

# IMPLICIT BIAS, ELECTION '08, AND THE MYTH OF A POST-RACIAL AMERICA

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## ABSTRACT

*The election of Barack Obama as the forty-fourth President of the United States signals that the traditional modes of thinking about race in America are outdated. Commentators and pundits have begun to suggest that the election of a black man to the nation's highest office means that the United States has entered a post-racial era in which civil rights laws are becoming unnecessary. Although President Obama's election means that explicit, open anti-black racism has largely faded, an analysis of the campaign's rhetoric and themes suggests that unconscious racism is alive and well. Rather than suggest a retreat from traditional civil rights protections, the 2008 election calls for enhancing and maintaining efforts to ensure that civil rights laws address less virulent, but persistent, forms of racism that persist in America today.*

I. INTRODUCTION.....	659
II. THE 2008 ELECTION AND RACE AT THE BALLOT BOX .....	662
A. <i>Black Political Success and Black Voters</i> .....	663
B. <i>Racial Messages in Modern Political Campaigns</i> .....	669
C. <i>Racial Messages in the 2008 Presidential Campaign</i> .....	673
1. <i>Too Black</i> .....	674
2. <i>Primate Imagery</i> .....	676
3. <i>Slurs</i> .....	677
4. <i>Foreign, Arab/Muslim</i> .....	678
5. <i>Interracial Taboo</i> .....	681
D. <i>Conclusion</i> .....	681
III. THE 2008 ELECTION AND THE ROLE OF UNCONSCIOUS BIAS IN EMPLOYMENT DECISIONS.....	682
A. <i>The Science of Implicit Racial Bias</i> .....	683
B. <i>Implicit Bias and Title VII</i> .....	687
C. <i>Implicit Bias and the Obama Campaign</i> .....	693
1. <i>Unconscious Bias and Voting in General</i> .....	694
2. <i>Walking the Racial Tightrope</i> .....	695
3. <i>Implicit Bias and the Primary Election Part I</i> .....	699
4. <i>Implicit Bias and the Primary Election Part II: The "Bradley Effect"</i> .....	702
5. <i>The General Election: A Surprise Ending</i> .....	709
D. <i>Conclusion: Employment Discrimination and the 2008 Election</i> .....	711
IV. CONCLUSION: POST ELECTION AND BEYOND.....	714

## I. INTRODUCTION

Barack Obama's rapid rise in American politics and his ascension to the nation's highest office is historic. Without question, his election signals a seismic shift in the way Americans think and talk about race. It is a significant leap in America's long journey towards racial equality. Americans on both the political left and right have begun to

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assert that we now live in a post-racial country.<sup>1</sup> If the country has entered a new era of race relations, what should become of the laws that were created for the era that has supposedly past?

For many, the answer to this question is that the laws prohibiting discrimination in the workforce and in the electoral processes are no longer useful. In the words of Professor Richard Epstein, discrimination should now be left to “die on the vine,”<sup>2</sup> now that it has been deprived of the widespread acquiescence and social support that once nourished it. Under this view, the civil rights laws have presumably served their purpose in routing out deeply entrenched, self-perpetuating bias. Such bias would have kept Barack Obama from even attending Harvard Law School, much less running for the nation’s highest office. If the barriers that bias creates are sufficiently diminished that he can become President, then the civil rights laws should arguably conform to the nation’s new reality. A postelection survey reveals that Barack Obama’s election to the Presidency has led many Americans to assert that racism is less of a problem in the United States and that policies designed to address racial inequality might now be unnecessary.<sup>3</sup>

The wholesale repeal of the civil rights laws hardly seems imminent. The current Congress has strengthened Title VII’s protection against employment discrimination by extending the statute of limitations for such actions.<sup>4</sup> This legislation was a response to the Supreme Court’s ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, which imposed a strict 180-day statute of limitation on these actions.<sup>5</sup> As *Ledbetter* demonstrates, judicial rulings provide the more likely route by which the rhetoric of a post-racial America will have its bite. Even without Congress, the courts can chip away at the protections that civil rights laws afford. Two of the Supreme Court’s most notable cases in its recent term involved civil rights and

1. Individuals on the political right, such as Ward Connerly and Abigail Thernstrom, argue that Barack Obama’s election is a significant step towards a post-racial America. Cathy Young, *Obama May Boost Foes of Affirmative Action*, CHI. SUN-TIMES, Jan. 28, 2009, at 23. Even those on the political left raise similar prospects. As recent as March 2009, with a photograph of President Obama, *The American Prospect* magazine’s cover story was “Post-Racial. Really?: The NAACP Navigates the New Politics of Race.” AM. PROSPECT, March 2009, at cover; see also Adam Serwer, *The Other Black President: The NAACP Confronts a New Political—and Racial—Era*, AM. PROSPECT, Mar. 2009, at 12.

2. Debate, *Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009), available at <http://www.pennumbra.com/debates/pdfs/ImplicitBias.pdf>.

3. See Cheryl R. Kaiser et al., *The Ironic Consequences of Obama’s Election: Decreased Support for Social Justice*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 556, 557-58 (2009) (finding through a longitudinal study that after Obama’s election, “participants . . . expressed less support for policies that address injustice such as affirmative action”).

4. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

5. 550 U.S. 618, 646 (2007).

employment discrimination.<sup>6</sup> President Obama's success creates the kind of background that might justify a retrenchment to some members of the Court. Furthermore, the fact that a black President now governs America will likely influence how district and appellate court judges (not to mention jurors) assess such cases.

Whether the United States has entered a true post-racial environment or not, the era of widespread, explicit bigotry is largely over. But we believe that civil rights laws remain essential and, ironically, the 2008 election demonstrates why. Contemporary racism tends not to take the same overt, virulent forms that it took in decades past. Rather, it tends to be subtle—even unconscious.<sup>7</sup> Civil rights laws and jurisprudence are designed to combat overt discrimination but function poorly as remedies for subtle, unconscious racism.<sup>8</sup> Unfortunately, uncovering convincing evidence that unconscious racism influences society at large has proven difficult, thereby impeding the drive for making over antidiscrimination laws. The 2008 election, however, provides evidence for the widespread existence of unconscious racism, as well as a case study in how it functions.

In this Article, we argue that the 2008 election shows that voting rights and employment discrimination laws must continue to embrace active, vibrant methods of combating unconscious bias if they are to accomplish their stated goals. The principles of open access to the polls and workplaces free from discrimination are likely to remain enshrined in American law for some time to come. The election of a black President, however, might suggest that racial gerrymandering has become unnecessary and that efforts to use Title VII to combat anything other than overtly racist practices in the workplace are unnecessary. We contend that the 2008 election shows nothing of the sort. Rather, we argue the 2008 election shows how that invigorated versions of these mechanisms are essential to combating the implicit racism that continues to influence elections and the workplace.

To make our case, we use the 2008 election as a case study, relying on a combination of qualitative and quantitative methods.<sup>9</sup>

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6. Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (involving employment discrimination); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S. Ct. 2504 (2009) (involving voting rights).

7. See *infra* Section II.A.

8. See *infra* Section II.B.

9. Gregory S. Parks & Jeffrey J. Rachlinski, *Barack Obama's Candidacy and the Collateral Consequences of the "Politics of Fear,"* in BARACK OBAMA AND AFRICAN AMERICAN EMPOWERMENT (Manning Marable & Kristen Clarke eds., 2009) [hereinafter Parks & Rachlinski, *Obama's Candidacy*]; Gregory S. Parks & Quinetta M. Roberson, "Eighteen Million Cracks": Gender's Role in the 2008 Presidential Campaign, WM. & MARY J. WOMEN & L. (forthcoming 2010), available at <http://papers.ssrn.com/sol3/>

We assess polling numbers, news accounts, and campaign rhetoric to contrast the election with the contemporary psychological research on how modern racism functions. We then assess what this means for the Voting Rights Act of 1965 and Title VII of the Civil Rights Act.

At the outset, we note that we are concentrating specifically on biases against black Americans, as opposed to other races, and as opposed to gender bias. The 2008 election raised some of these issues, especially gender, but the use of the Obama campaign as a case study means that the clearest observations arise concerning biases against black Americans.

## II. THE 2008 ELECTION AND RACE AT THE BALLOT BOX

The 2009 “Beer Summit” at the White House with President Obama, Professor Henry Louis Gates, and Officer James Crowley (the Cambridge police officer who had arrested Gates for disorderly conduct) surely stands among the oddest examples of what might be meant by a “Post-Racial America.”<sup>10</sup> In years past, Crowley’s arrest might have followed a standard, pessimistic racial script in which a racist police force harasses a successful black man. It would have produced defensive reactions from police, outrage from the black leaders, lawsuits, or even riots. The script today is more complicated. Officer Crowley works for a black police chief in a state governed by a black governor in a country with a black President. In President Obama’s America, the story ends with handshakes over beer in the Rose Garden, rather than with litigation and violence. Does a country where voters elect black people to high public offices such as police chief, Governor, and President really need the protections of the Voting Rights Act?

We doubt that anyone would argue seriously that President Obama’s success suggests that efforts to provide equal or widespread access to the polls are unnecessary. Elections remain marked by unfortunate, sporadic instances of fraud and voter disenfranchisement that continue to demand attention at the state and federal levels.<sup>11</sup> But the Voting Rights Act goes beyond efforts to

papers.cfm?abstract\_id=1297340; Gregory S. Parks, Jeffrey J. Rachlinski, & Richard A. Epstein, Debate, *Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009), available at <http://www.pennumbra.com/debates/pdfs/ImplicitBias.pdf>; Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination Through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3 (2009) [hereinafter Parks & Roberson, *Michelle Obama*].

10. The “Summit” was widely reported. See, e.g., Helene Cooper & Abby Goodnough, *Over Beers, No Apologies, but Plans to Have Lunch*, N.Y. TIMES, July 30, 2009, <http://www.nytimes.com/2009/07/31/us/politics/31obama.html>.

11. See HEATHER K. GERKEN, THE DEMOCRACY INDEX 11-26 (2009) (giving examples of difficulties occurring during elections).

ensure access to the polls to all eligible voters. The Act facilitates, and even demands, a degree of gerrymandering designed to ensure that minority groups, especially black Americans, will find electoral success through the creation of districts that are disproportionately composed of minorities.<sup>12</sup> The wisdom of this kind of racial gerrymandering remains the source of heated debate.<sup>13</sup> Although it allows minority politicians to succeed, it arguably also dilutes the influence of minority voters overall by concentrating their interests into a few districts.<sup>14</sup> The success of black politicians like President Obama and Massachusetts Governor Deval Patrick arguably provides evidence that white voters will vote for minority candidates, undermining the foundational assumptions of racial gerrymandering.

President Obama and Governor Patrick's electoral victories, however, convey a misleading impression. As we discuss in this Section, the success of black politicians has been tied closely to the presence of black voters. The 2008 electoral cycle was not exceptional. Voting patterns in the United States remain wildly racially stratified. Furthermore, as we discuss below, modern campaign rhetoric promotes this stratification. Few black politicians would enjoy any measure of success without racial gerrymandering. In short, President Obama is nearly unique, and it would be inappropriate to found changes in election law on his success.

#### A. Black Political Success and Black Voters

The success of black politicians has always depended upon the franchise and political engagement of black voters. Just after the Civil War, Congress' passage of the Fifteenth Amendment, the Enforcement Act, and the Force Act first set black political power in motion.<sup>15</sup> South Carolina offered an early example of what this large and newly motivated black population could accomplish. In 1870, black politicians attained three congressional seats, four of the state's eight executive offices, and a seat on the State Supreme Court.<sup>16</sup> Throughout the South, black politicians took advantage of the political climate of reconstruction to achieve high office, including

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12. See Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 743 (2008) (discussing the role of racial gerrymandering under the Voting Rights Act).

13. See *id.* at 744.

14. See *id.* at 744-45.

15. See BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 5 (1992); DAVID MICHAEL HUDSON, *ALONG RACIAL LINES: CONSEQUENCES OF THE 1965 VOTING RIGHTS ACT* 15 (David A. Schultz, ed., 1998); Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL'Y 71, 75-76 (2006).

16. Cashin, *supra* note 15, at 76-77.

three positions in the United States Senate. By 1875, Congress had eight black members.<sup>17</sup>

Suffrage proved to be an ephemeral right for black Americans, however.<sup>18</sup> The end of Reconstruction also signaled the end of suffrage for black voters and the demise of black political power. The election of 1876 saw the number of black members of Congress drop into the single digits.<sup>19</sup> It fell to zero by 1902 and stayed there until 1928.<sup>20</sup> The number of black congressional members did not reach double digits again until 1969,<sup>21</sup> four years after the passage of the Voting Rights Act.

With the advent of the Voting Rights Act, black political participation in elected office again began to grow. Unlike previous civil rights legislation, the Voting Rights Act gave the attorney general and the courts broad powers to grant relief wherever the court found Fifteenth Amendment violations. The Act contained this enforcement mechanism “to ensure the administration of a discrimination-free electoral process.”<sup>22</sup> The Act also established “mechanisms or ‘special provisions’ to monitor certain states and counties, and it created a triggering mechanism to bring most of the

17. Black Americans in Congress, Historical Data, Black-American Representatives and Senators, 1870—Present, 44th Congress, 1875-1877, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=44> (last visited July 30, 2010) [hereinafter Black Americans, 44th Congress]. There were a total of sixteen black congressmen from 1869 to 1877. Black Americans in Congress, Historical Data, Black-American Representatives and Senators, 1870—Present, 41st Congress, 1869-1871, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=41> (last visited July 30, 2010); Black Americans in Congress, Historical Data, Black-American Representatives and Senators, 1870—Present, 42nd Congress, 1871-1873, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=42> (last visited July 30, 2010); Black Americans in Congress, Historical Data, Black-American Representatives and Senators, 1870—Present, 43rd Congress, 1873-1875, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=43> (last visited July 30, 2010); Black Americans, 44th Congress, *supra*.

18. For an account of the multitude of factors that lead to black disenfranchisement, see HUDSON, *supra* note 15, at 7, 16-17; V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 555-643 (Alfred A. Knopf ed., 1949); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 28-31 (2004); Cashin, *supra* note 15, at 80.

19. Black Americans in Congress, Black-American Representatives and Senators by Congress, 1870—Present, 45th Congress, 1877-1879, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=45> (last visited July 30, 2010).

20. Black Americans in Congress, Black-American Representatives and Senators by Congress, 1870—Present, 57th Congress, 1901-1903, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=57> (last visited July 30, 2010); see Black Americans in Congress, Black-American Representatives and Senators by Congress, 1870—Present, 71st Congress, 1929-1931, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=71> (last visited July 30, 2010).

21. See CRS REPORT FOR CONGRESS, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870-2008, (2008), available at <http://www.senate.gov/reference/resources/pdf/RL30378.pdf>.

22. HUDSON, *supra* note 15, at 55.

South under federal monitoring and the special provisions of enforcement.”<sup>23</sup> These efforts worked hand-in-hand with voter registration campaigns throughout the South to revitalize black voters. Renewed participation by black voters, combined with explicit racial gerrymandering to produce voting districts with disproportionately large black populations, facilitated the election of black politicians. Beginning in the 1970s, the number of black politicians in former confederate states elected to state and federal legislatures grew from less than fifty to more than 100 and reached almost 200 by the late 1980s.<sup>24</sup> The success of black politicians has thus always been tied to the legal protection of black voters.

An examination of the 2008 election reveals that the Presidential race was a salient anomaly that has not changed the tight relationship between black political engagement and the success of black politicians. The same election that produced the nation’s first black President continued the tradition of overwhelmingly racial voting patterns in the national legislature. The demographics of the House of Representatives are the product of racial gerrymandering and overwhelmingly racially stratified voting. The 2008 election sent thirty-nine black representatives to the 111th Congress.<sup>25</sup> Blacks make up, on average, 48.4% of the population in these thirty-nine congressional districts.<sup>26</sup> In contrast, the 396 other districts have populations that are an average of 8.7% black. Even these statistics underestimate the racial divide, however. Among the thirty-nine congressional districts that have black populations of one-third or more, thirty-two, or 82.1% have black representatives. The other 396 districts have only seven, or 1.8%, representatives who are black. Only one district (Minnesota’s Fifth, which is 12.7% black) has a demographic makeup that is less than the nationwide black population (12.8%) and yet has a black representative. Among the 313 districts with smaller black populations, not one has a black representative.

The demography of congressional districts is no accident. Explicit racial gerrymandering is largely responsible for the creation of

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23. *Id.*

24. *Id.* at 17 fig.1.

25. This information was taken from the website of the Congressional Black Caucus. Congressional Black Caucus—Member Information, <http://cbc.lee.house.gov/members/officers.shtml> (last visited July 30, 2010); see also Black Americans in Congress, Black-American Representatives and Senators by Congress, 1870–Present, 111th Congress, 2009-2011, <http://baic.house.gov/historical-data/representatives-senators-by-congress.html?congress=111>. This number excludes the six non-voting representatives, which include two black members from the Virgin Islands and the District of Columbia.

26. The demographic information in this Section, including Table 1, comes from the website of United States Census Bureau. U.S. Census Bureau, Congressional District Data, [http://www.census.gov/rdo/data/congressional\\_district\\_data.html](http://www.census.gov/rdo/data/congressional_district_data.html) (last visited July 30, 2010).

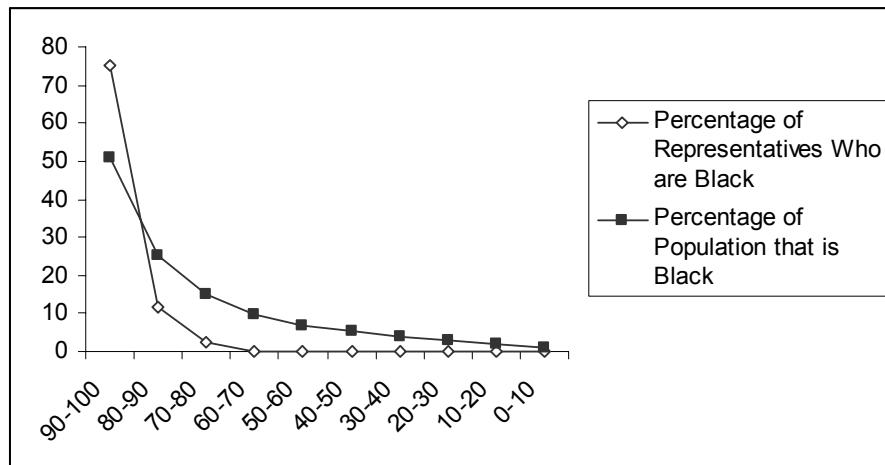
thirty-nine congressional districts that have large black populations. Because the demographics of the districts vary enormously, even if voters select representatives from the population in the district without regards to race, some districts would be more likely than others to have black representatives. For example, the First Congressional District of Illinois (currently represented by former Black Panther, Bobby Rush) is 65.1% black. Hence, if race played no role in the availability of candidates or the election process, the district would have a 65.1% chance of having a black representative. At the other end of the scale, only 0.25% of Wisconsin's Seventh Congressional District (currently represented by Dave Obey) is black, and hence it would only have a 0.25% chance of having a black representative if race played no role.

Figure 1, below, demonstrates that the disparities in selection cannot be explained by variations in the demographics of the congressional districts. This figure breaks the 435 congressional districts into ten roughly equal groups,<sup>27</sup> ordered by the percentage of the district that is black, from highest to lowest. For example, the forty-four districts that have the highest percentage of blacks (on the left part of the graph), on average, have a black population of 51.1%. These forty-four districts are represented by thirty-three black representatives (75%), and eleven non-black representatives. As Figure 1 shows, black representatives are highly concentrated in the districts with the highest concentrations of black voters. Additionally, there are no black representatives representing any district in the bottom seven deciles of percent of black population, even though there remain sizeable numbers of black voters in these districts.

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27. To use only even numbers, every other decile, starting with the second, is 43, as opposed to 44, districts.

**Figure 1: Percentage of Black Representatives and Percentage of Population that Is Black Among Congressional Districts, by Decile of Black Population**



The racial disparity in this graph cannot be explained by chance.<sup>28</sup> The ability of black candidates to get elected to the House of Representatives depends entirely on having a large percentage of black voters in a congressional district. The statistics even reveal a distinct tipping point. Black candidates represent most of the districts with a black population greater than one-third; non-black candidates represent nearly all of the districts with black populations less than one-third. A one-third tipping point is consistent with the following simple pattern: black voters nearly unanimously support black candidates; half of non-black voters vote nearly unanimously *against* black candidates; and the remaining half of the non-black voters divide on political issues. That highly racially stratified voting pattern would produce, nearly precisely, the racial composition of the House in exactly the same election that produced the nation's first black President.

Other factors are also apt to be at work, of course. Incumbency matters enormously. In 2008, 378 of the 397 incumbents running for re-election, or 95.2%, succeeded (thirty-six incumbents left the House, due to retiring, running for other office, or losing the primary election).<sup>29</sup> Among the black representatives, only William Jefferson

28. If race played no role in voters' electoral decisions, then we assumed that the percentage of the population that is black in the 44 Congressional Districts with the highest percentage of black residents (22.48 percent) would produce 10 Representatives who are black (.2248 multiplied by 44, rounded off). Likewise, the remaining 391 Districts, which consist of 3.45% black residents, should produce 14 black Representatives (.0345 multiplied by 391, rounded off). The actual numbers, 33 and 6, respectively, are highly unlikely to be achieved by chance.  $\chi^2(1) = 57.4$ ,  $p < .001$ .

29. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2008: U.S. SENATE AND U.S. HOUSE RESULTS 79, available at <http://www.fec.gov/pubrec/fe2008/2008congresresults.pdf> (last visited July 30, 2010); Greg Giroux, Incumbents Defeated in General Elections, 1968-2008, <http://www.cqpolitics.com/cq-assets/eap/campaigns/girouxgems/DefeatedInGeneralElections.pdf>

(who was under a federal indictment for bribery)<sup>30</sup> of Louisiana lost his bid for re-election in 2008.<sup>31</sup> But outside of President Obama, 2008 was no watershed year for black politicians. The election maintained a highly stratified status quo.

Party matters too, of course. Black voters are easily the Democratic Party's most reliable contingent,<sup>32</sup> making race impossible to disentangle completely from party. Accounting for party thus only redirects the analysis to assessing why black candidates succeed overwhelmingly and exclusively in primary elections in black districts. Districts that are more than one-third black also tend to be dominated by democrats. Due to the fact that black voters are overwhelmingly democratic, they make up a majority of the voters in the democratic primary elections in these districts. If black voters heavily favor black candidates in primary elections, then black politicians will theoretically win both the primary (due to black favoritism) and the general election (due to the dominance of the Democratic Party in that district). Favoritism for black candidates might thereby combine with black voter clustering in the Democratic Party to explain the extraordinary success of black politicians in districts with large numbers of black voters. The extraordinary lack of success of black politicians in districts where white voters are more prevalent, however, signals that white voters—even Democrats—disfavor black candidates.

The United States Senate provides the clearest test of the effects of racial gerrymandering. Unlike congressional districts, the states are not gerrymandered by race. Black politicians seeking to serve in the Senate generally face an electorate that has few black voters. Only Mississippi has a population that is more than one-third black (37.2%).<sup>33</sup> Several other Southern states have sizeable black populations,<sup>34</sup> but the black population in all those states falls below

(last visited July 30, 2010); The Cook Political Report, 2008 House Summary, Aug. 21, 2008, [http://www.cookpolitical.com/charts/house/summary\\_2008-08-21\\_13-30-19.php](http://www.cookpolitical.com/charts/house/summary_2008-08-21_13-30-19.php).

30. Joel Roberts, *Rep. Jefferson Indicted in Bribery Case*, CBS NEWS: POLITICS, June 4, 2007, <http://www.cbsnews.com/stories/2007/06/04/politics/main2882231.shtml>.

31. Republican Vietnamese-American Ahn "Joseph" Cao defeated him in the general election. FED. ELECTION COMM'N, *supra* note 29, at 113. Ohio's 11th District changed from one black Representative to another, as Marcia Fudge won the seat previously held by the late Stephanie Tubbs Jones, who died on August 20, 2008. *Id.* at 145.

32. Rod Young, African American Voting Patterns: Black Voting Demographics 2008 Democratic Primary Statistics, Aug. 7, 2008, [http://racism-politics.suite101.com/article.cfm/african\\_american\\_voting\\_patterns](http://racism-politics.suite101.com/article.cfm/african_american_voting_patterns).

33. U.S. Census Bureau, State and County Quick Facts: Mississippi, <http://quickfacts.census.gov/qfd/states/28000.html> (last visited July 30, 2010).

34. For example, Alabama has a black population of 26.4%, Georgia has a black population of 30%, Louisiana has a black population of 32%, and South Carolina has a black population of 28.5%. U.S. Census Bureau, State and County Quick Facts: Alabama, <http://quickfacts.census.gov/qfd/states/01000.html> (last visited July 30, 2010); U.S. Census Bureau, State and County Quick Facts: Georgia, <http://quickfacts.census.gov/qfd/>

the one-third cutoff that seems critical to black political success. Black politicians do not fare well in Senatorial elections. The only sitting black Senator is Roland Burris, who was appointed to serve out President Obama's term in Illinois.<sup>35</sup> Furthermore, Barack Obama was only the third black politician elected to the Senate in America's history (although two others before Senator Burris have been appointed to serve).<sup>36</sup> Without the intervention of the Voting Rights Act and racial gerrymandering, the House would presumably be no different.

Despite the legal efforts aimed at ensuring black political participation, law alone cannot change human behavior. *Brown v. Board of Education*<sup>37</sup> overturned *Plessy v. Ferguson*'s<sup>38</sup> "separate but equal" doctrine as it related to public education, but the change in law that the decision announced did little to alter the underlying attitudes that produced segregation.<sup>39</sup> Indeed, widespread segregation in schools remains the norm, even fifty years later.<sup>40</sup> Likewise, despite the ratification of the Fifteenth Amendment, the enactment of the Voting Rights Act and the subsequent rise in the number of black elected officials, racism has persisted in the American political process. Recent history, too, suggests that political candidates' race has long predicted whether voters would elect them to office. Merely protecting access to the polls is not enough to ensure black political success. Even in 2008, the active intervention of racial gerrymandering remains an essential measure to overcoming racial voting patterns.

### B. Racial Messages in Modern Political Campaigns

Why do racial voting patterns persist in an electorate that largely denounces the influence of race at the polls? While many factors contribute to the persistence of racial voting patterns, political

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states/13000.html (last visited July 30, 2010); U.S. Census Bureau, State and County Quick Facts: Louisiana, <http://quickfacts.census.gov/qfd/states/22000.html> (last visited July 30, 2010); U.S. Census Bureau, State and County Quick Facts: South Carolina, <http://quickfacts.census.gov/qfd/states/45000.html> (last visited July 30, 2010).

35. Black Wall Street District, Past & Current African American Senators, <http://blackwallstreet.org/blk.resources.dir/goc.html> (last visited July 30, 2010).

36. *Id.*

37. 347 U.S. 483 (1954).

38. 163 U.S. 537 (1896).

39. Laura Bacon, Note, Godinez v. Sullivan-Lackey: *Creating a Meaningful Choice for Housing Choice Voucher Holders*, 55 DEPAUL L. REV. 1273, 1275 (2006) ("But progress through the law can only truly make a difference if the underlying discriminatory attitudes change as well.").

40. See generally BARRY A. GOLD, STILL SEPARATE AND UNEQUAL: SEGREGATION AND THE FUTURE OF URBAN SCHOOL REFORM (2007) (arguing that "racially separate schools cannot be equal even if funding levels are the same as wealthy White school districts"); JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2006).

leaders must accept some of the blame. Overt racism is no longer a strategy that national leaders employ. Subtle messages that fan lingering racial animosity, however, still commonly animate modern campaign strategies. Voters' perceptions about race influence how they cast their ballots, and white politicians also have long used veiled racism as a way to swing voters or to get white voters out to the polls.<sup>41</sup>

Richard Nixon's 1968 campaign provided perhaps the first blueprint for a modern political campaign in the United States.<sup>42</sup> Included in the Nixon campaign's pioneering efforts in the art of spin was the use of racial messages that quietly harnessed the racial mood among white voters.<sup>43</sup> The campaign promised "law and order," which many saw as code for cracking down on black militants.<sup>44</sup> The campaign solicited supporters to show up at Nixon rallies to shout racial epithets so candidate Nixon could disparage the explicit expression of racism.<sup>45</sup> This tactic had a double message for white voters. To those who disdained explicit racism, Nixon could be seen as espousing a reasonably progressive message that racism was morally wrong. To those who harbored racist sentiment, the presence of the supporter at the campaign was evidence that like-minded voters supported Nixon.

Many Republicans since Nixon maintained a drumbeat of covert racial messages in campaigns. When Ronald Reagan spoke of supposed "Welfare Queens" who game the system, voters knew what he meant.<sup>46</sup> This latter imagery melded the Republicans' focus on lower taxes and smaller government with whites' racial animosity. The message to whites was implicit but clear: your taxes are high because Lyndon Johnson's programs are funneling your money to undeserving black women. These seemingly race-neutral campaign themes, welfare and crime, carry demonstrably racially loaded undertones.<sup>47</sup>

By the 1980's, the Republican Party had completely undermined the traditional Democratic support among Southern whites and labor union members with these kinds of tactics. So successful were these

41. See KEITH REEVES, VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES, AND RACIAL POLITICS IN AMERICA 3-90 (1997).

42. See JOE MCGINNIS, THE SELLING OF THE PRESIDENT 1968 (1969).

43. See *id.* at 93-96 (discussing a development of a commercial for the Nixon campaign involving the Vietnam war with racial undertones).

44. Robert E. Weems, Jr. & Louis A. Randolph, *The Ideological Origins of Richard M. Nixon's "Black Capitalism" Initiative*, 29 REV. BLACK POL. ECON. 49, 53 (2001).

45. MCGINNIS, *supra* note 42, at 93.

46. Paul Krugman, *Republicans and Race*, N.Y. TIMES, Nov. 19, 2007, <http://www.nytimes.com/2007/11/19/opinion/19krugman.html>.

47. See Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 383-91 (1997); Fred Slocum, *White Racial Attitudes and Implicit Racial Appeals: An Experimental Study of "Race Coding" in Political Discourse*, 29 POL. & POL'Y 650 (2001).

efforts that by 1985, the National Democratic Party openly sponsored research to discern why so many working-class white voters had abandoned their traditional support for the party.<sup>48</sup> After conducting significant research on the subject, pollster Stanley Greenberg attributed the defection to dissatisfaction with the Democratic Party's increasing association with black voters.<sup>49</sup> White defectors expressed a profound distaste for black voters and issues important to black voters. Their racial sentiments greatly affected how white defectors felt about government and politics.<sup>50</sup> For these voters, blacks constituted an explanation for "almost everything that ha[d] gone wrong in their lives."<sup>51</sup> They perceived blacks as a "serious obstacle to their personal advancement."<sup>52</sup> Not being black relegated them to lower middle-class status. Not living near blacks made their neighborhoods decent places to live.<sup>53</sup> It is no surprise that such voters repudiated the Democratic Party and developed such hardened racial attitudes. Just as whites moved to the suburbs to flee increasing integration in urban public schools, so too did many abandon the increasingly integrated Democratic Party. In effect, latent racism combined with the tone of political campaigns to create and maintain subtle racially charged voting patterns.

As overt racism became increasingly taboo, white politicians continued to appeal to white voters' concerns through subtle overtures.<sup>54</sup> In 1988, a group that supported George H. W. Bush's presidential campaign ran a highly controversial ad that baited white fears about young black male violence. The ads featured a sinister image of Willie Horton, a black escapee from Massachusetts who fled to Maryland and broke into a white couple's home. There, Horton stabbed the husband and raped the wife. In addition to emphasizing Horton's crimes, the ads also "attacked Democratic presidential candidate Michael Dukakis (then governor of Massachusetts) for the weekend release program under which Horton had fled the state."<sup>55</sup> Republican political operatives knew that the Horton ad would use continuing racism as a way to win white support.<sup>56</sup>

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48. Frederick Slocum & Yeuh-Ting Lee, *Racism, Racial Stereotypes, and American Politics*, in THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION 62 (Jean Lau Chin ed., 2004) [hereinafter PREJUDICE AND DISCRIMINATION] (citing STANLEY B. GREENBERG, REPORT ON DEMOCRATIC DEFECTION 13-18, 28 (The Analysis Group, 1985)).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. See generally TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 143 (2001) (noting the success of Nixon's strategy to win over the South in his presidential campaign using implicit racial messages).

55. PREJUDICE AND DISCRIMINATION, *supra* note 48, at 72-73.

56. MENDELBERG, *supra* note 54, at 143-44.

When Jesse Helms, a white Senator from North Carolina, faced a black challenger, Harvey Gantt, in 1990, few were surprised that race played a role in Helms' ultimate victory. In the race, Helms raised several issues tied to race, including his allegation that Gantt favored quotas that would benefit blacks.<sup>57</sup> "One of Helms' advertisements showed the hands of a white person crumpling a rejection letter. 'You needed that job,' the announcer says. 'And you were the best-qualified. But they had to give it to a minority because of a racial quota. Is that really fair?'"<sup>58</sup> The ad was broadcast just a few days shy of the election and boosted Helms to victory in an election that had been a dead heat.<sup>59</sup>

Politicians have even found ways to fan racial animosity even in elections between white candidates. During the 2000 presidential primaries, Karl Rove masterminded a much-needed victory for George W. Bush during his South Carolina primary with a campaign that featured a quiet racial attack. Rove strategically used "whispered innuendos," one of them being "that John McCain fathered a black child out of wedlock."<sup>60</sup> People in some areas of South Carolina received phone calls in which self-proclaimed pollsters would ask, "Would you be more likely or less likely to vote for John McCain for president if you knew he had fathered an illegitimate black child?"<sup>61</sup> This was likely a reference to Bridget, a darker-skinned child whom the McCains had adopted as a baby from an orphanage in Bangladesh.<sup>62</sup> "Richard Hand, a professor at Bob Jones University, sent an e-mail message to 'fellow South Carolinians' telling recipients that Mr. McCain had 'chosen to sire children without marriage,'"<sup>63</sup>

Before the 2008 campaign, the most recent attempt at subtle racial appeals in a prominent election occurred during the 2006 U.S. Senate race in Tennessee. "[I]n a tight race between Bob Corker [white] and Rep. Harold Ford, an African American, the Republican National Committee played the race card."<sup>64</sup> A television ad, funded by the Republican National Convention ("RNC"), insinuated an

57. Peter Appleborne, *Racial Politics Surfaces Again in Some Races in Southern States*, ST. LOUIS POST-DISPATCH, Nov. 7, 1990, at 8C.

58. *Id.*

59. PREJUDICE AND DISCRIMINATION, *supra* note 48, at 72.

60. Bill Curry, *Rove Leaves Long Trail of Dirty Tricks*, HARTFORD COURANT, Aug. 19, 2007, at C3.

61. Jennifer Steinhauer, *Confronting Ghosts of 2000 in South Carolina*, N.Y. TIMES, Oct. 19, 2007, at 1.

62. *Id.*

63. *Id.*

64. Jesse Jackson, *Does GOP Mean Gutter-Oriented Politics?*, CHI. SUN-TIMES, Oct. 31, 2006, at 27.

intimate relationship between Ford and a white woman.<sup>65</sup> The ad's hardest-hitting jab came from the mouth of a scantily clad white woman, who says she met Harold "at the Playboy party," casting a flirtatious look into the camera. Then as the ad draws to an end, the woman says, "Harold, call me."<sup>66</sup> That dig was meant to remind people that Ford attended a 2005 Super Bowl party sponsored by Playboy. But it was also meant to suggest that the black congressman had gotten too familiar with a white woman.<sup>67</sup> Hilary Shelton, head of the Washington office of the National Association for the Advancement of Colored People ("NAACP"), said the ad "contradicted the spirit of remarks delivered at last year's NAACP convention by the Republican National Committee chairman, Ken Mehlman, in which he decried those in his party who had tried to 'benefit politically from racial polarization.'"<sup>68</sup> The NAACP also said that the ad played "on fears of interracial relationships to scare some white voters in rural Tennessee to oppose . . . Ford."<sup>69</sup>

The continued racial overtones of heated political campaigns have likely helped maintain racially stratified voting patterns. Race baiting splits white and black voters. The subtle use of racial cues capitalizes on lingering racial attitudes to attract white voters. To the extent it works, it repels black voters. The contrast of occasional, explicit racism exhibited by a fringe candidate or supporter also makes the subtler message seem measured and acceptable. The political dynamic creates an equilibrium wherein one candidate or another will periodically try to attract white voters with racial messages that make subtle racism acceptable and widespread in political life.

### C. Racial Messages in the 2008 Presidential Campaign

Does the election of Barack Obama change the equilibrium? We think not. The 2008 campaign lacked messages as blunt as those in the past, but it was not free from racial imagery. An analysis of the words, images, and symbols of the campaigns reveals that several racial themes emerged, some of which follow the script of racially coded messages laid down by past campaigns. These scripts took advantage of latent negative associations many white Americans harbor towards black Americans just as past campaigns have done.<sup>70</sup> Other comments and themes (mostly from supporters or fringe

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65. *Id.*; Peter Wallsten, *Democrats Say GOP Ad Appeals to Racist Fears*, BUFFALO NEWS, Oct. 24, 2006, at A5.

66. Jackson, *supra* note 64; Wallsten, *supra* note 65.

67. Wallsten, *supra* note 65.

68. *Id.*

69. *Id.*

70. Parks & Rachlinski, *Obama's Candidacy*, *supra* note 9.

groups) represent explicit racism. We identify and discuss these themes below.

### 1. Too Black

One early concern about Candidate Obama was that he might be “too black.” In the growing body of research on the nature of racial bias in America in the twenty-first century, the main finding (which we discuss below) is that a large number of white Americans associate black Americans with a range of negative concepts.<sup>71</sup> The research also shows, however, that these negative associations are directed at black Americans who appear the most stereotypically black. For example, priming police officers with violent imagery causes them to make mistakes in a lineup that favor picking out suspects who are rated as more “stereotypically Black.”<sup>72</sup> Worse yet, juries are more likely to sentence black defendants who look more “stereotypically Black” to death in capital cases than those who look less stereotypically black in cases involving white victims.<sup>73</sup> The Clinton campaign, in fact, took the obvious tack that this research tone suggests by airing a television advertisement that darkened the tone of Senator Obama’s skin, thereby making him look more stereotypically black.<sup>74</sup> The ad was a none-too-subtle effort to make Senator Obama appear more black, and (to white Americans) more menacing.<sup>75</sup>

Candidate Obama’s opponents also found that events could help them move some voters to conclude that Senator Obama seemed too black politically. Minister Louis Farrakhan, during the Nation of Islam’s Savior’s Day gathering in 2008, publicly praised Senator Obama,<sup>76</sup> forcing Senator Obama to publicly “reject and denounce” Minister Farrakhan’s support.<sup>77</sup> Senator Obama’s association with Reverend Jeremiah Wright proved to be the best opportunity for the Clinton campaign to change the way Americans saw Senator Obama.<sup>78</sup> Senator Obama was roundly criticized for his long-standing relationship with Reverend Wright—whom many white voters and

71. See *infra* Part. III.A (discussing implicit racial bias).

72. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 885-87 (2004).

73. See Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

74. Bill Sanderson, *Shady TV Ad Darkens ‘O’—Clinton Sparks Huetube Ruckus*, N.Y. POST, Mar. 5, 2008, at 008.

75. *Id.*

76. Margaret Ramirez, *Farrakhan Sings Obama’s Praises—Senator Has Criticized Him, Says Support Not Sought*, CHI. TRIB., Feb. 25, 2008, at 1.

77. Steven Thomma, *Pivotal Debate a Crackling Exchange*, MIAMI HERALD, Feb. 27, 2008, at 1A.

78. Brian DeBose, *Divisive Minister is Kept at a Distance*, WASH. TIMES, Mar. 14, 2008, at A01.

political pundits came to view as racist, militant, and unpatriotic.<sup>79</sup> The Clinton campaign needed little help here, as an endless loop of sound bites of Reverend Wright's controversial statements appeared on YouTube and cable television.<sup>80</sup>

The association with Reverend Wright did real damage to Candidate Obama's campaign. He was forced to respond in a widely publicized speech on race in Philadelphia. This speech drew praise from many quarters, but it did little to assuage concerns among many white voters.<sup>81</sup> After the emergence of Reverend Wright, Candidate Obama fared poorly among white voters in the remaining Democratic primaries, even though he ultimately disavowed Reverend Wright. For many white Americans, this association may have made him too black to be President. None of the associations that some white candidates in both parties have had with radical or controversial clergy have hurt their political standing to the extent that Obama's association with Reverend Wright hurt his campaign.<sup>82</sup> Reverend Wright is simply too black for white Americans.

The McCain campaign chose not to re-raise Reverend Wright in the fall campaign.<sup>83</sup> Instead, they tried to tie Senator Obama to former Weather Underground leader Bill Ayers. Governor Palin was the campaign's primary mouthpiece for this effort, alleging that Senator Obama "kicked off his political career, [sic] in the guy's living room."<sup>84</sup> The effort intended to blend two messages—terrorism and that Candidate Obama posed a danger to America. The former is a throwback to the 2004 Bush campaign's efforts to appear stronger on the terrorism issue than Senator John Kerry. Branding a candidate's policies as dangerous is standard fare, but attempting to make a

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79. *Id.*

80. *Amplifying Sound Bites from the Sermons*, B. GLOBE, Apr. 29, 2008, at 6A.

81. Jake Tapper & Nitya Venkataraman, *Obama Distances from Longtime Pastor in Race Speech*, ABC NEWS, Mar. 18, 2008, <http://abcnews.go.com/GMA/Vote2008/story?id=4469583>.

82. Ironically, Senator Clinton had closer ties to Minister Farrakhan through her surrogate, Pennsylvania Governor Ed Rendell, who publicly praised Minister Farrakhan during the 1990s. Colbert I. King, *Farrakhan's Pennsylvania Admirer*, WASH. POST, Apr. 26, 2008, at A17. Senator Clinton was also not subjected to much scrutiny when it was revealed that former President Clinton had invited Reverend Wright to a White House prayer breakfast in 1998. *Clinton Criticizes Photo's Release*, TELEGRAPH HERALD, Mar. 22, 2008, at A7. Nor was Senator McCain criticized much for his endorsement by Reverend John Hagee, who spoke favorably of Hitler and negatively against Catholics and homosexuals. Juliet Eilperin & Kimberly Kindy, *McCain Rejects Pastor's Backing Over Remarks*, WASH. POST, May 23, 2008, at A1.

83. See Toby Harnden, *John McCain Campaign Rules Out Using Jeremiah Wright Against Barack Obama*, DAILY TELEGRAPH, Oct. 8, 2008, [http://blogs.telegraph.co.uk/news/tobyharnden/5406868/John\\_McCain\\_campaign\\_rules\\_out\\_using\\_Jeremiah\\_Wright\\_against\\_Barack\\_Obama](http://blogs.telegraph.co.uk/news/tobyharnden/5406868/John_McCain_campaign_rules_out_using_Jeremiah_Wright_against_Barack_Obama).

84. Posting of Scott Conroy to From the Road, Palin: Obama Began His Political Career in Terrorist's Living Room, <http://www.cbsnews.com/blogs/2008/10/05/politics/fromtheroad/entry4502414.shtml> (Oct. 5, 2008, 13:56 EST).

candidate seem personally dangerous is a novel tactic that plays off of latent associations that most white Americans harbor between black Americans and violence.

## 2. Primate Imagery

One of the ugliest aspects of the 2008 presidential campaign included several incidents where voters likened the Obama's to various types of primates. First, in February 2008, one commenter on *The Huffington Post* indicated that Ms. Obama was reminiscent of Zira—one of the characters from *Planet of the Apes*.<sup>85</sup> Three months later, a white Georgia bar and grill owner began selling T-shirts at his establishment depicting the image of Curious George, a cartoon monkey, with the slogan “Obama in ‘08.”<sup>86</sup> Then in June, a Utah company began making a sock monkey (doll) of Senator Obama.<sup>87</sup>

These efforts arise from the latent associations many white Americans harbor between blacks and apes. In one study of this relationship, individuals were subliminally shown images of black faces, white faces, or neutral images.<sup>88</sup> Then they were shown fuzzy images of animals (apes and non-apes), which gradually became clearer. Individuals were instructed to indicate the point at which they could identify the image. Individuals more easily identified ape images when primed (subliminally shown images) with black male faces than when not so primed. Moreover, individuals found it more difficult to identify ape images when primed with white male faces.<sup>89</sup> In a second study, individuals primed with images of apes more closely attended to black faces than white faces, as compared to those individuals primed with jumbled line drawings.<sup>90</sup> Another study showed that white males implicitly associate African Americans with apes, as opposed to cats and other animals, even though these participants denied awareness of the stereotype “African Americans are like apes.”<sup>91</sup> The results suggest that although the black-primate association is common, it may operate outside of “explicit cultural knowledge of the association.”<sup>92</sup>

85. Comment by menairbo on *Michelle Obama Predicts Ohio Victory*, HUFFINGTON POST, Feb. 15, 2008, [http://www.huffingtonpost.com/2008/02/15/michelle-obama-predicts-o\\_n\\_86896.html](http://www.huffingtonpost.com/2008/02/15/michelle-obama-predicts-o_n_86896.html).

86. Bo Emerson, *Politically Correct? Not This Bar Owner*, ATLANTA J.-CONST., May 15, 2008, at B1.

87. *Doll ‘Pure Racism,’* GRAND RAPIDS PRESS, June 15, 2008, at A4.

88. Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 295 (2008).

89. *Id.* at 296.

90. *Id.* at 298.

91. *Id.* at 301.

92. *Id.*

The major candidates and their principal surrogates avoided making these associations during the campaign, as did the news media. Even after the election, however, the New York Post published a cartoon portraying President Obama as an ape.<sup>93</sup>

### 3. *Slurs*

The 2008 Presidential campaign also featured patently racially derogatory terms and quasi-derogatory terms to describe candidate Obama when viewed through a racial lens. Accordingly, white politicians' use of implicit anti-black bias predicts the use of racial slurs.<sup>94</sup>

Early in the campaign, Hillary Clinton's surrogate, Andrew Cuomo, used the phrase "shuck and jive" to describe how candidates evade questions from the press. Though he did not mention Obama by name, many believed he was referring to Obama.<sup>95</sup> Additionally, Republican Congressman Tom Davis, in discussing how Senator Obama would have difficulty handling the immigration debate, described this issue as a "tar baby."<sup>96</sup> Arguably, Representative Davis' statement was not racially tinged, although he has a history of making similar statements.<sup>97</sup>

Obama also received a considerable amount of criticism after he referenced some working-class voters' frustration with the economy. He noted, "[i]t's not surprising, then, they get bitter, they cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations."<sup>98</sup> Senator Clinton used this statement to charge Senator Obama with being elitist.<sup>99</sup> What was striking about such a critique is that Senator Obama was raised in poverty by a single mother and then by his grandparents. And despite his Columbia University and

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93. Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, GUARDIAN U.K., Feb. 18, 2009, <http://www.guardian.co.uk/world/2009/feb/18/new-york-post-cartoon-race>. For a closer analysis of the New York Post cartoon in the context of the black (Obama)-primate association, see Gregory S. Parks & Danielle C. Heard, "*Assassinate the Nigger Apeff!*: Obama, Implicit Imagery, and the Dire Consequences of Racist Jokes," Aug. 11, 2009, available at <http://ssrn.com/abstract=1447572>.

94. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 361-63 (2007).

95. Robin Givhan, *On the Subject of Race, Words Get in the Way*, WASH. POST, Jan. 20, 2008, at M1.

96. *GOP Rep. Uses Term 'Tar Baby' in Memo About Obama, Election*, HUFFINGTON POST, May 14, 2008, [http://www.huffingtonpost.com/2008/05/14/gop-rep-uses-term-tar-bab\\_n\\_101793.html](http://www.huffingtonpost.com/2008/05/14/gop-rep-uses-term-tar-bab_n_101793.html).

97. Adrienne T. Washington, *To Tom Davis, with Friendly Persuasion*, WASH. TIMES, Dec. 16, 1994, at C2.

98. Tom Vanden Brook, *Clinton Brands Obama's Words as 'Elitist, Divisive'—Says Rival's Remarks Leave Him Open to Republican Attack*, USA TODAY, Apr. 14, 2008, at 5A.

99. *Id.*

Harvard Law degree, he and his wife had just paid off their student loans relatively close to when he decided to run for the Presidency.<sup>100</sup> This is in contrast to Senator Clinton (wife of a former President, Ivy League educated, and multimillionaire)<sup>101</sup> and Senator McCain (husband of a multimillionaire and son of a Navy Admiral).<sup>102</sup> Although the attack was arguably an effort to paint Senator Obama as a Northeastern, ivory-tower liberal, it had other connotations given the historic tendency among some white Americans to react negatively to someone they consider an “uppity nigger.” Indeed, Obama was the only presidential candidate openly criticized as “uppity.”<sup>103</sup>

Fringe groups also used a number of demeaning racial slurs during the campaign. Near the end of the presidential campaign, the Chaffey Community Republican Women, Federated sent out a newsletter that depicted Barack Obama on a \$10.00 “food stamp.” Also on the food stamp was a bucket of KFC fried chicken, a piece of watermelon, spare ribs, and a pitcher of Kool-Aid.<sup>104</sup> The group’s president, Diane Fedele, indicated that she had no idea why anyone would take offense to the image, stating “[i]t was just food to me. It didn’t mean anything else.”<sup>105</sup>

#### *4. Foreign, Arab/Muslim*

Candidate Obama continuously faced allegations that that he was unpatriotic, un-American, and even a foreigner. These allegations started early when he was criticized in the primaries based on false allegations that he does not pledge allegiance to the American flag. Such critiques stemmed from him not placing his hand over his heart during the singing of the national anthem at an Iowa fair.<sup>106</sup> In addition, critics latched onto the fact that Obama had stopped wearing an American flag pin on his lapel, despite arguing that he believed some politicians used the flag pin as a hollow substitute for

100. Jill Abramson, *Taking Aim at Elitism*, N.Y. TIMES, Apr. 16, 2008, at A16.

101. Hillary Clinton Biography, <http://www.biography.com/articles/Hillary-Clinton-9251306> (last visited July 30, 2010); Tim Middleton, *Hillary Clinton: Midas Touch at Work*, MSN MONEY, Sept. 4, 2007, <http://articles.moneycentral.msn.com/Investing/MutualFunds/HillaryClintonMidasTouchAtWork.aspx>.

102. Tony Allen-Mills, *Flawed Cindy McCain Has a Grudge List*, TIMES ONLINE, Feb. 3, 2008, [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/us\\_elections/article3295472.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/us_elections/article3295472.ece).

103. Laura Clawson, *Salon: Obama Used to Be “Uppity,”* Feb. 11, 2007, <http://www.dailykos.com/story/2007/2/11/223840/971>.

104. Dan Bernstein, *Coming to You in Stereotype*, PRESS-ENTERPRISE, Oct. 17, 2008, at C01; Colin Hickey, *The Power of Images*, MORNING SENTINEL, Nov. 2, 2008, at 1.

105. Bernstein, *supra* note 104.

106. Alec MacGillis, *Obama Faces Test in Asserting His Own Brand of Patriotism*, WASH. POST, May 4, 2008, at A1.

patriotic deeds.<sup>107</sup> Because of such actions, critics—often white voters—labeled Senator Obama as unpatriotic.<sup>108</sup> By the time of the Democratic National Convention, the Obama campaign seemed to have concluded that a cold intellectual description of why he was not wearing a flag was unwise and duly surrounded him with as many American flags as would fit on every stage he entered.

Candidate Obama's name, of course, made him vulnerable to allusions of foreign loyalties or status, but his race also played a role in this vulnerability. Many white Americans continue to associate racial minorities with disloyalty. As recently as twenty years ago, a poll indicated that 51% of non-black Americans believed that black Americans are less patriotic than other racial groups.<sup>109</sup> Such attitudes remain pervasive at the unconscious level. In one recent study, researchers found that college students more easily paired American symbols with white faces rather than with black faces.<sup>110</sup> In another study, white and Asian Americans associated whites with the "American" concept to a greater extent than blacks.<sup>111</sup> Yet another study showed that people associated eight white American Olympic athletes more strongly with the category "American" than eight black American Olympic athletes (even though the subjects in the study were more familiar with the black athletes than the white athletes).<sup>112</sup> Furthermore, when whites and Asians are primed (where individuals are subliminally shown images) with the American flag, their attitudes toward black Americans become more negative.<sup>113</sup> When whites and Asians are primed with images of the American flag, their attitudes toward Democrats were not altered, but their attitudes toward blacks generally, and Senator Obama specifically, became more negative.<sup>114</sup> A study conducted in December 2007 showed that people more easily associated Senator Clinton with the category "American" than Senator Obama.<sup>115</sup> That study also showed that participants explicitly found Barack Obama more American than Tony Blair. However, implicitly, the participants more strongly

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107. Jeff Zeleny, *The Politician and the Absent American Flag Pin*, N.Y. TIMES, Oct. 5, 2007, at A22.

108. *See id.*; see also MacGillis, *supra* note 106.

109. STUDS TERKEL, RACE: HOW BLACKS & WHITES THINK & FEEL ABOUT THE AMERICAN OBSESSION, at v (1992) (quoting a 1990 University of Chicago National Opinion Research Center survey).

110. Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 451-53 (2005).

111. *Id.* at 458-59.

112. *Id.* at 454-55.

113. Shanette C. Porter et al., The American Flag Increases Prejudice Toward African-Americans (unpublished manuscript, on file with the authors).

114. *Id.*

115. Thierry Devos et al., Is Barack Obama American Enough to Be the Next President? The Role of Ethnicity and National Identity in American Politics, [http://www.rohan.sdsu.edu/~tdevos/thd/Devos\\_spss2008.pdf](http://www.rohan.sdsu.edu/~tdevos/thd/Devos_spss2008.pdf) (last visited July 30, 2010).

associated pictures of white politicians with the “American” concept than pictures of black politicians.<sup>116</sup>

In addition to equating Obama’s race with a lack of being authentically American, critics have attempted to allude to his middle name, Hussein, as another indicator that he is not authentically American. Bill Cunningham, a conservative radio show host and supporter of Senator McCain, revved-up a crowd before Senator McCain’s appearance at a political rally by repeatedly referred to Obama as “Barack *Hussein* Obama,” emphasizing his middle name.<sup>117</sup> At a rally late in the campaign, an elderly McCain supporter openly called Obama “an Arab.”<sup>118</sup> Senator McCain repudiated both of these remarks,<sup>119</sup> but the events were reminiscent of the Nixon campaign’s tactics. Although there is no evidence that the McCain campaign scripted the event—and Senator McCain’s rebukes seemed entirely sincere—these comments might have reinforced the notion that Senator Obama was simply less American than Senator McCain.

The latent sense that Barack Obama is not quite American has not entirely dissipated with his election. In the summer of 2009, CNN reporter Lou Dobbs began publicly questioning President Obama’s citizenship.<sup>120</sup> Dobbs is the most visible, mainstream source of this rhetoric. The “Birthers,” radical conservatives who seek to prove Barack Obama is ineligible to hold the office of President,<sup>121</sup> began appearing at town hall meetings of members of both parties during 2009, demanding an investigation into President Obama’s citizenship.<sup>122</sup> Health care protests during 2009 also focused on a theme of “taking back America.” Rhetoric demanding that politicians “take back our country” is not unique to President Obama—President Bush attracted similar calls.<sup>123</sup> Past demands to “take back America,” however, have not been accompanied either by the emotional anger that characterized many rallies this summer or by charges that the

116. *Id.*

117. Michael Luo, *A Host Disparages Obama, and McCain Quickly Apologizes*, N.Y. TIMES, Feb. 27, 2008, at A20.

118. Jonathan Martin & Amie Parnes, *McCain: Obama Not an Arab, Crowd Boos*, Oct. 10, 2008, <http://www.politico.com/news/stories/1008/14479.html>.

119. His response to the assertion that Senator Obama was an Arab was, “[n]o ma’am. He’s a decent family man.” *Id.* We doubt that Senator McCain meant to indicate that no Arab could be a decent family man, but it was an unfortunate choice of words.

120. Edward Wyatt, *CNN President Says Obama Citizenship Issue is ‘Dead,’ but Lou Dobbs Revives It*, N.Y. TIMES, July 28, 2009, <http://mediadecoder.blogs.nytimes.com/2009/07/28/cnn-president-says-obama-citizenship-issue-is-dead-but-lou-dobbs-revives-it>.

121. Ben Smith, *Culture of Conspiracy: The Birthers*, POLITICO, Mar. 1, 2009, <http://www.politico.com/news/stories/0209/19450.html>.

122. Mike Castle on Barack H. Obama Birth Certificate, <http://www.youtube.com/watch?v=9V1nmn2zRMc> (last visited July 30, 2010).

123. See MICHAEL MOORE, DUDE, WHERE’S MY COUNTRY (2004).

President is not a citizen. Just as black American Olympic athletes, decked out in red, white, and blue uniforms, seem less American to some than their white counterparts, apparently so too does a black American President seem less American than his predecessors.

##### *5. Interracial Taboo*

Arguably, the most successful racial subtext that the McCain campaign used was that of the interracial sexual taboo. In August of 2008, the McCain campaign ran an advertisement designed to use Senator Obama's growing celebrity status against him. The advertisement called him "the world's biggest celebrity" and featured Paris Hilton and Britney Spears. The ostensible point of using these two particular celebrities was to suggest they are vacuous, troubled party girls, illustrating the idea that celebrity status does not equate to the leadership skills needed to govern.<sup>124</sup> But the world of celebrities is filled with people who doubtless lack qualifications to run the country. The use of these two blond, white women arguably amounted to race-baiting. As one critic of the advertisement put it, using Paris Hilton and Britney Spears "subliminally played on white America's fear of black men violating the delicate flowers of white American womanhood."<sup>125</sup>

Shortly after the advertisement began airing, Senator Obama began to drop in the polls. By the end of August, Senator McCain had erased Senator Obama's large lead, and the campaign was too close to call.<sup>126</sup> What role the Hilton-Spears ad played in this is impossible to say with certainty. The same month included the conventions and the surprise announcement that Governor Palin would be Senator McCain's running mate. The interracial taboo remains powerful, however, and cannot not easily be dismissed as a partial explanation for the tightening of the electoral race during this period. As noted above, the taboo was successfully used in the 2006 Tennessee Senate race against Harold Ford. Although the fall campaign was generally free of racial subtext, it seems unlikely that the McCain campaign chose these two celebrities at random.

##### *D. Conclusion*

The creation of "minority" congressional districts is one of the most controversial components of the Voting Rights Act. These

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124. McCain Ad Calls Obama a Celebrity, <http://www.youtube.com/watch?v=xmFrBaskrlQ> (last visited July 30, 2010).

125. Jonah Goldberg, *Media Play Race Card on Obama*, REPUBLICAN-AMERICAN, Sept. 28, 2008, at 4D, available at <http://article.nationalreview.com/372112/the-media-play-the-race-card-on-obama/jonah-goldberg>.

126. *Gallup Daily: No Bounce for Obama in Post-Biden Tracking*, GALLUP, Aug. 26, 2008, <http://www.gallup.com/poll/109834/gallup-daily-bounce-obama-post-biden-tracking.aspx>.

districts dilute the influence of minority voters by concentrating them in a handful of districts, thereby allowing other representatives to ignore the concerns of minorities. The application of the Voting Rights Act to gerrymandering allows an unfortunate, heavy-handed federal intrusion on a process that is historically local. The role of the courts in reviewing these districts also uncomfortably entangles judges in the political process. Weighed against these costs is the concern that absent racial gerrymandering, minority politicians would never achieve elected office. The election of Barack Obama to the nation's highest office thus undermines a foundational assumption of racial gerrymandering under the Voting Rights Act.

An assessment of the 2008 election reveals that race continues to play an enormous, albeit subtle, role in elections. Racially stratified voting is pervasive. The same election that produced a black President also witnessed the election of 39 black representatives, almost all of whom come from districts that are more than one-third black. Absent racial gerrymandering, the House would likely look like the Senate, which now lacks even one elected black member. Furthermore, the 2008 election continued a modern tradition of racial subtext that promotes racially stratified voting. The Presidential election itself included several explicitly racist intrusions by fringe groups and sub-textual references by Candidate Obama's chief opponents. A full analysis of the 2008 election thus shows that it cannot support the end of racial gerrymandering. Limiting the Voting Rights Act to the protection of access to the polls so as to ensure equal access would effectively end the careers of many minority politicians. Many white voters happily voted for Barack Obama. An assessment of the national legislature, however, suggests that, like most Presidential candidates, he is an extraordinary outlier, rather than the tip of a larger iceberg of post-racial elections.

### III. THE 2008 ELECTION AND THE ROLE OF UNCONSCIOUS BIAS IN EMPLOYMENT DECISIONS

It comes as little surprise that the 2008 election holds lessons for the electoral process—it was an election after all. The election also has some surprising lessons for how employment discrimination functions. The election of the President of the United States is undoubtedly the longest and most public job interview imaginable.<sup>127</sup> As such, it provides an unusual case study of how racial discrimination functions in the employment process.

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<sup>127</sup>. Senator Clinton herself made the analogy between the Presidential campaign and a hiring decision. Jim Acosta et al., *Clinton: "Think About This as a Hiring Decision,"* CNNPOLITICS.COM, May 18, 2008, <http://www.cnn.com/2008/POLITICS/05/18/campaign.wrap/index.html>.

As with voting rights, the 2008 election arguably provides superficial support for pulling back the reins on active legal intervention to prevent discrimination. President Obama's success shows that the influence of explicit racism on employment has diminished enormously. This comes as old news to employment discrimination legal scholars who have long argued that Title VII's protections should be redirected toward eliminating the more pervasive influence of unconscious or implicit racial biases.<sup>128</sup> The influence of unconscious bias is necessarily more difficult to identify than explicit racism, thereby making it hard for reformers to argue that Title VII jurisprudence needs to be extended to address such biases. We contend that the 2008 election, paradoxically, provides evidence that unconscious or implicit bias influences hiring decisions. A broad look at the Obama campaign underscores the influence of race on the 2008 election. To land the job of President, Obama had to walk a veritable racial tightrope—building black support while not alienating white voters.<sup>129</sup> He had to navigate a minefield of unconscious racial biases, just as any black job candidate would.

#### A. *The Science of Implicit Racial Bias*

Research on “implicit bias” demonstrates that race influences unconscious cognitive and emotional reactions, wholly outside of conscious, rational awareness.<sup>130</sup> Psychologists term these unconscious, emotional influences “implicit biases”—attitudes or thoughts that people hold but might not explicitly endorse.<sup>131</sup> These attitudes commonly conflict with expressly held values or beliefs, as demonstrated clearly by the December 2007 study we discussed above, showing conflicts between the participants’ explicit and implicit beliefs about whether Barack Obama or Tony Blair is more American.<sup>132</sup> Participants in that study knew, at a conscious level, that Tony Blair is a British politician and Barack Obama is an American. But their minds held internal associations that more closely associated Tony Blair, particularly his ethnicity, with characteristics that they think of as quintessentially American.

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128. See *infra* Part III.B.

129. Amina Luqman, *Obama's Tightrope*, WASH. POST, July 6, 2007, at A15.

130. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006) (explaining that “implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes”).

131. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 5 (1995); see also Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in *SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES* 265, 266 (John A. Bargh ed., 2007).

132. See Devos, *supra* note 115.

Many people who embrace the egalitarian norm that skin color should not affect their judgment of a job or political candidate also unwittingly harbor negative associations with minorities.<sup>133</sup> People might not even be aware that they hold these attitudes.<sup>134</sup> Even so, these implicit cognitions influence how people evaluate others.<sup>135</sup> The implicit cognitive processes might heavily influence the final choice of a voter who does not otherwise clearly embrace one candidate over another.<sup>136</sup>

Over the last ten years, psychologists have identified ways to measure these implicit cognitions. These measures have proven to be particularly useful for studying bias against blacks for two key reasons.

The first is that when explicit measures are used, individuals may not reveal their true attitudes or preferences because of social desirability biases, thus attenuating the magnitude of the relationship that researchers identify between attitudes and political outcomes. A second comparative advantage of implicit measures is that individuals may not even be aware of their true preferences or attitudes.<sup>137</sup>

The Implicit Association Test (“IAT”) has rapidly become the most widely used measure of implicit racial bias.<sup>138</sup> The IAT basically measures the relative strength of associations between pairs of concepts. It does so with a simple computer task that asks participants to sort stimuli into one of four categories. The four categories are also paired together, so that the difficulty of the sorting process produces a measure of how closely the person taking the IAT associates the categories.<sup>139</sup> For example, one of the most common IAT tests asks participants to sort positive words, negative words, black faces, and white faces. The task pairs white faces with positive words and black faces with negative words and measures how long it takes participants to sort randomly presented stimuli. Then it alters the pairings to be white faces with negative words and black faces with positive words, and again measures the time it takes

133. See Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 56 (2006); Greenwald & Kreiger, *supra* note 130.

134. Greenwald & Banaji, *supra* note 131; see also Nosek et al., *supra* note 131.

135. See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 435-37 (2007) (reviewing evidence that implicit social cognition predicts behavior).

136. See *infra* Part III.C.1.

137. Cindy D. Kam, *Implicit Attitudes, Explicit Choices: When Subliminal Priming Predicts Candidate Preference*, 29 POL. BEHAV. 343, 345 (2007) (internal citations omitted).

138. See Lane et al., *supra* note 135, at 430 (noting that techniques that assess response times are the most widely used methods for ascertaining implicit attitudes).

139. *Id.* at 431.

participants to sort the four types of stimuli. The difference in average reaction times in the two different pairings provides a measure of the participant's association between the two categories (white with good and black with bad versus white with bad and black with good).<sup>140</sup>

IAT studies reveal that a majority of Americans more closely associate black faces with weapons and white faces with harmless objects than the opposite pairing.<sup>141</sup> Additionally, participants identified weapons faster when primed with black faces than white faces.<sup>142</sup> The proper interpretation of these results has been a matter of some debate,<sup>143</sup> but most scholars conclude that the IAT can measure invidious implicit biases.<sup>144</sup> Furthermore, the bias begins at an early age. Baron and Banaji assessed white American six-year-olds, ten-year-olds, and adults using a child-oriented version of the IAT. Remarkably, even the youngest group showed implicit pro-white/anti-black bias, with self-reported attitudes revealing biases in the same direction. The ten-year olds and adults showed the same magnitude of implicit race bias, but self-reported racial attitudes became substantially less biased in older children and vanished entirely in adults, who self-reported equally favorable attitudes toward whites and blacks.<sup>145</sup> It seems that people learn bias early but only later learn to cover the bias by publicly embracing more egalitarian norms.

The latter point shows the striking divergence between explicit attitudes towards race and measures of implicit bias.<sup>146</sup> Although explicit and implicit measures of bias are related, even people who openly embrace egalitarian norms often harbor very negative associations concerning blacks.<sup>147</sup> Even participants who are told that the IAT measures undesirable racist attitudes and who explicitly self-report egalitarian attitudes find it difficult to control their biased

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140. *Id.*

141. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 166, 168 tbl. 1 (2008).

142. B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 183-86, 188 (2001).

143. See Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?"*, 15 PSYCHOL. INQUIRY 257 (2004).

144. See Greenwald & Kreiger, *supra* note 130; Lane et al., *supra* note 135; Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV: What We Know (So Far) About the Method*, in IMPLICIT MEASURES OF ATTITUDES 59, 62 (Bernd Wittenbrink & Norbert Schwarz eds., 2007) [hereinafter Lane et al., *Implicit Association Test*].

145. Baron & Banaji, *supra* note 133, at 55-56.

146. See Lane et al., *supra* note 135, at 431.

147. See generally Baron & Banaji, *supra* note 133 (indicating that whereas seemingly egalitarian views about race develop over time, implicit racial attitudes stay the same).

responses.<sup>148</sup> These findings suggest that the explicit and implicit studies measure somewhat different cognitive systems. The explicit measures show that most adults have learned the importance of egalitarian norms, or at least the importance of embracing such norms publicly. These explicit norms, however, reflect only the slower deductive processes.

Implicit racial bias is not a mere abstraction. It is linked to the deepest recesses of the mind—particularly the amygdala. The amygdala is an almond-sized subcortical brain structure, involved in emotional learning, perceiving novel or threatening stimuli,<sup>149</sup> and fear conditioning.<sup>150</sup> Neurological research shows that whites react to black faces with amygdala activation, even when shown black faces subliminally.<sup>151</sup> This activation does not occur in whites processing white faces. Furthermore, the degree of amygdala activation after exposure to black faces correlates with IAT scores.<sup>152</sup> In short, whites who show evidence of a high degree of implicit bias react to black faces, whether they know it or not, with some measure of fear and anxiety.

The unconscious bias that the IAT measures also seems to affect cognitive processes. In one study, subliminally priming participants with the word “white” made it easier for them to recognize positive words like “smart” than when they were primed with the word “black.”<sup>153</sup> Other studies show even more marked effects when researchers use black and white faces as priming materials.<sup>154</sup> Similarly, whites subliminally primed with black male faces reacted to a staged computer mishap with much greater hostility than those primed with white male faces.<sup>155</sup> Other work shows that subliminally priming people with words commonly associated with blacks could lead individuals to interpret ambiguous behavior as more aggressive.<sup>156</sup> Consistent with the findings of the IAT, the

148. Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 92 (2003).

149. Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 AM. PSYCHOLOGIST 717, 720 (2001).

150. *Id.*; see also Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000).

151. William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 811 (2004).

152. *Id.*

153. Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23, 23 (1983).

154. John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL & SOC. PSYCHOL. 510, 522-23 (1997).

155. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238-39 (1996).

156. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 10-12 (1989).

associations most people have with blacks are different from those they have with whites. Exposure to black faces, even at a subliminal level, activates both the category “African American” and the associated stereotypes and behaviors that go along with it. In turn, white individuals seem simply to think differently, at least at an intuitive level, about blacks than about whites.

Other striking demonstrations of the influence of unconscious racial bias on behavior show that these biases can be life-threatening. One study placed participants in a video game style police simulation in which they had to assess whether a target was holding a gun or a harmless object (wallet, soda can, or cell phone).<sup>157</sup> Participants had to decide as quickly as possible whether to shoot the target. Both black and white participants were more likely to mistake a black target as armed when he in fact was unarmed; conversely, they were more likely to mistake a white target as unarmed when he in fact was armed.<sup>158</sup> Furthermore, unconscious anti-black bias correlated with the extent of this shooter bias.<sup>159</sup> In the area of health care, Green and his colleagues found that the diagnoses of internal medicine and emergency medicine physicians were associated with their unconscious bias.<sup>160</sup> In that study, those physicians who harbored implicit negative associations with black patients diagnosed black patients differently than white patients.<sup>161</sup>

### B. Implicit Bias and Title VII

As the moniker implies, implicit bias is bias; it puts a thumb on the scale against its targets.<sup>162</sup> Although Title VII was passed to eliminate racial bias from employment decisions, it is challenging to use a legal remedy to address an implicit bias of which employers themselves might lack awareness. Although courts can detect the influence of implicit bias in some ways, legal scholars have argued for some time now that the current jurisprudence is not well suited for eliminating the influence of implicit bias from the workplace.

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157. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-17, 1319, 1325 (2002).

158. *Id.* at 1317.

159. Glaser & Knowles, *supra* note 141.

160. Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, J. GEN. INTERNAL MED. 1231 (2007).

161. *Id.* The results of this study are complex. Overall, physicians were more likely to diagnose black patients with coronary artery disease, and physicians with strong black-bad associations assigned treatments differently to these patients. *Id.* at 1236 fig.3, 1237. The combination produced similar treatment strategies for both black and white patients, albeit through different diagnostic routes. *Id.* at 1237.

162. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006).

Under Title VII, employers may not discriminate against applicants or employees on the basis of a number of categories, including race and color.<sup>163</sup> Under *McDonnell Douglas Corp. v. Green*, a complainant establishes a prima facie case for racial discrimination where he shows:

- (i) [T]hat he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>164</sup>

The burden then shifts to the employer to demonstrate a valid nondiscriminatory reason for rejecting the employee.<sup>165</sup> An employer cannot, however, use the complainant's conduct as a pretext for the discrimination, nor may it engage in racial double standards.<sup>166</sup> In turn, the employee must "demonstrate that the proffered reason was not the true reason for the employment decision."<sup>167</sup> This may be done directly by demonstrating that "a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation" is not credible.<sup>168</sup>

This framework is not ideally suited to identifying the influence of implicit bias.<sup>169</sup> It can identify explicit, conscious biases and animus much more easily than addressing biases people are not consciously aware they harbor.<sup>170</sup> People who hold overtly racist sentiments often say as much in public ways. A police chief who says he does not believe women make good officers or a human resources director who states that she worries about hiring blacks because she thinks they are lazy make easy targets for the law's prohibition against discriminatory hiring practices.<sup>171</sup> Such individuals commonly try to hide these sentiments, particularly in litigation, but it is easy for

163. 42 U.S.C. § 2000e-2(a)(1) (2006).

164. 411 U.S. 792, 802 (1973).

165. *Id.* at 802.

166. *Id.* at 804.

167. Tex. Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

168. *Id.*

169. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319, 322 (1987).

170. See Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant Is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225, 231-36 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006).

171. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 969-70 (2006).

these people to slip up. Litigation might ultimately reveal the discrimination in some way—perhaps through the discovery of casual comments in depositions or through the identification of confidential memoranda through document production. The reliance on unconvincing pretexts that are easily identified might also be common in those who deliberately discriminate.

Unconscious bias, however, is difficult to detect. People who hold implicit biases against women or blacks are not necessarily aware of these biases. People's reports of their cognitive processes are often not consistent with their judgments.<sup>172</sup> Many influences on judgment seem to operate outside of people's awareness.<sup>173</sup> Combining this observation with contemporary research on the structure of the brain, psychologists now argue that people rely on two distinct cognitive systems of judgment: one that is rapid, intuitive, and unconscious; another that is slow, deductive, and deliberative.<sup>174</sup> The intuitive system can often dictate choice, while the deductive system lags behind, struggling to produce reasons for a choice that comports with the accessible parts of memory. Thus, an intuitive gut reaction against a job candidate can dictate a hiring decision. The rational account only follows later and might not provide a fully accurate account of the decision. People who harbor negative implicit associations with black job applicants might assess resumes of women or blacks more harshly than those of white males without even being aware of what they are doing. Although antidiscrimination laws ban the influence of race or gender in hiring decisions regardless of the source of such influence, unconscious bias can escape scrutiny.

Professor Linda Hamilton Krieger identified the role that unconscious bias might play in employment discrimination almost a decade and a half ago. Krieger argued that most modern stereotyping arises from “cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment previously attributed to motivational processes.”<sup>175</sup> Furthermore, it is not only “bad” people who stereotype; as part of “normal cognitive functioning,” all people categorize and stereotype natural objects as a way “to simplify the task of perceiving, processing, and retaining information about people in memory.”<sup>176</sup> These stereotypes

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172. See, e.g., Timothy De Camp Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports About the Effects of Stimuli on Evaluations and Behavior*, 41 SOC. PSYCHOL. 118, 121-23, 125, 127 (1978).

173. See *id.*

174. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6-9 (2007) (reviewing this literature).

175. Krieger, *supra* note 170, at 1187 (internal citation omitted).

176. *Id.* at 1188.

unintentionally bias people's judgment about members of other groups and operate outside of one's own conscious awareness.<sup>177</sup> Although her work predated the development of the IAT, it presaged the science that followed.

The existing Title VII framework does not easily square with the view that bias arises from unconscious cognitive processes. The courts generally assume that unless employers harbor discriminatory intent or motive, they will not discriminate.<sup>178</sup> As such, proving discriminatory intent in the employment context is a high hurdle to overcome.<sup>179</sup> Under the analytical framework established by *Texas Department of Community Affairs v. Burdine* and *McDonnell Douglas Corp. v. Green*, proof of disparate treatment is evinced by three steps.<sup>180</sup> First, pretext analysis begins when the plaintiff presents a prima facie case of discrimination.<sup>181</sup> In response, the defendant has the burden of producing legitimate, nondiscriminatory reasons for its decision to engage in the action at issue as it pertains to the plaintiff.<sup>182</sup> Second, the plaintiff can prevail only by proving that the defendant's proffered reason was not the "true reason[]" for the decision,<sup>183</sup> but merely a "pretext for discrimination."<sup>184</sup> According to Krieger's research:

The most common method of proving pretext is to show that the employer's proffered reason is not worthy of credence either because it appears implausible in light of data upon which such an employment decision should have been based, or because it appears inconsistent with decisions reached in similar cases involving employees outside of plaintiff's protected class.<sup>185</sup>

This framework fails to account for the fact that race and sex categorization "may distort perception, memory, and recall for decision-relevant events such that, at the moment of decision, an employer may be entirely unaware of the effect of an employee's group

177. *Id.*

178. See *id.* at 1167.

179. See *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) (indicating that "[p]roof of such discrimination is always difficult").

180. 450 U.S. 248, 252-53 (1981); 411 U.S. 792, 802 (1973).

181. *Burdine*, 450 U.S. at 253 n.6; *McDonnell Douglas*, 411 U.S. at 802.

182. See, e.g., *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802.

183. *Burdine*, 450 U.S. at 253.

184. *Hicks*, 509 U.S. at 515; *Burdine*, 450 U.S. at 256; see also *McDonnell Douglas*, 411 U.S. at 804.

185. Krieger, *supra* note 170, at 1179. Krieger goes on to provide examples such as "(1) Evidence that the objective data maintained by the defendant did not support the result reached by the decisionmaker; (2) Evidence that the decisionmaker seemed to undervalue or ignore facts favorable to the employee; (3) Evidence that the decisionmaker made a judgment about the plaintiff without being able to point to specific events which would reasonably support such a judgment; or (4) Evidence showing that similarly situated Anglo employees were on occasion treated more favorably." *Id.* at 1180.

membership on the decisionmaking process.”<sup>186</sup> In essence, according to Kreiger, current disparate treatment jurisprudence wrongly construes how discriminatory motivation accounts for judgmental strategies that employers use in decisionmaking. This occurs in three ways. First, it assumes that discrimination occurs when a decisionmaker refuses to consider an individual for a particular position. Furthermore, it assumes that the decision arises out of antipathy for that individual’s social group or because placing the individual in the position in question violates role expectations for members of the individual’s social group.<sup>187</sup> Second, disparate treatment jurisprudence assumes that “stereotypes can cause discrimination when group status is consciously used as a ‘proxy’ for some other job-relevant trait.”<sup>188</sup> Third, it assumes that discrimination occurs at the precise moment of the employer’s decisionmaking.<sup>189</sup>

The disparate treatment jurisprudence also mistakenly assumes that decisionmakers possess adequate access to their own thoughts as to why they will make, or have made, certain decisions.<sup>190</sup> As such, it assumes that decisionmakers are aware of the reasons why they will make, or have made, employment decisions.<sup>191</sup> With such knowledge, well-intentioned decisionmakers comply with Title VII.<sup>192</sup> In contrast, decisionmakers with bad intentions know when they are taking an employee’s group status into account; when challenged, they design pretexts to cover their tracks.<sup>193</sup>

Oddly enough, the human brain excels at creating pretext to cover the role of unconscious motives.<sup>194</sup> The brain commonly reacts with an intuitive judgment, which the rational side must then explain, almost as if the behavior were the product of external events. Thus, in one unusual study where researchers gave subjects the somewhat embarrassing task of picking out their favorite piece of lingerie, participants tended to select the third choice, regardless of the available options.<sup>195</sup> When asked to explain their choice (an even more embarrassing chore than selecting the favorite), subjects never stated that they had simply selected the third option so as to avoid having to think about the task, even though that was likely what they were doing. They found some explanation, however silly, and settled upon it. Similarly, in a study in which the researchers subtly

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186. *Id.* at 1167.

187. *Id.* at 1181-82.

188. *Id.* at 1182.

189. *Id.* at 1183.

190. *Id.* at 1167.

191. *Id.* at 1185.

192. *Id.*

193. *Id.*

194. See Wilson & Nisbett, *supra* note 172.

195. *Id.* at 123-24.

manipulated subjects' willingness to tolerate electric shocks, subjects invented explanations to account for their tolerance of the pain.<sup>196</sup> Even though a placebo pill was responsible for the tolerance, subjects said things such as "I used to build radios and stuff when I was 13 or 14, and maybe I got used to electric shock."<sup>197</sup> The placebo pill unconsciously influenced their tolerance, but the rational side of the brain supplied an explanation. The brain's ability to rationalize and hide intuition is so profound that psychologists argue that the human system of moral reasoning is founded entirely on intuition, even though philosophers (and lawyers) treat it as highly rational, coherent, and conscious.<sup>198</sup>

The rationalization of intuitive judgment seems to work well in the employment context, at least in experimental settings. Researchers have found that subjects selecting among resumes adjust their rationalizations in ways that can accommodate bias. For example, when the resume of a white job candidate showed more experience than that of a black candidate, subjects emphasized the importance of experience for the job; when the reverse was true they claimed experience was not important.<sup>199</sup> The rational, conscious side of the brain seems geared to cover the potentially embarrassing choices that the intuitive side might make. This tendency makes ferreting out the influence of unconscious bias difficult.

Nevertheless, some courts have tried to recognize the influence of unconscious bias in employment discrimination suits. Courts have refused to grant defendant-employers summary judgment in Title VII cases given employers' "hidden or unconscious [discriminatory] motives."<sup>200</sup> In fact, *Shaw v. Cassar* highlighted the following:

Overt and blatant discrimination is a relatively rare phenomenon . . . It is intentional discrimination in its covert hidden form that now poses the real problem. Evidence of illicit intent may be extremely difficult to obtain, whether the responsible individuals are conscious of their bias, and therefore likely to try to hide it, or whether they are expressing unconscious bias through some discretionary decisionmaking process.<sup>201</sup>

196. Nisbett & Wilson, *supra* note 172, at 257.

197. *Id.*

198. See Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

199. Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474 (2005).

200. Oxman v. WLS-TV, 609 F. Supp. 1384, 1387 (N.D. Ill. May 10, 1985).

201. 558 F. Supp. 303, 316 (E.D. Mich. Jan. 7, 1983) (quoting Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CAL. L. REV. 1201, 1203 (1982)).

Some courts have even stated that Title VII forbids unconscious race bias,<sup>202</sup> even though existing jurisprudence generally does not accommodate such claims. Recognition of the role of unconscious bias in employment discrimination would lead courts to be more skeptical about pretext and to attend more closely to the context and environment in which the bias allegedly operates. The election of a black President, however, would suggest the opposite—that courts embrace the notion that we have entered a post-racial period in which claims of bias should be taken more skeptically. In the next Section, we argue that the 2008 campaign refutes the latter idea.

### C. Implicit Bias and the Obama Campaign

A key impediment to convincing courts that they need to recognize the potential for unconscious bias in Title VII claims is a lack of direct evidence that unconscious bias implicates employment decisions outside of the context of psychology experiments. The research clearly shows that implicit biases are widespread.<sup>203</sup> It also shows that implicit biases affect behavior and judgments that are closely related to employment decisions, such as the amount of eye contact an interviewer makes with a job candidate.<sup>204</sup> Research also indicates that implicit biases produce disparities in judgments in hypothetical cases by doctors and even judges.<sup>205</sup> It also shows that implicit bias affects behavior in a realistic simulation, as in the shooter bias study.<sup>206</sup> But there remains no study that connects the presence of implicit biases to actual employment decisions made in the real world. To be sure, other studies carefully document the existence of racial disparities in how job candidates are treated by actual employers.<sup>207</sup> These studies lack measures of implicit biases, however, so the connection remains to be made.

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202. *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 931-32 (7th Cir. 1993) (holding that an employer's failure to adhere to its own set of rules invites "subjective determinations likely to reflect unconscious racial bias").

203. See Greenwald & Krieger, *supra* note 130, at 951, 955-56.

204. See *id.* at 961.

205. See Green et al., *supra* note 160 (discussing the role implicit bias plays in doctors' diagnoses of black and white patients); Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (discussing the role implicit bias plays in judges' rulings).

206. See Glaser & Knowles, *supra* note 141.

207. Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 552-54 (1997); John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65-66 (2002); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 438-40 (2001); see also Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 75, 77-78 (2003).

Drawing upon several lines of argument, we contend that a close analysis of the 2008 campaign documents some influence of unconscious bias on voters' decisions. We start by reviewing evidence that implicit bias affects voting in general. We then present an analysis of the political landscape that Candidate Obama faced, drawing from reviews and discussions of the early months of his candidacy. We then assess poll numbers from the primary election to review how he successfully navigated this landscape. Finally, we present an assessment of whether the so-called "Bradley Effect" and the role it may have played in the 2008 election can be taken as evidence of the role of implicit bias among the electorate. We contend that the complete portrait shows a widespread influence of implicit bias in the 2008 election.

We recognize that this conclusion seems ironic. After all, Candidate Obama landed the job for which he was applying and would have no claim under Title VII. But unlike most job applicants, Candidate Obama had armies of people working to help him obtain the position. More importantly, he had a professional staff of well-funded campaign managers to help him navigate the landscape of implicit bias in the electorate. To the extent his candidacy lays out a blueprint for successfully navigating implicit racial bias, it reveals the existence and influence of this bias.

### *1. Unconscious Bias and Voting in General*

It is reasonably clear that implicit bias can influence voters. Voting is not based solely on the deductive, deliberative system of reasoning; intuition and emotion play significant roles in voter choice.<sup>208</sup> In one study involving a choice of candidates, for example, the emotional responses to candidates accurately predicted voter preferences for more than 90% of the decided voters and 80% of the undecided voters.<sup>209</sup> Spin doctors seem to know this. Most political advertisements are meant either to inspire voter enthusiasm, thereby motivating their political engagement and loyalty, or to induce fear, thereby stimulating vigilance against the risks some candidate supposedly poses.<sup>210</sup> Other research shows that political advertisements that provoke anxiety stimulate attention toward the

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208. See generally DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION (2007).

209. William G. Christ, *Voter Preference and Emotion: Using Emotional Response to Classify Decided and Undecided Voters*, 15 J. APPLIED SOC. PSYCHOL. 237, 238 (1985).

210. Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions*, 49 AM. J. POL. SCI. 388, 393-97 (2005).

campaign and discourage reliance on habitual cues for voting; in short, they can induce crossover voting.<sup>211</sup>

Likeability also affects voting. In one study, disengaged voters who watched entertainment-oriented talk show interviews of Al Gore and George W. Bush were more likely to vote against their party loyalties when they found the crossover candidate likeable.<sup>212</sup> Accordingly, politicians prime (that is, use subtle, if not subliminal, messages) exposed and attentive voters to base their voting decisions on issues and images emphasized during the campaign.<sup>213</sup> Thus, candidates have an incentive to use arguments that evoke emotions such as fear, anxiety, and anger. Such emotional appeals allow politicians to galvanize their base and attract uncommitted voters' support. Moreover, the use of emotionally evocative appeals is consistent with the media's desire for excitement and drama in their reporting.<sup>214</sup> It is no surprise that such appeals influence voting patterns, inasmuch as people's implicit attitudes affect how they vote.<sup>215</sup> Emotion is clearly not a panacea for candidates. Politically astute voters were not influenced by the extent to which they found the candidates likeable.<sup>216</sup> As with most decisions, both passion and reason influence voting. All candidates must win the hearts and minds of the voters—and the hearts are probably more important.

## 2. Walking the Racial Tightrope

Candidate Obama faced the daunting task of winning hearts and minds that all candidates face. He also faced complex racial challenges, particularly early on in the campaign, that other candidates did not. As noted earlier, white voters seemed to wonder whether candidate Obama was "too black."<sup>217</sup> At the same time, many leaders in the black community openly wondered whether he was "black enough."<sup>218</sup> On the one hand, candidate Obama married a

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211. George E. Marcus & Michael B. Mackuen, *Anxiety, Enthusiasm, and the Vote: The Emotional Underpinnings of Learning and Involvement During Presidential Campaigns*, 87 AM. POL. SCI. REV. 627, 677-78 (1993).

212. Matthew A. Baum, *Talking the Vote: Why Presidential Candidates Hit the Talk Show Circuit*, 49 AM. J. POL. SCI. 213, 223-30 (2005).

213. James N. Druckman, *Priming the Vote: Campaign Effects in a U.S. Senate Election*, 25 POL. PSYCHOL. 577 (2004).

214. Jennifer Jerit, *Survival of the Fittest: Rhetoric During the Course of an Election Campaign*, 25 POL. PSYCHOL. 563 (2004).

215. Westen, *supra* note 208; Inna Burdein et al., *Experiments on the Automaticity of Political Beliefs and Attitudes*, 27 POL. PSYCHOL. 359, 359-71 (2006); Malte Friese et al., *Predicting Voting Behavior with Implicit Attitude Measures: The 2002 German Parliamentary Election*, 54 EXPERIMENTAL PSYCHOL. 247, 247-55 (2007).

216. Baum, *supra* note 212, at 217.

217. See *supra* Part II.C.1.

218. Luqman, *supra* note 129. Even when Obama ran for an Illinois congressional seat against former Black Panther Bobby Rush, his blackness was questioned. Jeff Zeleny,

black woman, lived in a predominantly black neighborhood, and attended a predominantly black church. Two issues seem to have raised the question in the minds of potential black voters, however.<sup>219</sup> Blacks were initially not sure that Obama had the same experiences as them since he was the child of an interracial union and had grown up in Indonesia and Hawaii.<sup>220</sup> Politically, black voters were also suspicious of a black presidential candidate who seemed to have such cachet with whites. They wondered what kinds of compromises a black candidate would have to make to be elected.<sup>221</sup> Many black leaders worried that Obama could only be as black as white voters would allow him to be.<sup>222</sup> In contrast, Hillary Clinton built strong support early in the black community based, in part, on her husband's popularity among black voters.<sup>223</sup> Oddly enough, being black had the potential to put candidate Obama at an early disadvantage among black voters, even as he also had to become appealing to white voters.

In addition to having his racial authenticity questioned, Obama was handicapped by the fact that at least some black voters did not believe he had a realistic chance of winning the November election. Democratic activist Donna Brazile, a black woman who was Al Gore's 2000 campaign manager, noted that black voters were pessimistic about whether the country was ready for a black president.<sup>224</sup> Some blacks believed that when push came to shove, "they" ("they" being anyone, maybe "the Republican smear machine," the FBI, or the CIA) would not let Obama win.<sup>225</sup> Other blacks, including Senator Obama's wife, feared that he would be placed in harm's way.<sup>226</sup> Some went so far as to fear that Obama would be assassinated and that not voting for him was a way to protect him.<sup>227</sup>

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*When It Comes to Race, Obama Makes His Point—with Subtlety*, CHI. TRIB., June 26, 2005, at 1.

219. Jean Marbella, *Who's Right When Race Lies Below the Surface*, BALT. SUN, Feb. 6, 2007, at 1B.

220. Gordon Jackson, *Stirring the Nation's Conscience, Obama Makes His Case for Being "Black Enough,"* MISS. LINK, Mar. 15, 2007, at A6; Marbella, *supra* note 219.

221. Nikole Hannah-Jones, *Is Obama Black Enough? Blacks Care If He Shares Our Values, Concerns*, OREGONIAN, Aug. 26, 2007, at E01.

222. *Id.*

223. Jonathan Kaufman & Valerie Bauerlein, *More Blacks Lean Towards Obama: Shift in Allegiance from Clinton Could Tighten Primaries in the South*, WALL ST. J., Dec. 14, 2007, at A5.

224. Karen Tumulty, *Out of Reach?*, TIME, Oct. 8, 2007, at 50.

225. Clarence Page, *Will Black Voters Overcome "Fear of Possibility"?*, BALT. SUN, Dec. 14, 2007, at 27A; Eugene Robinson, *Obama and the "They" Sayers*, WASH. POST, July 31, 2007, at A19.

226. Lynn Sweet, *Michelle Obama to Play Bigger Role in Campaign: Candidate's Wife also his "Most Important Advisor,"* CHI. SUN-TIMES, Mar. 12, 2007, available at <http://www.suntimes.com/news/sweet/292926,CST-NWS-sweet12.article>.

227. Jim Galloway & Bob Kemper, *Blog: Political Insider: "America Is Readier to Elect a White Woman than It Is an African-American Man,"* ATLANTA J.-CONST., Oct. 15, 2007.

White voter support for Obama was complicated from the start. Unlike previous black candidates, Obama enjoyed real success among white voters. He won in Iowa and came close to winning in New Hampshire, even though both states have only tiny black populations.<sup>228</sup> Even in South Carolina, the heart of the old South, Obama attracted large percentages of white votes.<sup>229</sup> Furthermore, Obama achieved his unprecedented ability to raise money from the grassroots with considerable support from white donors.

Views on the sources and meaning of Obama's success among whites were mixed in the early stages of his campaign. Some argued that Gallop and *Newsweek* polls showing that Americans stated that they would support a black President reflected a new reality and that white voters now look beyond race.<sup>230</sup> Others argued that enough Americans were still preoccupied by race that Obama faced an uphill struggle to capture enough white votes to succeed in a national election.<sup>231</sup> Lurking beneath Obama's success in early primaries was evidence that support among many whites was weaker than it seemed.<sup>232</sup> Even as Obama did well among whites in South Carolina, he did far worse among whites there than he did in Iowa and New Hampshire.<sup>233</sup> Furthermore, as we discuss below, other black candidates have found that white support in the polls sometimes has a symbolic quality that erodes fast when it comes time to vote.<sup>234</sup> Whites sometimes give pollsters responses they perceive to be politically correct but act on different impulses in the voting booth.<sup>235</sup>

Even white voters who would ultimately vote for Obama were not necessarily engaged in a race-neutral focus on his qualities as a candidate, relative to Senator Clinton. Psychologists have long found that many white Americans are somewhat well aware of their own prejudices and those of the society in which they live and find facing

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228. In Iowa, Obama won 38% of the votes; Clinton won 29%. Christina Bellatoni, *Huckabee, Obama Win in Iowa—Youth Support Bypasses Hillary*, WASH. TIMES, Jan. 4, 2008, at A01. In New Hampshire, Clinton won 39% and Obama won 36%. Patrick Healy & Michael Cooper, *Clinton Is Victor, Defeating Obama: McCain Also Wins*, N.Y. TIMES, Jan. 9, 2008, at 1.

229. In South Carolina, Obama won 55% to Clinton's 27%. Dan Balz et al., *Obama Is Big Winner in S.C.: Clinton 2nd After Bitter Campaign*, WASH. POST, Jan. 27, 2008, at A1.

230. Jaun Williams, *Obama's Color Line*, N.Y. TIMES, Nov. 30, 2007, at 23.

231. Cynthia Tucker, *Racial Bias So Deeply Embedded That You Might Not Recognize It in You*, BALT. SUN, Jan. 21, 2008, at 13A.

232. Healy & Cooper, *supra* note 228.

233. In Iowa and New Hampshire, Obama claimed 33% and 36%, respectively, of the white vote. In South Carolina, he only took 24%. In contrast, Clinton's share of the white vote was 27%, 39%, and 38%, respectively. Steven Thomma, *Dem's Racial Chasm Persists: S.C. Results Reinforce Opposite Challenges for Obama and Clinton*, CHARLOTTE OBSERVER, Jan. 27, 2008, at 8A.

234. Dick Polman, *Barack Obama's Race Seems to Be a Second-Tier Issue in '08 Election*, AUGUSTA CHRON., Jan. 24, 2007, at A05.

235. See *infra* notes 253-78 and accompanying text.

these biases an unpleasant experience.<sup>236</sup> They react by engaging in actions designed to quell the uncomfortable sense that they and their peers are biased. Senator Obama could benefit from the “aversive racism” that many Americans feel, making his race an advantage among white voters. A white voter who supports Obama does not necessarily want a black man to be president but might only want to be able to congratulate himself or herself for backing a black person. As Bruce Llewellyn, Colin Powell’s cousin, told *The New Yorker* magazine, “whites love the idea that, ‘[g]ee, we weren’t prejudiced.’ ”<sup>237</sup>

Obama had been careful to avoid using America’s racial legacy against white voters. In doing so, according to Shelby Steele, Obama granted whites the benefit of the doubt that they are decent Americans who are not racists. In return for this gift, many whites openly embraced Obama and gave him a fair chance to make his case for his candidacy.<sup>238</sup> Obama’s race “can implicitly encourage [white voters] to feel that a vote for Obama is a vote for tolerance, for a future free of the constricting prejudices of the past . . . .”<sup>239</sup> If a black man can attain this nation’s highest office—largely with the support of white voters—maybe our nation finally judges people “on the basis of the content of his character rather than the color of his skin.”<sup>240</sup> Whites would like to believe that the nation is breaking free of racial prejudice, and Senator Obama’s successful presidential campaign allows them to do that.<sup>241</sup> In essence, Senator Obama cast himself as a bridge over the troubled waters of race relations to a post-racial America. At least a certain segment of white voters supported him because of that. During his Philadelphia “race speech,” however, he disabused whites of this notion. He pointedly noted that resolving America’s race problem was a collective responsibility.<sup>242</sup> And arguably, he paid a price for this assertion; he fared poorly among white voters in the primaries that followed this speech.

The results in the spring primaries suggest that the disaffection of working-class whites for the Democratic Party’s close association with black voters continues to affect national politics. Even though

236. See generally Margo J. Monteith et al., *Putting the Brakes on Prejudice: On the Development and Operation of Cues for Control*, 83 J. PERSONALITY SOC. PSYCHOL. 1029 (2002).

237. Polman, *supra* note 234.

238. See SHELBY STEELE, A BOUND MAN: WHY WE ARE EXCITED ABOUT OBAMA AND WHY HE CAN’T WIN 74-75 (2007).

239. David Greenberg, *Playing the Tolerance Card: How Obama Is like JFK*, SLATE, April 20, 2007, available at <http://www.slate.com/id/2164662>.

240. Martin Luther King, Jr., *I Have a Dream*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 258 (1986).

241. See Polman, *supra* note 234.

242. Senator Barack Obama, Address at the Constitution Center, Philadelphia, Penn.: A More Perfect Union (Mar. 18, 2008), available at <http://blogs.wsj.com/washwire/2008/03/18/text-of-obamas-speech-a-more-perfect-union>.

Senator Obama embraced more progressive positions than Senator Clinton on issues of importance to working-class voters (such as free trade), she consistently attracted more support from these voters than he did.<sup>243</sup> These voters might see Senator Obama as more supportive of affirmative action than Senator Clinton, or see her as stronger on some other issue, such as health care. Additionally, Senator Clinton has not engaged in the kind of race baiting that has characterized previous efforts of the Republican Party. She might not need to do so, however, as these are the same voters Karl Rove, Jesse Helms, the first President Bush, and Richard Nixon targeted in past elections with racially motivated ads. Working-class white voters seem inclined as Democrats on policy but as Republicans on race.

### *3. Implicit Bias and the Primary Election Part I*

We separately assess the results of the Democratic primary election from the general election and also separately provide a secondary analysis of the accuracy of the polls in the primary election as evidence of the “Bradley Effect.” The Democratic primary remains of interest since, unlike the general election, it provides a comparison of two candidates with similar political views. In assessing the primaries, we are mindful that Senator Clinton made history by almost becoming the first woman to capture the Presidential nomination of a major political party. IAT studies show that most adults more closely associate women with home life and men with careers,<sup>244</sup> which certainly might have affected Senator Clinton’s candidacy. Our analysis tries to focus on the role race played and the racial subtext of the campaign, but gender likely mattered as well.

If implicit bias affects voters, one would expect that, at a minimum, those who harbor negative associations with blacks would tend to oppose a black candidate. Democratic primary/caucus exit polls indicate that Senator Obama had problems with white voters during the primaries. As Table 1 shows, in twenty-seven out of thirty-seven primaries or caucuses for which exit poll data was available, Senator Clinton beat Senator Obama among white voters.<sup>245</sup> Asian and Latino Americans, who also express implicit preferences for whites over blacks on the IAT (albeit to a lesser

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243. Christi Parsons & John McCormick, *Blue-Collar Vote Tough for Obama: Group More Likely to Give Clinton Edge*, CHI. TRIB., Feb. 10, 2008, at 1.

244. Greenwald & Banaji, *supra* note 131, at 15-17.

245. See MSNBC.com, 2008 Primary Results—Exit Polls, <http://www.msnbc.msn.com/id/21660890>; The Washington Post, Primaries and Caucuses, Entrance and Exit Polls, <http://projects.washingtonpost.com/2008-presidential-candidates/primaries/exit-polls> (last visited July 30, 2010) [hereinafter 2008 Primary Exit Polls]. Note that Table 1 reports only those states in which we had data available from both black and white voters.

extent than whites)<sup>246</sup> also voted for Senator Clinton in higher numbers in eight out of eleven of those primaries/caucuses for which data are available.<sup>247</sup> Demographic groups that tend to harbor more implicit anti-black bias also favored Senator Clinton. Those who voted for Clinton over Obama tended to be older,<sup>248</sup> poorer,<sup>249</sup> and less educated<sup>250</sup> than Senator Obama's supporters.

The disparity between black and white voters in the Democratic primaries was astonishing. As illustrated in Table 1, the exit polls show that black voters overwhelmingly supported Senator Obama, especially as the primary season progressed. With the exception of Senator Clinton's state of New York, black voters' support did not depend much on geography, never falling below 72%, and usually far exceeding that. But support among white voters varied enormously. In every state, Senator Obama garnered more support from Black voters than white voters. In fact, nowhere was the shift in support—the "race gap"—less than a forty-seven-percentage point swing (which occurred in South Carolina). That means that the percentage of black voters who supported Senator Obama minus the percentage of black voters who supported Senator Clinton was at least forty-seven points greater than the percentage of white voters who supported Senator Obama minus the percentage who supported Senator Clinton. At the most extreme, voters in Alabama, Arkansas, New Jersey, Louisiana, Ohio, and Pennsylvania shifted by more than 100 percentage points. In these States, black and white voters behaved practically as mirror images of each other.

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246. Greenwald & Kreiger, *supra* note 130, at 958.

247. Parks & Roberson, *Michelle Obama*, *supra* note 9, at 26.

248. In twenty-seven out of thirty-eight states, a greater percentage of eighteen to twenty-four year-olds voted for Obama, whereas in twenty-five out of thirty-eight states, a greater percentage of seniors age sixty-five and older voted for Clinton. Parks & Roberson, *supra* note 9, at 42-43.

249. In nineteen out of thirty-eight states, a greater percentage of individuals who earned less than \$50,000 voted for Clinton, whereas in twenty-four out of thirty-eight states, a greater percentage of individuals who earned more than \$100,000 voted for Obama. *Id.*

250. In twenty-six out of thirty-eight states, a greater percentage of individuals who had only a high school education voted for Clinton, whereas in twenty-eight out of thirty-eight states, a greater percentage of individuals who had some post-graduate study voted for Obama. *Id.*

**Table 1: Exit Poll Results for Spring Primaries by Race; % Supporting Each Candidate<sup>251</sup>**

State	Black Voters		White Voters		Race Gap*	Black % in State	Winner
	Obama	Clinton	Obama	Clinton			
<b>January Primaries / Caucuses</b>							
Iowa <sup>c</sup>	72	16	33	27	50	2.1	O
Nevada <sup>c</sup>	83	14	34	52	77	6.8	C
South Carolina	78	19	36	24	47	29.5	O
<b>Super Tuesday Primaries / Caucuses</b>							
Alabama	84	15	25	72	106	26	O
Arizona	79	12	38	53	82	3.1	C
Arkansas	74	25	16	79	112	15.7	C
California	78	18	45	46	61	6.7	C
Connecticut	74	24	48	49	51	9.1	O
Delaware	86	9	40	56	83	19.2	O
Georgia	88	11	43	53	87	28.7	O
Illinois	93	5	57	41	62	15.1	O
Massachusetts	66	29	40	58	55	5.4	C
Missouri	84	15	39	57	87	11.2	O
New Jersey	82	14	31	66	113	13.6	C
New York	61	37	37	59	46	15.9	C
Tennessee	77	22	26	67	96	16.4	C
<b>Mid-February Primaries / Caucuses</b>							
Louisiana	86	13	30	58	101	32.5	O
Maryland	84	15	42	52	79	27.9	O
Virginia	90	10	52	47	65	19.6	O
Wisconsin	91	8	54	45	74	5.7	O
<b>March Primaries / Caucuses</b>							
Ohio	87	13	34	64	104	11.5	C
Texas	84	16	44	54	78	11.5	C
Mississippi	84	15	39	57	87	36.3	O
<b>April-June Primaries / Caucuses</b>							
Pennsylvania	90	10	37	63	106	10	C
Indiana	89	11	60	40	58	8.4	C
North Carolina	91	7	61	37	60	21.6	O
Kentucky	90	7	23	72	132	7.3	C

<sup>251.</sup> See 2008 Primary Exit Polls, *supra* note 245. Each state's results can be accessed by clicking on the state's name.

\* Refers to the voting within race minus the cross race voting (% of black support for Obama minus white support for Obama plus white support for Clinton minus black support for Clinton).

c Caucuses; all others are primaries.

Black voters are more complicated, as we discuss below. Black voters overwhelmingly supported Senator Obama throughout the campaign, despite early concerns about whether he was authentically black. Black Americans show greater variability in the results of the race-IAT than other races, but between 32 and 65% of blacks favor whites on the IAT.<sup>252</sup> Thus, the data here are mixed. The fact that black Americans express far less pro-white favoritism on the IAT suggests that they would be more likely to support candidate Obama than other races. The IAT data, however, does not predict the degree of overwhelming support from black voters that candidate Obama ultimately enjoyed.

#### *4. Implicit Bias and the Primary Election Part II: The “Bradley Effect”*

The 2008 election featured the vigorous debate in the media over the existence of the “Bradley Effect.” The Bradley Effect refers to the tendency for the last-minute polls (and sometimes exit polls) to overestimate voter support for the black candidate in an election between a black and a white candidate. The moniker comes from the 1982 California governor’s race that pitted Los Angeles Mayor Thomas Bradley, a black Democrat, against Attorney General George Deukmejian, a white Republican. Bradley’s election would have made him the first black American to be elected governor in the United States,<sup>253</sup> but Bradley lost the close election. Race was clearly not the only factor in Bradley’s loss. An outpouring of conservative voters bent on defeating a gun control referendum might also have been a factor.<sup>254</sup>

Issues and the factors that influence voter turnout play a role in any election, but the polling data suggested that race played a role in Bradley’s defeat. Throughout the race, Bradley had led Deukmejian by six to ten points in the Field Poll (the local version of the Gallup

252. Greenwald & Kreiger, *supra* note 130, at 958; John J. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 *POL. PSYCHOL.* 881, 895 (2004) (citing C. Vincent Spicer & Margo J. Monteith, *Implicit Outgroup Favoritism Among Blacks and Vulnerability to Stereotype Threat* (2001) (unpublished manuscript on file with author)).

253. David Nyhan, *Racism Cited as Factor in Bradley’s Loss; Minorities Make Gains in US House*, B. *GLOBE*, Nov. 7, 1982; William Raspberry, *Blacks Didn’t Lose This Election*, *WASH. POST*, Nov. 17, 1982, at A19.

254. Robert A. Jordan, Op-Ed., *The Lessons of Bradley’s Defeat in California*, B. *GLOBE*, Nov. 10, 1982.

Poll).<sup>255</sup> Bradley led by 14% in a poll published just one month before the voting.<sup>256</sup> The final Field Poll gave Bradley 48% and a seven-point lead. Yet, Bradley lost by one percentage point, 49 to 48%,<sup>257</sup> a defeat by 52,295 votes out of 7.5 million.<sup>258</sup> This was the only major error in a final Field Poll in its fifty-year history.<sup>259</sup>

The error in the Field poll suggests that some voters might have been unwilling to reveal their racial preferences. They might simply have lied to pollsters about their choice, producing a gap between poll numbers and actual results. Alternatively, the variations between the polling results and the actual voting might reflect last-minute changes of heart. In fact, virtually all of the undecided white Democrats and Independents broke for the GOP candidate.<sup>260</sup> At the last minute, in the privacy of the voting booth, a number of whites simply could not pull the lever to elect a black man as governor.<sup>261</sup>

Seven years after Bradley's bid to become the first black governor, L. Douglas Wilder claimed that title when he beat J. Marshall Coleman, a white Republican, for Virginia's governorship. Wilder defeated Coleman by garnering slightly more than half of the 1.78 million votes cast.<sup>262</sup> Although Wilder won and the capital of the former Confederate States seated the nation's first black governor, the election's results were, like those in California, at odds with pre-election polls conducted in the final week of the campaign.<sup>263</sup> Polling data had found that Wilder had been between four and fifteen percentage points ahead of Coleman.<sup>264</sup> Because Wilder was leading in every public and private poll, most experts argued that Coleman made up the difference with a surge in the final days of the election.<sup>265</sup> But the Virginia race added a new twist to the Bradley

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255. Patrick Reddy, *Does McCall Have a Chance?; Yes, He Does, but Black Candidates for Top State Offices Face an Uphill Climb*, BUFF. NEWS, Jan. 20, 2002, at H1.

256. Nyhan, *supra* note 253.

257. Reddy, *supra* note 255.

258. Jordan, *supra* note 254; Nyhan, *supra* note 253.

259. Reddy, *supra* note 255.

260. *Id.*

261. Raspberry, *supra* note 253. Some voters were more explicit. A poll conducted by the *Los Angeles Times* revealed that 8% of the Democrat and Independent crossover voters (meaning that they voted for the Republicans) indicated that they felt that government was doing too much for blacks and other minorities. A CBS-New York Times exit poll of actual voters showed that 3% of the voters admitted outright that their gubernatorial decision was based on race. Mark Shields, *It Wasn't White Racism that Beat Tom Bradley*, WASH. POST, Nov. 12, 1982, at A31. Pollster Mervin Field said 3% of voters, asked in exit polls why they rejected Bradley, "offered as their reason . . . that they could not vote for a black man." Nyhan, *supra* note 253.

262. The Associated Press reported Wilder winning by 5,533 votes, while United Press International gave him a 7,755-vote spread. Kent Jenkins, Jr., & R.H. Melton, *Wilder Revels in His Triumph: Slim Margin Puzzles Analysts*, WASH. POST, Nov. 9, 1989, at A1.

263. *Id.*

264. *Id.*; see also Reddy, *supra* note 255.

265. Jenkins & Melton, *supra* note 262.

Effect. The exit poll surveys suggested that Wilder would win by about ten points. In effect, a full 10% of the voters in the exit poll reported that they had voted for the black candidate immediately after they had cast their ballot for the white candidate.

The election of David Dinkins as Mayor in New York City during the same election cycle produced a similar phenomenon. In 1989, Dinkins, a black Democrat, ran against Rudolph Giuliani, a white Republican, in the New York mayoral race. New York City voters elected Dinkins, their first-ever black mayor.<sup>266</sup> But on Election Day, the media started the day reporting results of pre-election public opinion polls that gave Dinkins a double-digit lead over Giuliani. Exit polls in New York suggested that Dinkins would win by at least six to ten points<sup>267</sup>—possibly even as many as fourteen to twenty-one.<sup>268</sup> Just as in the Wilder-Coleman race, however, pre-election polls greatly overstated Dinkins' lead; Dinkins won by a much narrower margin than polls had shown.<sup>269</sup> In the end, Dinkins polled 50% to Rudolph Giuliani's 48%.<sup>270</sup> Pollsters groped for explanations for the closer-than-predicted margins, and some offered a simple answer: Survey respondents lied, or they changed their minds from black to white in the privacy of the voting booth.<sup>271</sup>

To some, the influence of the Bradley Effect on the elections in New York and Virginia in 1989 bore the taint of insidious and deep-seated racial prejudice.<sup>272</sup> If the voters did not intend to pick the black candidate, why lie to the pollsters? The answer lies in how subtle racism can be. Those who might have lied in post-election surveys would deny they are prejudiced; they know it is publicly unacceptable to appear to make decisions on the basis of race. The mindset of some voters may have best been captured in the comment of a white voter in the Bronx, "I like Giuliani. He looks good. He's white like me."<sup>273</sup> For others, as political scientist Larry Sabato stated, "It's socially acceptable to vote for a black candidate . . . Whites tell pollsters ahead of time that they are voting for the black candidate, and then they go into the voting booth and can't quite pull down that lever."<sup>274</sup>

266. Editorial, *Why Did They Lie?*, POST-STANDARD, Nov. 14, 1989, at A10.

267. *Id.*

268. Dan Balz, *Vote Counting Methods, Race Factor in Polls Leave Plenty of Room for Error; Some Blame Voters for Off-the-Mark Projections*, WASH. POST, Nov. 9, 1989, at A37.

269. Tom Baxter & Dwight Morris, *Voters May Lie About Voting Against Blacks—Numbers Don't Add Up from Polls to Election*, ATLANTA J.-CONST., Nov. 9, 1989, at A21.

270. Balz, *supra* note 268; *Why Did They Lie?*, *supra* note 266.

271. Gary Langer, *Dinkins, Wilder Showings Poorer than Expected*, CHARLOTTE OBSERVER, Nov. 9, 1989, at 14A; *Why Did They Lie?*, *supra* note 266.

272. *Why Did They Lie?*, *supra* note 266.

273. *Id.*

274. *Id.*

More controlled survey research supports the existence of the Bradley Effect. A study by Berinsky demonstrates that voters are reluctant to express preferences concerning racially polarizing issues for fear of appearing racist.<sup>275</sup> In his study, voters who privately opposed school integration were unwilling to express their opposition publicly.<sup>276</sup> Rather than say they were opposed to integration, voters sought race-neutral principles to express their opposition—responding with “I don’t know.” Though the results from the 1989 data may be different in type from the school integration results in the study, Berinsky notes that they are similar in kind. In both cases, the “no opinion” result seemed to be a cover—for at least a significant proportion of the sample—for opposition to policies and candidates in choices that are racially sensitive. Whites who are apprehensive about voting for black candidates simply “vacate the field” in pre-election polls; they declare themselves undecided rather than come out and say that they oppose a black candidate.<sup>277</sup> In this study, “[t]his similarity between the school integration results and the 1989 pre-election poll results carrie[d] over to a simulation that predicts respondent’s candidate choice.”<sup>278</sup>

Many pollsters have argued that the lack of a Bradley Effect in the more recent Senatorial races in North Carolina and Tennessee suggests either that the phenomenon is a thing of the past, or that it was the product of over-interpreting statistical noise in a few selected elections. The spring primaries, however, produced both evidence of the effect and evidence of how it is evolving.

The first primary of the spring season produced a Bradley Effect. Before voting in New Hampshire, polls had Senator Obama leading Senator Clinton by roughly twelve points in the State.<sup>279</sup> But like Los Angelinos before them, New Hampshire voters flinched at the last minute and would not admit as much to the pollsters. To be sure, some commentators denied that the Bradley Effect was at work in New Hampshire and cited alternative explanations.<sup>280</sup> The polls were conducted before Clinton moved voters by tearing up in a diner and before she had a successful debate.<sup>281</sup> Furthermore, many independent

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275. Adam J. Berinsky, *The Two Faces of Public Opinion*, 43 AM. J. POL. SCI. 1209, 1213, 1221 (1999).

276. *Id.* at 1221.

277. KEITH REEVES, VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES, AND RACIAL POLITICS IN AMERICA 87 (1997).

278. Berinsky, *supra* note 275, at 1224.

279. Kenneth Lovett, *Obama Has 13-Point NH Lead*, N.Y. POST, Jan. 7, 2008, at 004.

280. See Michael Graham, *Op-Ed Primary Wrongly Colored Racist* by Matthews, B. HERALD, Jan. 11, 2001.

281. Michael Fauntroy, *Don’t Overplay the “Bradley Effect,”* HUFFINGTON POST, Jan. 9, 2008, [http://www.huffingtonpost.com/michael-fauntroy-phd/dont-overplay-the-bradley\\_80810.html](http://www.huffingtonpost.com/michael-fauntroy-phd/dont-overplay-the-bradley_80810.html).

voters “who told pollsters before the election they planned to vote for Obama but then voted for Republican John McCain because Obama was so far ahead they believed he would win easily.”<sup>282</sup>

Although other factors could have had some effect in the polling miscue, substantial evidence supports the idea that the Bradley Effect played a role. First, the small residue of undecided voters and small number of independent voters who switched to McCain cannot account for the thirteen-point shift between the final polls and the actual results. Second, as was the case with the Wilder election, the exit polls were consistent with previous polls; voters clearly lied to pollsters both before and after they had voted.<sup>283</sup> These factors have led many commentators to conclude that the Bradley Effect influenced the outcome in New Hampshire.<sup>284</sup>

As Table 2 shows below, the Bradley Effect took a different turn as the primaries proceeded.<sup>285</sup> The erosion of the support for Senator Obama between the final polls and the actual electoral results was most robust in primary states with black populations under 7%: California, Massachusetts, New Hampshire, and Rhode Island. By contrast, polls were basically accurate in states with black populations near the national black population of 12.8%: Illinois, Indiana, Ohio, Tennessee, and Texas. A reverse Bradley Effect—whereby pollsters underestimated support for Senator Obama—occurred in Alabama, Georgia, Mississippi, North Carolina, South Carolina, and Virginia, all of which have a 19% or higher black population.<sup>286</sup> Missouri seemed slightly out of place in this trend, as

282. Robert Gammon, *Clinton Victory Tainted by Race?*, EASTBAY EXPRESS, Jan. 10, 2008, available at <http://www.eastbayexpress.com/92510/archives/2008/01/10/clinton-victory-tainted-by-race>.

283. *Id.*

284. Graham, *supra* note 280 (citing MSNBC commentator Chris Matthews' perspective on what took place in New Hampshire). “You remember the Lone Ranger and Tonto?” Matthews asked another MSNBC pundit, Joe Scarborough. “I think paleface speak with forked tongue.” *Id.* In stating such, Matthews implied “that white New Hampshire Democrats lied to pollsters about supporting Obama because they are bigots who never had any intention of voting for a black man.” *Id.* He went on to say, “I thought white voters stopped being what they didn’t want to be. You know what it tells me? White people aren’t proud of who they are.” *Id.* When asked whether his complaints might be more appropriate to the South than New England, Matthews replied “Boston? BOSTON? . . . There’s a different kind of prejudice in the North than in the South. It may not be ‘I think I’m better than you,’ but it might be ‘I don’t want to live next door to you.’” *Id.*; see also Tim Graham, *Matthews Lectures Forked-Tongue ‘Paleface’ Bigots of New England*, NEWSBUSTERS, Jan. 10, 2008, <http://www.newsbusters.org/blogs/tim-graham/2008/01/10/matthews-lectures-forked-tongue-paleface-bigots-new-england>.

285. Anthony G. Greenwald, *Tracking the Race Factor*, PEW RES. CENTER PUBLICATIONS, Mar. 14, 2008, <http://pewresearch.org/pubs/755/tracking-the-race-factor> (providing the source of the data reported here); see also Peter Aldhous, *Why Pollsters Are Flummoxed Over Clinton and Obama*, NEW SCIENTIST, Mar. 30, 2008, available at <http://www.newscientist.com/article/mg19726493.800-why-pollsters-are-flummoxed-over-clinton-and-obama.html> (reviewing this evidence).

286. Greenwald, *supra* note 285.

its population is only 11% black, and it expressed a slight reverse Bradley Effect, but the effect was small. Of the eighteen states with open primaries and available data, only Wisconsin was inconsistent with the trend. States with small black populations expressed the Bradley Effect; states with large black populations expressed the reverse Bradley Effect.

**Table 2: Pre-Election Overestimate of Support for Senator Obama by State\***

State	Percentage point Overestimate of Obama's Support**	% Black in Population
<b>States Showing a Bradley Effect</b>		
New Hampshire	+ 11	0.7
California	+ 11	6.7
Massachusetts	+ 8	5.4
Rhode Island	+ 8	4.5
<b>States in Which Polls Were Accurate</b>		
Ohio	+ 3	11.5
New Jersey	+ 2	13.6
Texas	+ 2	11.5
Illinois	+ 1	15.1
Tennessee	0	16.4
Indiana	- 4	8.4
<b>States Showing a Reverse Bradley Effect</b>		
Missouri	- 6	11.2
North Carolina	- 6	21.6
Mississippi	- 7	36.3
Virginia	- 10	19.6
Wisconsin	- 13	5.7
Alabama	- 15	26.0
South Carolina	- 17	29.5
Georgia	- 17	28.7

\* The Table includes only the eighteen states with open primaries on which sufficient data were available.

\*\* Positive numbers indicate that the polls overestimated support for Obama; negative numbers indicate that the polls underestimated support.

Although evidence is unclear as to exactly how this unusual polling pattern emerged, the pattern is consistent with the idea that voters rely on both intuitive/emotional and deductive/rational systems of judgment to decide how to cast their ballots. White Democratic voters could convince themselves to vote for Senator Obama in a rational, deductive way. Democrats who vote in the primaries tend to be more liberal than the average voter and are

likely closer to Senator Obama's policy positions than Senator Clinton's more moderate positions. But these factors represent rational reasons to vote for a candidate. Even though candidate Obama's positions were closer to those of most Democrats who vote in primaries than candidate Clinton's and even though candidate Obama largely refrained from raising overtly black issues, he is still visibly black: he looks black, has a black family, and attends a black church. When pollsters ask voters how they have voted, they are somewhat embarrassed at having relied on their baser instincts and state that they voted for Senator Obama. Hence, when white voters dominate the electorate, the Bradley Effect emerges.

Black voters had almost the opposite perspective on Senator Obama's candidacy, especially early on. Black voters also tend to be more liberal than the average voter and hence also embrace views closer to Senator Obama's positions than Senator Clinton's. But many black Americans deeply believed that a black candidate could not win the Presidency. And black Americans support Democrats in national elections in overwhelming numbers. Thus, to a large segment of black voters, it might rationally have seemed better to support Senator Clinton in hopes of having a better chance of having a Democrat win in the general election. But the emotional allure of voting for a viable black candidate—something many black Americans thought that they would never see—could have led to an impulsive move in the voting booth. Thus, when the electorate includes large numbers of black voters, they elevate the support at the booth exceeds estimates based on what they had told pollsters. In effect, many black and white voters had opposite instincts, rationally supporting one candidate up until their emotional sides overtook them in the end, thereby producing opposite tendencies in the elections.

The results from the caucuses support this thesis as well. Unlike elections, caucuses require a public vote. Thus they do not allow for voting for a white candidate in private while announcing support for the black candidate in public. Senator Obama did better among white voters in caucuses than in primaries. Like the evidence that white voters lie in exit interviews, Senator Obama's strength in caucuses suggests that some white voters confront a last-minute tendency to flinch at the idea of voting for a black man. Further, they are sufficiently embarrassed at this instinct that they lie about it in exit polls in conventional elections and suppress this tendency when forced to vote in public in caucuses.<sup>287</sup>

The 2008 Democratic Primary thus produced results that are thoroughly influenced by race. The divergence between black and

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287. Voters in caucuses also tend to be more liberal than in elections, which might also account for greater support for Obama in the caucuses.

white voters was enormous and thorough. Black voters overwhelmingly supported Senator Obama at the polls. White voters were more mixed, but many states saw Senator Clinton winning by huge margins of thirty points or more. So thorough was the influence of race that it even produced muddled reactions to inquiries by pollsters that likely reflected the difficult reconciliation of egalitarian social norms with emotional internal reactions.

##### *5. The General Election: A Surprise Ending*

The polling numbers in the general election witnessed a surprising absence of the effects of implicit bias. State by state, the polls were largely accurate.<sup>288</sup> The combined Bradley and reverse Bradley Effects did not emerge as they had in the primaries. Black voters overwhelmingly supported Obama, but Obama won among white voters in nineteen states.<sup>289</sup>

Some predictable demographics related to voting behavior in the general election as well. Younger voters overwhelmingly voted for Obama.<sup>290</sup> Nationally, Obama received 66% of the votes from voters ages eighteen to twenty-nine, while McCain received only 32%. McCain carried the majority of votes from senior voters (age sixty-five and above).<sup>291</sup> Education did not provide a reliable predictor, although McCain did slightly better among less well-educated white voters.<sup>292</sup> Traditional political divisions influenced the general election. Those who earned less than \$50,000 a year more likely voted for Obama, while those who earned more than \$100,000 a year voted for McCain and Obama evenly.<sup>293</sup> Of course, the overall pattern of victories in the states largely followed the breakdown of red and blue states from the last few national elections.

After a long campaign that featured some measure of racial subtext and a racially stratified pattern of voting in the Democratic primary, how is it that the November Presidential election looked free from the influence of race? In the words of James Carville, “it’s the economy, stupid!”<sup>294</sup> Obama did well among voters who worried about the economy.<sup>295</sup> Obama won twenty-seven states among voters

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288. See generally CHUCK TODD & SHELDON GAWISER, HOW BARACK OBAMA WON: A STATE-BY-STATE GUIDE TO THE HISTORIC 2008 PRESIDENTIAL ELECTION 51-246 (2009) (providing a state-by-state breakdown of the results of the 2008 election).

289. *Id.* at 247-48.

290. *Id.* at 30-31.

291. *Id.* at 31.

292. *Id.* at 33.

293. *Id.* at 34.

294. Richard Alleyne, *Gordon Brown: It's the Economy, Stupid!*, TELEGRAPH, May 23, 2008, <http://www.telegraph.co.uk/news/newstopics/byelection/2015038/Gordon-Brown-Its-the-economy-stupid.html>.

295. TODD & GAWISER, *supra* note 288, at 43.

who were worried about the national economy at the time of the general election.<sup>296</sup> Similarly, McCain won twenty-eight states among voters who were not worried about the national economy, versus four for Obama (the rest lack data or were too close to call).<sup>297</sup>

Candidate Obama also surely benefited from the nature of how implicit bias and prejudice function in general. By the time of the fall campaign, Barack Obama was a genuine celebrity. He had enjoyed largely positive press coverage for many months, which likely meant that most voters had developed associations that were unique to him. Bias tends to operate by filling in the blanks: when whites see a black man in a dark alley pulling an ambiguous object out of his wallet, their minds tend to fill in the detail with a gun, rather than a harmless wallet. Upon meeting a black job candidate for the first time, someone who harbors negative associations with blacks will rely on those associations to evaluate the employee. By late August of 2008, however, Barack Obama was no longer just a black man—he was Barack Obama. The constant media exposure would have ensured that many voters developed their own associations for just him alone.

Ironically, the long primary might have helped him enormously. At the outset of the primaries, voters still more closely associated Tony Blair (white politicians in general) with the concept of America than black politicians, but we doubt that this association persisted into the fall. Obama was certainly still a black candidate, but by August of 2008, he was the most well known black candidate in American history. Research on voters' attitudes shows that lingering implicit biases remained, as some voted against him because they felt he was too foreign.<sup>298</sup> But the simplest forms of bias can, and likely did, dissipate with familiarity.

Senator Obama also benefited from an unexpected political subtext. Every high school civics class in America teaches that as the financial markets plummeted during the Great Depression, a Republican President clung to the principle that the government should not intervene. Whether true or not, most Americans believe that the interventions of Franklin Roosevelt were essential to keeping the nation from outright revolution and complete collapse. The script of a Democrat moving the government to rescue the economy from the dangers of Republican-sponsored free market excess is well known. To his credit, candidate Obama excelled at taking advantage of the script, while Senator McCain seemed hesitant. The most effective single line

296. See *id.* at 51-246.

297. See *id.*

298. Eric D. Knowles et al., *Anti-Egalitarians for Obama? Group-Dominance Motivation and the Obama Vote*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 965, 967-68 (2009).

of the campaign might have been when Obama ribbed McCain for halting his campaign by asserting that the President has to be able to manage more than one crisis at a time. It made McCain seem befuddled, thereby also playing off of another source of implicit biases—biases against the elderly.<sup>299</sup>

As one commentator put it, “a drowning man doesn’t care what color the person is who throws him a life preserver.”<sup>300</sup> To many, Senator Obama seemed to offer that life vest. The polls showed the candidates to be dead even right before the collapse of Lehman Brothers—the event that triggered the financial crisis of 2008-09. A week later, Senator Obama took the lead, never to lose it again.<sup>301</sup>

It is important to note that implicit bias has its limits. White job applicants do not always get hired in preference to black applicants. The November results remind us somewhat of the 1970s movie *Blazing Saddles*, in which a desperately racist, but also just plain desperate white town in the Old West finds itself with no choice but to hire a black sheriff to defend itself. A National Public Radio interview conducted in Wisconsin, right before that state’s primary, illustrates the point. The interviewer asked a Republican diner owner whom he supported in the upcoming election. The owner indicated that he would vote Democratic in 2008, out of concern for the economy and the direction of the nation. When asked which candidate he would support in the primary, the owner said, “I think I’m going to vote for that black boy.”<sup>302</sup> The latent racism is inherent in the statement, of course, but so too is the willingness to overcome the racism to hire someone who appeared, to that voter, to be able to address the nation’s problems.

#### D. Conclusion: Employment Discrimination and the 2008 Election

The 2008 election demonstrates why the effectiveness of Title VII continues to depend on taking steps to ensure that it addresses unconscious bias. The campaign was filled with racial subtext and included some explicit racism by fringe elements. It also produced wildly disparate voting patterns by race, especially in the primaries. Additionally, the primaries produced an odd, but highly reliable set of polling errors that suggest a lurking racial influence. This

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299. Project Implicit—FAQs, <https://implicit.harvard.edu/implicit/demo/background/faqs.html> (last visited July 30, 2010).

300. Kimberly Hefling, *McCain Losing Ground with Working-Class Whites*, FOXNEWS.COM, Oct. 10, 2008, <http://www.foxnews.com/wires/2008Oct10/0,4670,WorkingClassVoters,00.html>.

301. See Gary Langer, *Daily Tracking Poll: Barack Obama Leads John McCain in Tone; Economy's His Main Boost*, ABC NEWS, Oct. 31, 2008, <http://abcnews.go.com/PollingUnit/Politics/story?id=6157353&page=1>.

302. *Shocked, Shocked to Find Such Anger in the Black Church!*, TALKING POINTS MEMO, Mar. 15, 2008, [http://tpmcafe.talkingpointsmemo.com/talk/blogs/ann\\_h/2008/03/09-week](http://tpmcafe.talkingpointsmemo.com/talk/blogs/ann_h/2008/03/09-week).

influence dissipated somewhat by the fall, but the landscape that the 2008 election presents would hardly be comforting to a black job candidate. The message that with a team of experts and a barrage of positive media exposure, you can get hired if an employer really sees you as uniquely valuable is not one that indicates that the nation has entered a post-racial phase.

The widespread racial polarity in voting in the primaries is as close as one can get to evidence of disparate impact in a unique situation like this. This disparate impact triggers further inquiry, demanding an explanation for the pattern. The general election resembles the Democratic-Republican split over the last few years and so would probably pass muster. But the primaries are harder to explain without reference to race.

Furthermore, any court assessing a Title VII claim would have to attend closely to the racist commentary and subtext that ran through the campaigns. Courts have encountered many of the explicitly racist references made about candidate Obama in Title VII actions and repeatedly held them to constitute evidence of bias.<sup>303</sup> Many of the kinds of explicitly racial rhetoric, and even some of the subtexts that appeared in the 2008 campaign, have also appeared in Title VII cases: references to blacks as primates;<sup>304</sup> imitating blacks engaging in “shuck-and-jive talk;”<sup>305</sup> using the word “tar baby” on a work bulletin board;<sup>306</sup> joking references to blacks enjoying fried chicken;<sup>307</sup> associations between blacks and watermelon;<sup>308</sup> the use of the term “uppity” in reference to black employees;<sup>309</sup> implying that minorities

303. Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 96-99 (2008).

304. “To suggest that a human being’s physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme.” White v. BFI Waste Servs. LLC, 375 F.3d 288, 298 (4th Cir. 2004). The use of the term monkey and other similar words has been part of actionable racial harassment claims across the country. See Webb v. Worldwide Flight Serv., Inc., 407 F.3d 1192, 1193 (11th Cir. 2005) (dealing with an employment discrimination action in which a plaintiff’s manager called him a monkey); Spriggs v. Diamond Auto Glass, 242 F.3d 179, 182 (4th Cir. 2001) (dealing with an employment discrimination action in which a plaintiff was called “monkey” and “dumb monkey”); Jeffries v. Metro-Mark, Inc., 45 F.3d 258, 260 (8th Cir. 1995) (dealing with an employment discrimination action in which a plaintiff was called a monkey); Daniels v. Pipefitters’ Ass’n Local Union No. 597, 945 F.2d 906, 910 (7th Cir. 1991) (dealing with an employment discrimination action in which plaintiffs were called “porch monkeys” and “baboons”).

305. Marvell v. Chaps Cnty. Health Ctr., 193 F. Supp.2d 636, 646 (E.D.N.Y. 2002).

306. Carter v. Kansas City S. Ry. Co., 456 F.3d 841, 844 (8th Cir. 2006).

307. Smith v. Fairview Ridges Hosp., 550 F. Supp. 2d 1050, 1057 (D. Minn. 2008) (citing Copeland v. Hussman Corp., Civ. No. 4:06-839, 2007 WL 3171427, at \*7 (E.D. Mo. Oct. 26, 2007)).

308. Bassett v. City of Minneapolis, 211 F.3d 1097, 1101 (8th Cir. 2000).

309. Rivers-Frison v. Se. Mo. Cnty. Treatment Ctr., 133 F.3d 616, 621 (8th Cir. 1998); Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981).

are not American enough;<sup>310</sup> calling an employee “too ethnic” or “pro-black;”<sup>311</sup> and raising concerns about blacks engaging in inter-racial relationships.<sup>312</sup> Courts have held that these kinds of stray remarks can help support a claim of discrimination when they are made by an actual decisionmaker<sup>313</sup> closely in time with the employment decision<sup>314</sup> in an effort to express discrimination<sup>315</sup> and in a way that is related to the decisionmaking process.<sup>316</sup> Although the major candidates avoided explicitly racial remarks, some of the true decisionmakers—the voters—indulged in such efforts in an effort to demean candidate Obama.

The reliance of courts on “stray remarks” represents a serious effort to begin to deal with implicit bias in employment discrimination. Courts historically treat such remarks as meaningless sophomoric humor in employment discrimination cases. The Supreme Court in *Price Waterhouse v. Hopkins*, for example, faced a case that was filled with highly gendered stray remarks and yet did not find them to be meaningful.<sup>317</sup> These are the kinds of comments that “leak” from those who harbor implicit biases. Unconscious, anti-black bias is correlated with the use of verbal slurs towards blacks.<sup>318</sup> The 2008 campaign should not, therefore, be taken as evidence that these comments need no longer be taken seriously.

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310. *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*1-2, \*9 (N.D. Cal. Apr. 5, 2006).

311. *Gordon v. JKP Enters., Inc.*, No. 01-20420, 2002 WL 753496, at \*2, \*8 (5th Cir. Apr. 9, 2002).

312. *Zeigler v. K-Mart Corp.*, No. 95-3019, 1996 WL 8021, at \*1 (10th Cir. Jan. 10, 1996); *Chacon v. Ochs*, 780 F. Supp. 680, 682 (C.D. Cal. 1991); *Reiter v. Ctr. Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 (D. Colo. 1985); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1365-66 (S.D.N.Y. 1975).

313. *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 301 (1st Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 (3d Cir. 1997); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290-91 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996); *Tooson v. Roadway Express, Inc.*, 47 Fed. Appx. 370, 375 (6th Cir. 2002); *Gorence, Wolf, and Bruce v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 762 (7th Cir. 2001); *Merritt v. Tellabs Operations, Inc.*, 222 Fed. Appx. 679, 683 (10th Cir. 2007); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 924 (11th Cir. 1990).

314. *McMillan*, 140 F.3d at 301; *Walden*, 126 F.3d at 513-14; *Brown*, 82 F.3d at 655; *Gorence*, 242 F.3d at 762; *Merritt*, 222 Fed. Appx. at 683.

315. *Brown*, 82 F.3d at 656; *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 633-34 (8th Cir. 1997).

316. *McMillan*, 140 F.3d at 301; *Woroski v. Nashua Corp.*, 31 F.3d 105, 110 (2d Cir. 1994); *Brown*, 82 F.3d at 655; *Gorence*, 242 F.3d at 762; *Harris v. Itzhaki*, 183 F.3d 1043, 1055 (9th Cir. 1999); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000); *Merritt*, 222 Fed. Appx. at 683; *Alton Packaging Corp.*, 901 F.2d at 924; *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997).

317. 490 U.S. 228, 277-79 (1989).

318. See generally Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 361-63 (2007).

Rather, the campaign itself shows how pervasive they are and how a job candidate must navigate them.

#### IV. CONCLUSION: POST ELECTION AND BEYOND

Research conducted after the election suggests that President Obama's success might be a misleading indicator of racial progress. Some voters who harbor anti-egalitarian racial views nevertheless cast their ballots for Obama largely to support the claim that the United States is now a post-racial country.<sup>319</sup> His election might even facilitate backsliding on racial progress. One study demonstrates that individuals become more willing to describe a job as better suited for whites than for blacks after expressing support for President Obama as a presidential candidate.<sup>320</sup> This result suggests that showing "support for Obama grants people *moral credentials*"<sup>321</sup>—where an individual's track record of egalitarian racial views provides them with an ethical certification that later facilitates racially biased decisions. It is akin to hiring or promoting a token black employee so as to avoid implementing a more widespread, systematic effort to rid a workplace of bias.<sup>322</sup> Addressing implicit bias at an individual level requires active cognitive and social effort. Belief that bias is a thing of the past might lead those with the desire to avoid acting on their implicit biases to let down their guard and might give license to those inclined to discriminate to carry on.

In the long run, President Obama's electoral success is good news for American race relations, of course. Current models of prejudice and stereotype reduction support the view that the 2008 election will reduce the effect of implicit biases overall. This work reveals that people can help avoid the influence of implicit biases if they: 1) are aware of their bias; 2) are motivated to "change their responses because of personal values, feelings of guilt, compunction, or self-insight;"<sup>323</sup> and 3) possess cognitive resources needed to develop and

319. *See id.*

320. Daniel A. Effron et al., *Endorsing Obama Licenses Favoring Whites*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 590, 591 (2009).

321. *Id.* at 590.

322. For research on tokenism in the workplace, see for example ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977). The courts have recognized tokenism in the workplace as well. *See Manning v. Sw. Bell Mobile Sys.*, Civ. A. No. 90-6838, 1992 WL 170552, at \*5 (N.D. Ill. July 16, 1992).

323. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803-05 (2001); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 157-58 (2004); Patricia G. Devine et al., *Prejudice with and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCHOL. 817, 820-21, 825-27 (1991). What is consistently found is that individuals—whites in particular—who are "more

practice correction.<sup>324</sup> The outcome of the 2008 election facilitates all of these factors. Exposure to high-esteemed black Americans reduces implicit bias, and the nation will now have at least four years of daily exposure to a black man occupying the highest office.<sup>325</sup> The Obama Administration has also appointed other minorities to prominent positions (most recently, Justice Sotomayor), creating even more role models that are vastly contrary to stereotypes.<sup>326</sup>

The United States has moved far from its brutal racial history, but it is still a work in racial progress. It is not that President Obama's election ends the debate on race, as his campaign highlighted myriad ways in which a modern conception of racial prejudice can and must be understood. His election will provide a new way to think about race in American life. It represents an auspicious beginning to new modes of thinking about the role of law in helping this society reach its racial egalitarian ideals. But it is still only the beginning of a new era.

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internally motivated" to reduce their levels of race bias show "less implicit prejudice, whereas those who [are] more externally motivated display[] more implicit prejudice." Leslie R. M. Hausmann & Carey S. Ryan, *Effects of External and Internal Motivation to Control Prejudice on Implicit Prejudice: The Mediating Role of Efforts to Control Prejudiced Responses*, 26 BASIC & APPLIED SOC. PSYCHOL. 215, 220-22 (2004). Specifically, high internal and low external motivation to reduce race bias appears to be the best method to reduce implicit race bias. Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1151-53, 1155-57 (1996); Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 839-44 (2002).

324. Dasgupta & Greenwald, *supra* note 323, at 800; Blair & Banaji, *supra* note 323, at 1145-48.

325. Dasgupta & Greenwald, *supra* note 323, at 805.

326. Jerry Kang, *Behavioral Realism: Future History of Implicit Bias and the Law*, Lecture at Ohio State University (Nov. 2006), available at <http://jerrykang.net/Engage>.