

Cornell Law Library Scholarship@Cornell Law: A Digital Repository

Cornell Law Faculty Publications

Faculty Scholarship

2008

Debate, Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?

Gregory S. Parks

District of Columbia Court of Appeals, dr.gsparks@gmail.com

Jeffrey J. Rachlinski

Cornell Law School, jjr7@cornell.edu

Richard A. Epstein

University of Chicago Law School

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Civil Rights and Discrimination Commons](#), [Politics Commons](#), [Politics and Social Change Commons](#), [President/Executive Department Commons](#), and the [Race and Ethnicity Commons](#)

Recommended Citation

Parks, Gregory S.; Rachlinski, Jeffrey J.; and Epstein, Richard A., "Debate, Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?" (2008). *Cornell Law Faculty Publications*. Paper 1369.

<http://scholarship.law.cornell.edu/facpub/1369>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

DEBATE

IMPLICIT RACE BIAS AND THE 2008 PRESIDENTIAL ELECTION: *MUCH ADO ABOUT NOTHING?*

The election of Barack Obama marks a significant milestone for race relations in our nation—on this much our debaters agree. The meaning of this milestone for the future of race-based policies, such as affirmative action and antidiscrimination laws, is where they disagree. Dr. Gregory Parks and Professor Jeffrey Rachlinski argue that any announcement of the arrival of a “post-racial America” is premature, as the presidential campaign actually revealed an implicit racial bias present in “most white adult brains.” The stereotypical criticisms of Obama, explicit racial references by supporters of opposing candidates, and “deeply racially stratified voting” were, in fact, “reflection[s] of how contemporary racism works.” Modern racism, they maintain, “operates not as an absolute barrier, but as a kind of tax on members of racial minorities.” Accordingly, race-based policies “can hardly be said to be unnecessary in a world in which the enormous resources Obama had available are necessary to combat bias.”

Professor Richard Epstein believes that in the face one of “America’s great racial achievements,” it’s “almost incredible” that Parks and Rachlinski focus on “a list of the worst racial episodes” of the campaign. In doing so, he argues, they ignore the widespread praise that Obama garnered from “people of all races”; neglect the “vicious treatment” of his opponents; and fail to “place the question of implicit racial bias in its larger social context”—ignoring implicit sexism and the explicit biases exhibited in the fights over gay marriage and immigration reform. Ultimately, in regards to race-based policies, Epstein believes that the debate is a “sideshow,” as “any private individual or firm can hire a person for good reason, bad reason, or no reason at all.” Rather than utilizing public force to end such practices, it is better that “they should just die on the vine because people have consciously decided not to do business with them.”

OPENING STATEMENT

*Barack Obama, Implicit Bias, and the 2008 Election*Gregory S. Parks[†] & Jeffrey J. Rachlinski^{††}

The election of Barack Obama as the forty-fourth President of the United States suggests that the United States has made great strides with regards to race. The blogs and the pundits all assert that Obama's win means that we now live in a "post-racial America." But is it accurate to suggest that race no longer significantly influences how Americans evaluate each other? Does Obama's victory suggest that affirmative action and antidiscrimination protections are no longer necessary? We think not. Ironically, rather than marking the dawn of a post-racial America, Senator Obama's candidacy reveals how deeply race affects judgment.

With notable exceptions, conscious or explicit racism was not part of the 2008 campaign. But social psychologists argue that unconscious or implicit biases have a powerful effect on how people evaluate each other. Much of this work is documented at <http://www.projectimplicit.net>. Implicit racial bias is widespread; the vast majority of adult Americans, for example, more closely associate white faces with positive imagery and black faces with negative imagery. Implicit bias induces dangerous assumptions; white Americans more readily associate black Americans with weapons and white Americans with tools than the opposite pairing. Implicit bias is crude and ugly; white Americans associate apes with black Americans. White adults also more readily associate the concept of American with being white, and showing white adults subliminal images of the American flag increases their antiblack bias. These findings particularly show the contrast between explicit beliefs and unconscious associations: African Americans are obviously American, but they seem less so to most adult white brains.

Furthermore, implicit biases influence how people evaluate others. White interviewers who harbor strong anti-black unconscious biases make less eye contact with black job applicants, exhibit hostile body language, and report that these interviews are uncomfortable.

[†] Law Clerk, District of Columbia Court of Appeals.

^{††} Professor of Law, Cornell Law School.

White interviewers who do not harbor such biases do not exhibit the same effects. And implicit biases have a documented neurobiological component. Those who evidence a strong association of white with good and black with bad use a part of their brain associated with the fear response (the amygdala) to process black faces. And at least one study also shows that unconscious racial biases can affect how people vote.

But did this landscape of unconscious bias affect the course of the 2008 election? Researchers have struggled to demonstrate the influence of unconscious biases in the real world. Ironically, several aspects of the election of the first black President of the United States provide that demonstration.

First, throughout the campaign, criticisms abounded that Obama was unpatriotic or insufficiently American. These attacks began early, when a news story that he failed to place his hand over his heart during the singing of the national anthem at an Iowa fair gained traction. They continued as his detractors complained that he declined to wear an American flag pin on his lapel. The absence of a flag on Obama's lapel was a small wonder when he was a little-known candidate, given the ability of American imagery to prompt negative associations among white Americans. Associations between being black and being foreign helped make Obama vulnerable to such charges.

So deep is the connection between black and foreign in many Americans' minds that one early study, conducted in the spring and fall of 2007, showed not only that voters more closely associated Hillary Clinton with American imagery than Barack Obama, they more closely associated *Tony Blair* with American imagery than Barack Obama. Thierry Devos et al., *Is Barack Obama American Enough to Be the Next President? The Role of Ethnicity and National Identity in American Politics*, available at http://www-rohan.sdsu.edu/~tdevos/thd/Devos_spsp2008.pdf. In addition to conflating President Obama's race with a lack of authentic Americanness, critics also alluded to his middle name, "Hussein," or alleged that he was Muslim or an Arab as other indicators that he was, as Pat Buchanan often termed, "exotic." It was perhaps no surprise that Senator McCain's campaign theme was "Country First," which takes fair advantage of McCain's war record, but also implicates that Obama fails to put country first in the same way. Unconscious racial associations between black and foreign helped make McCain's campaign theme seem to be a desirable strategy.

Second, the campaign was not entirely free of explicit racial references, many mimicking the studies of associations between black people and apes. 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.” In June, a Utah company began making a sock monkey (doll) of Obama. During the fall, a man at a McCain rally carried a monkey doll with an Obama sticker wrapped around its head. At various points, both Democrats and Republicans used milder racial slurs to refer to Obama. Senator Clinton surrogate, Andrew Cuomo, used the phrase “shuck and jive” in an indirect reference to Obama’s campaign strategy. Republican congressman Tom Davis, in discussing how Senator Obama would have difficulty handling the immigration debate, described this issue as a “tar baby.” Even when charging Obama with being an “elitist”—a charge that would seem to be inconsistent with stereotypes about black Americans—many of his detractors used the more racially tinged word “uppity.”

Third, the primary elections exhibited what has been called the Bradley Effect—the tendency of polls to overestimate support for a black candidate in an election against a white candidate. *See* Anthony G. Greenwald & Bethany Albertson, Tracking the Race Factor, PEW RESEARCH CENTER, Mar. 14, 2008, <http://pewresearch.org/pubs/755/tracking-the-race-factor> (providing the source of the data reported here). Although commentators denied that the Bradley Effect occurred, the pattern that emerged during the spring primaries was clear. States with small percentages of black voters that held primaries (California, Massachusetts, New Hampshire, and Rhode Island) exhibited the Bradley Effect. By contrast, polls were basically accurate in states with black populations near the national black population of 12.3%: Illinois, Indiana, Ohio, Tennessee, and Texas. A *reverse* Bradley Effect—whereby pollsters underestimate support for Senator Obama—occurred in Alabama, Georgia, Mississippi, North Carolina, South Carolina, and Virginia, all of which are 19% or more black. Of the eighteen states with open primaries and available data, only Wisconsin was inconsistent with this trend.

The pattern of polling error suggests strongly that voters either lied to pollsters or changed their minds at the last minute. White voters flinched at the last moment, unwilling to pull the lever in favor of the black candidate. Black voters, did the opposite; finding themselves unable to resist the prospect of voting for a viable black candidate when the time came to cast their ballots (or turned up at polls in numbers greater than expected). That this pattern did not persist in

the fall is an interesting and promising development. But no pollster who assesses the spring primary data carefully will advise a future black candidate to ignore the possibility.

Fourth, the election was marked by deeply racially stratified voting. Obama won among black voters by 91 percentage points; among Latinos by 36 points; among Asians by 27 points; but he lost among white voters by 12 points. ABC News, *How They Voted: Exit Poll Full Results*, http://abcnews.go.com/PollingUnit/ExitPolls2008#Pres_All (last visited Jan. 31, 2009). The spring Democratic Party primaries (which obviously control for political party preferences) were even more stratified. Exit polls showed that Obama never fared better among white voters than black voters. *See, e.g.*, msnbc.com, *Exit Polls*, <http://www.msnbc.msn.com/id/21660890/> (last visited Jan. 31, 2009); Washington Post, *Entrance and Exit Polls*, <http://projects.washingtonpost.com/2008-presidential-candidates/primaries/exit-polls/> (last visited Jan. 31, 2009). Although he won overwhelmingly among black voters everywhere, only in Iowa, Illinois, Vermont, Indiana, and North Carolina did he win among white voters. After the news reports of his former pastor, Reverend Wright, surfaced, he performed even worse among white voters. He lost white voters in Pennsylvania, Ohio, and Kentucky by 26, 30, and 49 points, respectively. All of this occurred even as less than 10% of voters indicated to pollsters that race influenced their vote, suggesting that voters might not understand their own motives well.

The campaign was thus a reflection of how contemporary racism works. Modern racism does not produce an overt smoking gun marking its influence; one has to look fairly carefully to find its influence. It operates not as an absolute barrier, but as a kind of tax on members of racial minorities. It facilitates certain negative assumptions through an invisible influence. McCain, after all, did not face a fair fight. Obama's success came in large measure from raising enormously more money than McCain and from the specter of an unpopular Republican President presiding over a horrific financial crisis that induced great demand for the kind of government intervention more closely associated with Democrats. And of course, implicit and explicit biases against older Americans' abilities are common as well.

Obama navigated the racial waters well. He spent a great deal of time and money creating positive imagery to combat the negative associations that are so common. For most of the spring campaign, his message was one of raw, positive optimism, unadorned with details. Wisely so, as studies of implicit racial bias suggest that details concern-

ing resumes and qualifications are influenced by unconscious associations. Once Obama created his own set of associations, he was rarely seen without a bevy of American flags behind him. Although campaign leaders now report that they only rarely discussed race, they ran a campaign well-suited to combating unconscious bias, just as McCain ran one well-suited to taking advantage of it.

But, of course, Obama had an army of strategists and pollsters backing his lengthy job interview with America. The ordinary black job applicant faces the same racial environment without such assistance. Affirmative action and antidiscrimination laws can hardly be said to be unnecessary in a world in which the enormous resources Obama had available are necessary to combat bias. The 2008 campaign thus teaches us that America is not so virulently racist as to reject a black applicant for a serious position outright. The nature of the campaign, however, shows that race continues to play a complex and profound role in how Americans judge each other. The post-racial America may be on its way, but has yet to arrive.

REBUTTAL

*The Good News on Race Relations*Richard A. Epstein[†]

Gregory Parks and Jeffrey Rachlinski have written a highly provocative, but exceedingly lop-sided, essay with the ominous title, *Barack Obama, Implicit Bias and the 2008 Election*. In it, they offer some grudging acknowledgement that the election of an African American President marks something of a milestone in the history of race relations in the United States. Obama received, for the record, more popular votes than any other candidate who has ever run for high office in the United States. He won by a respectable margin of seven percentage points, 53 to 46 and his 66 million-plus votes gave him an edge of about 8.5 million over John McCain. Obama was able to attract and hold deeply committed supporters of all races and creeds. He raised, month in and month out, huge sums of money online. He was able to call on an army of volunteers who scoured the landscape in close states, doing everything to secure his victory. The mood at his election-night celebration in Grant Park, Chicago, can only be described as euphoric. His inauguration was only slightly less so. It did not take a deep statistical examination of the crowds at either event to realize that they were a cross-section of the American population by race. And it did not take deep psychological analysis to see the near worshipful looks of happiness and pride on the faces of everyone in attendance. Barack Obama stands as an iconic figure.

As a long-time resident of Hyde Park (who was in New York during the entire campaign), I can name many of my well-to-do white friends who took to the highways and byways to campaign for Obama in the strong conviction that he would present a public face for the United States that would allow us to regain the affection and respect of people all around the globe. The Obama adoration that runs through Europe, Latin America, and Asia is not a subtle form of implicit or unconscious racism. It is exactly the opposite. It is an explicit

[†] James Parker Hall Distinguished Service Professor of Law, University of Chicago Law School.

and conscious affirmation that Barack Obama has the personal qualities to lead the United States back to its former glory.

In the face of all this nonstop adulation, I find it odd, almost incredible, that Parks and Rachlinski think that the appropriate way to examine the mood of the nation is to offer a list of the worst racial episodes of the past campaign. In doing so, they commit multiple mistakes and omissions. Here are three: First, they ignore all the ugly but unsuccessful efforts to link Obama to Bill Ayres in order to paint Obama as a man who consorts with terrorists. Ayres, of course, is white. Second, they ignore the widespread praise that Obama earned for his speech defending himself from the charge of being too cozy with the Reverend Jeremiah Wright, from whom he eventually—and rightly—distanced himself. Neither effort to bait or inflame the American electorate against Obama had any lasting effect. Third, and most egregious, they ignore the literally millions of kind and generous actions by people of all races that propelled Obama to his hard-fought and well-earned victory in the last election.

Indeed, in explaining why Obama won, I would put grace under fire at the top of the list. McCain was clinging to a small lead in the polls until the financial meltdown hit Wall Street in late September and early October. McCain's response was to go into panic mode, and to suggest that the first debate be canceled so that he and Obama could return to Washington to address the problems of the nation. Obama then got off the best line of the campaign when he said, in response, that the President of the United States ought to be able to multitask. This perfect putdown of McCain showed how, without uttering McCain's name, Obama could portray his opponent as frazzled and panicky, while keeping his dignity and cool.

Nor was it just a flash in the pan. Obama kept that image up all through the debates. His demeanor, especially when he was *not* speaking, was flawless. He did not gesticulate or fidget, but kept a calmly skeptical gaze on McCain as the over-the-hill Republican lurched back and forth on the stage, desperately trying to score points. The contrast between the dignified Democrat and the rambunctious Republican was not lost on television audiences. The polls reported that Obama won the debates hands down.

The concerns that Parks and Rachlinski raise about the treatment of Obama are odder still in light of their puzzling silence on the vicious treatment directed nonstop toward George W. Bush, John McCain, and especially Sarah Palin. In this regard, I am not of course referring to the dead-on impersonations of Palin that catapulted Tina Fey to fame on Saturday Night Live. Rather, I am thinking of the

posters depicting Palin as a vampire that greeted me each day as I walked down West 15th Street in New York City. In addition, the endless abuse and epithets hurled toward George Bush for his Iraqi and domestic policies revealed a hatred that would have generated an instant outcry if directed toward Obama, which thankfully it was not. Whatever implicit resentments some people harbored toward Obama, his race insulated him from the kind of ugly and explicit charges routinely hurled at white Republican candidates.

In light of these complex political cross currents, we should think long and hard before attributing much, if any, weight to the so-called Bradley Effect, which posits that many white Americans are prepared to say that they will vote for a black candidate, but are unable to pull that lever in the polling booth. There is of course much debate over whether the Bradley Effect actually played a role in the defeat of Mayor Tom Bradley of Los Angeles by George Deukmejian, his Republican rival in the hotly contested 1982 California gubernatorial election. The alternative explanation was that the polls stopped too soon to pick up the Deukmejian surge, which drove home the substantive differences between the two candidates on budgetary and economic issues. Likewise, the polls also missed the effective Deukmejian campaign to collect absentee ballots. Lots of people fretted about the Bradley Effect after Hillary Clinton thumped Obama in the California primary, but Obama easily carried California against McCain in the general election, 61% to 37%, with a plurality of nearly 3 million votes. The far more likely explanation for these numbers is this: some people, white or black, may have an implicit racial bias, but what really counts is that they have no desire to defend their bias once it is called to their attention. If anything, their conscious actions may well *overcorrect* for their implicit preferences, which could work to the advantage of candidates like Obama. Indeed, African American candidates everywhere have, in recent years, been consistently able to make large inroads among white voters while white candidates, especially Republicans, find it notoriously difficult to attract black voters at all. One very obvious explanation for these trends is that the Democratic platform, with its strong social justice component, appeals to African American voters more than it does to white voters.

Parks and Rachlinski also misfire by failing to place the question of implicit racial bias in its larger social context. For starters, the possibility of implicit sexism with respect to both Hillary Clinton and Sarah Palin may have struck a more responsive chord in the last election. Yet even that is small potatoes compared to the truly ugly cam-

paigns relating to Proposition 8 in California, over gay marriages, where both sides revealed all too many explicit biases, reflecting credit on no one. And, if I were to look for other hot-button issues, I would turn first to immigration, where the anti-outsider campaigns often have an explicit ugliness that was wholly absent in the presidential election.

In sum, the evidence from the past election deserves a much more positive interpretation than Parks and Rachlinski give it. But what about the political agenda that motivated their remarks in the first instance—the strong boost for affirmative action and antidiscrimination protections? Their obvious fear is that Americans will let down their guard on these fronts now that Obama is about to take over the White House. My reaction is to disagree with them on both counts, but for different reasons.

Long before the current election, I wrote a book called *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992). The gist of my argument was that competition in labor markets affords workers far greater protection against racial discrimination than any government program, which could easily end up, through public enforcement actions, creating more discrimination than it eliminates. Seventeen years later I see no reason to change my negative judgment on these laws, which are both ineffective and costly to enforce.

The key analytical point is the stark contrast between discrimination and the use of force. Aggression exposes any individual to the tender mercies of the person who likes him or her the *least*. But even in a market that is rife with discrimination, the economic fortunes of members of the disfavored groups are determined by the attitude of those who like them the *most*. The most that people with racial hatreds can do is to refuse to hire people whom they hate. In this environment, the implicit biases of some do not matter much. What counts are the favorable attitudes of others.

This approach has powerful implications for the treatment of affirmative action. The modern cast of mind demands special justification for private firms and institutions to engage in affirmative action programs. The standard approach is to give a harsh indictment of American racial practices to explain the deviations from the color-blind antidiscrimination laws that now sit on the statute books. With each passing year, tales of overt discrimination a generation or more ago supply ever weaker justifications for today's affirmative action programs. Appeals to racial diversity do not quite pick up the slack because many different groups can claim a part of the new affirmative action programs.

To a classical liberal/libertarian like myself, these debates are a sideshow. The key point is that any private individual or firm can hire a person for good reason, bad reason, or no reason at all. Hence they can engage in affirmative action programs even if they reject every single claim that Parks and Rachlinski make about the dire effects of implicit bias on the white-American psyche. And that is much the better way to go about our national business. It is a mistake to require private parties who wish to engage in affirmative action to issue a harsh public denunciation of past practices of dominant social elites to justify their action. There is absolutely no need at the time of one of America's great racial achievements to urge, yet again, that more public and private action is needed to exorcise our innermost demons. It should be quite enough to let people who want to start affirmative action programs do so. And if other organizations want to start white-only programs, let them do so. Freedom of association is the operative principle. We are strong enough as a nation not to treat private offense to the associational preferences of others as a reason to shut them down by public force. Better that they should just die on the vine because people have consciously decided, one at a time, not to do business with them. Or do Parks and Rachlinski really believe that various hate-groups will take over the nation if the antidiscrimination laws are repealed and private affirmative action is allowed? I am eager to hear their response.

CLOSING STATEMENT

Does 2008 Mark the Beginning of a Post-Racial America?

Gregory S. Parks & Jeffrey Rachlinski

We thank Richard Epstein for his thoughtful and careful reply to our contribution, even as we disagree. It does not surprise us that Professor Epstein's reply cuts right to the heart of the important point about unconscious bias: does it really affect how people behave, and even if it does, should law respond in some way? He does not challenge the evidence of the widespread existence of unconscious bias or its influence but makes the point that many factors—other than race—influenced President Obama's victory.

Professor Epstein's argument that the 2008 election ultimately turned on factors that swamped any influence of race is obviously correct, given the outcome. President Bush's unpopularity, lingering dislike for the ongoing war in Iraq, fears of terrorism, and conventional political loyalties all played a role in the outcome. We do not deny this. These concerns were, however, not quite enough. Senator McCain was leading in the polls up until the country encountered the worst economic collapse since 1929. Most Americans embrace the historical narrative of the Great Depression that an activist Democratic President rode to the nation's rescue after the deregulatory excesses of the Republicans produced an economic collapse. And Senator McCain's response certainly did not play well for him. Every drop in the Dow produced an uptick in Obama's poll numbers. The typical white person who is drowning is more likely to take a life preserver from a black person, as opposed to a white person, where the former's life preserver seems surer to do the job. Fear of losing everything combined with an ideal black candidate is sure to check all but the most racist of attitudes. As such, we don't contend that unconscious bias is an insurmountable obstacle to success by black Americans.

Professor Epstein's account of the election, in many ways, reminds us of the research on racial bias and attention. Those who embrace an egalitarian norm are aware of the potential influence of racial bias, and those paying close attention can manage to avoid making biased decisions. And, as Professor Epstein notes, they sometimes overcorrect. For many voters, the 2008 general election might have fit this paradigm well; most Americans embrace egalitarian norms, and many

were likely concerned about influence of race on their choice. The circumstances were ideal for combating bias or even for producing overcompensation in some. Voters who might have merely voted for Obama might have overcompensated by donating to his campaign as well.

But all of these influences strengthen the basic point. Despite the ideal conditions for a race-neutral decision, evidence of racial bias can be found, not just in the extreme incidents, but in the nature of the campaign run against him. But it is also telling that evidence of the bias can be found more clearly in the primaries, when voters were less familiar with Obama, and thus had less information on which to make their choice. The primaries produced, as we noted, a clear variation on the Bradley Effect that correlated with the percentage of black voters in the state. And it featured Reverend Wright. As Professor Epstein notes, we did not mention Obama's acclaimed speech on race relations in Philadelphia. Quite simply, this is because it was not successful. As much praise as the speech was given in many circles, it had little apparent effect on the white Democrats in Pennsylvania, Kentucky, and Ohio, who overwhelmingly voted for Senator Clinton in the weeks that followed.

But more importantly, if one can find evidence of the influence of unconscious bias in even this setting, then how pervasive might its influence be in the course of more ordinary lives? Consider the results of one recent study in which researchers sent resumes that varied only in name to hundreds of potential employers. Employers called the numbers on resumes with names most people associate with black applicants, such as Lakisha and Jamal, far less often than resumes with names like Emily and Greg. That is bad enough, but more disturbingly, the presence of a college degree on the resume increased the callback rate for Emily and Greg, but did not have any effect on the callback rate for Lakisha and Jamal. At the initial stages of employment decisions, many potential employers review resumes quickly and without a great deal of attention. It is that kind of decision that rests at the polar opposite of the features of the 2008 Presidential election. When it becomes difficult to find racial effects in studies like this, then America can be said to exist in a post-racial world.

Raising this study might be said to be an unfair move in the debate, which is, after all, on the 2008 election. But we think the presence of unconscious racial bias in the 2008 election also shows that America has not entered a post-racial world and implicates, among other things, employment discrimination law. Professor Epstein raises

an interesting point by noting that the 2008 election included some extreme commentary directed at Governor Palin and President Bush as well. However, epithets at Republican leaders and vampire posters of Governor Palin are clearly different from the attacks we identified on Obama. The attacks on Obama that we identified were inspired by the color of his skin in ways that take advantage of conscious and unconscious biases. By contrast, the attacks on Republicans, repugnant though some may have been, were ideologically driven. And neither does the portrayal of Governor Palin as a vampire play into any common gender stereotype with which we are familiar. As the resume study shows, racism (conscious or otherwise) undermines the ability of its victims to improve their lot in life, as race is used as a quick heuristic. When black political candidates face ridicule for their education, ideological commitments, or resumes, as opposed to being compared to apes or labeled as uppity, then the lampooning will be similar.

Whether racism, conscious or unconscious, will “die on the vine” as it falls in disrepute, as Professor Epstein suggests, or whether some form of public intervention is necessary to move it along into the dustbin of history is really the critical question. We suspect that rumors of racism’s demise are greatly exaggerated. If evidence of its influence can be found in the 2008 campaign, when people were being careful and being attentive, then surely it can be found in the more mundane places of our society.

The tone of our piece, we confess, sounds somewhat like a football fan whose team has just won the Super Bowl by two touchdowns, but who wants to complain about a blown call by a referee who cost them an early season victory instead of celebrating. Fair enough. And of course, the inauguration of the nation’s first black President is a moment to celebrate. Unless, of course, you just got laid off and cannot get anyone to look carefully at your resume because your name is Lakisha.

CLOSING STATEMENT

Don't Play the (Unconscious) Race Card!

Richard A. Epstein

The Closing Statement of Gregory Parks and Jeffrey Rachlinski represents what I can only describe as an invincible pessimism on the great questions of race relations. They find it hard to celebrate good news on race relations, and constantly look for reasons to rain on this nation's parade. At a time when I am more worried about the premature deification of Barack Obama, they look back to his campaign to see unwarranted suspicion about him.

But what does their evidence prove? Yes, John McCain was ahead by a few points in the polls against a political newcomer in what seemed to be a Democratic year. But Obama had many obstacles to overcome, not the least of which was that he had been taken to the woodshed many times by his now Secretary of State, during the course of a nonstop campaign that easily could have sapped his energy. But when crunch time came, McCain acted in an inexplicable fashion and paid the price, giving up about seven points in the polls. Is there any reason to think that a white democratic nominee would have benefited more substantially? Nor is there anything in the unfortunate affair of Reverend Wright that tells a different story. Obama may not have gained ground after his speech, but he did not lose any ground either, and he staved off a real threat to his campaign. More instructively, the Wright issue faded as the campaign went on and as the association between Obama and Bill Ayres received far more attention. It seemed more politic to link Obama (falsely) with an alleged former terrorist rather than with a black reverend. And to the credit of the nation, that campaign did not work either. Indeed anyone who knows both Obama and Ayres, as I do, knew from the start that any supposed conspiratorial connection was not supported by a shred of real evidence. The race card did not work; indeed it is probably more accurate to say that it was not really played.

More generally, we can ask this question about the role of race in political elections. Right now there is a constant effort to create "majority-minority" districts that give minority candidates a fair chance of winning an election. The simple empirical question is what percent-

age minority does this district have to have? I am no expert in this area, but I am quite confident that this number is lower by a goodly amount today relative to what it was twenty or thirty years ago. Race has become, I believe, a less salient issue.

Parks and Rachlinski sense that the political tides are flowing against them, so they resort to studies that deal with employment relations. Here one common type of study provides resumes to prospective employers that are identical in all ways except race, and ask us to conclude that the better response given to white names than to black ones shows that the unconscious force of racism still exerts itself. But it is necessary to think hard about this kind of evidence. Against it must be set off other evidence that cuts in the opposite direction. In industry after industry, firms stage minority recruitment fairs to recruit high school and college students. Does anyone really think that these are elaborate shams intended to conceal hard bitten preferences? And if one actually tracks initial job positions, the story is much the same. Hold the record constant and minority students get better initial placements than white students, especially at elite institutions.

These key factors help explain some of the survey evidence which suggests that white names generate a more positive response than minority names. But the resume question is far more complicated than Parks and Rachlinski acknowledge. Change the race and lots of other things change as well. Employers have some sense of the relative strength of their white and their African American candidates. If the anonymous resume across the transom for the minority candidate is stronger than any they have seen, why pursue it if this candidate will go to some stronger firm. Put otherwise, the choice that the personnel director has to ask is whether he or she can land an African American candidate who is in the top 5% of that cohort relative to a white candidate who stands far lower down in his or her own cohort. Other factors could also intrude. Hiring the African American candidate may be more difficult because the antidiscrimination laws will make it more difficult to fire that candidate, if the job does not go well. The differences in the applicant pools and the impact of the antidiscrimination laws could easily matter in dealing with these cases. Given these known background factors, the asserted identity is weaker in fact than it appears on paper.

My own inclination in these matters is to distrust the survey data, and to worry about the employment data. But once again, it is hard to make comparisons because of the differential impact that the law has on members of different groups. It is an old familiar theme that many

neutral laws—think minimum wages—disadvantage members of minority groups that have weaker educational skills. And if so, deregulation is a good first response. And the same can be said about the antidiscrimination laws, for by making it harder to fire minority workers the law makes it riskier to hire them—unless of course there is a need to hire minority workers to stave off potential disparate impact law suits.

All this market confusion comes at a high price, because the most likely effect of any form of state regulation is to raise the cost of doing business which in turn will reduce wage levels to all groups. Yet it is hard to persuade the Congress to back off of this. Right now, it is considering the misnamed “Paycheck Fairness Act,” on the grounds that unconscious bias against women is alive and well in the marketplace. Its “finding” of fact insists:

Despite the enactment of the Equal Pay Act in 1963, many women continue to earn significantly lower pay than men for equal work. These pay disparities exist in both the private and governmental sectors. In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination.

Paycheck Fairness Act, H.R. 1338, 110th Cong. § 2(2) (2008).

I don’t know of a shred of evidence that supports this grand denunciation. Nor can I think of a decent argument for the further strangulation of labor markets in a time of crisis. But I fear that the constant laments of Parks and Rachlinski about unconscious bias will only fan the flames, on matters of sex as well as race. The last thing we need now is more unwise regulation of labor markets that are already reeling from the current economic downturn. Alas, that is what we are likely to get.

Preferred Citation: 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), <http://www.pennumbra.com/debates/pdfs/ImplicitBias.pdf>.