THE concept of discrimination dominates the law of civil rights, so much so that it lends its name to the entire field of employment discrimination law. It is at once deeply influential, if not actually irreplaceable, and yet essentially contested. Discarding "discrimination" seems scarcely imaginable, yet the limitations of the term have been frequently lamented, especially in constitutional law. Within the field of employment discrimination law, however, the same criticisms of the concept have proven more effective, mainly by expanding the scope of statutory prohibitions against discrimination through the theory of disparate impact, which imposes liability for discriminatory effects without proof of discriminatory intent. Other departures from the concept of discrimination, ranging from protection of pregnant women to reasonable accommodation of the disabled, can be added to the list.

In this Essay, I argue that these developments suggest that the concept of discrimination is at least incomplete and probably insufficient to remedy persistent forms of inequality in the workplace. These developments, resulting mainly from processes of statutory interpretation and amendment, have not yet coalesced to displace the concept of discrimination from its central role in employment discrimination law. They do not define a single alternative concept that would serve as an organizing principle for the field; they do, however, demonstrate that the concept of discrimination is increasingly inadequate to this task.

My argument proceeds in three parts. Part I summarizes familiar controversies over the concept of discrimination in constitutional law and shows how they have influenced the statutory law of
employment discrimination. Although its hold on the law is intense, the concept of discrimination has been both narrow in scope and uncertain in its development. Discrimination emerged as a central concept in constitutional law in several early decisions under the Fourteenth Amendment but was eclipsed during the regime of "separate but equal." It was then revived in the decisions leading to Brown v. Board of Education\(^1\) and reached its zenith less than twenty years ago in Washington v. Davis.\(^2\) In the years immediately after Brown, the prohibition against discrimination was used against explicit segregation and obviously pretextual forms of discrimination. As these practices were abandoned, the limitations of a prohibition against discrimination once again became prominent and gave rise to debates over such issues as proof of state action and intentional discrimination, the grounds of prohibited discrimination, and the permissibility of affirmative action. These debates have carried over into and deeply influenced the statutory law of employment discrimination.

Part II examines the inherent limits of the concept of discrimination that have animated and unified the debates in constitutional and statutory law. Despite extensions of the concept of discrimination, its core meaning requires discriminatory intent: intent to distinguish two or more groups on the basis of some specified characteristic. It follows that the concept of discrimination accommodates theories of disparate impact only with difficulty. It also follows that the concept does not easily allow most forms of affirmative action. Extension of the concept to forms of discrimination other than race, such as sex, age, and disability, have further weakened its unifying force. Although dictionary definitions cannot resolve fundamental questions of principle—we cannot "make a fortress out of the dictionary"\(^3\)—the core meaning of discrimination exercises a profound influence over extensions of its meaning to new and controversial areas. Any number of articles, arguments, and decisions have struggled to determine the proper scope of the concept of discrimination. Although nothing in the concept itself precludes this debate, perhaps it is a debate over the wrong

\(^1\) 347 U.S. 483 (1954).

\(^2\) 426 U.S. 229 (1976).

\(^3\) Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (Hand, J.), aff’d, 326 U.S. 404 (1945).
issue. It may be time to look for other concepts to help achieve equality in the workplace.

Part III examines several developments in employment discrimination law that support this conclusion. The most revealing is the use of the concept of discrimination mainly to protect employees who already have jobs. In this role, individual claims of intentional discrimination amount to little more than alternatives to claims of wrongful discharge, claims that have gradually spread throughout the entire work force. For this reason, claims of discrimination have not increased the employment opportunities of minorities or women but have only helped to preserve the opportunities that they have obtained by other means. A second development has been the codification of the theory of disparate impact in the Civil Rights Act of 1991, and, no less important, its transformation into one of several means of encouraging employers to engage in affirmative action, whether willingly or not. Affirmative action itself is inconsistent with the concept of discrimination, and privately initiated remedies for inequality are inconsistent with the whole regime of fault on which employment discrimination law has been based. A final development has been the proliferation of statutes that have added to the constitutional prohibition against racial discrimination. In extending the original prohibition to wholly new grounds, Congress has used familiar language—often verbatim—from previously enacted statutes and leading decisions. In the process of repetition and extension, however, these terms have gradually acquired new and broader meanings that no longer embody only the concept of discrimination. It remains controversial how far these new enactments go beyond the concept of discrimination, but that is how the question should be framed—not in terms of whether the new enactments can still be made to fit the old mold by ever more drastic manipulations and distortions.

I. Discrimination in Constitutional Law

A. A Survey of Constitutional Decisions

Discrimination became a dominant concept surprisingly late in decisions under the Equal Protection Clause. Its reign has been

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both shorter and less well-founded than is commonly supposed. Nevertheless, the influence of the concept has extended to other areas of constitutional law, such as the First Amendment\(^5\) and the Commerce Clause,\(^6\) and to statutory law, especially the major civil rights statutes enacted after *Brown v. Board of Education*\(^7\).

Before the Civil War, the term “discriminate” (and variations upon it) appeared in opinions of the Supreme Court only in the ordinary and neutral sense of “distinguish.” Most of these cases were not concerned with constitutional law at all; many, for instance, were admiralty cases.\(^8\) And even those that were constitutional cases, such as *Gibbons v. Ogden*\(^9\) and *Barron v. Mayor of Baltimore*,\(^10\) used the term only incidentally. As a concept distinct from the general concept of equality before the law, discrimination did not exist at all.

After the Civil War, of course, everything changed. Discrimination figured prominently in the drafting of the Fourteenth Amendment, although an explicit prohibition against racial discrimination was not adopted by Congress.\(^11\) A narrower prohibition against discrimination with respect to voting was adopted in the Fifteenth Amendment, as were a variety of similarly narrow prohibitions against discrimination in the Civil Rights Acts of 1866, 1870, and

\(^5\) See, e.g., Police Dep’t v. Mosley, 408 U.S. 92, 101-02 (1972).


\(^7\) 347 U.S. 483 (1954).


\(^9\) 22 U.S. (9 Wheat.) 1, 216 (1824) (“But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas.”).

\(^10\) 32 U.S. (7 Pet.) 243, 249 (1833) (“*[T]he original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state[s] . . . .”

1875. Although none of these enactments used the word "discrimination" itself, they were sufficient to embed the concept deeply in the fabric of civil rights law.

The Supreme Court first used the concept in the pejorative sense familiar today in a case decided under the Privileges and Immunities Clause of Article IV. In *Paul v. Virginia,* a case decided in 1869 at the height of Reconstruction, the Court said that the Privileges and Immunities Clause "inhibits discriminating legislation against [citizens of each State] by other States." The Court later used the same language to describe the purpose of the Fourteenth Amendment in the *Slaughter-House Cases* and in *Strauder v. West Virginia.* The aim of the Fourteenth Amendment, the Court declared, "was against discrimination because of race or color." This prohibition was soon extended, in *Yick Wo v. Hopkins,* to the discriminatory administration of an otherwise neutral law:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

These famous decisions established the constitutional principle against discrimination. Other equally famous, not to say infamous, decisions of the time emphasized the limitations of that principle. The *Civil Rights Cases* denied Congress the power to remedy discrimination in public accommodations on the ground that the actions of private individuals did not amount to state action under

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12 See Act of March 1, 1875, ch. 114, §§ 1, 2, 4, 18 Stat. 335-37; Act of May 31, 1870, ch. 114, §§ 1, 2, 16, 17, 23, 16 Stat. 140, 144, 146; Act of April 9, 1866, ch. 31, §§ 1, 2, 14 Stat. 27.
13 75 U.S. (8 Wall.) 168 (1869).
15 83 U.S. (16 Wall.) 36 (1873).
16 100 U.S. 303 (1880). Other cases soon repeated the analysis of *Strauder.* See, e.g., Neal v. Delaware, 103 U.S. 370, 385-86 (1881); Virginia v. Rives, 100 U.S. 313, 320-21 (1880); Ex parte Virginia, 100 U.S. 339, 344-45 (1880).
17 *Strauder,* 100 U.S. at 310.
18 118 U.S. 356 (1886).
19 Id. at 373-74.
20 109 U.S. 3 (1883).
the Fourteenth Amendment.\textsuperscript{21} \textit{Plessy v. Ferguson}\textsuperscript{22} notoriously interpreted the Fourteenth Amendment to allow "separate but equal" segregation. As the \textit{Plessy} opinion framed the issue, the Fourteenth Amendment prohibited discrimination in political and civil rights, but not in social rights, such as marriage or association.\textsuperscript{23} Other decisions, less well known but equally significant, limited enforcement of the Fifteenth Amendment to explicit discrimination by the state in denying the right to vote.\textsuperscript{24}

These decisions set the agenda for the debate over discrimination until \textit{Brown}. The question posed by these decisions was not whether proof of intentional discrimination was necessary to establish a violation of federal law but whether it was sufficient. Most of the early cases answered no; as the decades passed, more and more answered yes. In constitutional law, the question was whether intentional discrimination by the state violated the Fourteenth or Fifteenth Amendment. In statutory law, it was whether Congress had the power to remedy private racial discrimination. Decisions concerned with voting, especially under the Fifteenth Amendment, with its specific prohibition against racial discrimination, were the first to require nothing more than proof of intentional discrimination.\textsuperscript{25} The school desegregation cases eventually reached the same result when \textit{Brown} rejected the doctrine of "separate but equal."\textsuperscript{26}

All of this history is familiar, if not in its details, at least in its broad outlines. What is sometimes forgotten in the celebration of \textit{Brown}, however, is that the opinion itself did not articulate the principle against discrimination in any precise form; it limited its reasoning almost entirely to the adverse effects of segregation in public education. So long as some harm to black children could be established, \textit{Brown} did not need to choose between discrimination and some broader concept of equality to deal with the problems that confronted the Court at the time. The opinion barely mentions the concept of discrimination,\textsuperscript{27} and, indeed, it was only sev-

\begin{enumerate}
\item Id. at 17-18, 21-25.
\item 163 U.S. 537 (1896).
\item See id. at 551-52.
\item See, e.g., Giles v. Harris, 189 U.S. 475 (1903).
\item See \textit{Brown}, 347 U.S. at 495.
\item Instead, the opinion emphasizes both the broader concept of inequality and the narrower concept of segregation. See id. at 490-95. The opinion uses the term
\end{enumerate}
eral years later, after a series of per curiam decisions, that the scope of the decision became clear: it prohibited all forms of intentional discrimination by the states.\textsuperscript{28}

If the full breadth of the concept of discrimination was never clearly defined, neither were its limitations. These first of all concerned the issue of state action: the degree of government participation in private discrimination necessary to establish a violation of the Fifth or Fourteenth Amendment. Since these Amendments apply only to federal, state, or local government, proof of some form of government participation is necessary to establish a violation of their prohibitions. Continuing disputes over the requirement of state action, some of which had antedated \textit{Brown},\textsuperscript{29} culminated in a series of decisions that marked the outer limits of state action, although more by muddling through than by any clear and consistent process of reasoning.\textsuperscript{30} The same can be said of the decisions that required proof of intentional discrimination to establish a violation of the Constitution,\textsuperscript{31} as well as the decisions that distinguished between permissible and impermissible forms of affirmative action under the Constitution.\textsuperscript{32}

The case that established the requirement of discriminatory intent, \textit{Washington v. Davis},\textsuperscript{33} is the clearest statement of the ascendancy of the concept of discrimination. It also addressed the scope of the theory of disparate impact under Title VII, although in an indirect and obscure way.\textsuperscript{34} The case itself concerned the adverse effects upon blacks of a test for police recruits in the District of Columbia. It therefore raised both a constitutional claim


\textsuperscript{29} E.g., Shelley v. Kraemer, 334 U.S. 1 (1948).


\textsuperscript{32} With Dan Ortiz, I have tried to make sense of these constitutional and statutory decisions in a previous article. See George Rutherglen & Daniel R. Ortiz, Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence, 35 U.C.L.A. L. Rev. 467 (1988).

\textsuperscript{33} 426 U.S. 229 (1976).

\textsuperscript{34} See id. at 248-52.
under the Fifth Amendment and a claim under the federal statutes that governed hiring by the District of Columbia. The Court sharply distinguished between the two. It held that a constitutional violation required proof of intentional discrimination whereas a statutory violation could be established by proof of disparate impact.\textsuperscript{35}

Requiring proof of intent to establish a constitutional violation had several immediate advantages: it linked liability for discrimination to fault and so provided a basis for blaming government officials for unconstitutional action; it limited judicial interference with other branches of government; and it was open to manipulation for different kinds of claims as the law or the facts warranted.\textsuperscript{36} In short, it offered both a justification for and a restriction upon judicial activism, reconciling and rationalizing both the progressive and the conservative aspects of the concept of discrimination in constitutional law. What the Court failed to do was to offer any reason why these same arguments should not apply to statutory law. Perhaps it did not need to do so, because these statutory claims were raised not under Title VII but under federal statutes concerned with civil service tests and the District of Columbia\textsuperscript{37} or because, as the Court held, the claim of disparate impact failed on the facts of the case.\textsuperscript{38} In any event, the decision emphasized the distinction between constitutional and statutory claims of discrimination without making clear exactly what the distinction was. As Justice John Paul Stevens observed, "[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."\textsuperscript{39}

\textbf{B. Criticism of the Concept of Discrimination}

No sooner had the obscure formula of "intentional discrimination" gained ascendancy in \textit{Washington v. Davis} than it was challenged by defenders of affirmative action. If critics of the concept of discrimination found it too narrow on the issues of state action

\textsuperscript{35} See id. at 245-48.
\textsuperscript{36} See Ortiz, supra note 31, at 1134-42.
\textsuperscript{37} See \textit{Davis}, 426 U.S. at 233 n.2, 249 n.15.
\textsuperscript{38} See id. at 249-52.
\textsuperscript{39} Id. at 254 (Stevens, J., concurring).
and intentional discrimination, they found it too broad on the issue of affirmative action. Affirmative action sponsored by the government constitutes both state action and intentional discrimination: it is government action that explicitly distinguishes between individuals on the basis of race. As critics of affirmative action are fond of saying, affirmative action is simply reverse discrimination. If anything plainly falls under the description of intentional discrimination, it is affirmative action.

In an influential article in the late 1970's, Owen Fiss took issue with this argument, not by denying the inference but by contesting the premise. He argued that the concept of discrimination was not the proper vehicle for addressing questions of disparate impact and affirmative action. In particular, on his view, the concept of discrimination should not be taken to determine the entire content of the Equal Protection Clause, even within the limited sphere of racial equality; it should not be used automatically to rule out necessary remedies for the longstanding effects of past discrimination. The alternative that he proposed was a form of equal protection that does not focus, as does the concept of discrimination, upon the rights of individuals but upon the rights of groups.

Whether or not Fiss' arguments for group rights are persuasive, his criticism of the concept of discrimination was widely shared. Supporters of affirmative action as diverse as John Hart Ely, Ronald Dworkin, Laurence Tribe, and Alan Freeman have argued that the concept of discrimination should be replaced by a more fundamental principle of equality. For Ely, it was curing defects in the democratic process. He found no basis for judicial interference with the democratic process when the majority discriminated against itself. For Dworkin, the alternative principle was treatment as an equal, which invoked abstract requirements of equal concern and respect, rather than a rigid rule of equal treatment. Affirmative action could deny equal treatment, which for Dworkin

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42 Id. at 129-36.
43 Id. at 147-70.
was the same as discrimination, without denying equal concern and respect.\textsuperscript{45} Tribe has argued, in much the same way as Dworkin, that a prohibition against discrimination is only one means of seeking racial equality.\textsuperscript{46} And, in a critical analysis of the whole of civil rights law, Freeman contrasted the "perpetrator perspective," which emphasizes the need to find a specific violation of a prohibition against discrimination, with the "victim perspective," which seeks to remedy overall patterns of inequality.\textsuperscript{47}

Paul Brest responded to these attacks on the concept of discrimination in another influential article, "In Defense of the Antidiscrimination Principle."\textsuperscript{48} He argued, however, less in defense of the principle than for its modification to reach largely the same results as Fiss: for a broad conception of the consequences of state action (if not of state action itself), against a strict requirement of intentional discrimination, and in favor of affirmative action.\textsuperscript{49} These arguments for reinterpreting the concept of discrimination represent a plausible strategy, but only up to a point. Stretching and shrinking the concept of discrimination to fit results justifiable on other grounds may be necessary to make sense of past decisions, but appeal to another concept altogether may be equally necessary. A prohibition against practices with a disparate impact on the basis of race grows naturally out of the principle of \textit{Yick Wo v. Hopkins}: the need to examine objective evidence of discriminatory intent.\textsuperscript{50} Yet, as the relationship between patterns of systematic disadvantage and institutional decisionmaking grows ever more complex, the principle develops from an evidentiary rule into a redefinition of the concept of discrimination. The same can be said of the arguments for affirmative action, although these reach the paradoxical conclusion that it is necessary to remedy the elusive effects of past discrimination by engaging in future discrimina-

\textsuperscript{46} See Laurence H. Tribe, American Constitutional Law 1514-21 (2d ed. 1988).
\textsuperscript{49} Id. at 15-22, 26-36.
\textsuperscript{50} See supra text accompanying note 18.
Opposition to a restrictive concept of discrimination shades by degrees into support for an entirely different means of remedying racial inequality.

II. THE CONCEPT OF DISCRIMINATION

The concept of discrimination has been both oddly neglected and pervasively involved in disputes over the meaning and application of the laws against employment discrimination. Title VII adopted the language of discrimination and segregation in its central prohibitions but left these terms completely undefined until a series of highly complicated amendments in the Civil Rights Act of 1991. Even so, that Act defined an "unlawful employment practice" to include both neutral practices with disparate impact and practices motivated by race, national origin, sex, or religion. Likewise, in the decisions interpreting Title VII, little depends upon the meaning of "discrimination" as it is ordinarily understood. The failure of this issue to attract attention is, in a sense, entirely understandable. Discrimination is an inherently "contented concept" whose meaning cannot be exhausted simply by dictionary definitions or arguments based on common usage. Its meaning instead must be worked out in actual moral, political, and legal disputes. But if the debate over "discrimination" cannot end with the dictionary, at least it can begin there. The choice of "discrimination," as opposed to some other term, such as "equality of opportunity," sets broad limits on disputes over how the term is used and, within those limits, exercises a profound influence over how those disputes are resolved.

"Discrimination," as it is ordinarily used, refers to a process of noticing or marking a difference, often for evaluative purposes. The two most common synonyms for the verb "discriminate" are "distinguish" and "differentiate," which in turn denote recognizing, discerning, appreciating, or identifying a difference. Someone who is colorblind cannot discriminate among colors, and someone who

51 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J.) ("In order to get beyond racism, we must first take account of race.").
54 See Ronald Dworkin, Law's Empire 71 (1986); Dworkin, supra note 45, at 103.
lacks taste in art cannot discriminate between good and bad paintings. As we saw in Part I, “discrimination” first appeared in the opinions of the Supreme Court in this sense. But if it is confined to this sense, the term cannot intelligibly be applied to two of the questions that have animated debates over discrimination in constitutional law: whether discrimination embraces only intentional discrimination, and whether it includes affirmative action. The phrase “intentional discrimination” is a redundancy according to the ordinary sense of “discrimination.” All discrimination is intentional in the sense that anyone who discriminates acts on the ground for the discrimination. It is conceptually impossible to discriminate on the basis of race without taking race into account. Conversely, most forms of affirmative action explicitly require consideration of race or sex. They plainly involve discrimination in the ordinary sense: they require race or sex to be taken into account in awarding benefits or advantages. From the perspective of common usage, the typical liberal position is therefore doubly paradoxical: it insists that nondiscriminatory actions with “discriminatory effects” are nevertheless discriminatory just as it maintains that affirmative action plans that plainly take account of race or sex are not. The first is not a form of discrimination as it is usually understood while the second plainly is.

It follows that either the liberal position on what constitutes discrimination or the common understanding of the term must be abandoned. Conservatives, of course, reject the liberal position. Whatever other argument the conservatives can advance for their own position, they do have a point in relying on common understanding. It is not a conceptual point about what “discrimination” must mean, for the term can have a technical legal sense in addition to its ordinary sense, but it is a point about how the term is understood by ordinary citizens. And it is the understanding of ordinary citizens that is crucial in a democracy.

The technical legal sense of “discrimination” bears a close relationship to the ordinary sense of the term in easy cases, but in progressively harder cases the relationship becomes more and more attenuated. In these harder cases, such as those involving disparate impact and affirmative action, the technical legal usage invites the question whether it is similar enough to ordinary usage to support a different sense of the same term. And it is in these controversial
cases, when understanding of the issues is most needed in a democracy, that misunderstanding is most likely. Lawyers are likely to use the term in its technical sense while ordinary citizens understand it in its usual sense. Yet it is the ordinary citizens whose support is necessary for enactment and enforcement of civil rights laws.

Liberals must therefore defend the technical legal sense of "discrimination." One way to do so is to sever the evaluative and descriptive components of the term, as it is ordinarily used, and to identify the evaluative use of the term with legally prohibited forms of discrimination. As a general approach, this strategy is more difficult than it might seem, because evaluative implications can be drawn from most descriptions of human action. To say that someone cannot tell the difference between good paintings and bad paintings is ordinarily a criticism, however mild. We cannot simply distinguish "discrimination between" from "discrimination against," and allow the former as a neutral form of discrimination and prohibit the latter as a pernicious form. Apart from affirmative action, current law prohibits discrimination between blacks and whites in the same circumstances that it prohibits discrimination against either. A similar strategy, to prohibit only "invidious discrimination," just shifts the dispute from the question of what is "discrimination" to the question of what is "invidious." "Invidious discrimination" cannot embrace all forms of racial discrimination without condemning affirmative action. Moreover, no amount of fine distinction among different forms of discrimination can extend the concept to cover discriminatory effects of nondiscriminatory action. That step requires a wholly different kind of argument, one that expands the scope of the concept.

Any attempt to isolate the legal sense of "discrimination" confronts the same dilemma: not that it is impossible to define the term in a way that conforms to the legal prohibitions against discrimination, but that it is impossible to do so without appealing to broader principles of equality. This is one conclusion to be drawn from the constitutional debates over discrimination. Rival formulations of the same concept, animated by different principles, support different uses of the same word. Even conservatives must appeal to such principles, if only to explain why a prohibition against discrimination should be found in the Fifth and Fourteenth
Amendments. Having appealed to such principles, conservatives can then argue for their own technical legal sense of discrimination and against the liberals’ sense. The history of the debate over discrimination in civil rights law has largely taken this course. But if this course has been available, it may now be exhausted.

Substituting one concept for another, of course, does not do away with disputes. On the contrary, the most plausible substitute—equal opportunity—is just as contested a concept as discrimination. What it does succeed in doing is framing the fundamental issues in a more appropriate and broader way, by raising the question whether there are other means, beyond prohibiting discrimination, of achieving equality. Equal opportunity could be equated with a prohibition against discrimination, but it need not be. An interpretation of equal opportunity simply as the exclusion of defined characteristics from consideration in public life is both too narrow and too negative: too narrow because it fails to remedy other sources of inequality, such as the persistent effects of past discrimination, and too negative because it tries to achieve equality only through a prohibition. Perhaps some such conception of equal opportunity is defensible, but it is hardly the only one. Other means toward a more broadly defined goal are at least equally plausible, such as various forms of affirmative action.

The question raised by the broader concept of equal opportunity is not whether the existing prohibitions against discrimination should be repealed, but whether they should be exclusive. Taking discrimination to be the dominant concept in civil rights law tends to exclude alternative remedies from consideration or, at least, to place their legitimacy in doubt. Over the range of cases to which it applies, a prohibition against discrimination is often the only ground for relief. If a policy or practice, such as an employment test with a disparate impact, does not amount to discrimination, then it does not amount to a violation of the law. Worse yet, if a voluntary remedy, such as some forms of affirmative action, satisfies the formal definition of “discrimination,” then it is prohibited. The negative, narrow, and exclusive features of the concept of discrimination, no doubt, made it an effective legal weapon against segregation. They have made it much less effective, if not entirely ineffective, in breaking down barriers to equality which are now both less obvious and more pervasive. The search for other, per-
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haps better, remedies should not be cut short because the concept of discrimination succeeded in breaking down explicit barriers in another era.

The concept of equal opportunity also dispels some of the practical implications often drawn from the concept of discrimination: that it must be applied on a case-by-case basis, that judicial proceedings or similar administrative proceedings are necessary to do so, and that prohibitions are the best—and perhaps the only—means of achieving equal opportunity. The concept of discrimination invites a case-by-case analysis because all instances of discrimination, no matter how widespread, can be broken down into discrimination against identifiable individuals. These individual instances of discrimination can then be aggregated to justify procedural innovations, such as class actions or pattern-or-practice actions, or even substantive theories of liability, such as classwide claims of intentional discrimination and disparate impact. Even forms of affirmative action might be justified as approximations to what would be achieved by a series of such individual judicial decisions. All these group remedies, however, remain approximations to the ideal of individual remedies for discrimination.

It is this ideal, and in particular the association between individual remedies and the concept of discrimination, that needs to be reexamined. The distinction between individual and group remedies does not correspond to the distinction between preventing discrimination and achieving equal opportunity. These two distinctions cut across one another, so that both discrimination and equal opportunity partake of both individual and group characteristics. A prohibition against discrimination, for instance, must be limited to certain specified grounds, based on some kind of collective judgment that discrimination against particular groups, such as racial minorities or women, is particularly bad. Conversely, any practical approach to achieving equal opportunity must provide individual remedies for identified victims of discrimination. The concept of equal opportunity can be implemented by either individual or group remedies. That is why prohibiting discrimination is one means, but only one, of promoting equal opportunity. Nothing but confusion is to be gained by following the usual legal model of

55 See Fiss, supra note 41.
discrimination and concluding that individual remedies are necessarily superior to group remedies. That determination must be made at a more concrete level, by asking which remedies prove to be effective in which cases.

Once the conceptual connection between discrimination and individualized decisions is broken, the need for or desirability of judicial proceedings as a method of enforcement comes into question. There is no need for legal actions by individual plaintiffs if collective remedies are more effective in achieving equal opportunity. To take this reasoning one step further, there may be no need for judicial actions at all or, in particular, for a finding that an employer has violated some preexisting prohibition. Assuming that the remedy does not infringe upon any rights of the defendant or third parties, it can be imposed without the need for any hearing at all. This conclusion follows from one way of looking at the debate over voluntary affirmative action: there is no need to determine whether an employer has committed "sins of discrimination" if it has voluntarily taken steps to achieve equality of opportunity.\(^5\) The same result follows if the government subsidizes affirmative action (for instance, through training) instead of prohibiting discrimination.

These arguments do not prove that any of these steps must be taken to achieve equality of opportunity, only that none of them is barred. As the next part of this Essay develops in more detail, the evolution of the civil rights statutes reveals a growing awareness of the need for multiple remedies for persistent inequalities. Ironically, just at the point where the concept of discrimination has come closest to codification in statutory language, it has also proven most subject to change.

III. STATUTORY DEVELOPMENTS

Constitutional law raised questions about the concept of discrimination, but it did not resolve all of them—or perhaps any of them—in any clearly defined way. Nevertheless, constitutional law has formed the background against which all of the recent civil rights statutes have been enacted and interpreted. All of them

have been influenced by the constitutional arguments, if only in fits and starts and in different forms on different issues, from the text of the statutes to the major decisions interpreting their language. In part, the process has been one of reacting to or avoiding issues posed by constitutional law; in part, one of recognizing the limits of the constitutional prohibition against discrimination and moving beyond it.

Title VII began this process by extending the constitutional prohibition in several different directions. It extended the prohibition first to private employment and then, through interpretation and amendment, to claims of disparate impact. Related to the latter are forms of affirmative action, particularly privately initiated affirmative action to avoid liability for disparate impact. Title VII also extended the prohibition to discrimination on the basis of sex before it was recognized in constitutional law. A similar extension to other grounds of discrimination not recognized in constitutional law has now been carried forward by the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA").

Three consequences of these developments have been particularly important. First, as the prohibitions against private discrimination became established, they changed from a force for integrating the workplace into one for preserving the gains from other efforts toward integration. This change has been wrought mainly by the increasing proportion of claims alleging discriminatory discharge. Second, the theory of disparate impact has increased the pressure on employers to find other means of integrating the workplace, mainly through various forms of affirmative action. Third, the extension of employment discrimination law to new grounds of discrimination, from sex to age to disability, has

59 The enactment of Title VII in 1964 preceded by several years the first decision recognizing a constitutional prohibition against discrimination on the basis of sex, Reed v. Reed, 404 U.S. 71 (1971).
added to and subtracted from the simple prohibition against discrimination that was first enacted in Title VII. With this extension, the force and effect of the prohibition have been altered in subtle and important ways; "discrimination," it turns out, means different things when applied to different groups.

A. The Diminishing Scope of Claims of Intentional Discrimination

Although theoretically unlimited in application, claims of intentional discrimination are now asserted mainly on behalf of those who already have jobs. Claims by recently discharged employees make up the largest proportion of claims filed under Title VII, about 59%, as opposed to claims of discrimination in hiring, which constitute about 19%.62 Moreover, the 59% figure does not include other claims by incumbent employees, such as discrimination in conditions of employment, promotions, or fringe benefits. The Civil Rights Act of 1991 took account of this fact by enhancing the remedies for intentional discrimination,63 perhaps to encourage applicants for employment to bring such claims more frequently or, more plausibly, to increase the compensation to incumbent employees for intangible forms of discrimination, such as sexual harassment based on a hostile environment.64 Even before 1991, victims of intentional discrimination on the basis of race could recover full damages,65 yet claims of such discrimination were brought mainly by incumbent employees.66 A central purpose of the Civil Rights Act of 1991 was to extend similar remedies to victims of discrimination on other grounds.

Enhancing the remedies for intentional discrimination does not preclude other steps to enhance other remedies for inequality in employment. The Civil Rights Act of 1991 took several such steps,

66 See Donohue & Siegelman, supra note 62, at 1015-16. This data refers to all employment discrimination claims, not just those under Title VII.
but none of them is likely to displace the predominance of claims of discrimination on behalf of incumbent employees. This pattern persists because incumbent employees have more to lose and better access to evidence, and therefore more reason to sue, than applicants for employment. Incumbent employees are more likely to hold high-paying jobs that support a large award of damages than are applicants for employment, who, by definition, are looking for work and may well find searching for another job more attractive than pursuing litigation. Applicants for employment can benefit from class actions, but in recent years class actions have been brought in less than a tenth of Title VII cases. Claims of intentional discrimination are not, in any event, likely to be brought as class actions, because they depend so heavily on the circumstances and qualifications of each individual plaintiff.

These converging trends strongly suggest that the progressive potential of claims of intentional discrimination has been exhausted. These claims were successful in the early years after enactment of Title VII in breaking down the most obvious patterns of discrimination and segregation in employment. Even now, they continue to protect workers who already have jobs, but they offer little continuing protection to workers who cannot get jobs. Protection of incumbent employees is no small achievement, but it more closely resembles the trend toward protection of workers from discharge without good cause. This general trend does not confer any special benefits upon minority groups or women.

Patterns of litigation under the ADEA confirm, and perhaps exaggerate, this trend. Although claims under that statute make up only about 20% of all claims of employment discrimination, a

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67 Id. at 1019-21.

68 In particular, they depend on the "legitimate, nondiscriminatory reason" that an employer almost always offers for not hiring, not promoting, or discharging a plaintiff. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).


majority of these claims are brought by white male workers.\textsuperscript{71} These workers already hold high-paying jobs, and they receive monetary awards that are several times higher than those received by plaintiffs from other groups.\textsuperscript{72} A surprising consequence of extending employment discrimination law from race and sex to age has been to confer benefits upon a group that can hardly claim to be collectively disadvantaged at all.

\textbf{B. The Theory of Disparate Impact and Affirmative Action}

Congressional endorsement of the theory of disparate impact in the Civil Rights Act of 1991 has been the principal doctrinal response to the limited scope of individual claims of intentional discrimination. The theory of disparate impact imposes liability upon employers for neutral practices that result in a disproportionate burden upon minority groups or women. If a plaintiff proves such disparate impact, the burden of proof shifts to the employer to justify the practice as “job related for the position in question and consistent with business necessity.”\textsuperscript{73} In formulating the employer’s burden of proof in these terms, Congress rejected \textit{Wards Cove Packing Co. v. Atonio},\textsuperscript{74} a Supreme Court decision that had reduced the employer’s burden. But Congress did not significantly reduce the plaintiff’s initial burden of proving disproportionate adverse impact. For this reason, and because of the decline of class actions under Title VII, the theory of disparate impact has not been used frequently in litigation, even after the Civil Rights Act of 1991.\textsuperscript{75}

The theory of disparate impact has had its principal effects elsewhere: in causing employers to abandon facially neutral employment practices, such as general aptitude tests, that have been successfully attacked using the theory and in encouraging employ-

\textsuperscript{71} George Rutherglen, From Race to Age: The Expanding Scope of Employment Discrimination Law, 24 J. Legal Stud. (forthcoming 1995).
\textsuperscript{72} See id.
\textsuperscript{74} 490 U.S. 642 (1989).
\textsuperscript{75} A survey of cases decided in 1992 and 1993 and reported on Westlaw found only a small proportion of class actions certified in employment discrimination cases. A total of 2,975 decisions in these years used the phrase “employment discrimination” or some variation on it. Of these cases, 179 (or 6\%) also used the phrase “class action” and 11 (or 0.4\%) also used some combination of “certified” and “class action.”
ers to adopt affirmative action plans to eliminate the most obvious forms of disparate impact. In this respect, the theory of disparate impact more closely resembles the pattern of regulation of federal contractors under Executive Order 11,246 than it does a straightforward theory of liability. Executive Order 11,246 requires federal contractors to establish affirmative action plans, as defined in a set of detailed regulations, but then allows the contractors to negotiate with the Office of Federal Contract Compliance Programs over the sufficiency of their plans. Enforcement of the executive order has been notoriously lenient at times, while the theory of disparate impact has put constant pressure on employers to engage in affirmative action, except during the short period after Wards Cove and before the Civil Rights Act of 1991. The employer response, in the form of privately adopted programs of affirmative action, was approved by the Supreme Court in United Steelworkers v. Weber and has remained, again with only limited exceptions, unaffected by more recent developments.

The theory of disparate impact was not originally devised as an inducement to engage in affirmative action, or at least it was not justified in those terms. It derived instead from the need to prevent evasion of Title VII through pretextual forms of discrimination. Judicial development of the theory, however, soon went beyond this limited goal and probably beyond the language of Title VII. As eventually rationalized by the Supreme Court, the theory was based on isolated phrases in the statute that were combined to make it illegal to “classify” an employee in any way that would “adversely affect his status as an employee, because of such

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76 At least this is the most plausible inference to be drawn from the general opposition of employers to any attempt to prohibit affirmative action. See Note, Rethinking Weber: The Business Response to Affirmative Action, 102 Harv. L. Rev. 658, 662 (1989).
79 Id. § 60-1.20.
individual's race, color, religion, sex, or national origin.” These phrases could be combined far more plausibly to restate the central statutory prohibitions against discrimination and segregation than to enact a full-blown theory of liability for discriminatory effects.

The cases that applied the theory of disparate impact reflected its uncertain foundation in the statutory language. Some emphasized the heavy burden upon the employer to show “business necessity”; others, the lighter burden of showing some form of “job relationship.” These differences came to a head in *Wards Cove*, in which the Supreme Court rejected the first interpretation of the theory and accepted the second, only to be overruled by Congress in 1991. After extensive debate, Congress reinstated preexisting law without, however, clarifying what it was. In its weakest form, the theory imposes only a light burden of justification upon the employer; it only extends the central prohibitions against discrimination and segregation to root out hidden discrimination. In its strongest form, the theory moves beyond the concept of discrimination to force employers to justify nondiscriminatory practices that deny equal opportunity. By rejecting *Wards Cove*, Congress presumably rejected the weakest form of the theory, but it did not necessarily embrace the strongest. Instead, it used equivocal language from both forms: an employer has the burden of proving that “the challenged practice is job related for the position in question and consistent with business necessity.” Faced with ambiguous statutory language codifying previous ambiguous case law, employers have apparently continued to do what proved successful

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84 See Rutherglen, supra note 82, at 1312-16.

85 See *Wards Cove*, 490 U.S. at 658-60.

86 Civil Rights Act of 1991, § 105(a), 42 U.S.C. § 2000e-2(k) (Supp. V 1994). The legislative history was as opaque as it was controversial. The only statement that Congress could agree on was that the law was to return to where it was before *Wards Cove* was decided. See id. § 105(b); 137 Cong. Rec. S15,273-77 (daily ed. Oct. 25, 1991) (interpretive memorandum of Sen. Danforth); see also Note, The Civil Rights Act of 1991: The Business Necessity Standard, 106 Harv. L. Rev. 896, 900-06 (1993) (“On the issue of business necessity, the Act merely returns the courts to where they were just prior to *Wards Cove*, and appears to provide little guidance as to what direction they should take from there.”).

in the past: abandon practices that have been condemned under the theory of disparate impact and engage in more or less voluntary (sometimes much less than voluntary) affirmative action.

The failure of the theory of disparate impact as a vehicle for continued litigation can therefore be attributed, at least in part, to its past successes. Although affirmative action plans do not provide an absolute defense to claims of disparate impact, they do render such claims all the more difficult to uncover and to prove. As more members of minority groups appear in disputed jobs, the beneficiaries of affirmative action are more reluctant to sue, class actions are more difficult to bring, the plaintiff’s statistical evidence of disparate impact is more easily rebutted, and judges are more easily persuaded of an employer’s good intentions. To be sure, none of these factors amounts to an ironclad defense, and the last has never been recognized as a defense at all. But these factors incline judges toward more lenient application of the theory of disparate impact and, correspondingly, discourage plaintiffs and their attorneys from bringing such claims in the first place. The net effect has been to transform the theory of disparate impact from a theory of liability to an incentive for employers to engage in affirmative action. Although this consequence of the theory has long been recognized—and loudly decried by opponents of the Civil Rights Act of 1991—it has carried the theory further and further away from its origins in the concept of discrimination. Claims of disparate impact may yet undergo a revival, but employers are far more likely to engage in affirmative action than in litigation to limit their exposure to liability under the newly codified version of the theory.

C. New Grounds of Discrimination

As prohibitions against discrimination have expanded to new and different grounds, the importance of individual claims has increased and the forms of affirmative action for different groups have multiplied. The coverage of sex in Title VII foreshadowed the extension of employment discrimination law to two other grounds not recognized in the Constitution: age in the ADEA and

disability in the ADA. These additions to the original prohibition against racial discrimination have raised two contrasting conceptual problems: on the one hand, how to interpret defenses that allow sex, age, or disability to be taken into account, and, on the other, whether to impose new forms of affirmative action that require these characteristics to be taken into account. These problems are only aggravated by the fact that both the ADEA and the ADA incorporate much of the original text of Title VII in their central prohibitions and defenses.\(^8\) Is the statutory language to receive the same interpretation when it is applied to different forms of discrimination? The cumulative effect of multiplying both the prohibitions and the exceptions, but retaining the same statutory language, is to diminish the force of a finding of discrimination and, accordingly, the incentive of an employer not to discriminate.

The process of extension and exception began with the addition of sex to the prohibition in Title VII, with an exception for any "bona fide occupational qualification" ("BFOQ").\(^9\) This exception also applies to two other grounds of discrimination covered by Title VII: national origin and religion. Neither of these has posed significant practical problems, but for contrasting reasons. National origin has virtually never been found to be a BFOQ,\(^10\) essentially because it too closely resembles race, which is not subject to the BFOQ exception at all; nor has religion, but only because it is subject to several other, broader exceptions, some of which reflect the requirements of the religion clauses of the First Amendment.\(^11\) Sex was the subject that caused the most problems with the BFOQ exception (at least before that exception was incorporated verbatim in the ADEA and caused similar problems there). The BFOQ exception reflects an awkward and inchoate


judgment that sex-based classifications are sometimes permissible, without quite indicating why or in what circumstances. This judgment does not entail the conclusion that discrimination on the basis of sex is a smaller problem than discrimination on the basis of race, only that it is a different problem. But if it is a different problem, it may be amenable to different solutions and, in particular, to solutions less dependent on the concept of discrimination.

The dispute over the coverage of pregnancy under Title VII illustrates the distortions caused by trying to assimilate sex to race. On the one hand, discrimination on the basis of pregnancy is formally equivalent to discrimination on the basis of sex. (Who else becomes pregnant other than women?) On the other hand, this way of looking at the issue systematically underestimates the barriers to employment of women created by the traditional division of labor within families. An employer is obligated to give benefits to women for pregnancy only if it gives corresponding benefits to men, regardless of the burdens that pregnancy imposes uniquely upon women. The question whether an employer should be required to take account of these burdens led to the more general debate among feminists whether women have the right to be treated the same as men or the right to be treated differently. However this debate over sameness and difference should be resolved, the concept of discrimination leaves no room for it to arise in the first place. It preempts the debate in favor of sameness.

Some recent statutes have reached a different conclusion, such as the California statute granting women a right to paid pregnancy leave and the federal Family and Medical Leave Act of 1993 (“FMLA”), which granted men and women a right to unpaid leave.

94 This controversy was largely resolved by the Pregnancy Discrimination Act § 1, 42 U.S.C. § 2000e(k) (1988), a statute that overruled several decisions that had excluded discrimination on the basis of pregnancy from the Title VII prohibition against discrimination on the basis of sex.
95 For two different perspectives on this debate, see Catharine A. MacKinnon, Feminism Unmodified 32-45 (1987); Herma H. Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley Women’s L.J. 1, 21-37 (1985).
96 Cal. Gov’t Code § 12945 (West 1992). This statute was held to be consistent with Title VII in California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987).
for family or medical reasons. These statutes attempt to go beyond the concept of discrimination to reduce the barriers to employment of women. Even if these statutes are framed in neutral terms to benefit both men and women, as the FMLA is, their most likely beneficiaries are women. These statutes can therefore be characterized as forms of affirmative action, although to do so calls attention to the concept of discrimination, if only by observing it in the breach. It would be better simply to drop any reference to discrimination and evaluate the effectiveness of these programs directly, in terms of the opportunities given to women to pursue careers outside the home.

The same process of creating and requiring exceptions to a general prohibition has taken place, in an even more exaggerated form, under the ADEA. Especially when it is considered alongside general social welfare programs that make age a qualification for participation, such as Social Security and Medicare, the prohibition against age discrimination in the ADEA seems often to be overwhelmed by the exceptions. Despite the fact that the ADEA incorporates, virtually verbatim, the central prohibitions from Title VII, these prohibitions turn out to have a different and far narrower meaning under this statute. This is not to say that the ADEA lacks significance. Like other prohibitions against discrimination, it is invoked mainly by individuals who have been discharged from their jobs. But, unlike these other prohibitions, the ADEA appears to be invoked mainly by white males, especially those who already hold high-paying jobs. Even more than Title VII, the ADEA has contributed to the general trend toward recognizing claims for wrongful discharge.

When we turn to exceptions to the ADEA, we find the BFOQ exception and several variations upon it. Like the BFOQ under Title VII, these have been narrowly construed (and some appear to

98 Several authors have argued for the extension of benefits to pregnancy along these lines. See Samuel Issacharoff & Elyse Rosenblum, Women and the Workplace: Accommodating the Demands of Pregnancy, 94 Colum. L. Rev. 2154 (1994); Colette G. Matzzie, Note, Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act, 82 Geo. L.J. 193, 217-24 (1993).


100 Rutherglen, supra note 71, at 21-22.

have been ignored altogether). Far more significant have been the general exceptions for considering age in pension, health, and disability plans. These have generated their own share of controversy, mainly over mandatory retirement, but in the end the statute has been amended to recognize the inevitable: that the benefits for older workers under pension, health, and disability plans must correspond to any increased costs in covering these workers. Such broad and significant exceptions in the ADEA reinforce the view that age is not a suspect classification, either in the technical legal sense or in the ordinary understanding of the term. A general prohibition against age discrimination, whatever its moral force, must be weaker than a prohibition against racial discrimination.

The uncertain status of age discrimination is reflected in persistent doubts about the application of the theory of disparate impact to claims under the ADEA. Although lower courts have reasoned from the identical statutory language in Title VII and the ADEA to identical theories of liability, the Supreme Court has expressed doubts about this extension of the theory of disparate impact, doubts that can only increase with the codification of the theory of disparate impact for Title VII but not for the ADEA. If these doubts result in a rejection of the theory of disparate impact under the ADEA, they represent a triumph of the narrow concept of discrimination. But it is a triumph that reveals the inability of that concept to account for the disparities among differ-

102 See, e.g., Western Air Lines v. Criswell, 472 U.S. 400, 412 (1985) (holding that the BFOQ exception to the general prohibition of age discrimination was meant to be "extremely narrow"); see also Howard Eglit, The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception, 66 B.U. L. Rev. 155, 179 nn.111-12 (1986) (arguing that the defense for reasonable factors other than age has been virtually ignored).


106 See Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1993) (expressly leaving this question open). One circuit has recently decided this question against the theory of disparate impact under the ADEA. See EEOC v. Francis W. Parker Sch., 63 U.S.L.W. 2265 (7th Cir. Oct. 21, 1994).

ent kinds of discrimination. Rejecting the dominant role of the concept of discrimination does not lead to the conclusion that the ADEA should be repealed, only that it cannot be interpreted identically to Title VII.

The process of repeating boilerplate statutory language reached its apogee in the ADA, which incorporates all of the major theories of liability and exceptions from Title VII. Some of these made their way into the ADA through the Rehabilitation Act of 1973,108 which prohibited discrimination against the disabled by the federal government, federal contractors, and recipients of federal funds. The most important obligation imposed by employers under the ADA, the duty of reasonable accommodation, followed this path.109

The language of reasonable accommodation was originally used as part of the definition of religious discrimination under Title VII.110 Although this definition was added by amendment to Title VII to protect the religious practices of employees, it was soon narrowly construed to avoid constitutional questions under the religion clauses of the First Amendment.111 From there, the duty of reasonable accommodation was incorporated in the Rehabilitation Act and the ADA, but with far different consequences. Because accommodating disabled employees raises no constitutional problems,112 this duty could be construed more broadly than the corresponding duty to accommodate religious practices.

As the law now stands under the ADA, reasonable accommodation is intertwined with two other terms defined in the statute: "qualified individual with a disability" and "undue hardship."113 The first term defines the employer's obligation not to discriminate under the statute; the second imposes limits on this obligation. Employers cannot discriminate against any "qualified individual

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with a disability,” which means “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Reasonable accommodation of a disability, in turn, is required unless it would result in “undue hardship” to the employer. Somewhat paradoxically, the employer’s duty not to discriminate includes the duty to take account of an individual’s disability in order to make a reasonable accommodation. It is at this point that the statute departs from the concept of discrimination as it is usually understood in employment discrimination law: as a prohibition against taking account of a specified characteristic, not a requirement that it must be taken into account. The employer is relieved of this affirmative duty if providing an accommodation would result in “undue hardship,” defined as “an action requiring significant difficulty or expense,” which, in turn, is determined in light of four factors set forth in the statute.

Exactly how these interlocking definitions are to be sorted out and then reconciled with the concept of discrimination is a subject for another inquiry. It plainly must be done, however, and plainly by invoking some concept other than discrimination. If there is any doubt about this point, it is removed by the elaborate provisions in the ADA regulating an employer’s inquiries into the disabilities of an employee or applicant for employment. An employer generally cannot make such inquiries before extending an offer of employment but can do so afterwards in carefully limited circumstances. The conflict between these provisions reflects many of the same problems as the conflict between the duty not to discriminate—by not taking account of disabilities—and the duty to provide reasonable accommodation—by doing exactly the opposite.

The ADA also goes beyond the concept of discrimination in codifying the theory of disparate impact, using terms nearly identical to those now incorporated in Title VII, and excepting disabilities

114 Id. § 12111(8).
115 Id. § 12112(b)(5).
116 Id. § 12112(b)(5)(A).
117 Id. § 12111(10).
118 Id. § 12112(d).
that endanger the health or safety of other employees\textsuperscript{120} or that result from alcoholism or the illegal use of drugs.\textsuperscript{121} These provisions reveal that the ADA serves different goals and must be implemented by different means than Title VII, despite the parallel language in both statutes. Like the ADEA, the ADA confirms the anachronism of relying on the concept of discrimination as the organizing principle of employment discrimination law.

\textbf{Conclusion}

Throughout the history of civil rights law, the concept of discrimination has been molded to serve different purposes and to address different problems. Sometimes its progressive aspect as a remedy for inequality has predominated; at other times, its conservative aspect as a restraint on other remedies. The process of repeated extension, constriction, and modification has left the concept intact but shapeless. As a unifying force, it does little more than contribute part of the name for employment discrimination law as a separate field. The descriptive, let alone the progressive, force of the concept has been exhausted. It is time not to abandon it, but to look for other concepts that can provide better remedies for inequality in employment.

A search for such concepts leads back to familiar arguments for affirmative action and the theory of disparate impact and forward to new means of encouraging women to participate in the labor market and of providing opportunities for the disabled. It also leads to considering entirely different means of regulation, other than individual claims of intentional discrimination, which now predominate in this field of law. If the concept of discrimination no longer expands the opportunities of disadvantaged groups, neither does regulation through litigation.\textsuperscript{122} In a sense, the debate over privately initiated affirmative action raised precisely this question, but it did so in a way obscured by the concept of reverse discrimination, which is, as its name reveals, simply the mirror image of the concept of discrimination. It is now time to consider other

\textsuperscript{120} See 42 U.S.C. § 12113(b) (Supp. V 1994).

\textsuperscript{121} See id. § 12114.

means and broader goals. This process can begin by looking beyond the concept of discrimination.