the forms of relief already specified in section 706(g) the phrase "or any other equitable relief as the court deems appropriate." The legislative history of the 1972 amendment also specifically approved of the case law that had developed concerning Title VII remedies, much of which had interfered with preexisting seniority systems by granting retroactive seniority to victims of discrimination.

The Supreme Court first considered the interaction between the broad remedial policies of section 706(g) and the seniority-protection policy of section 703(h) in Franks v. Bowman Transportation Co. In an opinion written by Justice Brennan, Franks held that: (1) section 706(g) authorized awards of retroactive seniority to those who could prove that they were the victims of discriminatory hiring; (2) although section 703(h) provided some measure of protection to accrued seniority, it did not preclude the award of retroactive seniority to victims of past discrimination, even though such awards would dilute the seniority rights of white workers hired pursuant to the employer's discriminatory policies; and, (3) although retroactive seniority should be ordered only when the equities of a case so dictated, it was the preferred remedy in hiring-discrimination cases, despite its potentially adverse effect on innocent white employees. Chief Justice Burger wrote a separate opinion concurring in part and dissenting in part, which argued that although there was no absolute bar to awarding retroactive seniority, it was generally more equitable to provide monetary compensation to victims of hiring discrimination in the form of "front pay" than it was to award retroactive seniority, which generally penalized innocent white employees. Justice Powell also concurred in part and dissented in part, in an opinion signed by Justice Rehnquist. He agreed that section 703(h) did not insulate even bona fide seniority systems from retroactive seniority awards where adherence to the seniority systems would perpetuate the effects of past discrimination, but argued that retroactive seniority should not be viewed as the preferred remedy in typical cases. Rather, district courts should be encouraged to

undermine existing seniority rights); see also Franks v. Bowman Transp., 424 U.S. 747, 758-60 (1976) (describing legislative intent to protect existing seniority rights).


104. See, e.g., S. REP. No. 415, 92d Cong., 1st Sess. 5 n.1 (1971) (citing with approval federal court decisions granting retroactive seniority relief); 118 CONG. REC. 7166 (1972) (citing intent that existing case law continues to govern construction and application of Title VII); see also Franks, 424 U.S. at 762-67 (describing legislative intent to allow continued use of retroactive seniority remedy).


106. Id. at 762-70.

107. Id. at 757-62.

108. Id. at 770-79.

109. Id. at 780-81 (Burger, C.J., concurring in part and dissenting in part).
formulate equitable decrees that better protected the interests of innocent white employees. Justice Stevens took no part in the decision, but every Justice who did participate agreed that Title VII could, in some instances, authorize interference with bona fide seniority plans through the award of retroactive seniority.

The Franks holding was refined in International Brotherhood of Teamsters v. United States. The Teamsters majority opinion, written by Justice Stewart and signed by seven members of the Court, balanced the competing make-whole and seniority policies of Title VII by construing section 703(h) to permit retroactive seniority awards designed to remedy the effects of discrimination that occurred after the effective date of Title VII, but not of discrimination that occurred before that date. In addition, the Court emphasized that awards of retroactive seniority were limited to those individuals who could prove that they were actual victims of the employer's discriminatory policies and were not available to individuals merely because of their membership in the racial minority group that had been discriminated against. The Court did, however, read Franks to permit the threshold showing of discriminatory intent required for access to section 706(g) remedies, including retroactive seniority, to be presumptively satisfied through demonstration of a class-wide pattern and practice of discrimination, rather than insisting on an individualized showing of intentional discrimination against each class member. Significantly, the major element in proof of a class-wide pattern and practice of intentional discrimination is typically statistical evidence establishing an unexplained discriminatory impact on the minority group seeking relief. Justices Brennan and Marshall agreed with the majority as far as it went, but would also have permitted retroactive seniority awards to remedy the effects of some pre-Act discrimination.

The final pre-Stotts gloss to the contest between affirmative action and seniority was added by American Tobacco Company v. Patterson, a 5-4 decision in which the majority opinion was written by Justice White, the author of the Stotts majority opinion. In American Tobacco, the Court held that section 703(h) immunized bona fide seniority systems from legal challenge even if they were adopted after the effective date of Title VII, and even if they perpetuated the effects of post-Act discrimination. The Court found congressional desire to pro-

110. Id. at 781-82 (Powell, J., concurring in part and dissenting in part).
112. Id. at 348-55. The Court also held that, without more, the fact that a seniority plan perpetuated the effects of pre-Act discrimination could not preclude the plan from being "bona fide" or render it "the result of an intention to discriminate," which would make § 703(h) protections inapplicable. Id.
113. Id. at 356-71.
114. Id. at 357-62. If the employer rebuts this presumption, the plaintiff must offer further proof of individual discrimination in order to secure a § 706(g) remedy. Id.
117. 456 U.S. 63 (1982). When the Court decided American Tobacco, Justice O'Connor had replaced Justice Stewart on the Supreme Court.
tect seniority to be such that section 703(h) applied regardless of when the plan was adopted and regardless of its discriminatory impact. In order to be beyond the scope of section 703(h) protection, a seniority plan had to be the product of a discriminatory purpose. In so holding, the Court expressly rejected the Teamsters interpretation that section 703(h) protected only seniority rights that existed on the effective date of Title VII. The Court instead held that all bona fide seniority rights were encompassed by the provision, regardless of when they accrued. In the American Tobacco context at least, this shifted the operative balance between the remedial and seniority policies of Title VII. Under Teamsters, the balance had been struck between pre- and post-Act accrual of seniority. American Tobacco reformulated that balance by rejuvenating the distinction between intentional discrimination and mere disparate impact which the Court had rejected in Griggs. Only proof of intentional discrimination permitted seniority to be overridden.

Justice Brennan dissented in an opinion signed by Justices Marshall and Blackmun, arguing that section 703(h) could not properly be applied to the adoption of seniority plans after the effective date of the Act. He reasoned that the purpose of section 703(h) was to protect legitimate employee expectations based upon seniority, but no such expectations could arise with respect to seniority plans that violated other provisions of Title VII if those plans were adopted after the effective date of the Act. As long as those plans were challenged for perpetuating the effects of post-Act discrimination within 180 days after their adoption, as is required under the Act, there would be no time for legitimate seniority expectations to arise.

Justice Stevens wrote a separate dissent, which fortified Justice Brennan’s position, arguing that section 703(h) by its terms was inapplicable because a seniority system knowingly adopted despite its perpetuation of post-Act discrimination could not be bona fide within the meaning of section 703(h). The adoption of such a seniority system, in the absence of adequate business justification, itself would constitute an act of racial discrimination that violated Title VII. Justice Stevens, therefore, concluded that section 703(h) could apply to seniority plans adopted after the effective date of the Act, but only to bona fide plans that did not have an unlawfully discriminatory impact.

It is not clear that there is any difference between the positions of Justice Stevens and the other dissenters. None would insulate a seniority plan from Title VII scrutiny simply because it was a seniority plan. All would invalidate the adoption of any seniority plan whose disparate impact, discounted by any business purpose that the plan served, was sufficient without reference to section

118. Id. at 68-75.
119. Id. at 69-70.
120. Id. at 71-75. Justice White did not reach the question of whether the plan at issue was a bona fide seniority plan, concluding that further factual development was required for proper resolution of that question.
121. See supra note 112 and accompanying text (discussing Teamsters construction of § 703(h) as permitting remedial retroactive seniority awards as long as discriminatory practice occurred after effective date of Title VII).
122. See supra text accompanying note 99 (discussing Griggs holding).
123. 456 U.S. at 80-84 (Brennan, J., dissenting).
124. Id. at 86-90 (Stevens, J., dissenting).
703(h) to amount to a Title VII violation. Thus, for the dissenters, section 703(h) added nothing to the law governing the adoption of seniority plans.

The position of the majority, however, appears to be that seniority plans, by virtue of section 703(h), are judged under a more lenient substantive standard than other employer actions for the purpose of determining whether a Title VII violation exists. The showing of disparate impact that is otherwise sufficient to establish a prima facie case of intentional discrimination under Title VII seems insufficient to establish that the adoption of a seniority plan perpetuating the effects of post-Act discrimination violates Title VII; a stronger showing of discriminatory purpose appears to be required.\footnote{125}

In sum, Title VII, as construed in Griggs, prohibits discriminatory employment practices whether they result from intentional discrimination or merely have a discriminatory impact. Nominally, section 706(g) authorizes the issuance of appropriate equitable relief only after a showing of intentional discrimination. As a practical matter, however, Griggs, Franks, and Teamsters permit the requisite showing of intentional discrimination to be made through unrebutted statistical evidence of discriminatory impact. Moreover, section 703(h) does not itself bar injunctive relief under section 706(g), even if such relief interferes with post-Act seniority accumulated by innocent whites; the interests of innocent whites are to be considered in determining whether a particular form of relief is or is not equitable under the particular circumstances presented. Nevertheless, where seniority is involved, two additional factors may limit the availability of a section 706(g) remedy. First, Teamsters requires individuals seeking awards of retroactive seniority to prove that they are themselves victims of intentional discrimination, rather than merely members of the minority group alleged to have been discriminated against. Second, in order to overcome section 703(h) seniority protections, American Tobacco may require a showing of intentional discrimination that is more particularized than the statistical showing otherwise adequate to obtain a section 706(g) remedy under Griggs, Franks and Teamsters.

\footnote{125. Compare text accompanying notes 118 to 122 (discussing American Tobacco majority view that discriminatory impact, without intent, insufficient to invalidate seniority plan) with text accompanying notes 123 to 124 (discussing American Tobacco dissenters' view that unexplained discriminatory impact invalidates seniority plan). Generally, a showing of discriminatory impact is sufficient to establish a prima facie Title VII violation, see Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971), and even to secure a § 706(g) remedy, such as retroactive seniority, which is available only after a showing of intentional discrimination. See Teamsters, 431 U.S. at 334-40, 357-62. Section 703(h), however, protects the operation of bona fide seniority plans from challenges based on the disparate impact that they cause, unless the disparate impact results from "an intention to discriminate." 42 U.S.C. § 2000e-2(h); see supra note 100 (quoting § 703(h)). Section 706(g) also contains an intent requirement, as a prerequisite to obtaining a remedy. 42 U.S.C. § 2000e-5(g); see supra note 97 (quoting § 706(g)). Presumably, it is the intent requirement in § 703(h)—as opposed to the weaker language in § 706(g)—that caused the majority to focus on discriminatory purpose, rather than effect, in electing to tolerate the disparate impact of the American Tobacco seniority plan. See 456 U.S. at 70 ("Such an injunction [against future application of a discriminatory seniority system], however, would lie only if the requirement of § 703(h)—that such application be intentionally discriminatory—were satisfied."). As the dissenters point out, however, nothing in the language or apparent purpose of § 703(h) requires the adoption of a seniority system to be judged under a discriminatory-purpose standard. Although § 703(h) protects the operation of seniority plans, it says nothing about the showing that must be made to bring them into existence consistent with Title VII. Rather, the adoption of a seniority plan would appear to be just another employment practice covered by Title VII and governed by the discriminatory-effect standard of § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2), consistent with Griggs. Compare the discussion of the Court's treatment of impact and intent in Teamsters, supra note 118 and accompanying text.}
Against the backdrop of this case law, the question of whether the *Stotts* consent decree was properly modified is easy to resolve—either way. Assuming that the trial court exercised sound equitable discretion in light of the changed economic circumstances in Memphis, the decree was properly modified unless one of the restrictions on Title VII relief applied and prevented modification.\(^\text{126}\) The *Stotts* majority holds that, because the consent decree affected seniority rights, the plaintiffs were precluded from obtaining relief in light of their failure to prove that they were themselves victims of discrimination.\(^\text{127}\) Moreover, even though seniority-based layoffs would have a racially disparate impact, the City's seniority plan was nevertheless entitled to section 703(h) protection because the plaintiffs failed to prove that adherence to the plan was an act of intentional discrimination.\(^\text{128}\) There are problems, however, with the majority's reasoning in *Stotts*.

The *Teamsters* requirement that individual plaintiffs prove that they are victims of discrimination was articulated in the context of a suit seeking awards of retroactive seniority, and the requirement appears to be limited to that context. As the *Stotts* dissent points out, the individualized, as opposed to class-wide, proof that *Teamsters* requires makes sense only in the context of a request for individualized, as opposed to class-wide relief.\(^\text{129}\) Indeed, if this were not the case, the prospective injunctive relief awarded in *Griggs, Franks*, and *Teamsters* itself would have been improper. In *Stotts*, however, no one sought retroactive seniority or any other type of individualized relief. Rather, the plaintiffs sought prospective class-wide relief in the form of an injunction prohibiting future use of the Memphis seniority plan in making layoff determinations. Because individualized relief was not at issue in *Stotts*, the *Teamsters* proof requirement was not applicable.\(^\text{130}\)

It may be that the Court considered even prospective injunctive relief to be unavailable because the plaintiffs had chosen to settle their case rather than prove the existence of a pattern and practice of discrimination after a trial on the merits.\(^\text{131}\) However, the technical absence of a finding that the defendants had engaged in a pattern and practice of discrimination hardly seems significant. The consent decree was not entered into until extensive discovery had been com-

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\(^\text{126.}\) Even if Title VII did not preclude modification, the trial court would still have been precluded from modifying the consent decree if the equities did not warrant modification, and its attendant interference with seniority rights, in the particular circumstances before the court. See 104 S. Ct. at 2588 (even after showing of discriminatory impact, courts must balance equities before ordering layoff to restore discriminatee's job); see also id. at 2593 (O'Connor, J., concurring) (courts can award preferential treatment only after balancing competing interests of discriminatees, innocent workers, and employer). As is apparent, however, a standard as broad as "doing what the equities require" provides no more guidance or constraint than a standard requiring the court to prohibit unjust discrimination.

\(^\text{127.}\) See id. at 2588.

\(^\text{128.}\) See id. at 2587.

\(^\text{129.}\) See id. at 2605-07 (Blackmun, J., dissenting) (race-conscious relief without proof of individual discrimination appropriate in class action suits to remedy class-wide discrimination).

\(^\text{130.}\) The consent decree did provide for certain back-pay awards, see supra note 23, but those awards are not relevant to the modification issue.

\(^\text{131.}\) It is difficult to know precisely what the Court's position is with respect to this issue. At times the majority appears to be troubled by deficiencies in the plaintiffs' proof resulting from the plaintiffs' election of settlement over trial, see 104 S. Ct. at 2587, 2590 n.16, something that was particularly important to Justice O'Connor. See id. at 2593-94 (O'Connor, J., concurring). At other times, however, the Court appears to assert that modification of the consent decree would be precluded even if the case had gone to trial and the plaintiffs had proven a pattern and practice of discrimination. See id. at 2588.
pleted, and the record was replete with statistical evidence creating a strong inference of intentional discrimination.\textsuperscript{132} Moreover, while the City did not admit to having engaged in unlawful discrimination, the Justice Department decree that was incorporated into the \textit{Stotts} decree both admitted that an inference of discrimination could be drawn from the City's past hiring practices and characterized the decree as designed to remedy what it referred to as "past discrimination."\textsuperscript{133} In addition, as the dissent points out, because the trial court merely issued a preliminary injunction, there was never any occasion for a trial to establish whether the City had engaged in a pattern and practice of discrimination.\textsuperscript{134} This is particularly important because the plaintiffs alleged not only that the City had engaged in hiring discrimination generally, but that even the layoffs themselves were the product of intentional discrimination.\textsuperscript{135} Because the City's appeal of the trial court's preliminary injunction postponed the need to prove those allegations, it would seem that the most the Supreme Court properly could have done was remand for continuation of the district court proceedings, including a trial at which the plaintiffs would have to prove a pattern and practice of discrimination if they wanted their preliminary injunction to be made permanent.\textsuperscript{136} Given the opportunity, the plaintiffs could certainly have made such a showing. This is real life, after all, and no one seriously doubts that the City of Memphis engaged in a pattern and practice of hiring discrimination.\textsuperscript{137}

Assuming that the absence of technical findings is not fatal, the trial court's Title VII authority to issue a preliminary injunction modifying the consent decree would appear to follow directly from the Supreme Court's approval of prospective injunctive relief in \textit{Griggs} and in the class-wide portions of both \textit{Franks} and \textit{Teamsters}. It is possible, however, that there is something special about the seniority rights implicated in \textit{Stotts} that distinguishes \textit{Stotts} from the pattern-and-practice aspects of those other cases. Interference with seniority is what distinguished the class-wide from the individualized aspects of \textit{Franks} and \textit{Teamsters}, and the Court's heavy reliance on section 703(h) in \textit{Stotts} suggests that seniority considerations may have been dispositive in that case as well.

\textsuperscript{132} See 679 F.2d at 551; see also supra notes 15 to 17 and accompanying text (discussing unexplained racial disparities in City's hiring and promotion practices).
\textsuperscript{133} 679 F.2d at 570-71 app.; see supra note 18 and accompanying text (discussing Justice Department suit against City).
\textsuperscript{134} 104 S. Ct. at 2606-08 (Blackmun, J., dissenting).
\textsuperscript{135} Id. at 2603-04 (Blackmun, J., dissenting).
\textsuperscript{136} See id. at 2603 (Blackmun, J., dissenting) (arguing that majority improperly treated injunction as permanent, foreclosing plaintiffs' opportunity to substantiate allegations of discrimination).
\textsuperscript{137} Justice White's refusal to remand the case for a permanent injunction hearing is ironic in light of his insistence on a remand for further factual development in \textit{American Tobacco} before ruling on the bona fides of the seniority plan there at issue, even though permanent injunctive relief had already been granted. See 456 U.S. at 66-67, 77 n.18; see also supra note 120 (discussing \textit{American Tobacco} remand to determine if seniority system bona fide).

The consequence of insisting on an actual judicial "finding" of discrimination prior to modification of a consent decree is likely to be a reduction in the number of Title VII cases that are voluntarily settled. Defendants will, of course, be reluctant to admit explicitly that they have engaged in a pattern and practice of racial discrimination, and after \textit{Stotts} plaintiffs will be reluctant to enter into consent decrees unless defendants first make the necessary admissions. Such a requirement would undermine one of the recognized objectives of Title VII, which is to encourage voluntary settlement of discrimination cases. See 104 S. Ct. at 2605 n.20 (Blackmun, J., dissenting) (discussing congressional policy to encourage voluntary settlement of Title VII suits).

\textsuperscript{138} See 104 S. Ct. at 2587.
Although the majority did not specifically so hold, *American Tobacco* may well stand for the proposition that even in class-wide pattern-and-practice cases, if the issuance of prospective injunctive relief would interfere with seniority rights, such relief is precluded unless the plaintiff first proves intentional discrimination and does so with a high degree of particularity.\(^{139}\) Because *American Tobacco* can be read to impose a higher substantive standard for Title VII violations involving seniority than for other Title VII violations, the *Griggs*-type proof of disparate impact that is sufficient to establish "intentional discrimination" for the purposes of section 706(g) may not be sufficient to establish the type of "intentional discrimination" required to overcome seniority protections under section 703(h). It may be that whenever seniority is involved, Title VII is simply not violated unless the defendant is shown to have engaged in the type of purposeful discrimination that the Court had in mind when it decided *American Tobacco*.\(^{140}\)

The problem with this explanation of the *Stotts* decision is that, while section 703(h) and *American Tobacco* may provide special protections for seniority, modification of the *Stotts* decree had nothing to do with seniority. First, the district court never directly ordered the City to depart from its seniority system. The court merely ordered the City to maintain current percentages of blacks in the Memphis Fire Department. The City, not the court, chose to deal with its fiscal problems by making layoffs in the Fire Department, rather than making them in other employment divisions that were not subject to a consent decree, or rather than avoiding them altogether by borrowing money or raising additional revenues in some other way. The City, not the court, chose to bring its seniority policy into conflict with its affirmative action obligations.\(^{141}\) Second, and even more important, the preliminary injunction issued in *Stotts* did not interfere with anyone's seniority rights. All of the affected employees were hired on the same day and thus had equal seniority.\(^{142}\) Under the facts of *Stotts*, the seniority that section 703(h) is designed to protect was simply never implicated. In light of all this, it is difficult to conclude that section 703(h) bars modification of the consent decree. The *Stotts* record seems to establish a pattern and practice of intentional discrimination that was adequate for the type of prospective, class-wide injunctive relief that the plaintiffs had requested.\(^{143}\)

\(^{139}\) The Court in *American Tobacco* never elaborated on the type of purposeful discrimination that is necessary to overcome the seniority protections of § 703(h), but it is clear that mere unjustified disparate impact is not sufficient. See 456 U.S. at 69-71; see also supra note 118 (discussing *American Tobacco*'s interpretation of § 703(h)).

\(^{140}\) See *Stotts*, 104 S. Ct. at 2592 (O'Connor, J., concurring) (arguing that Title VII protects bona fide seniority systems with discriminatory effects as long as no intentional discrimination); id. at 2587 (§ 703(h) allows use of bona fide seniority system employment practices that have disparate impact as long as no intentional discrimination).

\(^{141}\) See 104 S. Ct. at 2602 (Blackmun, J., dissenting) (noting that preliminary injunction limited City's ability to lay off blacks, but did not affect other fiscal options).

\(^{142}\) See supra note 30 and accompanying text (discussing provision in City's seniority plan that layoffs between employees with equal seniority were to be made in reverse alphabetical order).

\(^{143}\) Even if the facts in *Stotts* were read to implicate seniority rights, it may well be that the plaintiffs proved the type of intentional discrimination that is required to overcome § 703(h) seniority protections under *American Tobacco*. The trial court found that Memphis did not adopt its seniority plan with an intent to discriminate, but the court did find that application of the plan for the purpose of making layoff determinations was not bona fide. See 104 S. Ct. at 2587. The court of appeals overruled this finding but held the injunction proper in the apparent belief that evidence sufficient to satisfy the lenient "intentional
There is a substantial counterargument, however. The suggestion that Teamsters is inapplicable and that the Stotts plaintiffs were not required to prove that they were victims of discrimination because they were seeking class-wide rather than individualized relief ignores the reality of what the Stotts plaintiffs were trying to accomplish. The plaintiffs wished to have more-senior whites laid off instead of less-senior blacks. Any such relief would necessarily constitute the functional equivalent of a retroactive seniority award to any black firefighter who was not laid off but who would have been, absent judicial modification of the consent decree. For such black firefighters, individualized relief is precisely what was at stake. The beneficiaries of the requested injunction were particular individuals with particular names and particular employment histories. Because the preliminary injunction effectively granted retroactive seniority to those firefighters without first requiring them to make the individualized evidentiary showing demanded by Teamsters, issuance of the preliminary injunction was not authorized under Title VII.

Even if one were to reject this retroactive seniority argument and view the case as a pattern-and-practice case, the injunction would still be unauthorized because the plaintiffs failed to prove the existence of a pattern and practice of discrimination. The fact that the record might have supported a finding of discrimination means nothing if that finding was not actually made. As the majority points out, the plaintiffs in Stotts chose not to pursue an ultimate adjudication on the merits. As a result, they never obtained the finding of class-wide discrimination required for the issuance of class-wide injunctive relief. This is no mere technical defect. When parties choose to settle a suit rather than obtain an adjudication of the merits, they avoid the expense and uncertainty of litigation, but in exchange, they forgo rights they might have secured by prevailing after trial. That is precisely what happened here.

By settling their case, the Stotts plaintiffs secured the City’s voluntary commitment to hiring and promotion quotas, something to which they may or may not have been entitled after trial. In exchange, however, they gave up the right to any further relief that might have been available after a favorable adjudication of the merits. If the plaintiffs were now permitted to obtain a court order modifying the consent decree, they would be breaching their agreement with the City, simply because their bargain did not turn out to be as favorable as they might have wished. Moreover, they would be doing so to the detriment of the innocent white firefighters on whose behalf the City agreed to the settlement.

discrimination” standard of § 706(g) was also sufficient to overcome § 703(h) protections. See 679 F.2d 551 n.6 (discussing lack of discriminatory intent). It may be that the lower courts would have made the findings required by American Tobacco if they had better understood what significance the Supreme Court would attach to the presence or absence of those findings, especially in light of the plaintiffs’ allegations that the layoffs had been conducted in an intentionally discriminatory manner. See id. at 2603 (Blackmun, J., dissenting) (discussing plaintiffs’ allegations).

144. The whites that the plaintiffs wished to have laid off were “more senior” as defined by the City’s plan, which included laying off employees hired on the same day in reverse alphabetical order. See supra note 30 (discussing City’s seniority plan).

145. Id. at 2588; see also id. at 2593 (O’Connor, J., concurring) (plaintiffs waived right to further relief by entering into consent decree).

146. See id. at 2588. The importance of an actual finding is also suggested by the Court’s denial of certiorari, a mere 13 days after Stotts was decided, in another case involving municipal layoffs. In that case, the lower court had circumvented seniority protections in order to maintain current levels of minor-
This argument against granting the injunction is bolstered by the special protection that section 703(h) gives to seniority plans. Even if one assumes that unmade findings of fact properly can be inferred from the statistical evidence contained in the Stotts record notwithstanding the parties' settlement agreement, the special protections accorded seniority by section 703(h) still preclude modification of the consent decree. American Tobacco indicates that, as a matter of substantive Title VII law, judicial interference with seniority must be based upon more than mere statistical evidence of disparate impact. Section 703(h) permits interference with seniority only after a showing of discriminatory intent that is rooted in hard evidence rather than statistical inference. However much the Stotts record may have supported a statistically based finding of a pattern and practice of discrimination, that record did not contain the kind of direct evidence of intentional discrimination required by American Tobacco where seniority is involved. Moreover, the fact that the layoffs in Stotts, under both the original and modified plans, were to be made on an alphabetical basis does not undermine this seniority based argument. The Memphis plan provided for breaking ties in seniority through layoffs in reverse alphabetical order. Accordingly, interference with the alphabetical provision, which was an integral part of the seniority plan itself, constituted interference with the principle of seniority and thereby triggered section 703(h) protections. Viewed in this light, the absence of adequate proof of discrimination in Stotts can be seen to have deprived the trial court of any Title VII authority it might otherwise have had to modify the consent decree.

Which view of the case is correct? Logically, the view of the case that better corresponds to the actual nature of the problem presented in Stotts should prevail. The fundamental difference between the majority and the dissenting positions relates to the individual as opposed to the group nature of rights conferred by Title VII. The majority viewed Title VII as protecting individual rights. Accordingly, the majority denied the black plaintiffs retrospective relief because they were seeking what amounted to reparations for past injuries inflicted on an entire group, but were doing so under a statute that, as the retroactive-seniority portion of Teamsters indicates, was designed to provide retrospective relief only to demonstrated individual victims of discrimination. The dissenters, however viewed Title VII as protecting group rights. Accordingly, they would have granted the black plaintiffs prospective injunctive relief because they believed that section 706(g), in authorizing broad and flexible remedies for Title VII violations, was designed to improve the social and economic condition of blacks as a group.

The broad readings of Stotts as a pathbreaking race discrimination case or as a case that prohibits quotas and even affirmative action itself focus on the...
majority's apparent rejection of the group nature of discrimination and discrimination remedies. Moreover, the precise meaning of the legislative history on which the Stotts majority relies depends upon prior specification of discrimination as an individual or group problem.\(^{150}\)

The suggestion that proper resolution of our discrimination problems turns on proper appreciation of the group or individual nature of those problems has gained considerable currency.\(^{151}\) Moreover, the underlying premise of much of the critical literature that now occupies the cutting edge of legal scholarship would suggest that proper characterization of discrimination problems is crucial.\(^{152}\) Indeed, the more philosophical strands of this literature seek to account for the present inadequacy of many of our legal doctrines by demonstrating the


\(^{151}\) See, e.g., Freeman, Antidiscrimination Law: A Critical Review, in The Politics of Law 96 (D. Kairys ed. 1982) (arguing that improper focus on individual rather than group nature of discrimination not only produces bad results but also legitimates counterproductive ways of thinking about race discrimination).
ways in which those doctrines emanate from an ill-conceived, liberal philosophical tradition that is designed to protect individual interests from evisceration by the state, rather than from a better-conceived, communitarian tradition in which shared group understandings make such legal constraints unnecessary.153

Assuming that proper characterization of the nature of discrimination problems is a prerequisite to satisfactory resolution of those problems, it is difficult to see how a judge could characterize discrimination without recourse to his or her own subjective reactions to the nature of the problem. The question of whether discrimination is really an individual or a group phenomenon appears to be nothing more than a question of perspective. Indeed, even the choice of the appropriate dichotomy seems to be nothing more than a matter of personal perspective. Several other dichotomies could serve as the basis for classification—such as the innocence/fault dichotomy, the earned/unearned dichotomy, or the public/private dichotomy—and it is hard to conclude that one dichotomy is objectively more appropriate than another.154 Even if the genuinely appropriate dichotomy could be selected in a satisfactory objective manner, however, the judge would still have to determine which half of the dichotomy genuinely embraced his or her legal problem.

Judges seeking proper characterization of the nature of discrimination would seem to have only three available options. First, they could characterize the problem on the basis of whatever functional concerns they perceived to be at stake, but this would make their characterizations subject to the subjectivity of all functional analysis. Second, they could balance the individual against the group aspects of discrimination in order to determine the true nature of discrimination, but the outcome would merely embody the subjectivity inherent in any balancing process. Finally, the judges could simply proclaim the true nature of discrimination to be whatever it struck them as being, without regard to the reason that it happened to strike them that way. That would, however, constitute a blatant submission to subjectivity. Such a proclamation, if not based on some sort of rational analysis, would necessarily be the product of the judges' psychological makeup or socialization or some similar determining factor, which, of course, is precisely what it means to say that something is subjective.155 Because the "true" nature of a problem is simply a statement about perspective, and because subjective elements seem to be essential in the establishment of perspective, the "true" nature of legal problems can only be ascertained through recourse to subjective values.156

153. See, e.g., Tushnet, supra note 2, at 782-86, 824-27 (arguing that constitutional dogmas of interpretivism and neutral principles developed as solution to Hobbesian problem of restraining sovereign's power by establishing standard for evaluating judicial performance).

154. See Edley, Justice: In the Eye of the Beholder, 35 HARV. L. SCH. BULL. 6, 7-8 (Spring 1984) (discussing how different dichotomies affect view about affirmative action and how dichotomies involve moral judgments).

155. It is only for the sake of argument that I am willing to concede that rational analysis could ever be detached from factors that determine subjective preferences.

156. Although the plaintiffs in Stotts alleged constitutional as well as statutory violations, see 104 S. Ct. at 2581, the Supreme Court barely discusses those constitutional claims, addressing them only in a single footnote. See id. at 2590 n.16. The majority holds that Title VII precluded interference with seniority rights under the facts presented in Stotts, but that holding would have been inconsequential if the Consti-
tution itself provided relief that entailed interference with seniority. In that event, Title VII would simply have been unconstitutional as applied to the facts of Stotts.

The school desegregation cases have now established that equal protection violations cannot be remedied simply through adherence to prospective racial neutrality. Rather, the fourteenth amendment also requires some remedy for the lingering effects of past discrimination. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971) and cases cited therein (court has broad equitable power to remedy past wrongs of segregation). Moreover, the remedy can, and sometimes must, take the form of benign racial classifications, and those remedial classifications do not themselves offend the equal protection provision. See id. at 18-20 (plan for faculty assignment based on race constitutional as part of overall effort to desegregate); see also North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (that prohibition of race-based student assignments unconstitutional; duty to desegregate requires consideration of race in formulating remedy); McDaniels v. Barresi, 402 U.S. 39, 41 (1971) (school board properly took students' race into account in drawing attendance lines to achieve greater racial balance). Why then does the fourteenth amendment not preclude the City from insisting on seniority-based layoffs that would undermine the remedial objectives of the Stotts decree? Indeed, a federal district court has held that seniority-based layoffs of police officers, which undermined the hiring gains made by minority police officers under an affirmative action decree, violated the equal protection clause, notwithstanding any Title VII protections that the seniority plan might have had. See NAACP v. Detroit Police Officers Ass'n, 53 U.S.L.W. 2065 (E.D. Mich. 1984).

The equal protection guarantee of the fourteenth amendment is violated only by intentional discrimination. See Washington v. Davis, 426 U.S. 229, 238-41 (1976) (holding that intentional discrimination must be shown for finding of equal protection violation). Accordingly, it is possible to argue that the fourteenth amendment permits adherence to the Memphis seniority plan because there was no finding of past intentional discrimination. Indeed, the Court seems to have accepted this argument in its footnote reference to the constitutional claims. See 104 S. Ct. at 2590 n.16. This argument, however, is only as persuasive here as it was in the Title VII context. Cf. supra notes 132 to 145 and accompanying text (arguing that only reason for no finding of past discrimination was parties' decision to settle).

What makes more sense is that the Court tacitly assumed Title VII remedies to be coextensive with, or more liberal than, whatever remedies the Constitution requires. If so, the Court's holding that no Title VII violation had occurred would have precluded the need to consider potential constitutional violations, which could not exist in the absence of a Title VII violation. General Elec. Co. v. Gilbert, 429 U.S. 125, 132-40, 145 (1976), suggests that the meaning of "discrimination" in Title VII is similar to its meaning for equal protection purposes. Moreover, there is language in Washington v. Davis suggesting that courts scrutinize allegedly discriminatory actions less closely for fourteenth amendment purposes than they do for Title VII purposes, although there is no discussion of why this should be the case. See 426 U.S. at 247.

There is, however, a serious problem with assuming that the scope of the constitutional prohibition merely mirrors the scope of Title VII. Such a view would eliminate the possibility of ever holding a congressionally prescribed remedy unconstitutional because it provided insufficient relief. If, for example, § 703(h) simply precluded all awards of retroactive seniority, the school desegregation cases suggest that the provision would be unconstitutional for the same reason that state prohibitions on benign racial classifications have been held unconstitutional—it would improperly interfere with compensatory relief for the victims of discrimination. True, Congress has been given a special role in the enforcement of the fourteenth amendment, see Katzenbach v. Morgan, 384 U.S. 641, 649-50 (1966), but that special role is generally thought to be limited to prohibiting actions that might otherwise constitute fourteenth amendment violations. Congress is not typically viewed as able to authorize an action that would otherwise violate the fourteenth amendment. Moreover, such deference to a politically accountable legislature, reflecting the transitory biases and prejudices of the electorate, would seem seriously to frustrate the protection of politically underrepresented minorities. This, in turn, would seem to undermine the whole point of judicial review, at least under one theory. See generally J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). There is no apparent reason, therefore, why the plaintiffs might not have been entitled to constitutional relief from the operation of the Memphis seniority plan even if they were precluded from obtaining statutory relief. And even if there is a reason, certainly it is not so obvious that it fails to merit discussion.

Because the Court is aware of the plaintiffs' constitutional claim, see 104 S. Ct. at 2581, the Court necessarily rejects that claim, even though it does not meaningfully discuss it. If this were not the case, the suit would have been resolved in the plaintiffs' favor. It goes without saying that tacit resolution of legal issues provides no insulation whatsoever from judicial bias. When a court does not even specify a legal standard that could potentially generate a result, recourse to subjective values appears to be the only way that the pertinent issue could have been resolved.

II. THE ROLE OF DOCTRINE

I have suggested that each of the legal issues presented in Stotts could just as
easily have been resolved one way as the other, because the governing doctrinal rules are too imprecise to generate only one result. Indeed, I have suggested that the doctrinal rules are such that they cannot be applied at all except through recourse to the subjective values of the decision makers. If the doctrinal indeterminacy that characterized analysis of the legal issues in Stotts can be generalized to all legal issues, it raises the question of why we bother with doctrine at all. Wouldn't it be more honest and efficient to concede the inevitable presence of bias and simply have our judges decide cases in the way that they deemed best under the circumstances?

A. GENERALIZATION

There is every reason to believe that the inability of doctrine to control resolution of the legal issues in Stotts can be generalized to all legal issues. The reason that the doctrinal formulations were indeterminate in Stotts is that it was always possible to identify an ambiguity in the applicable legal rule. Sometimes the ambiguity was created by doctrinal language that was too imprecise to be of much guidance. For example, doctrinal language describes a justiciable case or controversy as an action in which the plaintiff is threatened by a "direct injury" that is "real and immediate" enough to give the plaintiff a "personal stake" in the outcome of the case, sufficient to ensure the "concrete adverseness" necessary to prevent a case from being dismissed on mootness or ripeness grounds. On other occasions, the ambiguity was more latent, resulting from judicial inquiry into an inherently indeterminate theoretical construct, such as the Court's nominal inquiry into the parties' intent in entering into the Stotts consent decree. On still other occasions, the ambiguity resulted from uncertainty about proper legal categorization, such as whether the trial court's preliminary injunction constituted the issuance of an individualized or a class-based remedy. It is virtually certain that one or another of these types of ambiguities can be found lurking beneath the surface of any legal issue in any case.

Meaningful resolution of the ambiguities inherent in doctrinal formulations can be accomplished only through recourse to some more fundamental principle that the doctrinal rules are designed to implement—such as a principle prohibiting unjust discrimination. Once direct reliance is sought on the imprecise underlying principle, however, the subjective preferences of the judge necessarily enter the analysis, just as they would if the judge were told merely to prevent unjust discrimination. In fact, they necessarily control the analysis. Resolution of the doctrinal ambiguity depends upon the meaning of the underlying principle, but the meaning of the underlying principle itself depends upon the judge's subjective interpretation of that principle.

In analyzing the Court's analysis of the legal issues in Stotts, I have tried to illustrate the ways in which three of the most common judicial techniques for resolving doctrinal ambiguity can work only through invocation of the judge's personal values. The first such technique is functional or policy analysis. In discussing the Court's resolution of the mootness issue, I suggested that meaningful resolution of that issue could be achieved only through a functional analy-

157. See City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) and cases quoted therein (reciting threshold requirements plaintiffs must satisfy to invoke federal court jurisdiction).
sis that emphasized fidelity to the policy objectives of the legal rules. Because policy objectives must be phrased in broad, general, and imprecise terms to be generally acceptable, however, functional analysis appears to accomplish nothing more than direct resort to the broad policy objectives themselves would accomplish in the way of insulating decisions from judicial bias.

A second common technique for resolving doctrinal ambiguities is interest balancing. Indeed, some legal doctrines, such as those requiring courts to balance the equities, explicitly make interest balancing the dispositive doctrinal consideration. In discussing the Court's construction of the terms of the consent decree, I suggested that, logically, the most sensible way to get a grasp on the chimerical intent of the parties was by balancing the competing interests that were at stake. Once again, however, it turned out that the technique of interest balancing could only work through recourse to the subjective values of the judge asked to strike the balance, thereby making it too an unsatisfactory safeguard against judicial bias. The doctrinal rules became nothing more than a medium for the judge's discretion, and it was that discretion, rather than the doctrinal rules, that generated the result.

The third technique for confronting doctrinal ambiguity can best be described as figuring out what is really going on. In discussing the Court's resolution of the Title VII issue, I suggested that the essence of the issue related to the individual, as opposed to the group, nature of discrimination and discrimination remedies. Implicit in reliance on this technique is the belief that legal issues have an essential nature that can be ascertained if the issues are stared at long enough. The nature of an issue, however, appears to be nothing more than a function of the perspective from which it is viewed by the judge, and perspective in turn appears to be nothing more than a shorthand term for subjectivity. Therefore, no matter how intensely we stare at legal issues, they are unlikely ever to be transformed from what they appear to be into what they really are.

In discussing these three particular techniques for confronting doctrinal ambiguity, I did not intend to suggest that they were exhaustive. They are the techniques that I perceive courts to use most often, but other techniques might be identified. Moreover, I did not intend to suggest that any particular technique was the proper technique to use for resolution of any particular issue. Each of the techniques can easily be used to resolve virtually any legal issue. Finally, I did not intend to suggest that the techniques are mutually exclusive. In fact, they seem to be quite interrelated. Specification of the interests to be considered in connection with the interest-balancing technique probably depends upon a judge's functional analysis of the case, which in turn, is likely to depend upon how the judge perceives what is really at stake in the litigation, and so on. As a result, it seems that there is simply no nonsubjective way in which legal doctrine can be applied, thereby making doctrine an utter failure at the task of guarding against judicial bias.\(^{159}\)

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158. It is, however, my intent to suggest that any other technique would be equally dependent upon subjective values.

159. I have offered more elaborate explanations for the necessary presence of bias in judicial decisions and have suggested that bias must exist no matter how seemingly precise the controlling language formulation might be. See Spann, supra note 88, at 528-36 (arguing that doctrinal indeterminacy pervades all cases).
B. ALTERNATE FUNCTIONS

If I am correct that legal doctrine is inherently incapable of guarding against the subjective values of judges and in fact depends upon subjective values in order to have meaning, it makes sense to wonder whether legal doctrine serves any useful purpose at all, or whether we should simply abandon doctrinal rules and rely instead on direct judicial application of our policy objectives. I have been able to think of three alternative functions that doctrine might serve, which could potentially justify its continued presence in the process of legal decision making. First, doctrine might illuminate the proper factors for judicial consideration, even if it is unable to guard against subjectivity in a judge's consideration of those factors. Second, doctrine might promote uniformity and consistency in judicial decisions by channeling whatever subjective values are involved into predictable and manageable directions. Finally, although doctrine cannot preclude the presence of subjective values in judicial decisions, it might serve to reduce the amount of judicial bias that would otherwise be present, thereby holding the influence of the judge's personal preferences to acceptably low levels. Ultimately, however, none of these alternative justifications proves to be very satisfying.

Whatever their shortcomings in eliminating subjectivity, doctrinal rules might nevertheless serve to illuminate the factors that should be considered in resolving legal issues by distinguishing between what is material and what is legally irrelevant. Accordingly, a well-meaning judge tempted to give consideration to an extraneous factor is instructed by the governing doctrinal rules not to do so. Assume, for example, that proper resolution of the modification issue in Stotts turned on proper construction of the consent decree. In determining whether the Stotts consent decree, by its own terms, prohibited seniority-based layoffs, the governing contract rules indicated that the intent of the parties in entering into the decree was to be dispositive.\(^\text{160}\) Other factors, such as weather conditions on the day that the complaint was filed or the judge's assessment of what might best promote harmonious race relations in Memphis, properly had no bearing on the decision. Closer examination, however, reveals that doctrine actually does very little to distinguish between factors that should and should not receive judicial attention, and whatever it does might well be counterproductive.

Most people would agree that weather conditions on the day that the complaint was filed should have no bearing on proper construction of the consent decree. But we do not need doctrinal rules to tell us that; it just would not make any sense to treat weather conditions as a factor. Therefore, if doctrine is to be useful in illuminating factors, it must be capable of satisfactorily distinguishing among legitimate contenders for judicial consideration. The judge's assessment of what construction of the consent decree would best promote harmonious race relations in Memphis does appear to be a legitimate contender. Doctrine, however, does not conclusively resolve whether this factor should be considered, and the resolution suggested on a superficial level may not be satisfactory.

Superficially, a doctrinal instruction to inquire into the intent of the parties would seem to preclude judicial consideration of what would best promote har-

\(^{160}\) See supra text following note 81 (describing contract law's treatment of parties' intent).
monious race relations. But, as indicated above, ascertainmment of the parties' intent, if not totally meaningless, is at least a tricky business. Certainly, each party can be said to have intended the outcome that would maximize that party's own interests, but those intents conflict and cannot, therefore, constitute the shared intent of the parties that is relevant under contract law. If one asks the largely ficticious question of what intent the parties are likely to have shared, promotion of harmonious race relations becomes a likely candidate. After all, this was a class action filed against a municipality. Neither side, therefore, was primarily concerned with advancing any personal interest that might have been at stake, and the lowest common denominator between their interests may well have been the parties' joint concern with improving race relations.

Even if the parties can be shown to have possessed a different intent, not involving race relations at all, it still is not clear that we would wish to preclude a judge from considering race relations as a factor in construing the consent decree. Courts exist to do more than merely enforce private contracts. They are social institutions that exist to promote the welfare of society. Thus our courts will not enforce contracts that are unconscionable or illegal, even though the intent of the parties to have such contracts enforced is beyond question. Because promotion of harmonious race relations is a high social priority, a doctrinal instruction to ignore that factor in construing the decree could easily be rejected as unacceptable. In the same way, therefore, that doctrine is unable to preclude the presence of judicial bias, doctrine may also be unable to illuminate reliably the factors that are entitled to judicial consideration.

There is one additional category of factors that doctrine might properly illuminate. That category consists of factors whose relevance to a proper decision would be generally conceded, but that the judge might simply overlook or under-value in the absence of doctrinal illumination. For example, statutes of limitations remind a judge that societal interests in finality and repose must be considered when cases are decided. Because those long-term considerations are rarely sufficient to override the more immediate substantive concerns presented in a case where the equities cry out for judicial intervention, their inclusion in the governing doctrine reminds judges that they must nevertheless give adequate consideration to those factors. Although the importance of such factors in isolated cases might seem minimal, doctrine reminds us that their cumulative importance cannot be ignored.

As appealing as this argument might initially appear to be, it once again has little to do with the existence or content of doctrine. The argument that long-term as well as short-term consequences should enter into a judge's deliberations simply suggests that all good arguments should be considered before a case is decided. When a new factor is persuasively addressed for the first time, it merits

161. See supra note 88 and accompanying text (describing circularity in resolving unanticipated problems by resorting to determination of parties' intent).

162. See generally Farnsworth, supra note 86, at 302-23, 347-58 (discussing public policy reasons for not enforcing unconscionable or illegal contracts).

163. See generally 53 C.J.S. (2d) Limitations of Actions § 1, at 901-04 (1948) (statutes of limitations designed to prevent surprise and suppress stale claims after certain period of time). Technically, a statute of limitations is a statute rather than a judicially developed doctrine. Construction of such statutes, however, involves judicially developed doctrinal rules, as does application of the related equitable doctrine of laches.
consideration even though, by definition, applicable doctrinal rules have not made it a material factor. Conversely, when doctrine directs a court to give consideration to a factor that the judge would like to underplay in light of the more compelling equities of a particular case, the judge can and probably should be expected to evade the doctrinal prominence accorded that factor, as did the first judge who decided to toll the statute of limitations because the defendant's fraud prevented the plaintiff from filing a timely action. Standing alone, therefore, doctrine would seem to do little to illuminate factors that properly should be considered in resolving legal issues.

A second potential justification for doctrine relates to its ability to facilitate uniformity and consistency in judicial decision making. By providing judges with guidance in deciding particular cases, doctrinal rules could be said to help ensure both that individual judges will, over time, decide similar cases in similar ways and that different judges will resolve similar cases in similar ways. This, of course, promotes desirable predictability and stability in the legal system. The argument that doctrine does much to advance these objectives, however, is unconvincing. In order for doctrine to serve this function, it would have to generate results, or at least illuminate factors. But, as has been shown, doctrine is not particularly good at doing either. It is not clear, for example, whether a judge called upon to construe the Stotts consent decree will consider the effect that particular constructions may have on future race relations. Some judges will, and some will not. Therefore, inasmuch as this factor determines the outcome, governing contract doctrine fails to promote either uniformity or consistency.

To the extent that there is any uniformity or consistency in judicial decisions, it is just as likely to exist in spite of the doctrinal rules as because of them. A clear example is provided by the events that followed the Supreme Court's invalidation of the legislative veto in INS v. Chadha.164 Strong arguments can be made that the decision rendered many criminal laws in the District of Columbia unconstitutional because those laws were enacted pursuant to a statute containing a nonseverable, unconstitutional veto provision. As a doctrinal result, many convicted criminals in the District of Columbia might be entitled to have their convictions overturned, and those who are incarcerated might be entitled to their release.165 It is relatively easy, however, to predict that judges in the District of Columbia simply will not let a large number of criminals go free. The judges will display a remarkable degree of uniformity and consistency, but they will do so in spite of—not because of—the seeming demands of doctrine. Accordingly, whatever is responsible for uniformity and consistency in judicial decisions appears to operate independent of doctrine.166

165. Three consolidated cases presenting particular variants of this argument are presently pending in the District of Columbia Court of Appeals under the name of Gary v. United States, No. 83-796 (D.C. argued Oct. 22, 1984).
166. Arguably, there is a principle permitting criminal convictions to be upheld despite the invalidity of the laws under which the defendants were charged. In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court, in announcing what was essentially a cost-benefit balancing test, held that the degree of retroactivity to be given changes in applicable law depended upon the particular circumstances involved. Id. at 627-29. The test was further refined in Stovall v. Denno, 388 U.S. 293 (1967), where the Court identified three factors to be considered in determining the appropriate degree of retroactivity: the purpose of the new rule; the extent of reliance on the old rule; and the effect of retroactivity on the administration of justice. Id. at 297. In addition, the pre- or post-conviction stage of proceedings at which the defendant
Even though doctrine appears to be incapable of tightly controlling judicial decision making, it might be justifiable as a means of reducing the degree to which judges are free to give vent to their biases. Perhaps doctrine limits the scope of judicial discretion even though it is not able to eliminate such discretion completely. Perhaps judges frequently are tempted to decide cases the way that they want to, but actually do so only to the extent that they can get away with it under the governing doctrinal rules.

The theoretical question of whether doctrine imposes any constraint whatsoever on judicial discretion is interesting, but unimportant to the present discussion. Whatever theoretical limitations may or may not be present, the practical, day-to-day freedom that doctrinal rules give judges in deciding cases is quite broad. Stotts illustrates this graphically. Stotts was an important case that was sure to send out signals about the future course of race relations in the United States. Nevertheless, few would argue that the justices operated under any perceptible constraint in resolving the legal issues. The case could easily have been decided either way.

As a practical matter, judges have near-complete discretion in resolving legal issues for at least two reasons. First, there are virtually always outcome-determinative doctrinal ambiguities that judges can manipulate in accordance with their subjective values, as consideration of the various legal issues in Stotts reveals. Second, even if this were not the case, judges could always "cheat" if they desired to reach a particular result badly enough. Despite the fact that there might be a consensus resolution of a particular legal issue, the judge is by no means bound to resolve the issue in accordance with that consensus. Even if the judge lacks the analytical skills to argue convincingly in favor of the result he or she desires, the judge can, on a limited number of occasions at least, simply assert the desired result. Arguably, this is precisely what Justice White did in resolving the mootness issue in Stotts. Moreover, judges can use a variety of techniques to reduce the likelihood that others will recognize that they have "cheated." Judges can, for example, resolve the issue in summary fashion with very little discussion, as Justice White did with respect to the plaintiffs' constitutional claims in Stotts. They can also frame the legal issues in terms of esoteric technical doctrines relating to things like justiciability and thereby reduce the

seeks recourse to the new rule of law can have significant bearing on the outcome, as can the nature of the underlying right at issue. Cf. Shea v. Louisiana, 53 U.S.L.W. 4173, 4174-75 (U.S., Feb. 20, 1985) and cases cited therein (discussing factors that affect retroactivity of changes in law). Assuming that retroactivity rules fashioned in a criminal law context also apply in the legislative veto context, the number of prisoners likely to be released as a result of Chadha would presumably be a factor affecting the degree to which Chadha should be given retroactive affect. In reality, however, the broad retroactivity tests articulated in Linkletter and its progeny cannot fairly be said to constitute a principle capable of constraining judicial discretion. Rather, the judge making a retroactivity determination seems to be told little more than to do what seems appropriate under all of the circumstances.

167. I believe that doctrine is completely incapable of imposing any such constraints. See Spann, supra note 88, at 528-36 (arguing that bias exists in every judicial decision, no matter how seemingly precise the controlling language formulation).

168. See supra text accompanying notes 38 to 52 (discussing majority's resolution of mootness issue). I do not, of course, intend to imply that Justice White could not have distinguished the mootness cases that stood in his way if he had been so inclined. See supra text accompanying notes 68 to 75 (discussing various judicial techniques to distinguish precedents and avoid finding of mootness).

169. See 104 S. Ct. at 2590 n.16; see also supra note 156 (discussing Justice White's footnote resolution of constitutional claims).
number of observers who will appreciate the problems in their analyses. In addition, judges can increase the scope of their operative discretion through obfuscation and reliance on legal assertions of questionable relevance, as Justice White arguably did in his footnote resolution of the scope of review issue.\(^1\) As long as judges do not "cheat" too often, they probably have the latitude to "cheat" whenever their subjective values tell them that they should. Although limitations in intelligence, creativity, or legal sophistication may limit the scope of a judge's discretion, doctrine itself does very little to impose meaningful constraints.

C. SIMPLE JUSTICE

Doctrine is inherently incapable of serving its central functions—constraining judicial discretion and guarding against the subjective values of judges who resolve our legal disputes—because doctrinal rules necessarily depend upon those subjective values in order to have any meaning. For the same reason, doctrine also fails to serve any useful alternative function. It is, therefore, tempting to conclude that we should recognize our doctrinal charade for what it is, and simply abandon doctrine in favor of direct judicial application of our policy objectives. If judges purport to do nothing more than prevent unjust discrimination, we can read their decisions free from the mystique of neutral principles and respond accordingly. Indeed, we could even supersede the intermediate formulations of our policy objectives, formulations such as the prevention of unjust discrimination, and have our judges apply directly our one overriding objective. We could simply instruct our judges to go forth and do justice.

But there is an air of unreality about all of this. Intuitively, some resolutions of legal issues are better than others. Intuitively, some functions are better served by one case outcome than another; some balances are properly struck one way but not another; and some ways of looking at the essential nature of legal problems are simply better than others. Moreover, to the extent that judges perceive these things to be true, their actions are very likely to be constrained. Obviously, something is wrong. Doctrine cannot both depend upon subjective values for its meaning and yet guard against subjectivity in legal analysis. What is wrong is that we have it all exactly backwards.

Legal doctrine does not constrain judicial decision making. Rather, it is judicial decision making that constrains doctrine. Legal doctrine can be best understood as an attempt by a collection of individual jurists to ascertain and articulate the prevailing values of their society. For example, the reason that the equal protection clause means something different in 1985 than it meant in 1885 is not because the language of the clause changed but because the social values that the clause is intended to implement have changed. The way we know that the underlying values have changed is because our judges have told us so. But how do the judges know? The only way that the judges can know is by interpreting what they perceive to be going on in the society around them. Their interpretations may be based on a wealth of data derived from oral arguments, political polls, or urban riots, but they are interpretations nevertheless. Like ju-

\(^1\) See 104 S. Ct. at 2585 n.8; see also supra note 77 (discussing Justice White's characterization and resolution of scope of review issue).
dicial interpretations of doctrine, judicial interpretations of prevailing social norms necessarily depend upon the subjective values of the judges in order to have any meaning. Therefore, to the extent that doctrine is simply an outgrowth of individual decisions either of numerous common law courts or numerous Supreme Court Justices, it takes its shape from whatever forces constrain judicial decisions. And judicial decisions are constrained only by the subjective preferences of the judges who issue them. The presence or absence of doctrine hardly seems to matter. Like it or not, it appears that our judges are indeed dispensing simple justice.

III. CONCLUSION

My theory is that there is not much difference between subjective values and neutral principles—simple justice is not much different from the complicated kind. If that is so, the quest for constraints on judicial bias is probably misguided; in any event it is certainly futile. Recently, legal scholars have begun to abandon the quest and to reconceive the nature of the legal system in a way that is not dependent upon principled constraint of our legal decision makers. It is not clear what such a reconceived legal system would look like, but transcending the artificial distinction between principle and bias is almost certain to be an advance.

171. See Tushnet, supra note 89, and commentators discussed therein.