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## Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action

Sandra R. Levitsky\*

### Introduction

That Americans overwhelmingly support principles of racial equality while opposing government measures designed to achieve racial equality is a conundrum which social scientists have yet to definitively resolve.<sup>1</sup> Social scientists have offered a wide range of explanations for why Americans do not support affirmative action, but few studies have specifically examined the ways in which affirmative action policies might be reconceived to garner popular support. This Article reviews and critiques three theories—the American Values Theory, Self-Interest Theory, and New Racism Theory—that explain American opposition to race-targeted policies. This Article argues that while no one theory can fully explain America’s position on affirmative action policies, each offers valuable insights into what an affirmative action policy must look like to win popular support. From this literature review, this Article identifies four criteria that an affirmative action policy must meet to be politically successful.

To test the viability of these four criteria, this Article examines their role in the passage of one of the most radical affirmative action laws in recent U.S. history: the Americans with Disabilities Act (ADA). Passed in 1990 during the rise of the anti-affirmative action backlash, the ADA’s “reasonable accommodation” requirement explicitly requires employers to take account of, and provide special treatment for, an individual’s disability. That such radical legislation could pass with overwhelming bipartisan support from both houses of Congress

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\*Ph.D. candidate, University of Wisconsin, Madison, Department of Sociology. J.D., University of Minnesota Law School 1997. B.A., Amherst College, 1993. The author wishes to thank Professors Gary Sandefur and Mark Suchman for their invaluable comments on earlier drafts of this Article.

1. This Article takes as its primary focus the issue of affirmative action for racial and ethnic minorities. Many of the arguments, however, also apply to the cases of affirmative action for women and other historically disadvantaged groups.

and a Republican President suggests that valuable lessons can be learned from the success of the ADA for future race-targeted policy.

## I. Explaining America's Contradictory Attitudes on Issues of Race

### A. *White Attitudes Toward Racial Equality and Affirmative Action*

Support for the principle of equal treatment for minorities has steadily increased among the American public since the early 1940s. Since 1944, when national opinion surveys first asked whether Blacks and Whites should be given an equal chance at jobs,<sup>2</sup> the proportion of the population (Black and White) who responded affirmatively rose from 42% in 1944, to 47% in 1946 and 1947, 83% in 1963, 87% in 1966, and 95% in 1972.<sup>3</sup> Attitudes about equal treatment in other areas such as integration in housing and education have followed similar patterns over time.<sup>4</sup>

While Americans have widely accepted the principle of equal treatment, they remain deeply divided on the issue of the government's role in assuring equal treatment for racial minorities.<sup>5</sup> "Implementation questions"—designed to measure support or opposition to actions that the government should take to end discrimination—are often regarded by researchers as a more genuine indicator of support for civil rights than responses to questions on principles alone.<sup>6</sup> Researchers have found that fewer people endorse the implementation of a principle than endorse the principle itself in every area they investigated—from desegregation in schools to busing.<sup>7</sup>

Affirmative action questions, one form of implementation

2. Surveys have typically phrased the question as follows: "Do you think Negroes should have as good a chance as white people to get any kind of job, or do you think white people should have the first chance at any kind of job?" PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS* 44 (1998).

3. See *id.* at 46. By 1972, when public opinion on this question reached ceiling levels, the National Opinion Research Center dropped the "equal jobs" question from their national survey. See HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* 111 (1997).

4. See SCHUMAN ET AL., *supra* note 3, at 120-21.

5. See PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 3 (1997) (arguing that the clash about race in the United States should be interpreted in the context of a deeper debate about the proper role of government in addressing race-related issues).

6. See SCHUMAN ET AL., *supra* note 3, at 121.

7. See *id.* at 137.

question,<sup>8</sup> concern specific actions that the government might take to improve the economic and social status of Blacks.<sup>9</sup> The term "affirmative action" represents a broad array of government policies, ranging from government expenditures to assist Black communities to preferential treatment in hiring or admissions.<sup>10</sup> A Special Counsel Report to the President of the United States provides a useful definition: affirmative action is "any effort taken to expand opportunity for women or racial, ethnic, and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration [in decisionmaking or allocation of resources.]"<sup>11</sup>

Nonpreferential affirmative action policies do not favor one racial group over another, mandate quotas, or set aside a particular benefit based on race.<sup>12</sup> These policies include, but are not limited to, recruiting and counseling, affirmative marketing, and data collection and disclosure of statistics regarding minority participation and success.<sup>13</sup> Race-conscious nonpreferential affirmative action plans are intended to remedy Black disadvantage in the modern labor market caused by informal recruitment and promotion mechanisms that tend to exclude or ignore Black candidates.<sup>14</sup> Such policies aim to increase the pool

8. See *id.* at 170.

9. See *id.* at 101.

10. See *id.* at 171-72.

11. CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 16-17 (1996); see also JOHN D. SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 6-8 (1996) (providing a brief history of the term "affirmative action").

12. See Adams, *infra* note 13, at 1402-03 (defining "nonpreferential" methods of affirmative action).

13. See Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1402 (1998). Professor Michelle Adams illustrates with two hypothetical examples of race-targeted, nonpreferential affirmative action strategies:

A hypothetical employer seeks to fill several positions. Hoping to make its selection from the broadest possible pool of applicants, the employer advertises in the classified section of two newspapers: the *New York Times* and the *Amsterdam News*, a newspaper with a primarily black readership. In both advertisements, the employer identifies itself as an "equal opportunity employer" and states that "women and minorities" are encouraged to apply.

....

[Another] employer adopts strong reporting procedures requiring the organization to monitor the race and gender of those it recruits, those it hires, and those it promotes. That information is forwarded to top management and assists top management in formulating additional recruiting efforts to attract and retain minorities and women at the organization.

*Id.* at 1395.

14. See Lawrence Bobo et al., *Laissez-Faire Racism: The Crystallization of a*

of qualified minorities by informing them of a benefit that had previously been denied to them because of biased decisionmaking.<sup>15</sup> While these forms of affirmative action are race-targeted in the sense that they acknowledge past and present implications of race in our society, they do not necessarily burden any other group in the competition for scarce benefits.<sup>16</sup> As a result, such forms of affirmative action have, for the most part, gone unchallenged in the courts, in legal scholarship, and in public debate.<sup>17</sup>

Affirmative action may also refer to explicitly preferential policies: set asides, goals and time tables, quotas, or any program in which a scarce benefit is allocated on the basis of race or ethnicity.<sup>18</sup> It is primarily these forms of affirmative action that have sparked legal, academic and public debates.

Overall, there is little White support for affirmative action in any of its forms.<sup>19</sup> Researchers have found that those specifically supporting preferential treatment range from a third of the public down to a few percentage points of those polled, depending on the phrasing of the question.<sup>20</sup> Programs designed to help Blacks gain access to higher education generally receive more support than programs for hiring and promotion.<sup>21</sup> This may be because such

*Kinder, Gentler, Antiblack Ideology*, in RACIAL ATTITUDES IN THE 1990'S: CONTINUITY AND CHANGE 15 (Steve A. Tuch & Jack K. Martin eds., 1997); MARK GRANOVETTER, GETTING A JOB: A STUDY OF CONTACT AND CAREERS (1974) (discussing the importance of informal interaction in a job search); see also Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 SOCIAL PROBLEMS 433, 437-41 (1991) (noting that social scientists have found that employers often rely on informal employee networks to generate job applicants and target neighborhoods and media outlets that have smaller Black populations and constituencies).

15. See Adams, *supra* note 13, at 1397.

16. One could argue, however, that information itself is a scarce benefit—neither recruiting nor recordkeeping is free; if an organization targets minorities, it is presumably spending less on other groups.

17. See Adams, *supra* note 13, at 1397.

18. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 n.1 (1986) (noting that preferential, or "hard" forms of affirmative action might include "reserving a specific number of openings exclusively for members of the preferred group").

19. See SCHUMAN ET AL., *supra* note 3, at 182-83.

20. See *id.*; James Kluegel & Eliot R. Smith, *Affirmative Action Attitudes: Effects of Self Interest, Racial Affect, and Stratification Beliefs on Whites' Views*, 61 SOCIAL FORCES 797 (1983) (discussing White opposition to programs seen as promoting preferential treatment); see also Seymore Martin Lipset & William Schneider, *The Bakke Case: How Would It Be Decided at the Bar of Public Opinion?*, PUBLIC OPINION, March/April, 1978, at 38. (stating that most Americans reject the use of conventional affirmative action and preferential treatment).

21. See SCHUMAN ET AL., *supra* note 3; Kluegel & Smith, *supra* note 20; see also Lipset & Schneider, *supra* note 20.

programs are seen by Whites as an attempt to "level the playing field," whereas employment is often seen as the final "game" itself.<sup>22</sup>

Despite the paucity of support for affirmative action and implementation policies, some have found in these statistics a silver lining. Schuman and his colleagues observed that a large proportion of Whites will opt for a vague middle position (e.g., spending should be "kept about the same") on these questions when it is an option, suggesting that while there is not strong support for these policies, neither is there strong opposition.<sup>23</sup> Political leaders on both sides of the issue therefore appear to have a fair amount of room for persuasion. It could be this potential for changing public opinion that is driving the quest to understand the "gap" between support for equality in principle and in practice. The following sections explore three theoretical explanations for America's ambivalence toward equality and affirmative action.

### B. *The American Values Theory*

American Values theorists posit that the gap between American support for equality in principle and in practice may be explained by an ongoing tension between two competing American values: egalitarianism and individualism.<sup>24</sup>

The principle that "all men are created equal" with certain rights of life, liberty, and the pursuit of happiness, has been characterized as "one of the most magnetic forces in United States life"<sup>25</sup> and as "the most powerful and influential concept in American history."<sup>26</sup> The principle of egalitarianism has been the battle cry of not only the Revolutionary and Civil Wars, but also the civil rights and women's movements, and more recently, the

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22. See SCHUMAN ET AL., *supra* note 3; Kluegel & Smith, *supra* note 20; see also Lipset & Schneider, *supra* note 20.

23. See SCHUMAN ET AL., *supra* note 3, at 177; Joseph F. Fletcher & Marie-Christine Chalmers, *Attitudes of Canadians Toward Affirmative Action: Opposition, Value Pluralism, and Nonattitudes*, 13 POL. BEHAV. 67, 80-81 (1991) (finding that a great many of those Canadians who say they oppose affirmative action could be persuaded to reconsider their opinion); see also SNIDERMAN & CARMINES, *supra* note 5, at 18 (stating that while White Americans tend to disapprove of most affirmative action policies, a majority does believe that an extra effort should be made to see that Blacks are treated fairly).

24. See Lipset & Schneider, *supra* note 20, at 43 (arguing that inconsistencies in survey data on racial attitudes are due to the tension between core American values).

25. J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 13-14 (1978).

26. BERNARD BAILYN ET AL., *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 277 (1992).

gay and lesbian and disability movements.

At the heart of the American Creed, however, side by side with the principle of equality, stands the equally compelling principle of individualism. According to this ideal, jobs and economic rewards are allocated exclusively on the basis of individual talent, effort, and training.<sup>27</sup> The principle stands most clearly for the idea that people should be judged as individuals, and neither stereotyped nor classified on the basis of their gender, race, religion, or ethnicity.<sup>28</sup>

While most Whites believe in equal opportunity, they also believe that inequality serves a positive function in American society and that relative position in the social hierarchy should be based on demonstrated ability and individual effort.<sup>29</sup> Thus Whites will support programs that help Blacks acquire skills necessary to compete because they are consistent with the value of equality of opportunity, but will reject programs seen as promoting preferential treatment because they perceive them as violating dominant equity norms.<sup>30</sup>

The tension between individualism and egalitarianism—the former suggesting a system of social stratification based on individual merit, and the latter implying a system of social equality—helps explain America's ambivalence to issues of racial justice. Seymour Lipset and William Schneider argue that Americans believe strongly in both individualism and egalitarianism, but at any point in history they will tend to favor one ideal more strongly than the other.<sup>31</sup> They observed that while most White Americans strongly endorsed the original, egalitarian goals of the Civil Rights Movement, the White public has not favored, and indeed has outright rejected, the Civil Rights Movement's more recent focus on substantive equality.<sup>32</sup>

Lipset and Schneider found that Americans make a critical distinction between compensatory action—policies designed to

27. See Lawrence Bobo & James R. Kluegel, *Opposition to Race-Targeting: Self-Interest, Stratification Ideology, or Racial Attitudes?*, 58 AM. SOC. REV. 443, 446 (1993) (discussing the characteristics of the belief in individualism that would explain opposition to certain forms of affirmative action).

28. See *id.* (arguing that the provision of rewards based on group status violates the American cultural norm of individualism).

29. See Kluegel & Smith, *supra* note 20, at 801; see also James R. Kluegel and Eliot R. Smith, *Whites' Beliefs About Blacks' Opportunity*, 47 AM. SOC. REV. 518, 523-25 (1982) [hereinafter Kluegel & Smith, *Whites' Beliefs*].

30. See Kluegel & Smith, *supra* note 20, at 801.

31. Lipset & Schneider, *supra* note 20, at 43-44.

32. See *id.*

help disadvantaged groups catch up to the standards of competition set by majority society—and preferential treatment—policies that suspend those standards by admitting or hiring members of disadvantaged groups who do not meet the same standards as White males.<sup>33</sup> Americans, in other words, want the terms of the competition to be fair, but they do not want to give up the competition itself. Thus, Americans tend to favor compensation for past deprivations in the form of special training programs, such as Head Start, but will draw the line at predetermining the results of the competition.<sup>34</sup>

Kluegel and Smith found similar results in their studies of racial attitudes in the early 1980s. In 1983, they found that programs designed to help Blacks win jobs (e.g., job training programs) or gain access to higher education (e.g., scholarships or education programs) have the support of about 70% of the White public.<sup>35</sup> Programs seen as promoting preferential treatment, on the other hand, were overwhelmingly opposed by close to 90% of White Americans.<sup>36</sup> Their explanation, like that put forth by Lipset and Schneider, was rooted in the individualist ideals of the American public. While a majority support programs that involve changing individuals to fit the existing stratification order, a majority oppose programs that appear to call for change in the stratification order itself.<sup>37</sup> Greater support, for example, can be found for job training programs for the disadvantaged than for programs that establish a minimum income for all workers.<sup>38</sup>

Empirical evidence on Whites' beliefs about the stratification system and Black disadvantage appear to support the American

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33. See *id.* at 41. A strong argument can be made however, that the distinction between compensatory and preferential treatment or "equality of opportunity" versus "equality of results" is not always clear. Admissions to elite schools, for example, may be seen as a reward for prior achievement in an earlier competition. From this perspective affirmative action would be a form of preferential treatment or equality of results. By contrast, one could argue that attendance at competitive schools is essentially a "meal ticket" to entry into the professional classes. See generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998) (demonstrating the effects of an elite education on Black and White students). From this perspective, affirmative action *supra* is intended to ensure equality of opportunity. See Lipset & Schneider, *supra* note 20, at 45. Such distinctions therefore, are often no more than a way of talking about the extreme poles on a continuum of perspectives on affirmative action.

34. See Lipset & Schneider, *supra* note 20, at 41.

35. See Kluegel & Smith, *supra* note 20, at 797.

36. See *id.*

37. See JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY 212 (1986).

38. See Bobo & Kluegel, *supra* note 27, at 446.



Values Theory. Kluegel and Smith found that the degree to which Whites believe the current stratification system already provides equal opportunities for all people is related to their views on affirmative action.<sup>39</sup> The more Whites perceive the opportunities for Blacks as being equal to their own, the more likely Whites will fault Blacks themselves for Black disadvantages, and the less likely Whites will approve of affirmative action.<sup>40</sup> Indeed, Kluegel and Smith have found that a majority of Whites see opportunities for Blacks as equal to or exceeding those of the average person in America.<sup>41</sup> Similarly, Schuman and his colleagues found that declining numbers of Whites list discrimination as an explanation for Black disadvantage.<sup>42</sup> Given that Whites deny the prevalence of discrimination and place most of the blame for Black disadvantage on Blacks themselves, it does not seem surprising that Whites would not support affirmative action policies.

As persuasive as the American Values Theory seems to be, there are compelling arguments for why it is an incomplete explanation for America's lack of support for affirmative action. While the evidence from studies on attitudes toward race-targeted policies indicates that there is a real tension between American ideals of equality and egalitarianism, framing the issue only in terms of American ideals obscures the role race plays in opinionmaking on issues of affirmative action. It suggests that Americans judge race-targeted policies solely by their consistency with personal views on equality and merit, with no consideration for the race of the beneficiaries of these programs. Neither empirical nor historical evidence supports the argument that opinions on affirmative action programs are in fact formed on the basis of American values alone.

Donald Kinder and Lynn Sanders have demonstrated in their recent work on racial attitudes that public opinion depends not

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39. See KLUEGEL & SMITH, *supra* note 37, at 212-13.

40. See Kluegel & Smith, *supra* note 20, at 801.

41. See KLUEGEL & SMITH, *supra* note 37, at 49; see also Kluegel & Smith, *Whites' Beliefs*, *supra* note 29, at 519-23 (Explaining that there is in fact, no research to support the claim that Blacks' opportunities are equal to or better than the average opportunities of Whites. One would need to demonstrate that Blacks receive higher occupational earnings and returns to human capital than Whites. Recent evidence shows that while the earnings of Blacks are approaching those of Whites, they are still lower than what Whites receive on average).

42. See SCHUMAN ET AL., *supra* note 3, at 155 (explaining that Whites instead cite low motivation as the most popular explanation for Black disadvantage); see also PAUL SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 40-41 (1993) (finding that Whites cite lack of genuine effort and irresponsibility as reasons for current Black disadvantage).

only on beliefs of individual citizens—their personal interests, political principles and feelings toward social groups—but also on the way an issue is framed.<sup>43</sup> When the authors asked respondents for their views on the same policy, framed in alternative ways (designed to mimic the rival frames that prevail in contemporary discourse), they found that Whites and Blacks were significantly more likely to support race neutral programs than programs explicitly targeting Blacks alone.<sup>44</sup>

Bobo and Kluegel found that while Americans do value opportunity-enhancing policies (e.g., training and education programs) over equal-outcomes policies (e.g., hiring quotas), *the race of the policy's beneficiaries also mattered*.<sup>45</sup> When they compared American attitudes toward race-targeting policies with attitudes toward income-targeting policies, they found that race targeting significantly diminishes Whites' support for *both* opportunity-enhancing policies and equal-outcomes policies relative to similar income-targeted policies.<sup>46</sup>

Historical evidence also contradicts the theory that Americans are opposed to race-targeted policies because they are morally committed to the ideal of individual merit. If Americans are in fact committed to the ideal of merit, then they ought to closely guard the system of meritocracy.<sup>47</sup> Yet American history is

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43. See DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 163-95 (1996) (discussing the concept of frames—the use of specific concepts and terms to present options in a highly influential way—in the context of race-targeted policies); Shanto Iyengar, *Framing Responsibility for Political Issues: The Cases of Poverty*, 12 POL. BEHAV. 19, 20 (1990); Barbara McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259 (1982) (concluding that responses from both physicians and patients were less favorable when the statistics describing the results of a surgery were presented in terms of morality rather than survival rates); see also Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980) (finding that consumers respond more favorably to reduced gasoline prices for paying cash than they would to a credit card penalty).

44. See KINDER AND SANDERS, *supra* note 43, at 165, 193.

45. See Bobo & Kluegel, *supra* note 38, at 458-59.

46. Compare KINDER & SANDERS, *supra* note 43, at 193-94 (summarizing experiment results that showed White Americans supported opportunity-enhancing programs designed for the poor rather than programs aimed at Black Americans), and Bobo & Kluegel, *supra* note 38, at 458-59 ("Race-targeting reduces support for opportunity-enhancing policies by about 22% on average relative to similar income-targeted policies. The impact of race-targeting is even larger when comparing policies that lean toward equalizing outcomes for blacks and whites."), with Fletcher & Chalmers, *supra* note 23, at 84-85 (finding that Canadian attitudes about affirmative action are not very well explained by the two values of equality and merit since only about 3% of the variance in attitudes toward affirmative action is attributable to the two values).

47. See SKRENTNY, *supra* note 11, at 37 (describing, by example, how the

replete with examples of special preferences bestowed on groups in a decidedly unequitable and nonmerit-based way.<sup>48</sup> John Skrentny describes, for example, preferences given to veterans in civil service (called veterans' preferences rather than affirmative action) with the full backing of public opinion.<sup>49</sup> The federal government and forty-seven states give preferences to veterans who take civil service exams by adding ten points to the scores of disabled veterans and their wives and five points to the scores of non-disabled veterans.<sup>50</sup> After the points are added, the civil service typically prefers veterans over non-veterans with equal scores.<sup>51</sup> Indeed, seven states give absolute preferences to veterans who pass the exams.<sup>52</sup>

Arguably, veterans' preferences are different from preferences based on race because racial preferences apply indiscriminately to all African Americans, whereas veterans are compensated specifically for serving their country.<sup>53</sup> Skrentny observes however, that veterans' preferences are also indiscriminate, failing to distinguish between those drafted and those who volunteered, those who fought and those who had a "safe" desk job.<sup>54</sup> Indeed they also extend to widows and wives of the disabled.<sup>55</sup>

This poses the possibility that the American public perceives veterans as justified exemptions from the merit competition.<sup>56</sup> Only when groups are assumed to be unworthy of special treatment, Skrentny suggests, do Americans invoke the democratic ideal of individual merit.<sup>57</sup> It is not, in other words, that Americans object to special preferences per se, but only to their racial beneficiaries.

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uncontroverted preference to veterans is not based on merit).

48. *See id.* at 36-60 (presenting veterans' preferences and nepotism as examples of special preferences that have gone unchallenged in American society).

49. *See id.*

50. *See id.* at 37. (stating that federal service exams ironically were designed to ensure merit hiring).

51. *See id.* at 37-38.

52. *See id.* at 38.

53. *See SKRENTNY, supra* note 11, at 58-59.

54. *See id.* at 59.

55. *See id.*

56. *See id.* at 60-62 (discussing the issue of moral worth in the context of American justice and merit).

57. *See id.* at 239.

### C. *New Racism Theory*

The widespread support for principles of equal treatment suggest that Americans today understand it is socially unacceptable to express overt, blatant prejudice. Proponents of the New Racism Theory argue that this does not necessarily mean such prejudice has been eradicated, but rather that it has taken on new forms. Often labeled "symbolic" or "modern racism,"<sup>58</sup> adherents of this view argue that Americans vent racial hostility today indirectly, such as in agreeing with statements like "the government pays too much attention to blacks" or "blacks who receive welfare could get along without it if they tried."<sup>59</sup>

Partial support for the New Racism Theory as a predictor of attitudes toward affirmative action programs has been found not only by Sears and McConahay, but also by Jacobson,<sup>60</sup> Kluegel and Smith,<sup>61</sup> Bobo and Kluegel,<sup>62</sup> and Kinder and Sanders.<sup>63</sup> Jacobson compiled a New Racism Scale by selecting questions from a Louis Harris and Associates survey that approximated those used by McConahay to measure symbolic racism.<sup>64</sup> While he found that the New Racism Scale was the strongest predictor of attitudes toward affirmative action, it was not the only predictor—old-fashioned racism and self-interest were also moderate predictors.<sup>65</sup> Kluegel and Smith similarly found some support for the New Racism Theory, but also concluded that all opposition to affirmative action cannot be seen as indicating White racial

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58. See David O. Sears, *Symbolic Racism*, in *ELIMINATING RACISM: PROFILES IN CONTROVERSY* 53, 56-57 (Phyllis A. Katz & Dalmis A. Taylor eds., 1988) (explaining that symbolic racism has involved antagonism toward Blacks' demands, resentment about special favors for Blacks, denials of continuing discrimination and lack of sympathy with the anger of Blacks).

59. Bobo & Kluegel, *supra* note 38, at 446; see also John B. McConahay, *Self-Interest Versus Racial Attitudes as Correlates of Anti-Busing Attitudes in Louisville: Is it the Buses or the Blacks?*, 44 J. POL. 692, 705-07 (1982) ("The tenets of modern racism are that discrimination is a thing of the past, blacks are pushing too hard, they are getting too much attention and sympathy from the nation's elites and that blacks' gains and demands are no longer justified."); see also David O. Sears et al., *Whites Opposition to Busing: Self-Interest or Symbolic Politics?*, 73 AM. POL. SCI. REV. 369 (1979).

60. See Cardell Jacobson, *Resistance to Affirmative Action*, 29 J. CONFLICT RESOL. 306 (1985) (finding that both new and old-fashioned racism were significantly related to attitudes about affirmative action programs).

61. See Kluegel & Smith, *supra* note 20.

62. See Bobo & Kluegel, *supra* note 38.

63. See KINDER & SANDERS, *supra* note 43.

64. Compare Jacobson, *supra* note 60, at 314-15 (describing the seven questions that comprised the New Racism Scale) with McConahay, *supra* note 59, at 708.

65. See Jacobson, *supra* note 60, at 326-27.

antagonism.<sup>66</sup> Thus, most studies seem to point toward the idea that the New Racism Theory works well in combination with other explanations for White opposition to race-targeted policies, but is flawed as a complete explanation.

If, as the New Racism Theory posits, attitudes toward social policy stem from underlying racial antagonisms, then Whites would oppose not only programs seen as preferential treatment, but also programs designed to simply *help* Blacks win jobs (e.g., job training programs) or gain access to higher education (e.g., scholarships or education programs). But studies have found that job training and education programs are in fact supported by the White public.<sup>67</sup> Similarly, if the true motivation for opposing affirmative action is in fact modern racism, then Americans would oppose affirmative action policies regardless of how survey questions are phrased or issues are framed. But again, empirical evidence suggests opinions are influenced significantly by both.<sup>68</sup> Given the number of factors which have been shown to influence the formation of attitudes toward affirmative action policies—from individuals' beliefs about American values<sup>69</sup> to the way questions about affirmative action are framed<sup>70</sup>—it seems inappropriate to equate attitudes toward a given policy solely with racism.

#### D. The Self-Interest Theory

The Self-Interest Theory posits that "Americans are unlikely to support policies from which they do not benefit."<sup>71</sup> Americans tend to resent programs in which the government is perceived as giving preferences to some groups and not others.<sup>72</sup> Therefore, the Self-Interest Theory is based on an argument of relative deprivation: people experience feelings of deprivation or

66. See KINDER & SANDERS, *supra* note 43, at 24 (concluding that racial resentment plays an important role in White public opinion, but is not the only thing that matters for race policy); Bobo & Kluegel, *supra* note 38, at 460 (finding only partial support for the new racism theory); see also Kluegel & Smith, *supra* note 20, at 814.

67. See, e.g., Kluegel & Smith, *supra* note 20, at 797 (finding strong support for opportunity-enhancing programs).

68. See KINDER & SANDERS, *supra* note 43; see also Fletcher & Chalmers, *supra* note 23 (providing examples of studies that have found significant effect of framing on attitudes toward affirmative action).

69. See, e.g., Lipset & Schneider, *supra* note 20.

70. See, e.g., KINDER & SANDERS, *supra* note 43; see also Fletcher & Chalmers, *supra* note 23.

71. Bobo & Kluegel, *supra* note 38, at 443.

72. See *id.* at 445 (citing examples of studies that have found White Americans often do not support programs seen as benefiting only certain groups).

resentment when they feel there is a discrepancy between what they have, what they want, and what they deserve.<sup>73</sup> Self-interest theorists maintain that resentment stemming from perceived relative deprivation as a result of affirmative action measures is a major impediment to widespread public support.<sup>74</sup>

Two types of self-interest have been tested with regard to opposition to race-targeting: (1) individual self-interest, "often defined narrowly to mean tangible losses or gains to an individual or his or her immediate family;" and (2) group self-interest, defined as "identification with a group and a sense of shared fate . . . [(e.g.,] Blacks are consistently more supportive of race-targeted policies than are Whites of comparable socioeconomic status)]."<sup>75</sup> In addition, self-interest may be measured by questions focusing on the relative *benefits* of a given policy for individuals or groups (e.g., will Whites benefit from this policy?)<sup>76</sup> or by questions measuring perceived *harm* of a policy to individuals or groups.<sup>77</sup>

In their study on opposition to race-targeting using a benefits-oriented definition of self-interest, Bobo and Kluegel found little support for the individual self-interest interpretation, but did find support for group self-interest, "[P]art of the reason for opposition to race-targeted policies is the sense that race-targeted policies benefit blacks to the exclusion of problems of working-class whites. The strongest aspect of group self-interest seems to be a straightforward calculation by whites that members of their own group will not benefit."<sup>78</sup>

Kinder and Sanders found similar results with their harm-oriented definition of self-interest.<sup>79</sup> They found that most Whites perceive affirmative action as "a clear and present danger."<sup>80</sup> Over

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73. See generally FAYE J. CROSBY, *RELATIVE DEPRIVATION AND WORKING WOMEN* 160 (1982) (explaining the theory of relative deprivation as dependent on a variety of cognitive-emotional factors instead of entirely on one's objectivity).

74. See Kluegel & Smith, *supra* note 20, at 802.

75. Bobo & Kluegel, *supra* note 38, at 445; see also KINDER & SANDERS, *supra* note 43, at 51, 81-84 (generally acknowledging that the line distinguishing group and individual self-interest is not always clear).

76. See, e.g., Bobo & Kluegel, *supra* note 38, at 445.

77. See, e.g., KINDER & SANDERS, *supra* note 43.

78. Bobo & Kluegel, *supra* note 38, at 459; Jacobson, *supra* note 60; see also Kluegel & Smith, *supra* note 20 (finding support for self-interest as a predictor of attitudes toward affirmative action programs).

79. See KINDER & SANDERS, *supra* note 43, at 54 ("Many White Americans appear convinced that in vital domains of life, . . . policies and procedures operate against their own interests and for the interests of Blacks.").

80. *Id.*

57% of Whites surveyed agreed that "affirmative action programs for blacks have reduced whites' chances for jobs, promotions, and admissions to schools and training programs."<sup>81</sup> Almost 75% said that "it was very or somewhat likely that a white person wouldn't get a job or a promotion while an equally or less qualified black person got one instead."<sup>82</sup> White Americans who believe that Blacks threaten their collective interests are significantly less supportive of affirmative action policies.<sup>83</sup>

William Julius Wilson, a strong advocate of the Self-Interest Theory, has argued that race-targeted policies are unlikely to receive wide support because many people have no stake in them.<sup>84</sup> He posits that to improve the life chances of Blacks, the government must advocate universal programs to which people of all races can positively relate.<sup>85</sup> Such universal programs would be designed to stimulate the general economy by promoting "wage and price stability, favorable employment conditions, and the development and integration of manpower training programs with educational programs."<sup>86</sup>

Scholars in virtually every discipline have roundly criticized the Self-Interest Theory, putting forward ample evidence that individuals often act out of motivations other than self-interest.<sup>87</sup> One line of criticism, derived from studies on procedural and distributive justice, is particularly relevant to the study of race-targeted affirmative action. Justice theorists<sup>88</sup> argue that in evaluating legal and political authorities and institutions, individuals rely less on self-interested calculations than on normative criteria of fairness.<sup>89</sup> That is, individuals evaluate outcomes not only against their personal gain and loss, but also against a desire to receive fair outcomes, arrived at by using fair

81. *Id.* at 83.

82. *Id.*

83. *See id.* at 84-85.

84. *See* WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 118-24 (1987).

85. *See id.*

86. *Id.* at 121.

87. *See* Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Explanation of Political Life*, in *BEYOND SELF-INTEREST* 3 (Jane J. Mansbridge ed., 1990) (providing an excellent summary of criticisms of Self-Interest Theory in disciplines ranging from economics to psychology and its impact on political policy).

88. *See* Tom R. Tyler, *Justice, Self-Interest, and the Legitimacy of Legal and Political Authority*, in *BEYOND SELF-INTEREST* 171, 172 (Jane J. Mansbridge ed., 1990) (defining justice theorists as scholars who study procedural or distributive justice under the following assumptions: individuals are motivated by a desire to receive fair outcomes arrived at by using fair procedures, and individuals evaluate their outcomes using justice-based criteria).

89. *See id.* at 172.

procedures.<sup>90</sup>

Empirical evidence in a wide range of contexts supports this theory. Studies of defendants in misdemeanor courts,<sup>91</sup> citizen-police encounters,<sup>92</sup> civil court cases,<sup>93</sup> alternative dispute resolution<sup>94</sup> and the political system<sup>95</sup> have all found that people are more likely to support authorities if they think that the procedures used in these experiences are fair. Overall, fairness of process has a greater effect on individuals' evaluation of these experiences than whether the outcomes are in their favor.

Research on judging fairness suggests several criteria on which individuals evaluate fairness. People consider the authorities' motivation, honesty and ethicality, the quality of the decisions, opportunities for error correction, and the authorities' bias.<sup>96</sup> Another crucial evaluative criterion is opportunity for representation.<sup>97</sup> People judge procedures as fair when they believe they have had an opportunity to participate in the decision.<sup>98</sup> Participation includes having an opportunity to present one's arguments and have one's views considered.<sup>99</sup> Those who feel they have participated in the decision are much more likely to accept its outcome, whether the outcome benefits them or

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90. *See id.*

91. *See* Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experiences*, 18 L. & SOC'Y REV. 51 (1984) (concluding that a major determinant of satisfaction with judges and the courts is the defendant's perception of fairness).

92. *See* Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC AND APPLIED SOC. PSYCHOL. 281, 288 (1980) ("Respondents who felt they were treated fairly by the police had more positive evaluations of their encounters with the police and of the police in general than did those who felt unfairly treated, irrespective of whether the police solved the problem for which they were called.").

93. *See generally* E. ALLAN LIND ET AL., *TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* (1989) (finding that personal evaluations of litigants regarding case outcome and delay were more strongly correlated with perceived fairness and satisfaction than were objective measures of outcome and delay).

94. *See* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y. REV. 103, 128 (1988) ("[A] key determinant of citizen reactions to encounters with legal authorities is the respondents' assessment of the fairness of the procedures used in that contact.").

95. *See* Kenneth A. Rasinski & Tom R. Tyler, *Fairness and Vote Choice in the 1984 Presidential Election*, 16 AM. POL. Q. 5 (stating that procedural fairness is a better predictor of political evaluations than considerations of distributive justice or economic outcomes).

96. *See* Tyler, *supra* note 94, at 128.

97. *See id.*

98. *See* Tyler, *supra* note 88, at 176.

99. *See id.*



not.<sup>100</sup> Further, people value the opportunity to present their case in a less formal way than is often possible in courts.<sup>101</sup> Thus, in civil cases, individuals often regard alternative forms of dispute resolution, such as mediation, as fairer than courtroom trials, presumably because informal procedures often offer greater opportunities for direct participation.<sup>102</sup> Likewise, in criminal cases, defendants perceive plea bargaining as fairer than going to trial.<sup>103</sup>

Research on procedural fairness thus suggests that, like the American Values and New Racism Theories, the Self-Interest Theory is incomplete as an explanation for American attitudes.<sup>104</sup> Rather than focusing on the outcomes of decisions or policies (i.e., how will this policy affect me or people like me?), individuals who are affected by third-party decisions in both formal and informal settings react to the procedural justice of the decisionmaking process, even if the decision is not in their favor. This suggests that Americans oppose affirmative action not only because they receive no benefit, but also because they perceive some groups as benefiting unfairly.

#### *E. Policy Implications for Affirmative Action*

None of these theories can single-handedly explain White Americans' lack of support for race-targeted policies. That each is only a partial explanation, however, does not mean that these theories are not useful in understanding the gap between American support for principles of racial equality and policies designed to achieve racial equality. This section looks at the implications of each theory for future race-targeted policies.

American Values theorists argue that the contest over the hearts of Americans on issues of race can be seen as a contest between the two values of individualism and egalitarianism.<sup>105</sup>

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100. See *id.*; see also Tyler, *supra* note 94, at 128.

101. Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 429 (1988).

102. See *id.*

103. See Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC'Y. REV. 483 (finding that the sense of fairness in the criminal proceedings significantly influenced felons' evaluation of treatment); Jean M. Landis & Lynne Goodstein, *When is Justice Fair?: An Integrated Approach to the Outcome Versus Procedure Debate*, 1986 AM. B. FOUND. RES. J. 675 (noting that such a finding adds support to the theorized role of outcome certainty in influencing perceptions of outcome fairness).

104. See *supra* notes 43-57, 58-70 and accompanying text (critiquing the American Values and New Racism Theories).

105. See *supra* notes 24-42 and accompanying text (elaborating on the American

Framing issues in terms of values affects the debate on affirmative action policies in at least two ways. First, it tends to obscure underlying issues of resource allocation.<sup>106</sup> It is harder, for example, to discuss the costs of a government policy when an issue is being framed as one of fundamental equalities ("How can one put a price on equality?"). It is easier to garner support for a policy when neither cost nor allocation of resources appears to be at issue. Second, framing an issue in terms of a basic American value automatically puts the opposing side on the defensive.<sup>107</sup> The most effective tactic of the anti-affirmative action movement, for example, has been to usurp the language of equality and merit for itself, framing affirmative action policies as unfair, unequal and denying equal opportunities for all.

The American Values Theory suggests that an affirmative action policy must be framed or justified in terms of fundamental American values to attract widespread support.<sup>108</sup> Since the late 1960s and 1970s, when the Civil Rights Movement's agenda turned from issues of formal equality to issues of substantive equality, the American public has been more receptive to arguments framed in terms of issues of individualism.<sup>109</sup> Recognition that a general need for affirmative action exists for an entire group does not necessarily mean that the same remedy should be available to everyone in the group.<sup>110</sup> Employees from the same racial or ethnic group with different levels of education might require varying forms of training, from none at all to quite a lot.<sup>111</sup> It is possible to design (and win support for) affirmative action policies that are intended to benefit a particular group, but which offer individual-based remedies.<sup>112</sup>

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Values Theory).

106. See Paul Gewirtz, *The Triumph and Transformation of Antidiscrimination Law*, in RACE, LAW, & CULTURE 110, 117 (Austin Sarat ed., 1997) (arguing that conceptualizing a social problem as a right or in terms of justice can obscure more relevant questions of resource allocation).

107. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 593 (1982) (arguing that all arguments in the form of equality place opposing arguments on the defensive).

108. That it has been difficult to popularize the "diversity" argument for affirmative action may be attributed in part to the fact that it has not been framed in terms of traditional American values. See *supra* notes 24-42 and accompanying text (discussing the American Values Theory).

109. See Lipset & Schneider, *supra* note 20, at 43.

110. See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 40 (1996) (discussing individualized versus group-based affirmative action programs).

111. See *id.*

112. See *infra* Part III.B. (discussing the use of individual-based remedies in the

The New Racism Theory suggests that using democratic principles such as egalitarianism and individualism as justifications for opposition to race-targeted policies is a mere pretext; in truth, opposition is based on nothing more than racism.<sup>113</sup> But studies which have tested this theory find that while it is true that race targeting does influence White opinionmaking, White Americans do not necessarily oppose all race-targeted programs equally.<sup>114</sup> Programs which are framed as opportunity-enhancing, even if race-targeted, consistently garner more popular support than programs which are designed to ensure equal outcomes.<sup>115</sup>

Finally, the Self-Interest Theory holds that Americans will only support policies from which they derive some benefit, and will resent programs in which the government is perceived as giving preferences to some groups and not others.<sup>116</sup> It is this resentment, primarily derived from a sense of relative deprivation, that impedes the political success of affirmative action laws. Wilson and other self-interest theorists would argue that one way to avoid the perception of relative deprivation is to design policies which have universal appeal rather than policies which are designed to assist only certain minority groups.<sup>117</sup> But, under this theory, *all* race-targeted policies would be eliminated in favor of a class-based approach to policymaking. Rather than engaging in the debate over whether a class- or race-based approach is more effective,<sup>118</sup> this Article assumes the need for at least some race-targeted affirmative action and seeks a way of designing race-based policy capable of garnering public support.

Here the work of justice theorists is helpful. We have seen evidence that in many cases people are concerned less with whether or not a policy benefits themselves or a group to which

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ADA).

113. See *supra* notes 58-66 and accompanying text (discussing the New Racism Theory).

114. See *supra* notes 67-70 and accompanying text (critiquing the New Racism Theory).

115. See *supra* notes 67-70 and accompanying text (critiquing the New Racism Theory).

116. See *supra* notes 71-83 and accompanying text (discussing the Self-Interest Theory).

117. See *supra* notes 84-86 and accompanying text (presenting Wilson's argument for universal policies).

118. For a discussion of why the class-based approach is ineffective as an alternative to race-targeted affirmative action, see BOWEN AND BOK, *supra* note 33, at 46-52 and EDLEY, *supra* note 11, at 142-59.

they belong, than they are with procedural fairness.<sup>119</sup> In other words, if a policy appears to comport with people's overall sense of fairness, it is more likely to be acceptable regardless of the policy's beneficiaries.<sup>120</sup>

Together, these theories suggest four criteria for a politically successful affirmative action policy. The policy must: (1) be framed in terms of basic American values; (2) offer individual-based remedies (even if the program targets a specific group); (3) be framed as opportunity-enhancing; and (4) emphasize procedural fairness. To test the viability of these criteria, the next two sections of this Article will examine their role in the passage of the most radical and politically successful affirmative action law in this country—the Americans with Disabilities Act.

## II. The Americans with Disabilities Act of 1990

Hailed as landmark civil rights legislation, the Americans with Disabilities Act (ADA)<sup>121</sup> was signed into law on July 26, 1990, only two years after first being introduced to Congress.<sup>122</sup> By contrast, civil rights bills for racial minorities were introduced to Congress for over two decades before the Civil Rights Act of 1964 was passed.<sup>123</sup> Arguably the most far-reaching civil rights legislation ever passed in this country, the ADA departs in many respects from previous civil rights laws. Most notably, the law includes what many commentators agree is one of the most sweeping affirmative action provisions ever enacted by the federal government,<sup>124</sup> applying to potentially forty-three million

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119. See *supra* notes 91-95 and accompanying text (citing studies which have demonstrated the role of procedural fairness in evaluations of policies and programs).

120. See *supra* notes 96-103 and accompanying text (discussing the criteria by which people evaluate fairness).

121. 42 U.S.C. §§ 12101-12213 (1994).

122. The first ADA bill was drafted by thirteen politically conservative members of an unnoted federal council appointed by President Ronald Reagan and introduced in the closing days of the 100th Congress in 1988 to almost universal disregard. See JOSEPH SHAPIRO, *NO PITY* 108, 114 (1993). Patrisha Wright, a savvy, politically-minded tactician, then rewrote the ADA with the assistance of Tom Harkin of Iowa and Edward Kennedy of Massachusetts. See *id.* at 114. Harkin and Kennedy then reintroduced the bill in the 101st Congress. After bills in both houses of Congress survived an impressive gamut of congressional committee markups and hearings, the House approved the final version of the bill by a vote of 377 to 28 on July 12, 1990. See 136 CONG. REC. H4629. The Senate followed suit on July 13, 1990, by an overwhelmingly lopsided vote of 91 to 6. See 136 CONG. REC. S9695.

123. The first equal employment opportunities bill was introduced to Congress in 1942. See BURSTEIN, *supra* note 2, at 5.

124. See, e.g., CHARLES LAWRENCE III AND MARI MATSUDA, *WE WON'T GO*

Americans, or close to one-fifth of the United States.<sup>125</sup> This section explores the significance of the ADA as a civil rights measure, with particular attention to its impact as an affirmative action law.

### A. *The Substance of the ADA*

The ADA was designed to extend civil rights protections similar to those found in laws prohibiting discrimination on the basis of race, color, sex, national origin, age, and religion to individuals with disabilities.<sup>126</sup> Modeled heavily after the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, the law's purpose was to guarantee equal opportunity for the disabled<sup>127</sup> with respect to employment, transportation, public accommodations, state and local government services and telecommunications.<sup>128</sup>

Title I of the ADA prohibits disability discrimination in all employment practices, including job application procedures, hiring, firing, compensation, advancement, and other terms and conditions of employment.<sup>129</sup> To be covered under the ADA, a disabled person must be "qualified," defined as meeting the requirements of the position and able to perform the "essential functions" of the position with or without "reasonable accommodations."<sup>130</sup> A "reasonable accommodation" is any

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BACK—MAKING THE CASE FOR AFFIRMATIVE ACTION 108 (1997) (calling the ADA the most radical affirmative action program in U.S. history); see also Karlan & Rutherglen, *supra* note 110, at 14 (discussing the ADA's reasonable accommodation provision as an affirmative action provision).

125. See SHAPIRO, *supra* note 122, at 7 (noting that estimates of the number of disabled Americans range from 35 to 43 million).

126. For an excellent discussion of the origins of the ADA, see Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

127. Under the ADA, an individual is considered "disabled" if he or she: (1) is substantially impaired with respect to a major life activity; (2) has a record of such impairment; or (3) is regarded as having such an impairment. In addition, the ADA protects people who are discriminated against because they know, are associated with, or are related to a disabled individual. See 42 U.S.C. § 12102(2) (1994).

128. See 42 U.S.C. § 12101(a)(3) (1994).

129. The ADA applies to all employers with fifteen or more employees, including private employers, state and local governments, educational institutions, employment agencies, and labor organizations. See 42 U.S.C.A. §§ 12111(2), (5) (1994).

130. 42 U.S.C. § 12111(8) (1994). The Supreme Court has stated that an inquiry into whether an individual is "qualified" involves an individualized assessment into whether the particular individual can perform the essential functions of the job despite his or her disability, and, if he or she cannot perform essential functions, whether a reasonable accommodation would enable the individual to do so. See

modification or adjustment to the work environment that will enable a qualified disabled individual to perform the essential job functions.<sup>131</sup> Such accommodations include, but are not limited to, acquiring or modifying equipment or devices, job restructuring, providing part-time or modified work schedules, adjusting or modifying examinations, training materials or policies and providing readers and interpreters.<sup>132</sup>

### B. *The ADA as a Departure from Past Civil Rights Laws*

The central tenets of the ADA are taken from Title VII of the Civil Rights Act of 1964 and, to a lesser extent, the Rehabilitation Act of 1973.<sup>133</sup> The cornerstone of employment discrimination law, Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of . . . race, color, religion, sex, or national origin."<sup>134</sup> It does *not* protect against discrimination based on disability. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by programs receiving federal financial assistance.<sup>135</sup> Section 503 of the Rehabilitation Act requires that any contract with the federal government in excess of \$10,000 contain a provision that "the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities."<sup>136</sup>

While the ADA is based on Title VII and Section 503, it nevertheless departs from both laws in ways that represent landmark changes for civil rights law. The most striking departure is the ADA's reconceptualization of the definition of

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School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 275, 288 (1987). The ADA includes a number of "loopholes" for employers. For example, despite the requirement to provide reasonable accommodations, an employer is not required to provide a reasonable accommodation that would pose an "undue hardship" on the business, defined as an "action requiring significant difficulty or expense" when considered in light of other factors such as the cost of accommodation in relation to the resources of the employer, or whether the accommodation would alter the nature or operation of the business. 42 U.S.C. § 12111(10) (1994). Employers also need not hire individuals who pose a "direct threat" to the health and safety of others. See 42 U.S.C. §§ 12113(b), 12111(3) (1994).

131. See 42 U.S.C. § 12111(9) (1994).

132. See *id.*

133. See Karlan & Rutherglen, *supra* note 110, at 5-8 (discussing the statutory origins of the ADA).

134. 42 U.S.C. § 2000e-2 (1994). Title VII of the Civil Rights Act of 1964 is but one title of the comprehensive Civil Rights Act. Other titles concern access to public facilities, voting rights, education, and discrimination in federally assisted programs.

135. See 29 U.S.C. §§ 793 and 794 (1994).

136. 29 U.S.C. § 793 (1994) (amended 1992).

discrimination itself. Title VII defines discrimination in a negative sense: "employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it."<sup>137</sup> Thus plaintiffs under Title VII can complain about discrimination against them but cannot insist upon discrimination in their favor.<sup>138</sup> By contrast, plaintiffs under the ADA can complain about discrimination if their employers *do not* take their disabilities into account.<sup>139</sup>

Second, the ADA incorporates an affirmative action provision into the basic requirements of the Act.<sup>140</sup> Nothing of this kind exists under Title VII. While the ADA does not require the employer to give a disabled applicant or employee any preferential treatment over other applicants or employees, the reasonable accommodation provision fits most general definitions of affirmative action<sup>141</sup> because it requires employers to take account of an individual's disabilities and to provide special treatment for that reason.<sup>142</sup> The Rehabilitation Act contains a similar affirmative action provision, but applies only to federal contractors.<sup>143</sup> The ADA applies to virtually all private businesses regardless of whether they do business with the U.S. government.<sup>144</sup>

Third, the ADA costs businesses money. Title VII merely requires businesses to change their practices; the ADA requires businesses to pay for accommodations for disabled employees to avoid being discriminatory. The Rehabilitation Act has a similar provision for federal contractors, but provides federal money for

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137. Karlan & Rutherglen, *supra* note 110, at 9.

138. *See id.* at 3.

139. *See id.*

140. This Article maintains that the reasonable accommodation provisions of the ADA, 42 U.S.C. § 12112(b)(5), constitute a form of affirmative action in that they require an employer to take account of an individual's disability and to provide special treatment to him or her on the basis of that disability. *See* Karlan & Rutherglen, *supra* note 110, at 14 (suggesting a similar interpretation of the reasonable accommodation provision).

141. *See* EDLEY, *supra* note 11, at 16-17 (defining affirmative action as "any effort taken to expand opportunity for [minorities] by using membership in those groups that have been subject to discrimination as a consideration [in decisionmaking or allocation of resources]").

142. *See* Karlan & Rutherglen, *supra* note 110, at 14.

143. The Rehabilitation Act of 1973 requires "affirmative action" by federal agencies and contractors with respect to employment. *See* 29 U.S.C. §§ 793, 794 (1994).

144. *See* 42 U.S.C. § 12111(2),(5)(1994) (defining "covered entity" and "employer").

those businesses which comply.<sup>145</sup> The ADA provides no such reimbursement for private businesses.

Finally, the ADA operates under the assumption that existing jobs can be modified to enable more individuals to perform them. It asks the employer, in other words, to accommodate the job to the individual, rather than demand that the individual accommodate himself or herself to the job.<sup>146</sup> Jobs under the ADA are conceptualized less as rigid job descriptions and more as "contingent assemblies of tasks and responsibilities that can be changed to accommodate the needs of individual employees."<sup>147</sup> No such assumptions exist under any other civil rights law.

### III. Analysis of the ADA as a Politically Successful Affirmative Action Measure

In a government that is both predisposed to recycling old policy ideas<sup>148</sup> and increasingly opposed to affirmative action, one wonders how the ADA could have been enacted so successfully. Section I of this Article proposed four hypotheses for what a politically successful affirmative action law must look like: (1) it must be framed in terms of basic American values; (2) it must offer individual-based remedies; (3) it must be framed as opportunity-enhancing; and (4) it must comport with normative criteria on fairness.<sup>149</sup> This section tests the viability of these hypotheses by examining their role in the passage of the ADA. Specifically, this section examines the *Congressional Record*, transcripts from congressional hearings, and the mass media coverage of the floor debate on the ADA to identify how legislators framed the debate on the ADA, and how they identified, discussed and resolved the major issues on reasonable accommodation.

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145. See 29 U.S.C. § 791, 793 (1994) (providing that the Rehabilitation Act of 1973 requires, as a condition of receipt of federal funds, that federal contractors, programs and agencies comply with the discrimination provisions of the Act).

146. See Karlan & Rutherglen, *supra* note 110, at 39.

147. *Id.*

148. Paul Burstein and Nelson Polsby have observed that policymakers are rarely innovative in their approach to legislating. See BURSTEIN, *supra* note 2, at 38; see also NELSON W. POLSBY, *POLITICAL INNOVATION IN AMERICA* 112 (1984) ("The amount of recycling we have seen—in which proposals are made, defeated, and reemerge later on . . . suggests that at any point in history there is a limited stock of ideas that provide an agenda for policymakers").

149. See *supra* Part I.E. (extracting from the American Values, New Racism and Self-Interest Theories those criteria required for a politically successful affirmative action policy).



### A. *The American Values Hypothesis*

Under the American Values hypothesis, a politically successful affirmative action law must appeal to traditional American principles of egalitarianism and/or individualism.<sup>150</sup> Overwhelmingly, the bills in both houses of Congress were framed in the language of the early Civil Rights Movement, relying on dependable buzzwords of that era: "equal opportunity," "equal access," and "a level playing field." The vast majority of floor statements, regardless of the speaker's political ideology, made some reference to American values, history, and justice:

*Harkin (D - IA):* The American dream is the dream of opportunity for all. And when any American is denied the opportunity to contribute, we all lose. When we free the talents and ability of millions of Americans with disabilities, we all win.<sup>151</sup>

*Armey (R - TX):* The intent of all civil rights legislation is to provide equal opportunities and a level playing field for everyone. The ADA intends to extend these protections to the disabled, and I fully support that intent.<sup>152</sup>

*Durenberger (R - MN):* [This bill] is a statement of our social values.<sup>153</sup>

*Hoyer (D - MD):* American history and justice have been founded on the principle that all Americans regardless of race, sex, age, ethnicity or any other factor are created equal. The principle assumes that society will do what is necessary and possible to ensure that equality of opportunity.<sup>154</sup>

That the framing of the ADA as an American values bill was an effective political strategy can be measured by its effect on opposition to the bill. Commentators have argued that framing an issue in terms of American values automatically puts any opposing argument on the defensive and obscures issues of resource allocation that may be relevant to the debate.<sup>155</sup> Opponents of the bill generally, and of the reasonable accommodation provision in particular, could not successfully argue the issue of whether the disabled ought to be accommodated. That issue, with only one exception, was never contested.<sup>156</sup> As Richard Cohen observed in

150. See *supra* Part I.B. (discussing the American Values Theory).

151. 135 CONG. REC. 19,800 (1989).

152. 136 CONG. REC. 10,878 (1990).

153. 135 CONG. REC. 19,810 (1989).

154. 136 CONG. REC. 10,856 (1990).

155. See *supra* notes 106-107 and accompanying text (discussing the American Values Theory).

156. See 135 CONG. REC. 21,741 (1989) (Senator Garn, a disabled man himself, explained why he voted against the ADA: "How then is the goal to eliminate

the *National Journal*: "The limited opposition to the bill can be explained partly by its label as a civil rights measure. . . . Few lawmakers want to oppose a bill that seemingly has the appeal of apple pie and bears little cost to the federal government."<sup>157</sup>

Rather than contesting the principle of accommodation for the disabled, the debate centered predominately on the language of the reasonable accommodation provision—opponents found the language far too vague—and on the issue of who should bear the cost of the accommodations:

*McCollum (R - FL)*: The big debate over this bill has never been over the issue of providing civil rights and antidiscrimination laws to protect our disabled community in the workplace. The big issue is how do we minimize the costs to the employer while still doing that?<sup>158</sup>

*Delay (R - TX)*: Mandating access for the disabled may be a reasonable requirement. Mandating that a business spend money to provide that access is something different. But to leave the spending mandate open-ended—with the courts determining how much small businesses must spend to accommodate the disabled—is unheard of.<sup>159</sup>

*John Motley: Nat'l Federation of Independent Business*: Many in the disability community view the ADA bill as a declaration of their independence . . . . But there exists a fundamental difference between statutes for other groups and the ADA bill—namely, as currently written, access for the disabled comes at the *expense* of others. Under past civil rights laws, businesses were required to "open their doors" to the various minority groups. The ADA would do the same for the disabled. However, in addition to opening the doors, businesses will be required to spend their own money to make alterations to those doorways and make other accommodations.<sup>160</sup>

Those who opposed the ADA found themselves in the unsavory position of attempting to raise the issue of costs during a

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discrimination against the disabled to be accomplished? The true answer is to be found within individuals—not the government. . . . There is a second consideration and that is the importance of the disabled person to take responsibility for himself or herself.")

157. Richard Cohen, *It Sounds Great, But What's It Mean?*, NAT'L J., Sept. 16, 1989 in U.S. CONGRESS, HOUSE COMMITTEE ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 2256 (1989) [hereinafter LEGISLATIVE HISTORY]; see also Editorial, *Blank Check for the Disabled?*, N.Y. TIMES, September 6, 1989, at A24, in LEGISLATIVE HISTORY, *supra* at 2255 (stating that "No politician can vote against this bill and survive.").

158. 136 CONG. REC. 10,872 (1990).

159. 136 CONG. REC. 10,419 (1990).

160. LEGISLATIVE HISTORY, *supra* note 157, at 1909 (statement of John Motley, National Federation of Independent Business).

debate that centered largely on the more "compelling" issues of freedom and equality. Recognizing the power of American values rhetoric, some legislators and business groups who testified during congressional hearings attempted to frame the issue of cost in terms of American values as well. In particular, they characterized the issue as one of fairness and equal rights:

*Armey (R - TX):* [T]he ADA as currently written may do far more than assure equal access. . . . We should be careful that in protecting one group of Americans we do not forget the rights of others.<sup>161</sup>

*DeLay (R - TX):* This bill has a laudable goal, but it lacks fairness. We are pitting one group of Americans against another group of Americans.<sup>162</sup>

Despite these attempts, the debate on the costs of implementing the ADA for private businesses was limited. Estimates of both the costs and the benefits were so speculative during the course of the debates, one *New York Times* editorial scathingly remarked: "No one wishes to stint on helping the disabled. It requires little legislative skill, however, to write blank checks for worthy causes with other people's money."<sup>163</sup>

Supporters of the ADA responded to the cost argument with a skillful combination of cost-benefit analysis and American values rhetoric. They typically referred to unemployment statistics for the disabled,<sup>164</sup> together with estimates of the cost of such unemployment to the government in both welfare payments and lost productivity.<sup>165</sup> They then made reference to a 1986 Harris poll which found that 66% of disabled, unemployed Americans would like to be working,<sup>166</sup> cited a wide range of loose estimates for what the ADA might cost, and then concluded that the ADA will turn out to save America money.<sup>167</sup> The argument of cost was then returned to the rhetoric of American values:

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161. 136 CONG. REC. 10,879 (1990).

162. 136 CONG. REC. 10,419 (1990).

163. LEGISLATIVE HISTORY, *supra* note 157, at 2255.

164. A 1986 Harris poll found that two-thirds of all disabled Americans between the ages of 16 and 64 were not working. See INT'L CENTER FOR THE DISABLED, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 47 (1986) [hereinafter ICD]. At the time of the survey, only one in four worked full time, and another 10% worked part-time. See *id.* at 49. No other demographic group under 65 had such high unemployment, including young Blacks. See *id.* at 47.

165. Some estimates of the cost of disability to the U.S. pocketbook are as high as \$170 billion a year. SHAPIRO, *supra* note 122, at 28.

166. See ICD, *supra* note 164, at 50.

167. See 135 CONG. REC. 19,800 (1989) (testimony of Senator Harkin, who introduced the bill to the Senate on September 7, 1989).

*Jeffords (R - VT)*: [The ADA's] effects should not be judged in terms of cost, but rather realized potential.<sup>168</sup>

*Conte (R - MA)*: The investment [the ADA] represents will yield tremendous outcomes by allowing millions of American citizens to work, compete, and contribute to our country in ways they never have before.<sup>169</sup>

Sponsors and supporters of the ADA included a broad array of Democrats and Republicans, liberals and conservatives. The coalition which so successfully pushed the ADA through Congress utilized a relatively conservative technique to pass a remarkable new civil rights law: it appealed to traditional notions of self-help, self-empowerment, investment in human capital, and equal opportunity for all.<sup>170</sup> By framing the debate of the ADA in these terms, legislators were able to avoid any sustained discussion about what the law might cost. It is evident, then, that the rhetoric of American values continues to be a highly effective and influential method of framing a potentially contentious issue.

### *B. The Individual-Based Remedy Hypothesis*

Evidence on American attitudes toward affirmative action suggest that Americans do not approve of remedies to persistent inequality that grant rewards on the basis of group membership rather than individual merit.<sup>171</sup> A successful affirmative action measure will necessarily have to contain, then, an individual-based remedy.

The issue of an individual-based remedy in the ADA arose in the context of a debate on vagueness: how much detail should the specific provisions regarding reasonable accommodation contain? Many legislators and businesses argued that the law as it was drafted was far too vague to lend any guidance to employers who were attempting to provide accommodations for the disabled.<sup>172</sup> They argued that by leaving vague definitions to the courts' discretion, legislators were abdicating their duties to write law effectively.<sup>173</sup> Supporters of the ADA, however, insisted that broad

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168. LEGISLATIVE HISTORY, *supra* note 157, at 948.

169. 136 CONG. REC. 10,860 (1990).

170. See SHAPIRO, *supra* note 122, at 121 (discussing disability rights activists' strategy of using a conservative self-help/independence argument to win support for the ADA).

171. See notes 33-36 and accompanying text (presenting research which has demonstrated an American aversion to group-based remedies).

172. See LEGISLATIVE HISTORY, *supra* note 157, at 1594, 1657, 1908 (statements by the Associated Builders and Contractors, Associated General Contractors of America and the National Federation of Independent Businesses respectively).

173. See 136 CONG. REC. 10,419, 10,903 (1990) (statements by Congressmen

definitions provided employers and courts with the flexibility to resolve accommodation issues on a case-by-case basis.<sup>174</sup> They stressed the importance of adapting each individual's work environment to his or her specific disability, and of determining what kind of accommodation may be reasonable in light of the financial resources of a particular employer.<sup>175</sup>

Whereas the beneficiaries of traditional affirmative action programs typically receive special treatment by virtue of their group status as a "protected class" (however that may be defined), under the ADA, disabled individuals must not only be "qualified" to perform a given job,<sup>176</sup> but the treatment itself must be designed to address the individual's particular disability and the employer must be able to reasonably provide the accommodation.<sup>177</sup> The ADA thus manages to target a group of disadvantaged minorities, while simultaneously providing individualized remedies for members of that group.

### C. *The Opportunity-Enhancing Hypothesis*

Research has found that Americans favor affirmative action programs when they are framed as opportunity-enhancing rather

DeLay and Olin).

174. A number of congressional reports declared that reasonable accommodation involves a fact-specific, case-by-case approach intended to take account of the needs of the individual as well as the requirements of the job. See, e.g., H.R. REP. NO. 101-485, 101<sup>st</sup> Cong., pt. 2, at 62 (1990), reprinted in 1990 U.S.C.A.N. 303, 344-45.

175. The idea that employers must change the work environment to conform to the specific needs of a disabled employee is a radical new innovation in public policy, one that grew out of the disabled movement. In the past, disability was considered a medical defect which was located in the individual. See Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, in IMAGES OF THE DISABLED, DISABLING IMAGES 181 (Alan Gartner & Tom Joe eds., (1987)) [hereinafter Hahn, *Civil Rights*]. Policy changes were considered unnecessary because the emphasis at that time was improving the functional capabilities of individuals. See *id.* Since the 1970s, a more sociopolitical approach toward disability has developed that looks at disability as the product of the interaction between an individual and his or her environment. See *id.* at 182; see also Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. OF SOCIAL ISSUES 39 (1988). Under this approach, all aspects of society—architecture, communication, social institutions—are shaped by public policy. See *id.* at 40. Structures are built, for example, because laws and regulations permit them to be constructed in a certain manner. Once the environment is perceived as a product of public policy rather than as fixed or immutable, then it may be altered to meet the needs of a wide range of people. See Hahn, *Civil Rights*, *supra*, at 192.

176. See 42 U.S.C. § 12111(8) (1994).

177. See 42 U.S.C. § 12112(5)(A) (1994).

than results-oriented programs.<sup>178</sup> While the floor debate contained countless references to the ADA as an extension of the civil rights granted to other minorities and women under the Civil Rights Act of 1964,<sup>179</sup> the emphasis in the debate was less about equality per se, than it was about equal opportunities and self-sufficiency:

*Riegle (D - MI):* Since the days of its inception this Nation has encouraged and valued independence and self-sufficiency. There is no better expression of these values than the ADA.<sup>180</sup>

*Harkin (D - IA):* The ADA gives power to individuals with disabilities to make choices, to decide for themselves what kind of life they want to lead, and promotes a meaningful and effective opportunity to become independent and productive members of our society.<sup>181</sup>

*Owens (D - NY):* The Americans with Disabilities Act of 1990 is an opportunity bill which will provide parallel protection for people with disabilities as have long existed for other minority groups and women.<sup>182</sup>

*Bennett (D - FL):* The ADA removes the hurdles and opens the door—the door to opportunity.<sup>183</sup>

There is considerable evidence that suggests that framing the ADA as opportunity enhancing was a deliberate attempt to move away from any characterization of the ADA as an affirmative action measure. Legislators on both sides of the political spectrum clearly did not want to be seen as promoting special preferences. Despite the fact that special preferences and affirmative action were in no way at issue during the floor debates, legislators made frequent, unsolicited remarks intended to clarify in what ways the ADA is *not* a special preference law:

*Hoyer (D - MD):* This bill does not guarantee a job—or anything else. It guarantees a level playing field.<sup>184</sup>

*Edwards (D - CA):* [T]he ADA does not require an employer to hire unqualified persons, nor does it require employers to give

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178. See, e.g., Kluegel & Smith, *supra* note 20, at 797; see also Bobo & Kluegel, *supra* note 38, at 446.

179. See 136 CONG. REC. 10,857 (1990) (reporting Rep. Owens' statement that "[t]he Americans with Disabilities Act of 1990 is an opportunity bill which will provide parallel protection for people with disabilities as have long existed for other minority groups and women."); see also 136 CONG. REC. 10,878 (1990) (reporting Rep. Arney's statement that "the intent of all civil rights legislation is to provide equal opportunities and a level playing field for everyone. The ADA intends to extend those protections to the disabled.")

180. 135 CONG. REC. 19,891 (1989).

181. 135 CONG. REC. 19,803 (1989).

182. 136 CONG. REC. 10,857 (1990).

183. 136 CONG. REC. 10,611 (1990).

184. 136 CONG. REC. 10,856 (1990).

preference to persons with disabilities. The ADA simply states that a person's disability should not be an adverse factor in the employment process.<sup>185</sup>

*Hatch (R - Utah):* Persons with disabilities I have talked to stress that their entire desire is only to be given the same opportunity to work and fend for themselves like anyone else. They are looking for what this bill provides—equal opportunity, not equal results.<sup>186</sup>

*Jeffords (R - VT):* [The ADA's] effects should . . . not be measured in terms of effort, but in increased productivity; and not be characterized as preferential treatment, but as reaffirmed human dignity.<sup>187</sup>

Absolutely no mention is made of the reasonable accommodations provision in the context of affirmative action. No legislator during floor debates on opportunities for the disabled made reference to the fact that the bill requires that employers spend additional resources on the disabled so that they may realize opportunities in the marketplace. It is not true, as Rep. Edwards from California suggested, that the ADA "simply states that a person's disability should not be an adverse factor in the employment process."<sup>188</sup> The ADA specifically mandates that employers take employees' disabilities into account and provide a reasonable accommodation to ensure their equal participation in the workplace.<sup>189</sup>

That legislators were uncomfortable promoting a law with affirmative action attributes, even when framed as opportunity enhancing, can be seen in the way they bent over backwards to characterize the ADA as "just another civil rights law." Whereas opposition to the ADA consistently attempted to portray the ADA as a "radical" new civil rights law,<sup>190</sup> legislators who supported the ADA tended to downplay its significant departures from traditional civil rights laws by repeatedly making reference to the ways in which the ADA was based on traditional American values and "tried and tested" civil rights laws like the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.<sup>191</sup> Thus, while the

185. 136 CONG. REC. 10,868 (1990).

186. 135 CONG. REC. 19,804 (1989).

187. LEGISLATIVE HISTORY, *supra* note 157, at 948.

188. 136 CONG. REC. 10,868 (1990).

189. See 42 U.S.C. § 12112(5)(A) (1994) (defining as discriminatory any situation in which employers do not make reasonable accommodations).

190. See 135 CONG. REC. 19,881 (1989) (reporting Senator Humphrey's reference to the ADA as "one of the most radical pieces of legislation I have encountered in my eleven years in the Senate.").

191. See 135 CONG. REC. 19,800 (1989) (reporting Senator Harkin's statement that "[i]n seeking passage of the ADA, we are not asking for an uncertain venture

reasonable accommodation provision is in fact opportunity-enhancing—i.e., it assists disabled workers to become more productive members of the workforce—legislators seemed reluctant to talk about the provision beyond values rhetoric, and indeed went to great lengths to avoid the appearance of supporting an affirmative action law.

#### *D. The Procedural Fairness Hypothesis*

The procedural fairness hypothesis states that a politically successful affirmative action law will comport with Americans' overall sense of procedural fairness.<sup>192</sup> One criterion by which Americans evaluate fairness is participation: people judge procedures as fair when they believe they have had an opportunity to participate in the decision.<sup>193</sup>

The ADA's reasonable accommodation provision is structured to maximize this type of participation. Both the Senate Labor and Human Resources Committee and the House Education and Labor Committee suggest steps for arriving at an appropriate reasonable accommodation in any given set of circumstances. Reports from both of these committees state that employers should consult with the disabled individual in deciding the appropriate accommodation.<sup>194</sup> When the preliminary consultations between the employer and the employee or applicant are insufficient to identify a reasonable accommodation, the reports suggest further steps for identifying and assessing the reasonableness of possible accommodations.<sup>195</sup> All told, the ADA requires a level of negotiation and cooperation between employer and employee or applicant that is far more interactive than that involved under any other civil rights statute.

It appears that this combination of individual-based remedies and participatory procedures for obtaining these remedies may be a politically appealing compromise in a society that views class-

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into uncharted waters. We are demanding a return to the tried and tested values that have guided our Nation for two centuries."); see also 136 CONG. REC. 10,857 (1990) (reporting Rep. Owens's statement that the fundamental concepts of the ADA bill were not new, but were derived from the Rehabilitation Act of 1973 and the Civil Rights Act of 1964).

192. See *supra* notes 96-103 and accompanying text (deriving the Procedural Fairness hypothesis).

193. See *supra* notes 96-103 and accompanying text (discussing the criteria by which people judge procedures as fair).

194. See S. REP. NO. 101-116, at 34-35 (1989); see also H.R. REP. NO. 101-485, pt. 22, at 66 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 348-49.

195. See S. REP. NO. 101-116, at 34-35 (1989).



based remedies as inherently unfair. In the case of the ADA, the provisions delineating a process whereby all parties agree to a reasonable accommodation were precisely what appealed to legislators and lobbyists as a fair compromise between the interests of the disabled and the business community. Arlene B. Mayerson, who testified before the Committee on Education and Labor on behalf of the Disability Rights Education & Defense Fund, stated: "[r]easonable accommodation is a flexible standard that balances the rights of the applicant or employee with the employer's legitimate business interests."<sup>196</sup> Congressman Weiss, like many legislators, echoed those sentiments: "The ADA is a reasonable and prudent bill that strikes a balance between civil rights of people with disabilities and the legitimate concerns of both large and small businesses."<sup>197</sup>

#### IV. Implications of the ADA for Race Targetted Affirmative Action Policy

As an affirmative action policy, the ADA cures much of what is lacking in current race-targeted policies. Congress not only framed the ADA as an issue of American values, but it devised a law which offered individualized, opportunity-enhancing remedies that comport with normative criteria for procedural fairness. The question of how the ADA's successes may be adapted to the context of race-targeted policy, however, still remains. Several arguments suggest that disabled Americans face such unique forms of discrimination that there is no adequate analogue in the circumstances of racial and ethnic minorities. This section tests the validity of these criticisms and presents some ideas for applying an ADA model to race-based policy initiatives.

##### A. Arguments Against Adapting an ADA Model to the Context of Race

First, one may argue that American attitudes toward the disabled are significantly different from attitudes toward racial and ethnic minorities. Commentators have observed, for example, that prejudice toward the disabled is more subtle than overt racial bigotry.<sup>198</sup> Disabilities are usually regarded as signs of weakness, helplessness and biological inferiority. They inspire pity, not

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196. LEGISLATIVE HISTORY, *supra* note 157, at 1626.

197. 136 CONG. REC. 10,875 (1990).

198. See, e.g., Hahn, *Civil Rights*, *supra* note 175, at 197.

malevolent intolerance.<sup>199</sup> This argument would suggest that support for the ADA may well have been based on a sense of paternalism or charity toward the disabled, attitudes which are less likely to inspire support for race-targeted legislation.<sup>200</sup>

A review of the *Congressional Record*, however, shows that legislators during the floor debate emphasized “self-help” rather than paternalism, stressing the importance of helping disabled Americans to become active participants in American economic and social life, and avoiding any suggestion of victimization.<sup>201</sup> The emphasis on self-empowerment is consistent with accounts—most notably Shapiro’s aptly titled book *No Pity*<sup>202</sup>—of a thriving new self-identity among members of the growing disability movement.<sup>203</sup> Shapiro describes a movement whose core is rooted in the idea that disability is neither tragic nor pitiable, but a source of pride and a fundamental part of one’s identity.<sup>204</sup> In lobbying for the ADA, the disability movement’s leaders relied on an explicitly conservative argument that played off the movement’s new self-image: disabled people wanted independence, jobs, and self-empowerment, not a paternalistic government handing them welfare checks.<sup>205</sup> The tenor of the congressional debates on the ADA echoed these themes.

A second argument for distinguishing the ADA from race-targeted policy emphasizes the unique barriers facing the disabled. While disabled individuals may well face invidious or structural discrimination in the labor market, they also face

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199. *See id.*

200. *See* SNIDERMAN & CARMINES, *supra* note 5, at 1-14 (arguing that the “charitable” impulse of White liberals at one time transformed the politics of race, but that the era of affirmative action has fundamentally changed racial politics).

201. *See supra* notes 170, 180-181 and accompanying text (providing examples of an emphasis during congressional debates on self-help and self-sufficiency).

202. *See* SHAPIRO, *supra* note 122.

203. A Louis Harris & Associates survey conducted for the International Center for the Disabled (ICD) in 1986 found clear signs of an emerging group consciousness among disabled people. *See* ICD, *supra* note 164, at 9-10. The survey found that 74% of all disabled Americans felt at least some sense of common identity with other disabled people. Almost half felt that disabled people are a minority group in the same sense as are Blacks and Hispanics. Almost 75% felt that anti-discrimination laws that protect minorities should also protect disabled people. *See id.*

204. *See* SHAPIRO, *supra* note 122, at 20. In his discussion of the growing disability movement, Shapiro points to traditional signs of a new and thriving group identity: the reappropriation of traditionally demeaning language (“crips”)—similar to the appropriation of words like “fag” and “dyke” in the gay and lesbian community—and the fight against demeaning and paternalistic imagery in the mass media. *See id.* at 30-40.

205. *See id.* at 120-21.

physical barriers to labor market participation which the reasonable accommodation provision is intended to redress. A wheelchair-bound individual cannot work, for example, if he or she cannot get up a set of stairs. By contrast, barriers for racial minorities involve more complex forms of discrimination which cannot be remedied by simply providing a ramp or widening doorways.

This Article does not suggest that remedies to racial discrimination are as simple as, or analogous to, remedies such as the reasonable accommodation provision. Rather, the case of the ADA's reasonable accommodation provision is used as an illustration of those characteristics of affirmative action policy which have proven politically feasible. The next section posits that it is not the specific forms of accommodations (e.g., ramps, doorways) which are useful for race-targeted affirmative action. Rather, it is the underlying assumption of the ADA's affirmative action provision—that the state, employers, and employees can devise innovative solutions for maximizing the ability of individuals to become productive workers—that may be applicable to the context of race.

Third, one may argue that the disabled differ from racial minorities because, unlike ascriptive social classifications such as race, Americans can become disabled at any time. In fact, fewer than 15% of current disabled Americans were born with their disabilities.<sup>206</sup> The ADA may appeal to many as a type of future insurance, that is, even if individuals are not disabled now, they may one day be so. Indeed, legislators repeatedly cited in their floor statements aggressive estimates of the number of disabled people in the United States—43 million disabled Americans or close to one-fifth of the U.S. population.<sup>207</sup> Many legislators told stories of their own disabilities or those of family members or friends, personalizing the problem of disability discrimination, bringing it “home,” framing disability as an issue which touches most of our lives.<sup>208</sup> It is hard to imagine how, in a society that increasingly believes racism is no longer a problem, legislators

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206. *See id.* at 7.

207. The ADA itself notes that 43 million Americans have one or more physical or mental disabilities. *See* 42 U.S.C. § 12101(a)(1) (1994). Other estimates are closer to 35 million. *See also* SHAPIRO, *supra* note 122, at 6.

208. *See* Barbara M. Altman & Sharon N. Barnartt, *Moral Entrepreneurship and the Promise of the ADA*, 4 J. OF DISABILITY POL. STUDIES 21, 28 (1993) (noting that Senators Tom Harkin, Edward Kennedy, Robert Dole and Daniel Inouye, as well as Representative Tony Coelho all either have a family member with a disability or have a disability themselves).

could ever successfully “spin” legislation for racial minorities in the same way.

It may well be true that there are aspects of the “spin” given to the ADA which could never be applied to the context of race-based policy. However, the wealth of social science literature on racial attitudes suggests that there are, in fact, effective strategies for framing race-targeted policies that parallel the theme of universality used in the context of the ADA. There is evidence, for example, that Whites are more likely to support job training programs for Blacks if the policy argument is made on grounds that are universal, applying equally to Blacks and Whites (e.g., “because the government ought to help people who are out of work and want to find a job”) than if the justification is race-targeted (e.g., “because of the historic injustices Blacks have suffered”).<sup>209</sup> Thus it would seem that framing policies in a way that emphasizes universality—even when the policies are in actuality aimed at a specific group—may be an effective strategy in race-targeted policymaking.

Finally, the idea that a politically successful affirmative action policy must offer individualized, opportunity-enhancing remedies appears to fly in the face of the current goals and strategies of the Civil Rights Movement. The Civil Rights Movement and government agencies like the Equal Employment Opportunity Commission turned to race-targeted affirmative action measures only after it became clear that removing legal barriers to equal opportunity was not enough to improve the status of minorities in this country. Similarly, group-based remedies were specifically chosen to redress what many perceive to be a group injury: individuals are not harmed by race discrimination because they are individuals but because they are members of a racial minority. Thus, to design an affirmative action policy with individual remedies and an emphasis on opportunity rather than results, would appear to shift the civil rights agenda backwards by about twenty-five years.

It is counterproductive to conceive of affirmative action as an all-or-nothing contest: either egalitarian or individualist, either group-based or individual-based. The ADA represents an alternative vision whereby elements of each of these approaches are contained in a single policy. The ADA is individualist in its

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209. SNIDERMAN & CARMINES, *supra* note 5, at 121 (describing the results of two surveys concerning race-targeted policy and universal job training policy); see also Bobo & Kluegel, *supra* note 38, at 460 (finding greater support for race-targeted opportunity-enhancing policies than race-targeted equal outcome policies).

emphasis on equal opportunity rather than equal results.<sup>210</sup> It is egalitarian in that it does more than prohibit formal discrimination as other civil rights laws do; it requires employers to spend money to accommodate disabled employees so that they may compete effectively in the marketplace.<sup>211</sup> In other words, the ADA speaks not only of employment opportunities, but *meaningful* employment opportunities. Likewise, the ADA is group-based in that it specifically targets the disabled community.<sup>212</sup> It is individual-based in that mere status as a disabled person alone does not determine whether one will receive the benefit of the ADA's reasonable accommodation provision; nor does it determine what kind of accommodation one is entitled to receive.<sup>213</sup> It is therefore entirely possible to draft affirmative action laws which are both consistent with a more aggressive civil rights agenda, and formulated to win popular support.

*B. Application of an ADA Model to the Context of Race-Targeted Affirmative Action*

After the successful passage of the Civil Rights Act in 1964, civil rights advocates turned their attention to a critique of formal equality and to the remedial possibilities of affirmative action. President Lyndon B. Johnson, one of the first outspoken proponents of affirmative action at the federal level, captured the essence of the criticisms of colorblind policies in his now famous 1965 Howard University speech:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair . . . [i]t is not enough just to open the gates of opportunity. All of our citizens must have the ability to walk through those gates.<sup>214</sup>

While the affirmative action policies which have evolved

210. *See supra* notes 179-191 and accompanying text (discussing the ADA as an opportunity-enhancing law).

211. *See supra* notes 140-145 and accompanying text (discussing how the ADA is in many ways more egalitarian than other civil rights laws).

212. *See supra* notes 126-128 and accompanying text (discussing the purpose of the ADA as a disability rights law).

213. *See supra* notes 171-177 and accompanying text (discussing the ADA's individual-based remedies).

214. LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 126 (1967).

since the 1960s have proven remarkably unpopular among the American public,<sup>215</sup> the ADA's reasonable accommodation provision manages to successfully capture the spirit of affirmative action while sustaining popular support. This section considers how to design race-targeted policies that achieve a similar balance.

To begin, we must recognize that embedded in the issue of race discrimination are a number of problems which call for different courses of action.<sup>216</sup> Redressing disparities in income and wealth between middle class Blacks and Whites does not, for example, require the same remedy as decreasing unemployment rates or increasing education and skill levels among the poor. For the limited purpose of illustration, this section focuses on the application of an ADA model to policies designed to remove barriers to the free flow of information regarding job opportunities and to policies intended to rectify competitive disadvantages in the labor market for minorities due to inadequate skill formation.<sup>217</sup>

Secondly, to argue that the ADA's affirmative action provision should serve as a model for race-based policy is *not* to suggest that Title VII should be amended in ways that parallel the ADA. The ADA's approach to reasonable accommodation is premised on a conception of discrimination that fundamentally differs from that found in Title VII.<sup>218</sup> To change the definition of race discrimination after forty years of "colorblind" jurisprudence is probably neither politically nor socially feasible. Rather than viewing reasonable accommodation in the context of race as a *right*, one can conceive of the reasonable accommodation provision as a heuristic device useful for generating creative solutions for maximizing the ability of minorities to become productive workers.

### 1. Access to Information

Obstacles to the free flow of information about jobs and job candidates has consequences for both employers and potential employees. When employers lack information about qualified minority candidates, they may be more likely to practice statistical discrimination, making decisions based on average characteristics

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215. See *supra* notes 19-20 and accompanying text (citing studies which have found extremely low levels of support for affirmative action policies).

216. See SNIDERMAN & CARMINES, *supra* note 5, at 10-11 (discussing the complexities of designing policies concerning race).

217. There is no obvious reason why the model couldn't be extended to other problems of race (or gender) discrimination and most notably affirmative action in education.

218. See *supra* notes 137-138 and accompanying text (discussing the ADA's definition of discrimination as a departure from past civil rights laws).

or stereotypes of certain groups rather than on the qualifications of individual candidates.<sup>219</sup> At the same time, potential candidates are placed at a competitive disadvantage in the labor market when they lack information on job opportunities due to informal recruitment and promotion procedures that fail to reach minority candidates.

In a recent study of 3200 employers, Professors Holzer and Neumark found that affirmative action in recruiting methods<sup>220</sup> successfully increases the hiring of women and minorities.<sup>221</sup> Establishments using affirmative action in recruiting are more likely to use intensive screening methods that enable them to identify more qualified women and minority candidates.<sup>222</sup> The authors argue that by using more intensive screening methods, employers obtain additional information about each candidate and pay less attention to more obvious—but potentially more limiting—signals of quality such as education, previous employment, and criminal history.<sup>223</sup> This additional information on individual candidates, the authors suggest, diminishes the probability that employers will practice statistical discrimination.<sup>224</sup> Other forms of affirmative action which aid the free flow of information in the employment context may include affirmative marketing and data collection and disclosure of statistics regarding minority participation and success.

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219. See HARRY J. HOLZER & DAVID NEUMARK, INSTITUTE FOR RESEARCH ON POVERTY, WHAT DOES AFFIRMATIVE ACTION DO? 55 (1988) (suggesting that when employers obtain more information, they pay less attention to noisier signals, such as education, previous employment and criminal history).

220. Recruitment methods included walk-ins, referral from employees/others, state/community agency, private agency, newspaper, and referral from unions/schools. See Holzer & Neumark, *supra* note 219, at 8.

221. See *id.* at 29, 48 (finding that the candidates hired under affirmative action recruiting plans are no less qualified than other hires and in fact perform better than White and male coworkers).

222. See *id.* at 44 (stating that screening methods included whether a test/work sample was required, whether a drug test/physical was required, whether the employer checked references, whether the employer checked education, whether the employer checked criminal records, whether a written application was required, and whether an interview was required). The authors found that with the exception of requiring an interview, employers who used affirmative action in recruiting or hiring were more likely to make use of each type of screening method. See *id.* at 24.

223. See *id.* at 35, 55 (noting employers who use affirmative action in recruiting tend to increase the pool of qualified minority candidates and also appear more willing to consider hiring those with stigmatizing personal characteristics and histories).

224. See *id.* at 55 (finding employers are less likely to practice statistical discrimination and pay less attention to qualities such as education, previous employment and criminal history when they obtain more information).

These information-driven forms of affirmative action are explicitly nonpreferential—they neither mandate quotas nor set aside any particular benefit based on race. Their aim is solely to increase the pool of qualified minorities by informing them of a benefit that had previously been foreclosed to them because of biased decisionmaking.<sup>225</sup> By taking affirmative steps to level the playing field with regard to employment opportunities, this form of affirmative action appeals to American Egalitarianism. Additionally, these information driven forms of affirmative action do not violate the principle of individualism by awarding a benefit on a basis other than individual talent, effort, and training. They expand the pool of qualified candidates but do not make exceptions for what constitutes “qualified.” For this reason, such policies may be framed as opportunity-enhancing rather than result oriented.

Finally, because the policies tend to generate more information about *all* candidates (regardless of race), employers are more likely to evaluate candidates on a wider range of characteristics.<sup>226</sup> More rigorous screening processes—such as the use of a written application, a test/work sample, or an interview—provide applicants with the opportunity to convey to employers positive work characteristics not visible to the employer who relies on more limited screening procedures such as reference and education checks. Because more rigorous screening methods afford candidates greater opportunities to represent themselves, the policies are more likely to comport with prevailing notions of procedural fairness. Thus, information-driven, race-targeted affirmative action policies conform to all four of the criteria previously discussed as necessary for popular support.<sup>227</sup>

One could argue however, that such forms of affirmative action fail to address one of the more substantive motivations for affirmative action generally: opportunities alone are often not enough to level the playing field. No amount of recruiting, for example, can assist those who were given inferior education or have received little to no job training. Without simultaneous attention to skill formation, information-driven affirmative action policies cannot address the more fundamental effects of this country’s history of race discrimination on racial and ethnic minorities. It is this issue that may particularly benefit from the

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225. See Adams, *supra* note 13, at 1397.

226. See Holzer & Neumark, *supra* note 219, at 32 (suggesting that as employers gather more information, they are willing to hire people with negative characteristics).

227. See *supra* Part I.E.



ADA's approach to affirmative action.

## 2. Skill Formation

There is considerable evidence that economic restructuring over the last two decades has caused declines in manufacturing employment, which in turn has had disproportionately negative effects on the earnings or employment, or both, of Blacks.<sup>228</sup> The combination of increased world market competitiveness, new technologies, and the spread of innovative approaches to production design have shifted demand for labor from the less educated and poorly skilled to the more educated and highly skilled.<sup>229</sup> The increased demand for skilled labor has magnified the disadvantages Blacks suffer from their lower skill levels in the labor market<sup>230</sup> and suggests that the issue of skill formation is of crucial significance for minorities.

Most businesses in the United States do not spend enough on job training.<sup>231</sup> The reason for this is endemic to a market

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228. See WILSON, *supra* note 84, at 39-46 ; JAMES JOHNSON & MELVIN OLIVER, *Structural Changes in the U.S. Economy and Black Male Joblessness: A Reassessment*, in URBAN LABOR MARKETS AND JOB OPPORTUNITY 113 (G. Peterson & W. Vroman eds., 1992) (analyzing the decline of central-city manufacturing employment); Gregory Acs & Sheldon Danziger, *Educational Attainment, Industrial Structure, and Male Earnings: 1980's*, 28 J. OF HUM. RESOURCES 619 (1993) (finding shifts in industrial employment patterns had a larger effect among Blacks than among Whites and Hispanics); see also John Bound & Harry Holzer, *Industrial Shifts, Skills Levels, and the Labor Market for White and Black Males*, 75 REV. OF ECON. & STAT. 387 (1993) (finding demand shifts away from manufacturing resulted in 40%-50% unemployment for less-educated young Blacks in the 1970s).

229. See CARL W. STEINBERG III AND WILLIAM G. COLMAN, *AMERICA'S FUTURE WORK FORCE* 32-35 (1994) (citing government statistics that show above average growth among jobs requiring relatively higher levels of education and training); James N. Danziger, *Social Science and the Social Impacts of Computer Technology*, 66 SOC. SCI. Q. 3 (1985) (discussing how new technologies and methods have created a demand for workers with greater skills and training); see also Randy Hodson et al., *Customized Training in the Workplace*, 19 WORK & OCC. 272, 273-76 (1992) (discussing the current demand for new skills).

230. See STEINBERG & COLMAN, *supra* note 229, at 33 (suggesting the earnings increase for college graduates may well be the result of a worse market for high school graduates); John Bound & Richard Freeman, *What Went Wrong? The Erosion of Relative Earnings and Employment Among Young Black Men in the 1980s*, 107 Q. J. OF ECON. 201 (1992); see also John Bound & George Johnson, *Changes in the Structure of Wages in the 1980's: An Evaluation of Alternative Explanations*, 82 AM. ECON. REV. 371 (1992).

231. See Hodson et al., *supra* note 229, at 276-77; see also Wolfgang Streek, *Skills and the Limits of Neo-Liberalism: The Enterprise of the Future as a Place of Learning*, 3 WORK, EMPLOYMENT & SOC. 89, 93 (1989) (stating that United States firms tend to invest training for their blue collar work forces only in times of rapid technological change and even then, only for their most skilled maintenance workers and not for the bulk of their blue collar workers).

economy in which the free labor contract reigns: firms can never appropriate the skills imparted to a worker.<sup>232</sup> Skills instead become the property of the worker, a form of capital workers may take with them when they leave, and which firms, because they cannot own, lack an incentive to provide.<sup>233</sup> Because workers in an open labor market have the right to move from one firm to another, firms will always be concerned that competitors will "poach" a firm's trained workers by offering them a higher wage without themselves investing in training.<sup>234</sup> Thus, because employers are loath to invest in training that they may lose to competitors, and competitors will not invest in training for the same reasons, the result is a chronic lack of skilled labor.<sup>235</sup> As one commentator put it: "If training is left to the market, there will be no training."<sup>236</sup>

Subsidized on-the-job training programs<sup>237</sup> have become popular as a way of compensating for this poor investment in training.<sup>238</sup> Funding for training programs has primarily come from the states, although the goal for such funding is typically to induce businesses to relocate, rather than to re-skill any segment of the labor force.<sup>239</sup> Training may include anything from basic literacy and mathematics classes to advanced classes in blueprint reading and statistical process control, to cross training in new skills and advanced training in electronics.<sup>240</sup>

Holzer and Neumark found that job training for minority workers hired under nonpreferential affirmative action recruiting policies tended to *out-perform* White, male workers.<sup>241</sup> Employers

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232. See Streek, *supra* note 231, at 93.

233. See *id.*

234. See Hodson et al., *supra* note 229, at 277.

235. See Streek, *supra* note 231, at 94. By contrast, in countries where skill is treated as a collective good, "poaching" may be prevented by government regulation. See *id.* at 95-96.

236. See *id.* at 94.

237. Studies have found that on-the-job training programs are far more effective in skill formation than vocational training schools. See Hodson et al., *supra* note 229, at 273; Streek, *supra* note 231, at 98-99. Between 1929 and 1982, on the job training is estimated to have been responsible for 55% of the improvements in labor productivity, compared to only 26% for pre-employment schooling. See EDWARD F. DENISON, *TRENDS IN AMERICAN ECONOMIC GROWTH, 1929-1982*, 30 (1984).

238. See Hodson et al., *supra* note 229, at 277 (finding that state sponsorship and funds are often important parts of a state's proposal for enticing a new manufacturing facility to locate in the state).

239. See *id.* at 277-78.

240. See *id.* at 281-82 (describing the various training programs).

241. Holzer & Neumark, *supra* note 219, at 48 (surveys indicating women and minorities hired under affirmative action program perform better than White males).

who provided job training to minority workers hired under preferential affirmative *hiring* policies (workers who tend to be, on average, less qualified than other workers) appeared to offset any differentials in qualifications such that the *performance* of affirmative action hires was generally not inferior to that of other workers.<sup>242</sup>

The benefits of investments in skill formation extend not only to employers but to workers as well. The skills employees gain through job training improve their ability to earn better wages, to qualify for more jobs, and to earn promotions and other benefits.<sup>243</sup> Training provides individuals with the ability to compete effectively in an economy in which state-of-the-art skills are amply rewarded.

Given the need for and benefits of skill formation, then, the prospects for tying job training to a politically successful affirmative action plan seem promising. One possibility would involve state subsidized job training programs similar to those used to entice businesses to relocate. Rather than using relocation as the condition for subsidization, however, skill-driven affirmative action programs would require implementation of information-driven affirmative action policies such as those discussed in the previous section. Firms would not be required to hire a certain number of minority applicants, but must instead demonstrate that their recruiting and screening methods are intended to maximize the applicant pool for qualified minorities.<sup>244</sup>

Once a business has met its burden in implementing information-driven affirmative action procedures, state subsidies would then assist in funding training for those hired from that applicant pool. Here policymakers could choose between providing job training for all workers who need it—regardless of race—or limiting the training to minority candidates only. While a stronger case can always be made for nonpreferential affirmative action in any attempt to garner public support,<sup>245</sup> an affirmative

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242. See *id.* (stating employers will take steps to offset the less-qualified hires).

243. Hodson et al., *supra* note 229, at 287 (discussing the effects of skills training on the workforce).

244. Whether firms decide to change the qualifications they seek in applicants based on the availability of subsidized training programs—thereby enlarging the applicant pool still farther—is a choice firms could make on an individual basis.

245. There is evidence that there are ways of framing race-targeted affirmative action policies in ways that generate near majority or majority levels of support from the public. See SNIDERMAN & CARMINES, *supra* note 5, at 121; see also Bobo & Kluegel, *supra* note 38, at 460 (suggesting that framing policy as “opportunity-enhancing”, even when race-targeted, is a politically viable approach). Sniderman and Carmines found that Whites were approximately half again as likely to support

action policy that focuses both on information and training—whether race targeted or not—would satisfy the four criteria outlined in this paper. First, like the ADA, a policy that focuses on skill formation comports with Americans' spirit of egalitarianism and individualism. It is individualist in its emphasis on equal opportunity and a level playing field rather than equal results. It is egalitarian in that it provides workers with the substantive tools to improve their place in the marketplace.

Second, it offers "individual-based remedies." Like the ADA's reasonable accommodation provision, which applies only to qualified employees based on individual need, a skill-driven affirmative action policy would provide job training only to qualified hires and then only on an individualized basis, depending on the candidate's incoming skills, the requirements of his or her job, and the resources of the firm. Under policies in which employers provide training regardless of race, nobody receives a benefit by virtue of group status alone. Explicitly race-targeted job training policies would arguably follow the ADA model more faithfully: minorities would be targeted by the policy, but group status alone would not determine whether one would receive the benefit of job training; nor would it determine how much job training one is entitled to receive.

Third, because the policy is expressly concerned with information and skill formation rather than hiring (although both information and skill formation would presumably increase the rate of hires for minority candidates),<sup>246</sup> it is not difficult to frame the policy as opportunity-enhancing rather than results oriented.

Finally, a policy which combines information-driven affirmative action practices with job training offers job candidates and employees greater opportunities to "participate"<sup>247</sup> in decisions

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job training programs for Blacks if the policy argument was made on grounds that were universal, applying equally to Blacks and Whites (e.g., "because the government ought to help people who are out of work and want to find a job") than if the justification was race-targeted (e.g., "because of the historic injustices blacks have suffered"). See SNIDERMAN & CARMINES, *supra* note 5, at 121. Bobo and Kluegel found that race-targeted policies which were framed as opportunity enhancing received more support than policies framed as results oriented. See Bobo & Kluegel, *supra* note 38, at 460. But there is also evidence that race-targeting *diminishes* Whites' support for affirmative action policies, regardless of how they are framed. See *id.* at 458. Bobo and Kluegel found, for example, that race targeting diminishes support for opportunity-enhancing affirmative action policies by about 22% relative to similar income-targeted policies. See *id.*

246. See Holzer & Neumark, *supra* note 219, at 3 (finding that affirmative action in recruiting and hiring tends to increase the number of minority applicants as well as employees).

247. This Article uses the term "participate" loosely—candidates participate in

about hiring and job training, and as a consequence is more likely to be perceived by other workers as fair. Affirmative action recruiting practices like those outlined in Part IV.A.4 allow employees to present themselves as a product of something other than their education credentials and criminal histories. Similarly, because of the wide variability in job training options—from basic reading and math skills assistance to high level electronics training—employees can work with employers to establish training priorities in ways that parallel employee/employer interactions under the ADA's reasonable accommodation provision.

Thus, state subsidized job training in firms which have implemented rigorous information-driven affirmative action practices, would seem to comport with the criteria which social science research has identified as necessary for a viable affirmative action policy and which have been so strikingly embodied in the ADA's reasonable accommodation provision. Further research is undoubtedly needed to quantify how such a policy would affect the employability and income of minority workers. Additional scholarship which applies such a framework to the context of other race-related issues (e.g., education) and to the context of gender are also needed. This Article is not intended to prescribe the specifics of any given affirmative action policy, but instead to demonstrate how the ADA's affirmative action provision might plausibly be applied to the context of race-based policy in employment.

## **Conclusion**

Race-targeted affirmative action measures have suffered from a striking lack of popular support in this country. While opponents of such measures have mobilized an effective legal and public relations campaign, proponents of affirmative action have yet to engage in any sustained effort to design innovative programs which both achieve the goals of the modern-day Civil Rights Movement and pass muster with the American public. This Article looked at social science research on attitudes toward principles of equality and affirmative action to identify those characteristics of an affirmative action policy that would be amenable to majority America. It then tested the viability of those criteria by examining their role in the passage of the ADA,

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the sense that they have more of an opportunity to represent themselves to employers who use more rigorous screening methods to hire. This is not to suggest that they necessarily participate in the decisionmaking process.

arguably the most aggressive, politically successful affirmative action law in U.S. history. Four criteria played a critical role in the ADA's success: (1) the framing of the ADA during floor debates as an issue of American values, as well as its design as (2) an opportunity-enhancing law (3) with individual remedies (4) that comport with generalized notions of procedural fairness. It is these basic criteria which policymakers should utilize in the context of race-based affirmative action to design effective affirmative action policies which neither compromise the agenda of the modern-day Civil Rights Movement, nor suffer at the hands of a hostile American public.

