

ESSAY

Gender Unbound?

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ABSTRACT

This Essay engages current research on gender norms and biases and the way they interact in the political sphere with female candidates. Since Hillary Clinton's campaign for U.S. President in 2008, many scholarly retrospectives have presented various reasons that her candidacy faltered. As a starting point, this piece addresses one particular account that is rooted in implicit bias theory. After outlining the application of this claim, which suggests that implicit bias is responsible for her loss, I show that the more conventional and structural explanations for Clinton's political defeat in the presidential primary contests are likely more responsible. Indeed, most female candidates face these issues in competing for office. These explanations, however, still leave open the real and present concern that gendered expectations do tend to shape the way female candidates craft their campaign strategies. For any future female candidate for president, confronting these expectations will remain a challenge.

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INTRODUCTION

The election of Barack Obama as President led to an important political debate about whether the campaign of 2008 signals the emergence of a postracial America.¹ The outcome of this campaign also raises a provocative question regarding the candidacy of his primary opponent, Hillary Clinton—what does her loss during the Democratic primary season tell us about gender bias in American politics? Clinton’s campaign not only clearly made progress toward breaking the “highest, hardest glass ceiling” in American politics,² but it also revealed some telling evidence about the remaining barriers that many female candidates face in the political system.³ Taking account of the individual cases of expressed gender animus and the more structural elements of bias in the campaign, two scholars—Gregory S. Parks and Quinetta M. Roberson—have provided insights in recent articles about the obstacles confronting female candidates at every level of politics.⁴

¹ See, e.g., News Release, Pew Research Ctr., The Economy, Health Care Reform and Gates Grease the Skids: Obama’s Ratings Slide Across the Board (July 30, 2009), available at <http://www.people-press.org/files/legacy-pdf/532.pdf>. The postracial America argument seems especially doubtful given the later controversy with the President’s comments on the arrest of Harvard professor Henry Louis Gates and Cambridge Police Sergeant James Crowley. Polling by Pew Research Center shortly after President Obama’s press conference showed a split in opinion, largely along racial lines. *Id.* at 6. Overall, the President’s job approval rating among whites in the wake of these events dropped seven percentage points. *Id.* at 3.

² See *Hillary Clinton Endorses Barack Obama*, N.Y. TIMES (June 7, 2008), http://www.nytimes.com/2008/06/07/us/politics/07text-clinton.html?pagewanted=all&_r=0 (providing a transcript of Senator Clinton’s concession speech).

³ See *infra* Parts II, IV.

⁴ Gregory S. Parks & Quinetta M. Roberson, “Eighteen Million Cracks”: *Gender’s Role in the 2008 Presidential Campaign*, 17 WM. & MARY J. WOMEN & L. 321 (2011) [hereinafter Parks & Roberson, *Eighteen Million Cracks*]; 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, *Through the Lens of Title VII*].

Among the multitude of retrospectives about the implications of the history-making 2008 campaign for the presidency,⁵ Parks and Roberson rather distinctively examine the issue of gender bias from a different perspective. Parks and Roberson draw on lessons from employment law to analyze the ways that gender bias influenced the outcome of the Democratic primaries and the general election.⁶ Building on their training in psychology to address the theory of implicit bias, the authors explore some interesting comparisons between the way gender bias operates in the typical employment setting and in the context of politics.⁷

This Essay reviews Parks and Roberson's major contentions, identifying some of the strengths and shortcomings in the authors' treatment of the 2008 election and gender in politics generally. On the whole, their argument that implicit gender bias was an important, though not wholly dispositive, factor in the 2008 election, as well as politics generally, is well supported by evidence from the campaign.⁸ The authors provide a good review of instances in which gender stereotypes and bias likely affected both Senator Clinton's effort to become the Democratic presidential nominee⁹ and the power and public view of First Lady Michelle Obama.¹⁰ They persuasively show that many of these episodes help illustrate the kind of unfair treatment that confronts most female candidates who vie for public office.¹¹

The unfair treatment of a candidate in political contests, however, is not quite the same as illegal treatment under the law. Although the insights from psychological studies provide a fresh perspective on its operation, the world of politics is too nebulous to apply the kind of analysis that the authors wish to import into employment law.¹² Despite their insights, the authors' arguments are somewhat less persua-

⁵ See, e.g., CHUCK TODD & SHELDON GAWISER, *HOW BARACK OBAMA WON: A STATE-BY-STATE GUIDE TO THE HISTORIC 2008 PRESIDENTIAL ELECTION* (2009) (providing a detailed overview and analysis of the voting demographics in the 2008 campaign); RICHARD WOLFFE, *RENEGADE: THE MAKING OF A PRESIDENT* (2009) (describing Barack Obama's 2008 campaign from a reporter's perspective).

⁶ Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 322–23.

⁷ See, e.g., *id.* at 325–32 (comparing explicit sexism in Hillary Clinton's campaign to explicit sexism in the workplace and considering whether Clinton could file a successful Title VII claim).

⁸ See *id.* at 335–39 (describing implicit bias and providing specific examples from the Clinton campaign).

⁹ See *id.* at 337–39.

¹⁰ See Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 4–7.

¹¹ Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 337–39.

¹² See *infra* Part III.

sive in linking the Clinton campaign's experience to Title VII's model of prohibited activity. Even accepting that gender bias was a factor in directing the ultimate course of the primaries and general election, the traditional factors that commonly shape political outcomes played a more commanding role in 2008.¹³

Part I of this Essay assesses Parks and Roberson's argument that courts should consider theories of implicit bias in evaluating employment discrimination claims. Part II recounts Parks and Roberson's observations about how gender discrimination operates in the political realm. Part III discusses the problems with the core assumption that the employment law model is easily applicable to politics. For several reasons, the rough-and-tumble world of political competition does not easily fit the criteria-based reasoning encouraged in the employment context. Turning to the details of the 2008 election, Part IV employs alternative theoretical frames to suggest that a more complete account of the campaign may show that gender bias worked along with other unmentioned factors in determining the ultimate outcome.

I. GENDER BIAS & EMPLOYMENT LAW

The analytical core of the Parks and Roberson argument is its prescriptive treatment of gender discrimination cases. In "*Eighteen Million Cracks*," *Gender's Role in the 2008 Presidential Campaign* ("*Eighteen Million Cracks*"), Parks and Roberson's analysis of Hillary Clinton's 2008 campaign, their critique focuses on the current doctrine that applies to claims that allege employment discrimination under Title VII of the Civil Rights Act.¹⁴ As with other areas of antidiscrimination law, a major challenge confronting plaintiffs in these cases is the legal requirement to provide sufficient evidence of an illegal purpose or intent on the part of the employer defendant.¹⁵ Today, of course, there are few civil lawsuits in which the plaintiff is able to produce "smoking gun" record evidence—a formal policy or personal statement indicating the defendant employer's explicit discriminatory intent.¹⁶

¹³ See *infra* Part IV.

¹⁴ See 42 U.S.C. § 2000e (2006); Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 322–23.

¹⁵ See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–09, 518–19 (1993). The intent requirement has also long been a critical issue for plaintiffs seeking redress under the antidiscrimination regime of the 1965 Voting Rights Act. 42 U.S.C. § 1973 (2006); see also *City of Mobile v. Bolden*, 446 U.S. 55, 67–74 (1980).

¹⁶ See, e.g., *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987); *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 638 (5th Cir. 1985).

Consequently, many plaintiffs rely upon more circumstantial cases to satisfy the intent requirement. Two common strategies of this variety include presenting data on the employer's decisions over an extended period of time or analyzing those decisions across a broader field of similarly situated individuals.¹⁷ Under this approach, the plaintiff seeks to demonstrate that the defendant's employment decision is part of a pattern of unequal or biased treatment of a disfavored class to which the plaintiff belongs.¹⁸ Multivariate statistical analysis is often crucial to establish such patterns in the employer's hiring decisions, although it also can force judges and jurors to wade through the conflicting (and sometimes very confusing) interpretations presented by dueling expert witness reports.¹⁹

Using either the direct or indirect approach, the seminal element in the plaintiff's evidentiary case is information about the employer's underlying motivations. Following *Price Waterhouse v. Hopkins*,²⁰ the main Supreme Court decision expounding upon gender-based claims, courts apply a burden-shifting regime that offers the employer the chance to present a nondiscriminatory explanation for the challenged decision.²¹ This step can further complicate the plaintiff's burden of showing discriminatory intent because the plaintiff-employee must answer any such rebuttal by challenging the credibility of the asserted nondiscriminatory rationale.²² Only if the evidence in its entirety shows that the asserted explanation is a pretext for unlawful discrimination will the court allow the lawsuit to proceed.²³ In practical terms, the plaintiff ultimately must pierce the assumption of rational decisionmaking on the part of the employer to move the claim forward.

In discussing *Price Waterhouse*, Parks and Roberson focus on the fact that gender-based stereotypes in the workplace did not figure more prominently in the Supreme Court's analysis of discriminatory

¹⁷ See, e.g., *EEOC v. Joe's Stone Crab, Inc. (Joe's Stone Crab II)*, 220 F.3d 1263, 1278 (11th Cir. 2000) (discussing how general data about disparate impact on a particular group can prove a Title VII violation for a facially neutral policy).

¹⁸ See *id.*

¹⁹ See William T. Bielby & Pamela Coukos, "Statistical Dueling" with Unconventional Weapons: What Courts Should Know About Experts in Employment Discrimination Class Actions, 56 EMORY L.J. 1563, 1564–67 (2007).

²⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²¹ See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–10 (1993); see also 45C AM. JUR. 2D *Job Discrimination* § 2416 (2009).

²² *St. Mary's Honor Ctr.*, 509 U.S. at 507–08.

²³ See *id.*; see also 45C AM. JUR. 2D, *supra* note 21, § 2416.

intent.²⁴ They claim that these stereotypes inform a great deal of biased decisionmaking in the workplace, even though the normal judicial search for intent-focused evidence is ill-suited to uncover this implicit bias.²⁵ *Price Waterhouse* recognizes a relatively loose association between expressed sex-based stereotypes and workplace discrimination.²⁶ The majority of the Justices concluded that a judge may find that such evidence is relevant to the plaintiff's case.²⁷ The opinion, however, does not embrace the more controversial assertion that these gender stereotypes, standing alone, can themselves demonstrate the kind of discriminatory intent that the statute forbids.²⁸ Although the Court directed trial judges to consider this type of evidence in support of a plaintiff's case, it warned that this information must accompany additional evidence that more directly links the asserted stereotype to the employer's decisionmaking.²⁹

Justifying a closer relationship between social stereotypes and discriminatory intent is the main goal of Parks and Roberson's works regarding gender in politics.³⁰ In Parks and Roberson's view, the existing legal doctrine ignores how prominently gender beliefs can inform the employer's thinking long before the challenged employment decision occurs.³¹ Indeed, the defendant may not even be cognizant of how these hidden biases can influence a hiring or promotion decision.³² For both of these reasons, the causal linkages in evidence that the *Price Waterhouse* framework demands may not be readily apparent to the typical plaintiff.³³ Indeed, they may even be impossible to obtain through the normal course of discovery.³⁴ Reviewing several

²⁴ See Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 325–26; see also Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 27–28.

²⁵ See Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 325–26, 332–37; see also Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 28–29.

²⁶ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989); see also *id.* at 272 (O'Connor, J., concurring).

²⁷ See *id.* at 251–52 (majority opinion).

²⁸ See, e.g., *id.* at 270–76 (O'Connor, J., concurring).

²⁹ *Id.* at 241–42, 251–52 (majority opinion).

³⁰ See Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 326–28.

³¹ See *id.* at 322–23, 335–38.

³² See *id.* at 336; see also Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 30.

³³ See Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 322–23, 331–37; see also Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 27–28.

³⁴ Because the scope of federal discovery is limited to the specific claim asserted by a given plaintiff, see FED. R. CIV. P. 26(b), it may be difficult to obtain the kind of comprehensive data on hiring and promotion behavior of a given defendant over time, particularly as it relates to a broad category of given plaintiffs.

district court cases, Parks and Roberson conclude that courts should give greater weight to evidence that unconscious bias shapes choices that might otherwise be regarded as rational.³⁵ To encourage courts to rethink this limitation, the authors appeal to psychological studies that explore models linking the concept of implicit bias with intentionality.³⁶

Turning to psychological research by Linda Hamilton Krieger, an early proponent of implicit bias theory, Parks and Roberson identify problems associated with the current legal doctrine's approach.³⁷ They assert that an employment determination is a more complex process than the current legal doctrine recognizes.³⁸ Disparate treatment inquiries normally evaluate intent at the point of decision rather than at earlier stages of institutional development.³⁹ The major insight Parks and Roberson distill from Krieger's literature is that prior, subjective viewpoints about a group can affect later evaluations of employees who are part of those groups.⁴⁰ Additionally, the existing legal doctrine requires evidence of explicit, conscious connections between a certain stereotype and a specific employment action.⁴¹ The very nature of the bias that the psychological literature identifies, however, is not known to the employer.⁴²

II. GENDER & POLITICS

In contrast to the literature discussing the interaction between race and politics—in which themes of disparity and extra-legal exclusion are more explicit⁴³—the scholarship on gender and politics struggles with an elusive and more subtle conceptual challenge. The central issue for gender and politics scholars is this: The basic measures of gender equality in American politics—having equal numbers

³⁵ Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 322–23, 331–32, 335–38; *see also* Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 27–28.

³⁶ *See* Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 40–41.

³⁷ Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 335–36 (discussing the findings of Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995)).

³⁸ *See* Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 40–41.

³⁹ *See id.* at 30.

⁴⁰ Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 335–36.

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See generally*, e.g., MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994); KEITH REEVES, *VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES & RACIAL POLITICS IN AMERICA* (1997); KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS* (1993).

of female and male voters and the growing ranks of successful female candidates—deceptively indicate that women operate on an equal playing field in politics.⁴⁴ As a society, however, we know that a significant gender gap in elected offices exists at virtually every level.⁴⁵ How, if at all, does the effect of gender bias figure into the scholarly account for this underrepresentation?

Women continue to make up a much smaller share of elected officials at the federal and state levels than one would expect based on their numbers in the American populace.⁴⁶ Immediately after the historic advancements for female candidates in the 1992 elections (dubbed the “Year of the Woman”), women still accounted for just ten percent of the entire membership in the U.S. Congress, less than twenty-five percent of all state executive officers, and barely twenty percent of the offices in the fifty state legislatures.⁴⁷

Almost two decades since that notable rise in female representation, those measures of progress have not dramatically improved.⁴⁸ Despite a continued upward trajectory in the number of officeholders, the female percentages in legislative halls and executive chambers across this country remain woefully behind the proportion of women in the electorate. Currently, less than a third of all elected officials within each of the aforementioned categories of political offices in this country are women.⁴⁹

These indicators, which reveal a plodding but steady movement toward gender parity, are especially disappointing in light of the prolonged energy behind the women’s suffrage movement. Long after the ratification of the Nineteenth Amendment and social movements to broaden access to political and economic power for women, the gender gap in holding public office remains.⁵⁰ This nation’s record re-

44 See, e.g., JENNIFER L. LAWLESS & RICHARD L. FOX, *IT TAKES A CANDIDATE: WHY WOMEN DON’T RUN FOR OFFICE* 2–7 (2005) [hereinafter LAWLESS & FOX, *IT TAKES A CANDIDATE*]; Georgia Duerst-Lahti, *The Bottleneck: Women Becoming Candidates*, in *WOMEN AND ELECTIVE OFFICE: PAST, PRESENT, AND FUTURE* 15, 15–17 (Sue Thomas & Clyde Wilcox eds., 1998) (comparing the success rates between men and women running for office).

45 LAWLESS & FOX, *IT TAKES A CANDIDATE*, *supra* note 44, at 18–21.

46 *Id.*

47 *Id.* at 20 (charting the percentage of women serving in various elective positions from 1979 to 2005). For more information about the Year of the Woman, see generally Kathleen Dolan, *Voting for Women in the “Year of the Woman,”* 42 *AM. J. POL. SCI.* 272 (1998); Virginia Sapiro & Pamela Johnston Conover, *The Variable Gender Basis of Electoral Politics: Gender and Context in the 1992 US Election*, 27 *BRIT. J. POL. SCI.* 497 (1997).

48 See LAWLESS & FOX, *IT TAKES A CANDIDATE*, *supra* note 44, at 18–20.

49 *Id.*

50 *Id.* at 18, 20. See generally JO FREEMAN, *A ROOM AT A TIME: HOW WOMEN ENTERED*

mains surprisingly weak compared with the performance of democratic societies.⁵¹ While the gender gap in political participation has largely disappeared with respect to voter turnout,⁵² political representation by women in America trails similar statistics in other industrialized nations. The United States ranks just thirty-fourth among all democratic states (and fifty-seventh overall worldwide) in the percentage of female elected officers.⁵³

Roberson and Parks note several explanations that have been presented by others for why this disparity has persisted.⁵⁴ Although they do not adopt a particular taxonomy for the factors they highlight, one can organize the major causal explanations in this area into three broad groupings: competition, mass stereotypes, and individual perceptions. Each of these factors helps to show that women commonly face a more complicated and daunting set of challenges than men do in their effort to get ahead in the political arena.

A. *Heightened Competition*

Research shows that women seeking office tend to win about as often as their male counterparts do.⁵⁵ Evidence also shows that female candidates tend to raise as much money and attract as many votes as men do, on average.⁵⁶ These studies also reveal, however, that there are distinctions in the types of campaigns in which women tend to succeed.⁵⁷ A comprehensive analysis of congressional campaigns over a fifty-year period found that the gender stratification of the races that women run was a key factor preventing women from expanding their presence in elected offices.⁵⁸ One key finding was that female congressional candidates were less likely than male candidates to participate in open seat contests.⁵⁹ This point is significant

PARTY POLITICS (2000) (detailing the rise of female participation in the political process from the 1700s to the present).

⁵¹ See LAWLESS & FOX, *IT TAKES A CANDIDATE*, *supra* note 44, at 18–19.

⁵² See *id.* at 18–21.

⁵³ *Id.* at 18.

⁵⁴ See, e.g., Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 326–28 (discussing gender stereotypes and parties’ “gate-keeping activities”).

⁵⁵ *Id.* at 327.

⁵⁶ See Barbara Burrell, *Political Parties, Fund-raising, and Sex*, in LEGISLATIVE WOMEN: GETTING ELECTED, GETTING AHEAD 41, 49–50, 52 (Beth Reingold ed., 2008) [hereinafter LEGISLATIVE WOMEN] (noting 2006 congressional fundraising slightly favored female major party nominees).

⁵⁷ Jennifer L. Lawless & Kathryn Pearson, *Competing in Congressional Primaries*, in LEGISLATIVE WOMEN, *supra* note 56, at 21, 30–36, 49–50.

⁵⁸ *Id.* at 26–27, 30–37.

⁵⁹ *Id.* at 31–34; Burrell, *supra* note 56, at 44–47.

because the probability of a nonincumbent winning is substantially higher in an open seat race.⁶⁰ But these winning candidates typically are recruited early by congressional campaign committees, and women are not as likely to make the short lists of the political operatives who target such prospects.⁶¹

In those races that involve an incumbent, female candidates seeking reelection still confront a relatively steeper climb to victory than men. On average, women in this context face a larger, more competitive field of challengers than male candidates.⁶² Importantly, the heightened level of competition is evident throughout every stage of the race when a woman is running. For instance, the enhanced competition is as pronounced in the primary contests involving women as in the general election match-ups.⁶³ Even the *opposing* party's primary contests tend to attract a more competitive field of challengers, all else being equal, when a woman enters the political arena.⁶⁴ Taken together, these findings indicate that women may be viewed as weaker, more vulnerable candidates, which tends to attract other competitors to the race.⁶⁵

Other research has uncovered a key difference in the types of elected offices in which women have made the greatest advancements. Compared with state and national offices, where men hold the wide majority of available seats, local campaigns appear to be where women tend to enjoy the greatest success.⁶⁶ Women are relatively well represented on local boards of education, city and county legislatures,

⁶⁰ See Lawless & Pearson, *supra* note 57, at 30–32. Because incumbency plays a significant role in shaping a candidate's name recognition, fundraising ability, and organizational networks, on average, challengers rarely succeed in unseating an incumbent seeking reelection. See generally GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 25–37 (1983) (discussing the “incumbency factor” in electoral politics). By comparison, an open seat contest (without an incumbent) offers a chance for an aspirant to compete on a level playing field with other candidates.

⁶¹ See Lawless & Pearson, *supra* note 57, at 31.

⁶² See *id.* at 31–34.

⁶³ *Id.*

⁶⁴ See *id.* at 33–34.

⁶⁵ See *id.* at 32.

⁶⁶ See David Lublin & Sarah E. Brewer, *The Continuing Dominance of Traditional Gender Roles in Southern Elections*, 84 SOC. SCI. Q. 379, 379–82 (2003) (discussing the success of women in winning local elections in the South); see also JENNIFER L. LAWLESS & RICHARD L. FOX, AM. UNIV. WOMEN & POLITICS INST., *MEN RULE: THE CONTINUED UNDER-REPRESENTATION OF WOMEN IN U.S. POLITICS* 6 (2012) [hereinafter LAWLESS & FOX, *MEN RULE*], available at <http://www.american.edu/spa/wpi/upload/2012-Men-Rule-Report-web.pdf> (indicating a relatively stronger preference among women for local political offices, including school boards).

and (to a lesser degree) local executive positions.⁶⁷ Although men use these positions as pathways to higher-profile offices, women frequently begin and complete their public service careers at the local level.⁶⁸ Some research attributes this gender imbalance to personal choices about family and well-being.⁶⁹ In contrast to this view, other work posits that even though these positions involve direct constituency work and grassroots organizing, they are also limited in their field of discretion.⁷⁰ At least some of this stratification therefore links to gender bias.

B. Mass Stereotypes

In their accounts on gender bias in politics, Parks and Roberson also have much to say about the biases in the public's view of issues and candidates.⁷¹ To the extent that public opinion about the qualities and issues deemed relevant to politics are associated with gender, stereotypes can cast a great shadow on campaigns and voting.⁷² Parks and Roberson's argument about gender bias in the employment setting is most relevant to the social science literature on gender and politics. In one article, the authors cite political communication research suggesting that basic beliefs about gender roles in society very heavily influence mass perceptions about politics.⁷³

Studies of gender stereotypes in politics have well-established theories explaining how the public opinions of politics and candidates are partly rooted in traditional notions of gender socialization.⁷⁴ Women, who have traditionally played the primary role in maintaining the home and family, continue to maintain domestic identities despite the marked social progress toward egalitarianism.⁷⁵ Even with greater access to educational and professional opportunities in the current era, women who participate and achieve in the most competitive sec-

⁶⁷ Lublin & Brewer, *supra* note 66, at 382–85, 391.

⁶⁸ *Id.* at 382–85, 394.

⁶⁹ See LAWLESS & FOX, MEN RULE, *supra* note 66, at 11.

⁷⁰ *Id.*; see also Lilliard E. Richardson, Jr. & Patricia K. Freeman, *Gender Differences in Constituency Service Among State Legislators*, 48 POL. RES. Q. 169, 169 (1995).

⁷¹ See, e.g., Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 339–45 (discussing the effects of Clinton's failed bid in the 2008 election and how it brought issues regarding gender bias to the forefront).

⁷² See *id.* at 338–40 (providing examples from Hillary Clinton's election).

⁷³ See *id.* See generally Richard L. Fox & Eric R.A.N. Smith, *The Role of Candidate Sex in Voter Decision-Making*, 19 POL. PSYCHOL. 405 (1998).

⁷⁴ See, e.g., Corrine M. McConaughy, *Seeing Gender over the Short and Long Haul*, 3 POL. & GENDER 378, 378 (2007).

⁷⁵ See generally SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989).

tors of society must harmonize the sometimes competing demands of excelling in the “working world” and successfully maintaining a vibrant home and family life.⁷⁶ This “double bind” sometimes imposes harsh life choices on women that rarely confront men, whose historically assigned social role lies in the workplace.⁷⁷

Importantly, the historical experience of women occupying home-based roles has established a norm in society that has failed to evolve as times have changed.⁷⁸ Assigning gender-specific roles in the public and private sphere confirms a social expectation that a woman’s place lies within the home.⁷⁹ Politics, as with other extra-family (and traditionally male) enterprises, involves matters well beyond what is customarily deemed to be the woman’s domain.⁸⁰ “Up through the mid-twentieth century, the notion of women serving in positions of high political power was anathema, in large part because of the expectation that women should prioritize housework and child care.”⁸¹ These notions of a woman’s work have not shifted despite the increasing percentages of women who inhabit spheres outside of the home.⁸²

Contemporary studies offer ample evidence that these persistent gender stereotypes also inform the public’s viewpoints and expectations about women in politics. Fully a third of respondents in one national opinion survey reported that women have personality qualities that make them less suitable for public service than men.⁸³ This effect is also pronounced in public views about how well women perform or would perform in executive offices, including governor and President of the United States. In another study, a majority of surveyed voters agreed with the proposition that a man would do a better job than a woman leading the nation through a crisis.⁸⁴ These respondents, while eschewing the most blatant gender stereotypes,⁸⁵ never-

⁷⁶ KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP* 4–5 (1995).

⁷⁷ *See id.*

⁷⁸ LAWLESS & FOX, *IT TAKES A CANDIDATE*, *supra* note 44, at 52.

⁷⁹ *See id.* at 8–9.

⁸⁰ *See id.*

⁸¹ *Id.* at 8.

⁸² *See id.* at 8–9.

⁸³ Shanto Iyengar et al., *Running as a Woman: Gender Stereotyping in Women’s Campaigns*, in *WOMEN, MEDIA, AND POLITICS* 77, 84–98 (Pippa Norris ed., 1997).

⁸⁴ Dianne Bystrom, *Confronting Stereotypes and Double Standards in Campaign Communication*, in *LEGISLATIVE WOMEN*, *supra* note 56, at 59, 60.

⁸⁵ For example, men and women rated equally well in intelligence and the ability to reach compromise. *Id.* at 60–61.

theless linked some assessments of qualifications to gender-based views about ability.⁸⁶ For example, although the poll found that women exceeded men in perceived ability with respect to trustworthiness and honesty,⁸⁷ voters generally rate these traits as less important attributes for a person in the office of the President of the United States.⁸⁸

Related studies confirm that although the public is more accepting of female politicians, the same antiquated stereotypes shade opinions about substantive matters as well. For instance, gender seems to inform expectations about the issues in which women should have greater expertise.⁸⁹ Male candidates are regarded as better suited to address policy issues related to national security and the economy.⁹⁰ On the other hand, women get more positive marks as superior managers of policy issues related to education, health care, poverty, and homelessness.⁹¹ The ability to handle domestic policy matters is commonly associated with the home and family roles that gender stereotypes tend to assign to women.⁹² This social expectation, however, also carries a downside for candidates. This norm discounts the ability of women to master traditionally male-dominated issues involving international relations and defense.⁹³ Although there is also a partisan dynamic in these findings—respondents who are Democrats show relatively more willingness to elect a female leader than their Republican counterparts—these gender effects remain robust.⁹⁴

Even more to the point, opinion research that explicitly associates personality traits with men and women very closely tracks the aforementioned gender stereotypes.⁹⁵ According to these opinion surveys, a majority of voters expressed a belief that women are more kind, compassionate, sensitive, understanding, honest, and trustwor-

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* See generally Carole Kennedy Chaney, R. Michael Alvarez & Jonathan Nagler, *Explaining the Gender Gap in U.S. Presidential Elections: 1980–1992*, 51 *POL. RES. Q.* 311 (1998).

⁸⁹ See Bystrom, *supra* note 84, at 62.

⁹⁰ *Id.*

⁹¹ *Id.* at 61–62.

⁹² *Id.*

⁹³ See *id.* at 60–61.

⁹⁴ *Id.*

⁹⁵ See, e.g., Kim Fridkin Kahn, *Does Being Male Help? An Investigation of the Effects of Candidate Gender and Campaign Coverage on Evaluations of U.S. Senate Candidates*, 54 *J. POL.* 497, 505–07 (1992); Jeffrey W. Koch, *Do Citizens Apply Gender Stereotypes to Infer Candidates' Ideological Orientations?*, 62 *J. POL.* 414, 417–18 (2000).

thy than men.⁹⁶ In contrast, the common descriptors that voters more often employ in describing men include “strong,” “tough,” “experienced,” and “knowledgeable.”⁹⁷ Unsurprisingly, this latter set of male-associated characteristics is commonly embraced by political candidates for office—including those for the presidency.⁹⁸

The prevalence of gender stereotypes in public opinion leads to two implications for female candidates and officeholders, each of which makes the road to winning elected office a more arduous one for women than for men. First, the media tends to reflect and confirm many of the public’s stereotypes in its presentation of political issues.⁹⁹ Scholarly analyses of media presentations of political races have found that the very same biased viewpoints and expectations about women and female politicians influence editorial decisions about the subject and quality of news coverage.¹⁰⁰ In many cases, the coverage that female candidates receive is more often focused on issues such as their viability, their marital status, and their family life.¹⁰¹ Additionally, the media coverage of women more often emphasizes the candidate’s mode of dress and style than does media coverage of men.¹⁰²

The second key effect is a reactive one, focusing on the strategic decisions that female candidates and their advisors often make in developing their campaigns.¹⁰³ Women entering politics must decide whether to embrace a public image that dispels established gender stereotypes or one that capitalizes on them.¹⁰⁴ Put another way, the candidate must decide whether she is a “female politician” or a “politician who is a woman.”

Female candidates employ a variety of tools to frame the public understanding of their personal identity as a woman, including ap-

⁹⁶ Kahn, *supra* note 95, at 505–07.

⁹⁷ *Id.* at 506, 515.

⁹⁸ See Monica C. Schneider & Angela L. Boss, *Measuring Stereotypes of Female Politicians*, 34 *POL. PSYCHOL.* (forthcoming 2013) (manuscript at 13–17), available at <http://online.library.wiley.com/doi/10.1111/pops.12040/pdf>.

⁹⁹ See MARIA BRADEN, *WOMEN POLITICIANS AND THE MEDIA* 1–3 (1996); William A. Gamson et al., *Media Images and the Social Construction of Reality*, 18 *ANN. REV. SOC.* 373, 390 (1992).

¹⁰⁰ Bystrom, *supra* note 84, at 60.

¹⁰¹ *Id.* at 62–63.

¹⁰² *Id.*

¹⁰³ See generally KIM FRIDKIN KAHN, *THE POLITICAL CONSEQUENCES OF BEING A WOMAN: HOW STEREOTYPES INFLUENCE THE CONDUCT AND CONSEQUENCES OF POLITICAL CAMPAIGNS* (1996).

¹⁰⁴ See Paul S. Hertson, J. Celeste Lay & Atiya Kai Stokes., *Women Running “as Women”: Candidate Gender, Campaign Issues, and Voter-Targeting Strategies*, 65 *J. POL.* 244, 244–47 (2003) (studying the beneficial effects in campaigns of capitalizing on gender stereotypes).

pearances with (or without) family, fashion choices, and photo appearances that develop their preferred persona.¹⁰⁵ On the more substantive side, evidence suggests that female officeholders also tend to emphasize issues and committee work that comports with the public's gendered beliefs.¹⁰⁶ Some female candidates have circumvented the gender pitfalls associated with the media by relying on the internet to reach voters.¹⁰⁷ This forum allows candidates to customize messages to multiple constituencies using information that appeals to the particular desires of a specific group.¹⁰⁸

C. *Individual Perceptions*

Aside from competition and stereotype, both of which Parks and Roberson address,¹⁰⁹ another issue they might have considered closely, but failed to address in their articles, is how a candidate's own perceptions can play a role in maintaining the political gender gap. This factor suggests that an individual's interactions with institutions can produce this particular set of expectations about the potential to advance. Put differently, this factor involves perceived structural limits on a woman's ability to give effect to her political ambition.¹¹⁰ Both the stratification in campaigns and the public's gender stereotypes create a "pipeline issue" that affects most potential female candidates.¹¹¹ A common but rarely explored issue of female

¹⁰⁵ In the case of Hillary Clinton's candidacy, for instance, her much vaunted array of pantsuits was partly an effort to present an image to counter the conventionally female mode of dress. See, e.g., Robin Givhan, *Wearing the Pants*, WASH. POST, Dec. 9, 2007, at A24. One can easily contrast the candidate's style to that of Michelle Obama, who commonly utilizes dresses and skirts. See, e.g., Kate Betts, *Michelle Obama and the New Power Dressing*, HARPER'S BAZAAR, Mar. 2011, at 252. Clinton's fashion choice is reflected in the attire of several women in leadership positions, largely because it closely mirrors the suits of her male counterparts. Similar issues commonly arise in the legal field, including the fashion choices for then-U.S. Solicitor General Elena Kagan—the first female in her role. See, e.g., Patricia J. Williams, *Tripping on Obama's Coattails*, DAILY BEAST (June 9, 2009 1:11 AM), <http://www.thedailybeast.com/blogs-and-stories/2009-01-09/tripping-on-obamas-coattails/pl>.

¹⁰⁶ See, e.g., Herrnson, et al., *supra* note 104, at 245–47, 251.

¹⁰⁷ Bystrom, *supra* note 84, at 67.

¹⁰⁸ See *id.*

¹⁰⁹ See, e.g., Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 326–29, 331; Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 4, 10–14.

¹¹⁰ See generally Kira Sanbonmatsu, *Political Parties and the Recruitment of Women to State Legislatures*, 64 J. Pol. 791 (2002).

¹¹¹ See LAWLESS & FOX, *IT TAKES A CANDIDATE*, *supra* note 44, at 26–28. Importantly, this point is not intended to suggest that individual perceptions alone account for the gender gap in political achievement. It is the interaction of structural forces with actual experience that tends to shade an individual's assessment of what advancement is possible for women who engage in the political context.

officeholders is confronting negative perceptions about campaigning, or what some frame as a gender gap in “political ambition.”¹¹² Some recent compelling research has suggested that factors that bear on the initial decision to run can dissuade even the strongest female candidates from entering the fray.

In their ambitious study *It Takes a Candidate*, Jennifer Lawless and Robert Fox observed that the gender balance in the pool of highly qualified citizens who are well-suited for political campaigning disappears at the point when those individuals consider a run for office.¹¹³ Their extensive survey of potential political candidates finds compelling evidence of gender differences in the winnowing process that commonly transforms a possible candidate for office into an actual one.¹¹⁴ Men and women perform equally well in other forms of political participation, but men are far more likely than women to take the preliminary steps necessary to pursue political office.¹¹⁵ Additionally, the differential effects are further pronounced when considering a run for the more high profile statewide or federal offices.¹¹⁶ This effect appears largely attributable to the complex ways that gender shapes the institutional structure of campaigning and individual perceptions about what is possible for women seeking political office.¹¹⁷

On average, women whose profiles make them eligible for the political arena have higher levels of education than similarly eligible men.¹¹⁸ And, professionally speaking, the résumés of female candidates include top-shelf indicators of their achievement in high-status fields that commonly produce the most viable political candidates.¹¹⁹ Among the so-called “political pipeline” professions, women are at least as well placed as men.¹²⁰ The process in which a well-situated citizen emerges as a candidate, however, appears to winnow out a substantial number of women.¹²¹ Put plainly, this evidence of public perception and candidate strategy indicates that women must be better than men to fare equally well.¹²²

¹¹² *Id.* at 28–32.

¹¹³ *Id.* at 22, 38.

¹¹⁴ *See id.* at 26, 46.

¹¹⁵ *See id.* at 38–41.

¹¹⁶ *Id.* at 49.

¹¹⁷ *Id.* at 41.

¹¹⁸ *See id.* at 34.

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See id.* at 60–62.

The calculus for women deciding whether to run is largely shaped by their perceptions of the political process. Data from Lawless and Fox's study indicates that women are more hesitant to run for office due to both structural and individual factors.¹²³ For example, the traditional family orientation of labor does not typically regard girls as politicians; women are less likely than men to report having the early formative experiences that groom them for a professional life in politics.¹²⁴ Additionally, a largely male-based ethos in politics commonly leads officials who recruit new candidates to favor men.¹²⁵ Well-credentialed male respondents more often report having contact with operatives who commonly seek new political candidates; the well-qualified females in the survey reported recruitment contact only half as often.¹²⁶ These factors tend to produce an effect on individual perception; women more often tend to discount their chances of success as a candidate due to an uneven playing field in political campaigns.¹²⁷ In all, demurring from a foray into the political arena is a less surprising decision for women than one might initially believe.

III. WHAT MAKES POLITICS DIFFERENT

Whether Parks and Roberson have identified a legal problem with their inquiries into the gender issues in the 2008 election, however, is a different matter altogether. This Essay views Parks and Roberson's ultimate goal—testing the viability of gender-based Title VII claims in the political context—as more metaphorical than the provocative title of one of their articles, "*Eighteen Million Cracks*," might suggest. Parks and Roberson state that their aim is to draw parallels between the political and legal contexts in which gender bias plays a role.¹²⁸ At times, however, it is unclear whether their purpose is truly to illustrate how our understandings of politics might shift if we incorporate some insights from employment law. In the end, this Essay posits that the greatest impact of Parks and Roberson's works is showing that a more complete and sophisticated theory of gender discrimination would give greater attention to the ways that implicit bias negatively influences women in the public realm.

¹²³ *Id.* at 67, 77–78.

¹²⁴ *Id.* at 63–65, 69–70.

¹²⁵ *Id.* at 83–89.

¹²⁶ *Id.* at 87.

¹²⁷ *Id.* at 89.

¹²⁸ See, e.g., Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 322–23.

Putting aside the sometimes flowery rhetoric that presidential campaigns and their candidates regularly employ,¹²⁹ the formal legal problem described by Parks and Roberson in both “*Eighteen Million Cracks*” and *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination Through the Lens of Title VII* is not an especially difficult matter to resolve.¹³⁰ Even with the greater sensitivity to the type of implicit bias that the authors discuss in the employment law setting,¹³¹ candidate Hillary Clinton would have no ability to seek legal recourse for her failed presidential run. Insofar as the law is concerned, this lack of legal recourse is a positive thing, as the employment law regime is not easily applicable to campaigns and elections for a few reasons.

First, the formal relationship between voters and candidates in the political system is not congruous with that of a normal employer and employee. Politicians are servants of the public; their accountability to the voters stems from the sacred trust embodied in their election.¹³² Indeed, there are legal settings in which the sacred trust between an official and the public animates legal action.¹³³ The formal process in which voters choose their leaders, however, is not an “employment decision” in the sense that Title VII employs the term. No single decisionmaker renders a final judgment in the competition over which candidate actually gets the job; rather, the “hiring” that is done in the electoral context is entirely within the control of what resembles a committee of the whole.

A common example taken from the political world helps to show the limitations of political rhetoric in application to the world of employment law. The winning candidate’s trite election night declaration

¹²⁹ Jeff Mason, *Clinton: See This as a Job Interview, but Ignore the Hair*, REUTERS (Mar. 25, 2008), <http://blogs.reuters.com/talesfromthetrail/2008/03/24/clinton-see-this-as-a-job-interview-but-ignore-the-hair/> (describing Clinton’s suggestion at a Pennsylvania rally to “[c]onsider this a job interview”); Courtney Perkes, *Rick Warren Hopes to Redefine Presidential Politics*, ORANGE COUNTY REG. (Aug. 8, 2008), <http://www.ocregister.com/news/warren-190353-going-people.html> (discussing a professor’s comments on Rick Warren’s likening his public forum to a “basic job interview” of John McCain and Barack Obama).

¹³⁰ Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4; Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4.

¹³¹ See Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 332–39 (discussing the study of implicit bias in employment law and examples of implicit bias in the Clinton campaign).

¹³² One such example of this view from the federal law sphere has to do with the concept of public corruption, which recognizes the relationship of trust between the elected official and the voters. See 18 U.S.C. § 201(b)(4) (2012); see also *Buckley v. Valeo*, 424 U.S. 1, 28 (1976). Furthermore, the definition of “public servant” is “a government official or employee.” MERRIAM-WEBSTER NEW COLLEGIATE DICTIONARY 952 (9th ed. 1985).

¹³³ See 18 U.S.C. § 201(b)(4).

that “the people have spoken”¹³⁴ is, in fact, terribly overinclusive—a majoritarian election system such as that used in the United States allows for as much as forty-nine percent of the people to speak and vote for a losing candidate. That same claim that “the people have spoken” is simultaneously underinclusive, as a politician actually represents a much larger constituency than just the selection of the people who traveled to the polls to vote (including those persons who are unregistered and those who legally cannot vote, including felons and children).¹³⁵

A somewhat more important contrast between politics and a typical employment setting is that each voter’s “hiring decision” is not entirely a deliberative one. Election ballots are cast in the secrecy of the polling booth, and voters selections reflect infinite combinations of the factors that they deem most important. Moreover, a voter’s point of decision about her preferred candidate is not simultaneous. Countless political communication studies confirm that the electorate does not collect information about candidates and the issues uniformly.¹³⁶ A surprising share of voters do not focus their attention on the campaign (including the most basic question of whose names are on the ballot) until the closing weeks of the race.¹³⁷ Indeed, a significant share of voters confirm their perceptions of the candidates in the final days (or perhaps even hours) of the campaign.¹³⁸

In the 2008 New Hampshire primary, for instance, evidence shows that the late deciders who observed the candidate debates defied the early predictions of a Hillary Clinton loss.¹³⁹ Their choices

¹³⁴ See, e.g., Mark Shields, *The People Have Spoken*, NPR (March 13, 2006, 11:37 AM), <http://www.npr.org/templates/story/story.php?storyId=5256345>.

¹³⁵ See JULIE MEYER, U.S. CENSUS BUREAU, AGE: 2000: CENSUS 2000 BRIEF 1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-12.pdf> (noting that twenty-six percent of the population in America is under the age of eighteen); Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disfranchisement in the United States*, 67 AM. SOC. REV. 777, 780–82 (2002) (noting that about 4.7 million citizens are denied the right to vote due to felony convictions).

¹³⁶ See, e.g., Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 575, 578, 583 (2012) (discussing how voters in different media markets and party insiders, for example, may have more or less information than other voters).

¹³⁷ See Brian Brox & Joseph Giammo, *Late Deciders in U.S. Presidential Elections*, 30 AM. REV. POL. 333, 334–35 (2009) (reviewing sources).

¹³⁸ See *id.*

¹³⁹ See Jeff Jones, *Late Deciders in New Hampshire*, GALLUP (Jan. 7, 2008), <http://www.gallup.com/poll/103612/late-deciders-new-hampshire.aspx>; Frank Newport, Jeffrey M. Jones & Lydia Saad, *After N.H., What's Next for Democrats, Republicans?*, GALLUP (Jan. 9, 2008), <http://www.gallup.com/poll/103654/What-Next-Democrats-Republicans.aspx>.

effectively sustained her campaign at a critical time.¹⁴⁰ Only a week after the Iowa caucuses, most polling indicated a surge by the Obama campaign.¹⁴¹ Had more people actually viewed the ten preliminary debates leading up to the Democratic primaries, they might have been swayed by the images of a commanding Hillary Clinton sharing the stage with a rather wooden and unsure Barack Obama.¹⁴² Clinton and Obama's sometimes telling exchanges on policy revealed important personal insights about the candidates.¹⁴³ The fact remains that relatively few people paid enough attention in the early going to develop a decided viewpoint.¹⁴⁴

The final distinction between elections and a traditional employment hiring process is the lack of clear, uniform criteria. Aside from the formal qualifications for the job of President, multiple (indeed, limitless) factors can inform a voter's choice of one candidate over another. A few of them may even appear rather frivolous. For instance, one of the most embarrassing (perhaps also telling) moments in the 2000 election was the unearthing of a strategy memo to Al Gore advising him to make specific fashion decisions that women found appealing.¹⁴⁵ Voters are unaccountable for their reasoning, other than to their own consciences. Voters can decide based on how a candidate makes them feel, even if those emotions have little at all to do with the candidate's actual performance in office.¹⁴⁶ Candidates therefore hire consulting teams to minimize the public view of their personal negatives and, especially if that candidate lags in the polls, to emphasize the negatives of their opponents.¹⁴⁷

These are not the only differences between employment law and politics, of course. In politics, a thin line exists between information that is off-limits and the knowledge that is accessible to public consid-

¹⁴⁰ See News Release, Pew Research Ctr., In GOP Primaries: Three Victors, Three Constituencies: Romney Gains Among Non-Evangelical Conservatives (Jan. 16, 2008), available at <http://people-press.org/reports/pdf/385.pdf>.

¹⁴¹ See Jones, *supra* note 139.

¹⁴² See *id.*

¹⁴³ See Kathleen Hall Jamieson, *Personality Revealed*, N.Y. TIMES (Oct. 2, 2012, 5:15 PM), <http://www.nytimes.com/roomfordebate/2011/10/23/do-good-debaters-make-good-presidents/in-presidential-debates-personality-is-revealed>.

¹⁴⁴ See Jones, *supra* note 139.

¹⁴⁵ See Michael Duffy & Karen Tumulty, *Gore's Secret Guru*, TIME, Nov 8, 1999, at 34 (describing the story of Al Gore's campaign consultant Naomi Wolf, who later denied these allegations, emphasizing that her role in the campaign was a minor one).

¹⁴⁶ See News Release, Pew Research Ctr., Growing Doubts About McCain's Judgment, Age and Campaign Conduct: Obama's Lead Widens: 52%–38% (Jan. 16, 2008) [hereinafter *Growing Doubts*], available at <http://people-press.org/reports/pdf/462.pdf>.

¹⁴⁷ See Duffy & Tumulty, *supra* note 145.

eration.¹⁴⁸ Unlike the traditional employment setting, politics often involves a no-holds-barred review of a politician's personal life.¹⁴⁹ Such an examination in a normal employment interview would run afoul of any number of privacy protections in federal law.¹⁵⁰ Candidates, however, present their personal histories (or some crafted facsimile of them) to give voters helpful insights about who they are.¹⁵¹ Sometimes this tactic works to their benefit, sometimes it does not.¹⁵² But trying to distinguish the personal from the professional seems terribly impractical in the political realm. If attention to these personal attributes were out of bounds as a legal matter, for instance, John McCain might well have pursued an age discrimination claim for the negative attention he received regarding his ability to complete a full term in office.¹⁵³ Similarly, Mitt Romney might have an even stronger religious discrimination case for the attention drawn to his church affiliation when he ultimately withdrew from the Republican primary.¹⁵⁴

IV. ALTERNATIVE EXPLANATIONS FOR ELECTION 2008

It is difficult to quarrel with the selected flashpoint moments from the 2008 campaign that Parks and Roberson attribute to driving the final outcome of the primary campaign.¹⁵⁵ Several of the post-mortem analyses of the Clinton presidential campaign have also highlighted these crucial episodes as reasons that led to her defeat.¹⁵⁶

¹⁴⁸ See, e.g., Lydia Saad, *Percentage Unwilling to Vote for a Mormon Holds Steady*, GALLUP (Dec. 11, 2007), <http://www.gallup.com/poll/103150/Percentage-Unwilling-Vote-Mormon-Holds-Steady.aspx>; see also Growing Doubts, *supra* note 146.

¹⁴⁹ See Saad, *supra* note 148.

¹⁵⁰ See, e.g., 42 U.S.C. § 2000e-2(a) (2006) (prohibiting discrimination against any individual on the basis of "race, color, religion, sex, or national origin").

¹⁵¹ See generally Growing Doubts, *supra* note 146 (examining various candidate traits that voters find germane to their election).

¹⁵² See, e.g., *id.*; Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 339–45 (discussing how Clinton and Palin chose to portray themselves to the public).

¹⁵³ See Growing Doubts, *supra* note 146 (providing a statistical analysis of voter surveys and finding that a growing number of voters were becoming troubled by Senator McCain's age); Caleb Hellerman, *McCain Faces Questions on Age, Health*, CNN (Oct. 8, 2008), <http://edition.cnn.com/2008/HEALTH/10/08/ftl.mccain.health/index.html> (describing how Senator McCain's age had become a "hot" campaign topic).

¹⁵⁴ See Saad, *supra* note 148 (reporting that eighteen percent of Republicans would not support a Mormon presidential nominee); see also, e.g., Michael Luo, *In Iowa, Mormon Issue Is Benefiting Huckabee*, N.Y. TIMES, NOV. 28, 2007, at A26 (describing how Mitt Romney's religious faith was made an issue in the primaries by Mike Huckabee's supporters).

¹⁵⁵ See, e.g., Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 337–38 (describing instances of implicit bias in the Clinton campaign).

¹⁵⁶ See, e.g., JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME* (2010).

Even if one concedes the claim that the doctrines and norms from employment law have some application to the political sphere, however, these moments may not necessarily provide the most complete explanation of the results.

In the employment law sphere, an alternative nondiscriminatory explanation for a particular outcome can defeat a prima facie case of unlawful gender-biased decisionmaking.¹⁵⁷ Here, one can point to more traditional factors in the Democratic nomination and general election process that account for the end of the Clinton campaign. Having laid out some of the conceptual problems with trying to harmonize the worlds of politics and employment law, this Part suggests some alternative and more conventional frameworks from political science that helped determine the outcome of this election.

A. Money

Political operatives and scholars who prefer structural explanations for political outcomes would begin any discussion about the Democratic nomination with the huge resource gap that the Clinton campaign faced throughout most of the primaries.¹⁵⁸ Money is aptly described as “the mother’s milk of politics” because it is so central to virtually every element of the candidate’s campaign strategy.¹⁵⁹ Decisions about campaign travel, event staging, and support staff are all basic matters that every national candidate needs to make.¹⁶⁰ A campaign cannot address any of these matters competently without a substantial infusion of cash. Although money is no guarantee for electoral success, a robust fundraising apparatus markedly improves a candidate’s chances of performing well.¹⁶¹

¹⁵⁷ See 45C AM. JUR. 2D, *supra* note 21, § 2416.

¹⁵⁸ See Jake Tapper, *Obama Bests Clinton in Primary Fundraising*, ABC NEWS (Apr. 4, 2007), <http://abcnews.go.com/WNT/Story?id=3008821&page=1> (detailing the funding gap).

¹⁵⁹ See, e.g., Bill Moyers & Michael Winship, *Mother’s Milk of Politics Turns Sour*, PBS (July 18, 2008, 12:33 PM), http://www.pbs.org/moyers/journal/blog/2008/07/mothers_milk_of_politics_turns_1.html.

¹⁶⁰ See J. Fred Giertz & Dennis H. Sullivan, *Campaign Expenditures and Election Outcomes: A Critical Note*, 32 PUB. CHOICE 157, 157 (1977) (attempting to quantify the role of campaign expenditures in elections).

¹⁶¹ See MICHAEL J. GOFF, *THE MONEY PRIMARY: THE NEW POLITICS OF THE EARLY PRESIDENTIAL NOMINATION PROCESS* 3–5 (2004) (describing the importance of financing in the pre-candidacy and early candidacy phases of a presidential nomination); Richard Briffault, *A Changing Supreme Court Considers Major Campaign Finance Questions: Randall v. Sorrell and Wisconsin Right to Life v. FEC*, 5 ELECTION L.J. 74, 79 (2006) (suggesting that fundraising often is an “arms race in which each candidate must constantly try to catch or outdo the other”).

In contemporary presidential and congressional campaigns, a large campaign bankroll is a key indicator in the “invisible primary,” an early competition for dominance over the polls and the pool of available donors.¹⁶² Put simply, early money tends to attract additional money. A well-designed and prodigious fundraising structure thus provides a public signal that a candidate is prepared to compete and win against a general election opponent.¹⁶³

None of this is intended to say that money is entirely unrelated to gender. According to some scholarship, the necessity to show fundraising prowess is a structural barrier that can exclude women who wish to enter the political fray as first-time candidates.¹⁶⁴ Because viable female candidates are often newcomers to politics, many do not have access to the networks for raising the money to support their campaigns.¹⁶⁵ The formation of the Political Action Committee EMILY’s List (Early Money Is Like Yeast),¹⁶⁶ which directs its fundraising efforts to assist female candidates, is one of the institutional responses to this concern.¹⁶⁷

Gender did not have its normal negative effect on fundraising in the 2008 presidential race. Hillary Clinton, the very antithesis of a political novice, launched her campaign with a very sizable account and one of the most experienced teams of high-profile fundraisers in the business.¹⁶⁸ She enjoyed striking advantages in early high-profile supporters, a seasoned campaign staff from two successful Senate runs, and the notoriety of a popular former U.S. President aiding her cause.¹⁶⁹ Further, the operation was effective at securing commitments from high-level donors through her group of “Hillraisers,” an

¹⁶² See GOFF, *supra* note 161, at 6; Wayne P. Steger, Andrew J. Dowdle & Randall E. Adkins, *The New Hampshire Effect in Presidential Nominations*, 57 POL. RES. Q. 375, 376 (2004). *But see* Andrew J. Dowdle & Randall E. Adkins, Does The “Money Primary” Still Matter? Change and/or Continuity in Pre-Primary Presidential Fundraising, 1980–2008, at 23–24 (Aug. 28–31, 2008) (unpublished manuscript), available at http://www.allacademic.com/meta/p279841_index.html (suggesting that a large campaign bankroll early on may no longer be so key).

¹⁶³ See GOFF, *supra* note 161, at 3.

¹⁶⁴ See Burrell, *supra* note 56, at 55–56.

¹⁶⁵ See *id.*

¹⁶⁶ *Frequently Asked Questions*, EMILY’S LIST, <http://emilyslist.org/who/faq> (last visited Sep. 12, 2013).

¹⁶⁷ See KAREN O’CONNOR, *WOMEN AND CONGRESS: RUNNING, WINNING, AND RULING 2* (2001).

¹⁶⁸ See Jennifer L. Lawless, *Sexism and Gender Bias in Election 2008: A More Complex Path for Women in Politics*, 5 POL. & GENDER 70, 70–71 (2009); Gail Sheehy, *Hillaryland at War*, VANITY FAIR, August 2008, at 74–76.

¹⁶⁹ Sheehy, *supra* note 168, at 74–77.

elite network of fundraising bundlers.¹⁷⁰ At the start of 2008, the Clinton campaign's financial situation outpaced what every other candidate had amassed.¹⁷¹

After the Iowa caucuses, however, a funny thing changed about these fundraising numbers. Having placed third in that state, the Clinton campaign found itself contending with an Obama money juggernaut that quickly assumed the lead in cash on hand.¹⁷² Like the Clinton money team, the Obama fundraisers had recruited bundlers to solicit donations from major contributors.¹⁷³ But the step that proved to be a crucial advantage to the Obama campaign was creating a robust online presence for soliciting and collecting smaller donations.¹⁷⁴ Even though Obama had organized his campaign later than Clinton, the online system provided the means to move quickly and decisively match and even surpass Clinton's fundraising efforts.¹⁷⁵ All told, Obama's campaign collected more than \$750 million—breaking every record in American politics.¹⁷⁶ To remain competitive, Clinton had to take out a personal loan and eventually amass a debt in the millions of dollars before finally withdrawing from the race.¹⁷⁷

A theory of gender, on its own, cannot easily account for the two major benefits that Obama gained from this fundraising system. First, the online infrastructure raised the level of innovation in political campaigns by integrating the communications and fundraising strategy in a very sophisticated way.¹⁷⁸ Not only did the Obama campaign develop lists of contacts from the people who attended rallies and related events, but it also utilized existing online platforms to identify and attract supporters.¹⁷⁹ The campaign harnessed web-based pro-

¹⁷⁰ Chris Frates, *Prominent 'Hillraisers' Give Clinton Edge*, POLITICO (May 16, 2007, 1:53 PM), <http://www.politico.com/news/stories/0507/4033.html>.

¹⁷¹ See Matthew Mosk, *Clinton Makes January Haul Public*, WASH. POST (Feb. 4, 2008, 7:14 PM), http://blog.washingtonpost.com/44/2008/02/04/clinton_makes_january_haul_pub.html.

¹⁷² See Karen Tumulty, *How Obama Did It*, TIME (June 5, 2008), <http://www.time.com/time/magazine/article/0,9171,1812049,00.html>.

¹⁷³ See Matthew Mosk & Alec MacGillis, *Big Donors Among Obama's Grass Roots*, WASH. POST, Apr. 11, 2008, at A1.

¹⁷⁴ See Matthew Mosk, *Obama Rewriting Rules for Raising Campaign Money Online*, WASH. POST (Mar. 28, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/27/AR2008032702968.html>.

¹⁷⁵ See *id.*

¹⁷⁶ Fredreka Schouten, *Obama's Fundraising Obliterates Records*, USA TODAY, Dec. 2, 2008, at A5.

¹⁷⁷ Kenneth P. Vogel & Jeanne Cummings, *January Yields Debt for HRC, Cash for Obama*, POLITICO (Feb. 20, 2008, 11:02 PM), <http://www.politico.com/news/stories/0208/8613.html>.

¹⁷⁸ See Mosk, *supra* note 174.

¹⁷⁹ See *id.*

grams, like Facebook, to target specific groups and collect data on likely supporters, which greatly enhanced its mass appeals for financial assistance.¹⁸⁰ With great precision, the campaign could send regular updates to communities online about the candidate's daily activities, speeches, and ideas.¹⁸¹ The specific information also allowed the campaign to tailor its messages based on the interests expressed by supporters.¹⁸² Overall, the strategy greatly enhanced the campaign's ability to secure new donations.¹⁸³

Second, the Obama campaign utilized its internet system to issue multiple solicitations to smaller contributors.¹⁸⁴ Unlike the Clinton campaign, which relied heavily on exclusive in-person events to solicit its major donors,¹⁸⁵ the Obama team expanded its reach considerably by identifying financial backers at varying income levels.¹⁸⁶ More than a few sent donations of less than one hundred dollars.¹⁸⁷ The campaign could quickly and cheaply summon an infusion of cash by targeting these same supporters later in the campaign because they had not exceeded the legal limit for campaign donations.¹⁸⁸ Even when Clinton had scored important state victories that kept her solidly in the race, the Obama fundraisers would include these developments in their messages to donors as reasons they needed additional donations.¹⁸⁹ The results of these online solicitations were rapid and steady, which allowed the campaign to turn attention to other matters in the very competitive race.¹⁹⁰ Meanwhile, Clinton's team required additional time and resources so that their candidate could make fun-

¹⁸⁰ See *id.* See generally DANIEL KREISS, *TAKING OUR COUNTRY BACK: THE CRAFTING OF NETWORKED POLITICS FROM HOWARD DEAN TO BARACK OBAMA* (2012); Victoria Chang, *Obama and the Power of Social Media and Technology*, *EUR. BUS. REV.*, May–June 2010, at 16, 16–21.

¹⁸¹ See Mosk, *supra* note 174.

¹⁸² See Chang, *supra* note 180, at 18–20.

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Jay Bryant, *Paid Media Advertising: Political Communication from the Stone Age to the Present*, in *CAMPAIGNS AND ELECTIONS AMERICAN STYLE* 96–100 (James A. Thurber & Candice J. Nelson eds., 3d ed. 2010) (emphasizing the Clinton campaign strategy aimed at attending organized fundraising events compared to Obama's reliance on social media and online tools to raise smaller dollar amounts).

¹⁸⁶ See Mosk, *supra* note 174; Michael Luo, *Small Online Contributions Add Up to Huge Fund-Raising Edge for Obama*, *N.Y. TIMES*, Feb. 20, 2008, at A18.

¹⁸⁷ See Mosk, *supra* note 174.

¹⁸⁸ See *id.*

¹⁸⁹ Luo, *supra* note 186.

¹⁹⁰ Tumulty, *supra* note 172.

draising appearances and phone requests for supplemental cash donations.¹⁹¹

Ultimately, the candidates' early strategic choices regarding fundraising made the difference. Clinton's team viewed the primaries as a chance to compete with and ultimately outpace her opponents.¹⁹² Her early dominance in the polls perhaps convinced her strategists that the competition in the race would dissipate after Super Tuesday, when the combination of her popularity and institutional support in large states would propel her to a huge delegate lead.¹⁹³ Accordingly, the Clinton fundraising model relied heavily on a core of high-level donors whose money could support an active campaign schedule through Super Tuesday.¹⁹⁴ The flaw in the strategy was the absence of a fallback position. Clinton did not anticipate that she would need to spend money in a months-long battle through the convention, which was precisely the scenario that the Obama campaign's model was designed to support.¹⁹⁵ By the time Clinton's people rushed to build and publicize their own online fundraising system, it was already too late.¹⁹⁶

B. *Class Warfare*

Another possible explanation for the result of the Democratic primary has to do with aggregate patterns of candidate preferences expressed by the electorate. Scholars in political science literature have long regarded class as a foundational element of social identity.¹⁹⁷ And because one's social standing often correlates with one's access to political power, class is also a primary ingredient in political

¹⁹¹ See *id.*; Sheehy, *supra* note 168, at 76–84.

¹⁹² See Susan Milligan, *Long Battle Still Ahead For Top Democrats*, BOSTON GLOBE, Jan. 20, 2008, at A17.

¹⁹³ See *id.*; see also Sheehy, *supra* note 168, at 76–84.

¹⁹⁴ See Jennifer Parker, *Democratic Rivals Play '08 Money Game*, ABC NEWS (Sep. 25, 2007), <http://abcnews.go.com/Politics/Vote2008/story?id=3644382&page=1>; see also Luo, *supra* note 189; Sheehy, *supra* note 168, at 76–84.

¹⁹⁵ See Parker, *supra* note 194; see also Luo, *supra* note 189; Sheehy, *supra* note 168, at 76–84.

¹⁹⁶ See Luo, *supra* note 189.

¹⁹⁷ See, e.g., Juan J. Linz, *Cleavage and Consensus in West German Politics: The Early Fifties*, in PARTY SYSTEMS AND VOTER ALIGNMENTS: CROSS-NATIONAL PERSPECTIVES 283, 283–86 (Seymour M. Lipset & Stein Rokkan eds., 1967) [hereinafter PARTY SYSTEMS AND VOTER ALIGNMENTS] (analyzing the interaction between class and politics in West Germany); Henry E. Brady & Paul M. Sniderman, *Attitude Attribution: A Group Basis for Political Reasoning*, 79 AM. POL. SCI. REV. 1061, 1061–78 (1985); Jeff Manza, Michael Hout & Clem Brooks, *Class Voting in Capitalist Democracies Since World War II: Dealignment, Realignment, or Trendless Fluctuation?*, 21 ANN. REV. SOC. 137, 137–162 (1995).

behavior.¹⁹⁸ Countless studies confirm that class affects several aspects of a voter's political participation—from his candidate preferences to his overall sense of satisfaction with government.¹⁹⁹ On an aggregate scale, the relationship between class and politics is a potent one.²⁰⁰ Resource inequalities in most industrialized democracies produce social strata with a mix of individual perspectives about what government should do.²⁰¹ Some of the most divisive substantive debates in politics—including taxation, equal opportunity, and social policy—are thus all heavily informed by class position.²⁰² In other words, class shapes both engagement with the political system and expectations about what must be done to assure that government and society function properly.²⁰³

Class-based struggles and debates are numerous in the evolution of American politics. One of the earliest moments was the elimination of the property requirement for voting, which expanded the American electorate and largely accounted for the election of Andrew Jackson to the presidency.²⁰⁴ These movements are not uniformly successful. For example, during Reconstruction, an effort to organize poor white tenant farmers in the South failed as white landed interests regained control by convincing white farmers to value their whiteness at the expense of the common economic concerns that they shared with freedmen.²⁰⁵ In the twentieth century, class-based social movements resulted in national reform legislation in the progressive era and the war on poverty.²⁰⁶ Although it has often been obscured by race, class-based thinking has remained an important feature of American political development.²⁰⁷

Class also has particular implications for electoral politics that are relevant to presidential campaigns. The parties competing for voter

¹⁹⁸ See, e.g., Robert Andersen & Anthony Heath, *Social Identities and Political Cleavages: The Role of Political Context*, 166 J. ROYAL STAT. SOC'Y 301, 303 (2003); Reinhard Bendix, *Social Stratification and Political Power*, 46 AM. POL. SCI. REV. 357, 357 (1952).

¹⁹⁹ See Andersen & Heath, *supra* note 198, at 301.

²⁰⁰ See Bendix, *supra* note 198, at 357, 362.

²⁰¹ See generally *id.*

²⁰² SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 18–20 (2005) (describing conflicts over these issues during the period leading up to the American Revolution).

²⁰³ See, e.g., Robert R. Alford, *Class Voting in the Anglo-American Political Systems*, in *PARTY SYSTEMS AND VOTER ALIGNMENTS*, *supra* note 197, at 67, 67–71.

²⁰⁴ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 62–66 (2000).

²⁰⁵ *Id.*

²⁰⁶ See *id.* at 232–33.

²⁰⁷ See, e.g., *id.*

support are quite sensitive to how differing viewpoints are distributed in the electorate, and they structure themselves to take full advantage of these differences.²⁰⁸ Both the material aspects (such as socioeconomic status or education) and the geographic dimensions (for example, state constituencies differ greatly in their class distributions) of class drive the strategic planning for campaigns. Especially in presidential campaigns, political parties choose nominees and frame their platforms to appeal to the broadest possible coalition of voters that crosses class lines.²⁰⁹ The recent deepening of the divide between the class groups and the decline of the middle and working class has made this effort more challenging because the parties have more often diverged to appeal to specific class strata.²¹⁰ Nonetheless, the issue of class is a dominant feature of contemporary politics.

Even if gender was at play in affecting voter choices in the 2008 Democratic primary race, class consciousness has been even more influential as a factor shaping the political process. Demographic evidence from the voter polls shows that the year 2008 proved no exception to the general effect of class identity shaping political viewpoints.²¹¹ Compared even to gender and race, class dynamics proved to be an even more reliable predictor for how each candidate fared across the country.²¹² In Kentucky, where more than sixty percent of the electorate does not hold a college degree and about forty percent of voters earn less than \$50,000, Clinton earned one of her most overwhelming victories.²¹³ Exit polling showed that her strongest support

²⁰⁸ *See id.*

²⁰⁹ JUDITH LARGE & TIMOTHY D. SISK, *DEMOCRACY, CONFLICT AND HUMAN SECURITY: PURSUING PEACE IN THE 21ST CENTURY* 94 (2006); Katherine Cramer Walsh, *The Effect of Social Class Identity on Presidential Vote Choice: The Role of Identity Stability and Political and Economic Context* (Apr. 20–23, 2006) (unpublished manuscript) (on file with The George Washington Law Review).

²¹⁰ *See id.* at 22–26.

²¹¹ *See Exit Polls*, CNNPOLITICS, www.cnn.com/ELECTION/2008/results/polls/#USP00p1 (last visited Sep. 12, 2013); *see also Key Indicators*, GALLUP, <http://www.gallup.com/tag/Key%2bIndicators.aspx> (last visited Sep. 12, 2013) (summarizing statistical breakdown of presidential candidate support by different key indicators); Lydia Saad, *Blacks, Postgrads, Young Adults Help Obama Prevail*, GALLUP (Nov. 6, 2008), <http://www.gallup.com/poll/111781/Blacks-Postgrads-Young-Adults-Help-Obama-Prevail.aspx#1> (providing the final pre-election Gallup Poll Daily tracking survey).

²¹² *Compare Exit Polls*, *supra* note 211, and *Key Indicators*, *supra* note 211, with Saad, *supra* note 211.

²¹³ *See Election 2008: Primary Season Election Results*, NY TIMES, <http://politics.nytimes.com/election-guide/2008/results/votes/index.html> (last visited Sep. 12, 2013); *State Fact Sheets: Kentucky*, USDA ECON. RES. SERV. (Mar. 28, 2013), <http://www.ers.usda.gov/stateFacts/KY.htm>.

in that state came from voters who are high school graduates and have salaries that are in the lowest income bracket.²¹⁴

Although Kentucky voted near the end of the primary campaign, the result was quite consistent with the trends in several other states.²¹⁵ Even in those contests that she lost, Clinton performed better than Obama in gaining support from working class voters.²¹⁶ In the bellwether state of Missouri, which Clinton narrowly lost to Obama, Clinton won fifty percent of all voters without a college degree.²¹⁷ She won, however, only thirty-one percent of college graduates compared to Obama's overwhelming sixty-five percent of that group.²¹⁸ This pattern is not especially surprising given how prominently class typically figures into American political competition.²¹⁹

Class dynamics also influenced the mode of campaigning from state to state. Obama enjoyed an advantage by organizing early in the caucus states, but states with traditional primary elections moved in one direction or another based largely upon the key demographic of class.²²⁰ Generally, Clinton was more likely to succeed in places where the average primary voter was rural, held a wage job, and completed education in high school.²²¹ She roundly defeated Obama in contests held in the largely rural states of Kentucky, Tennessee, and West Virginia—states with a profile resembling her adopted home state of Arkansas.²²² This pattern of performance held true even after Obama had advanced with a sizable delegate lead over Clinton.²²³ On the other hand, Obama won far more often in the states featuring a di-

²¹⁴ *Exit Polls*, *supra* note 211.

²¹⁵ *Compare Election 2008: Primary Season Election Results*, *supra* note 213, with *Exit Polls: Kentucky*, CNNPOLITICS, <http://www.cnn.com/ELECTION/2008/primaries/results/epolls/#KYDEM> (last updated May 20, 2008, 7:39 PM).

²¹⁶ See *Results: Hillary Clinton*, CNNPOLITICS, <http://www.cnn.com/ELECTION/2008/primaries/results/candidates/#1746> (last updated Aug. 20, 2008, 9:00 AM) (follow "Exit Polls" links assigned to each state to access class voting statistics).

²¹⁷ See *Exit Polls: Missouri*, CNNPOLITICS, <http://www.cnn.com/ELECTION/2008/primaries/results/epolls/#MODEM> (last updated Feb. 1, 2008, 11:19 AM).

²¹⁸ See *id.*

²¹⁹ See *supra* notes 201–10 and accompanying text.

²²⁰ Jon Cohen & Jennifer Agiesta, *White Working-Class Voters Fuel Clinton's Comeback*, WASH. POST, Mar. 5, 2008, at A9; Neil A. Malhotra & Erik Snowberg, *The 2008 Presidential Primaries Through the Lens of Prediction Markets* (Jan. 27, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1333785>.

²²¹ See Shan Carter & Amanda Cox, *How Different Groups Voted in the 2008 Democratic Presidential Primaries*, N.Y. TIMES (June 4, 2008), http://www.nytimes.com/2008/06/04/us/politics/04margins_graphic.html.

²²² Cohen & Agiesta, *supra* note 220; see also *Results: Hillary Clinton*, *supra* note 216.

²²³ See *Results: Hillary Clinton*, *supra* note 216.

verse class profile—including more voters with graduate degrees, with salaried employment, and with a city address.²²⁴

On several issues, the candidates showed their sensitivity to the class dynamics inherent in the election. The contrast was on full display in the campaign to win one of the most crucial state primaries, Pennsylvania.²²⁵ With balanced support throughout the state, including the suburban counties around Philadelphia, Clinton won this state by almost ten percentage points.²²⁶ Clinton achieved her highest margins over Obama in the northeastern and middle counties of the state, partly by calling attention to her connections to the working class city of Scranton.²²⁷ At several public events and in commercials, she emphasized her experiences learning to shoot during summer vacations with her grandparents in the Pennsylvania woods.²²⁸ Clinton also appeared at photo opportunities in the more rural counties of the state interacting with working class groups.²²⁹

Obama sharply ridiculed Clinton's tactics by jokingly comparing her to Annie Oakley.²³⁰ His attack, however, was partly a reaction to his own publicized gaffes involving class-based appeals.²³¹ In taped comments at a northern California fundraiser only weeks before the primary, Obama had suggested to an audience that people in small towns facing economic hardship were "bitter" and therefore "cling[ed]" to political issues related to guns and religion out of frustration.²³² Further, Obama engaged in his own affirmative efforts to

²²⁴ Carter & Cox, *supra* note 221.

²²⁵ Katharine Q. Seelye, *Surrogates Stump in Keystone State*, NY TIMES THE CAUCUS (Apr. 14, 2008, 9:38 AM), <http://thecaucus.blogs.nytimes.com/2008/04/14/surrogates-stump-in-keystone-state/>.

²²⁶ *Exit Polls: Pennsylvania*, CNNPOLITICS, <http://www.cnn.com/ELECTION/2008/primaries/results/epolls/#PADEM> (last updated April 23, 2008, 1:40 PM).

²²⁷ In the counties of the northeast region of Pennsylvania, Clinton achieved her highest margin of victory over Obama according to exit polling. *See, e.g., id.*

²²⁸ *See* Peter Hamby, *Clinton Touts Her Experience with Guns*, CNN POLITICS (Apr. 12, 2008, 7:00 PM), <http://politicalticker.blogs.cnn.com/2008/04/12/clinton-touts-her-experience-with-guns/>.

²²⁹ Hillary Clinton's campaign strategy included frequent appearances in the economically depressed northeastern region of Pennsylvania. *See* David Pierce, *Clinton Campaigns in Scranton; Says She Won't Forget Northeastern Pa.*, 2008 PENN. PRIMARY (March 10, 2008), <http://www.thepennsylvaniaprimary.com/apps/pbcs.dll/article?AID=/20080310/PRIMARY/80310035>.

²³⁰ *See* Peter Hamby & Chris Welch, *Obama Goes on Offensive Against Clinton*, CNNPOLITICS (Apr. 14, 2008), <http://edition.cnn.com/2008/POLITICS/04/14/obama.clinton/index.html>.

²³¹ *See id.*

²³² *See* Mayhill Fowler, *Obama: No Surprise That Hard-Pressed Pennsylvanians Turn Bitter*, HUFFINGTON POST (Apr. 11, 2008, 6:43 AM), http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html.

appeal to this same demographic of working-class voters.²³³ Who can forget the most awkward televised moment of his campaign: the candidate clutching a bowling ball in a fruitless effort to demonstrate his ease with the working-class lifestyle?²³⁴

To be sure, class has an important tie to gender. The U.S. Census reports that the poverty rate of households headed by women is nearly double the poverty rate of households headed by men.²³⁵ As significant as this factor was in shaping this campaign, class seems to make only a minor appearance in Parks and Roberson's accounts of the 2008 primary race.²³⁶ It may be that the presence of gender biases is class specific, which poses an intriguing set of questions for assessing how different voters perceive the candidates and issues in politics. Even if Parks and Roberson are correct about the independent role of gender bias, their claim would be stronger if they also provided some explanation about how it operated in light of the well-known and widespread effects of class in this particular election.

C. Intersectionality

A final factor that Parks and Roberson failed to emphasize is intersectionality—another key factor affecting how the voters and candidates approached this campaign. Parks and Roberson do note that race and gender each shaped this election, but they do not include in that consideration how the combined influence of these factors made a distinct impact.²³⁷ This is an especially important matter in the Democratic primary because women of color are such a significant share of the electorate in several important states.²³⁸

The absence of any consideration of intersectionality in Parks and Roberson's articles is even more surprising considering how employ-

²³³ Eli Saslow, *Who's More Red, White And Blue-Collar?*, WASH. POST, May 6, 2008, at A1.

²³⁴ See *id.*

²³⁵ See Press Release, U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2011 (Sept. 12, 2012), available at http://www.census.gov/newsroom/releases/archives/income_wealth/cb12-172.html (“In 2011 . . . 31.2 percent of families with a female householder and 16.1 percent of families with a male householder lived in poverty.”).

²³⁶ See, e.g., Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 339 (mentioning briefly how poorer individuals tended to vote for Senator Clinton); Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 34, 42 (quickly addressing the breakdown of voters according to class and providing a table without any analysis).

²³⁷ See Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 340.

²³⁸ See Kareem Crayton, *You May Not Get There with Me: Barack Obama and the Black Political Establishment*, in BARACK OBAMA AND AFRICAN AMERICAN EMPOWERMENT: THE RISE OF BLACK AMERICA'S NEW LEADERSHIP 195, 201–02 (Manning Marable & Kristin Clarke eds., 2009).

ment law scholars have already stressed the importance of this factor. Commentators like Kimberle Crenshaw have masterfully argued for greater critical attention in antidiscrimination doctrines to the effects of multiple levels of discrimination and bias in society.²³⁹ These studies conclude that the interactive effects of discrimination and bias are as relevant for analyzing an employer's behavior in discrimination lawsuits as understanding the injuries of a plaintiff who must bear the consequences of those actions.²⁴⁰

This key observation has an important application in the political sphere, where several scholars have noted how the gender patterns in legislatures for women of color are quite distinct.²⁴¹ Only two women of color have been among the already small club of female contenders for a major party's nomination for president.²⁴² Traditional political discourse tends to define public policy issues in discrete terms of race or gender, excluding those issues that can affect women of color in a targeted way.²⁴³ As Crenshaw and others have explained, women of color may have a particular experience due to the interaction of these identities in ways that defy such discrete categorizations.²⁴⁴ Indeed, some of the scholarship on gender and politics highlights these differential effects as well.²⁴⁵

One of the clearest illustrations from presidential politics of intersectionality's importance is the widespread focus on Jesse Jackson as the first black "contender" for President despite the fact that the first black candidate was Congresswoman Shirley Chisholm from New

²³⁹ See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166–67.

²⁴⁰ See *id.*

²⁴¹ R. Darcy & Charles D. Hadley, *Black Women in Politics: The Puzzle of Success*, 69 SOC. SCI. Q. 629, 629–630 (1988); Luis Ricardo Fraga et al., *Gender and Ethnicity: Patterns of Electoral Success and Legislative Advocacy Among Latina and Latino State Officials in Four States*, 28 J. WOMEN POL. & POL'Y 121, 138–40 (2006).

²⁴² The two contenders were members of Congress—Shirley Chisholm of New York, who sought the presidency in 1972, and Carol Moseley Braun of Illinois, who was a contender for the nomination in 2003. See Lisa Woznica, *Chisholm, Shirley*, in BLACK WOMEN IN AMERICA: AN HISTORICAL ENCYCLOPEDIA 236, 236, 237 (Darlene Clark Hine ed., 1993); Dan Mihalopolous, *Moseley Braun Seeks Democratic Nomination*, BALTIMORE SUN (Sept. 23, 2003), http://articles.baltimoresun.com/2003-09-23/news/0309230144_1_braun-columbia-south-carolina.

²⁴³ See Claudine Gay & Katherine Tate, *Doubly Bound: The Impact of Gender and Race on the Politics of Black Women*, 19 POL. PSYCHOL. 169, 170 (1998); see also Phyllis Marynick Palmer, *White Women/Black Women: The Dualism of Female Identity and Experience in the United States*, 9 FEM. STUD. 151, 153, 164 (1983).

²⁴⁴ See, e.g., Crenshaw, *supra* note 239, at 139–140; see also Gay & Tate, *supra* note 243, at 170.

²⁴⁵ See Palmer, *supra* note 243, at 154.

York.²⁴⁶ Chisholm's insurgent campaign for the 1972 nomination faltered partly due to intersectionality issues.²⁴⁷ Amid a crowded Democratic field of white male (and more conservative) candidates, Chisholm directly challenged the Nixon administration's policies on Vietnam, poverty, and education.²⁴⁸ Her basic strategy was to capitalize on the liberal voters who had supported Robert Kennedy four years earlier but had no preferred candidate in the campaign.²⁴⁹ Even though her platform similarly directed its appeal toward both feminist and black constituencies, the leaders within each of these communities were divided about supporting her.²⁵⁰

Chisholm's campaign won a significant number of delegates in larger states due to alliances within the male-dominated Congressional Black Caucus and the largely white National Organization for Women; neither group, however, formally endorsed her due to their reservations about supporting a black woman.²⁵¹ Chisholm later noted her disappointment with questions from both communities regarding her viability in the general election and her abilities as an effective spokesperson for the liberal agenda.²⁵² Shirley Chisholm's failed nomination bid suggests that even though they belong to two historically marginalized groups, women of color have complex and distinct political identities and experiences that can pose challenges to their credibility within each group.²⁵³

²⁴⁶ See Woznica, *supra* note 242, at 237 (noting that Chisholm was the first black candidate); R.W. Apple, Jr., *Jackson Is Seen as Winning a Solid Place in History*, N.Y. TIMES, Apr. 29, 1988, at A16; see also Tera W. Hunter, *The Forgotten Legacy of Shirley Chisholm: Race Versus Gender in the 2008 Democratic Primaries*, in OBAMA, CLINTON, PALIN: MAKING HISTORY IN ELECTION 2008, at 66, 67 (Liette Gidlow ed., 2011) (explaining that Chisholm's 1972 campaign effort represented less about her status as the first black presidential candidate and more about her role as a woman competing against both white and black sentiments snubbing her legitimacy); John Nichols, *Hillary Clinton Versus Shirley Chisholm*, NATION (June 5, 2008, 12:20 AM), <http://www.thenation.com/blog/hillary-clinton-versus-shirley-chisholm#> (focusing on Chisholm's role as a female candidate rather than as a Black candidate).

²⁴⁷ SHIRLEY CHISHOLM, *THE GOOD FIGHT* 31, 38, 75–77 (1973).

²⁴⁸ *Id.* at 165–99 (providing Chisholm's various position papers and transcripts of her campaign speeches).

²⁴⁹ See *id.* at 7; Woznica, *supra* note 242, at 236–38; see also Arthur H. Miller & Warren E. Miller, *Issues, Candidates and Partisan Divisions in the 1972 American Presidential Election*, 5 BRIT. J. POL. SCI. 393, 410–11 (1975).

²⁵⁰ Hanes Walton, Jr. & C. Vernon Gray, *Black Politics at the National Republican and Democratic Conventions, 1868–1972*, 36 PHYLON 269, 277 (1975).

²⁵¹ See CHISHOLM, *supra* note 247, at 75, 123; see also John W. Soule & Wilma E. McGrath, *A Comparative Study of Presidential Nomination Conventions: The Democrats 1968 and 1972*, 19 AM. J. POL. SCI. 501, 508 (1975).

²⁵² See CHISHOLM, *supra* note 247, at 37–38.

²⁵³ See Gay & Tate, *supra* note 243, at 172.

Intersectionality was as influential in the 2008 primaries as it was in the Shirley Chisholm campaign. In the 2008 primaries, African American women in particular recognized that race proved to be at least as powerful a factor as gender was in the campaign. The primary competition pitted two candidates from the Democratic Party's most significant and loyal constituencies, which threatened to divide the core of the party's electoral coalition.²⁵⁴ One of the most heated debates on the campaign trail was whether race or gender bias posed a greater barrier in politics.²⁵⁵ Former Democratic vice-presidential nominee Geraldine Ferraro (a Clinton supporter) provocatively suggested in an interview that Obama would never have been a serious contender for the nomination had he been either a woman or white.²⁵⁶ She later resigned her position in the Clinton campaign to quell the negative public reaction.²⁵⁷ Although her detractors characterized this point as racially insensitive, Ferraro maintained that her comments described how gender bias clouded a fair comparison of the experience that each candidate brought to the table.²⁵⁸

Likewise, media mogul Oprah Winfrey (an early backer of Obama) felt compelled to justify her publicized endorsement in the face of criticism from her white female viewers that she had betrayed the cause of women by supporting Obama.²⁵⁹ Gender identity was a significant feature in the subjects and themes in her syndicated television show, and the threatened boycott by a large share of her television audience might have caused financial loss as well as severe damage to her public image.²⁶⁰ Winfrey rightly understood the risk of not responding to this allegation, and she rapidly issued a press state-

²⁵⁴ *Id.*

²⁵⁵ See Simon Jackman & Lynn Vavreck, *Primary Politics: Race, Gender, and Age in the 2008 Democratic Primary*, 20 J. ELEC. PUB. OPINION & PARTIES 153, 154 (2010) (referencing several Clinton supporters who threatened to vote for John McCain in the general elections).

²⁵⁶ Katharine Q. Seelye & Julie Bosman, *Ferraro's Obama Remarks Become Talk of Campaign*, N.Y. TIMES, Mar. 12, 2008, at A23 (noting later comments that "[i]t's O.K. in this country to be sexist It's certainly not O.K. to be racist. I think if Barack Obama had been attacked for two hours—well, I don't think Barack Obama would have been attacked for two hours").

²⁵⁷ See Joyce Purnick, *Ferraro Is Unapologetic for Remarks and Ends Her Role in Clinton Campaign*, N.Y. TIMES, Mar. 13, 2008, at A16.

²⁵⁸ *Id.*

²⁵⁹ See Jeff Zeleny, *Oprah Endorses Obama*, N.Y. TIMES THE CAUCUS (May 3, 2007, 3:25 PM), <http://thecaucus.blogs.nytimes.com/2007/05/03/oprah-endorses-obama-2/> (quoting Oprah Winfrey's explanation of her endorsement from CNN's Larry King Live: "Because I am for Barack does not mean I am against Hillary or anybody else.").

²⁶⁰ See Emily Friedman, *Women Angry over Oprah-Obama Campaign*, ABC NEWS (Jan. 22, 2008), <http://abcnews.go.com/Politics/story?id=4167650&page=1&page=1> (describing messages that were posted on Oprah.com by disappointed women).

ment noting that her support for Obama was not a denunciation of Clinton or of her contributions as a public figure.²⁶¹ Throughout the primary, Winfrey emphasized favorable comments about Clinton in justifying the reasons for her choice of a candidate.²⁶²

Oprah Winfrey was not alone in grappling with this dilemma. Women of color, especially African American women, were at the fulcrum of this identity tug-of-war. Facing conflicting pressures from both campaigns,²⁶³ these voters weighed whether making history for women or for blacks deserved greater priority. Ultimately, more black women in the Democratic primaries moved en masse toward Obama.²⁶⁴ Even compared with black men, exit polling reveals that black women were among the most ardent supporters of the Obama campaign in states that gave the candidate his decisive edge in February (incidentally Black History Month).²⁶⁵ Despite emphasizing several endorsements from prominent black women (including Maya Angelou and Congresswomen Shelia Jackson Lee, Stephanie Tubbs Jones, and Maxine Waters),²⁶⁶ Clinton simply could not overcome the momentum that this trend posed.

CONCLUSION

The laudable contribution of Parks and Roberson's articles "*Eighteen Million Cracks*" and *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination Through the Lens of Title VII* is their argument in favor of incorporating implicit bias as a more central element in the analysis of discrimination cases. They persuasively lay out the problems with the legal doctrine's view of intent, which ignores the real ways that stereotypes can influence otherwise neutral decisionmaking. As the authors show, emergent psychology research provides some promising ideas for constructing models that can show credible and sustainable connections between types of group bias and formal decisionmaking. By outlining a more complex understanding of discrimination that includes the more latent structural dimensions of bias and stereotype, Parks and Roberson suggest that

²⁶¹ See Zeleny, *supra* note 259.

²⁶² See, e.g., *id.* (describing a few of Winfrey's positive comments regarding Clinton).

²⁶³ See, e.g., Thomas F. Schaller, Editorial, *Black Women Face Dilemma in Democratic Primary*, BALTIMORE SUN, Feb. 7, 2007, at A17.

²⁶⁴ See *Exit Polls*, *supra* note 211; *Key Indicators*, *supra* note 211; Saad, *supra* note 211.

²⁶⁵ See *Exit Polls*, *supra* note 211; *Key Indicators*, *supra* note 211; Saad, *supra* note 211.

²⁶⁶ See Josephine Hearn, *Congress' Black Women Favor Hillary*, POLITICO (Jan. 23, 2008, 7:07 AM), <http://www.politico.com/news/stories/0108/8055.html>; Vanessa Thorpe, *Maya Angelou's Poem in Praise of Hillary*, OBSERVER, Jan. 19, 2008, at 3.

courts ought to show as much concern about the general biases that pervade the workplace as the more specific expressions of animus and disaffect that the traditional legal doctrine rightly tries to deter.

What an argument grounded in employment law can tell us about politics, though, is not entirely clear. Parks and Roberson very persuasively identify the crucial moments in the 2008 primary campaign, showing the influence of gender bias both in its conscious and unconscious forms.²⁶⁷ Unfair treatment, however, is not a new phenomenon in political debate—as one well-regarded observer described politics: “[It] ain’t bean bag[s].”²⁶⁸ The quest for political power is a fundamentally different kind of enterprise from the typical employment-hiring context. Campaigns and elections are intensely competitive, subjective, and personal. They involve multiple decisionmakers whose deliberation and neutrality cannot be assumed. Just as elections are a chance for the public to express its hopes, they also are a platform for conveying the electorate’s fears about the candidates and issues. For all of these reasons, politics cannot easily embrace the kind of analysis that the authors would like to apply.

Other more traditional issues that affected the Democratic primary tend to overshadow the influence of implicit bias. The influences of money, class, and intersectionality obscure any gender-based analysis. Given this complicated mix of factors, drawing any hard conclusions about the influence of gender discrimination (either implicit or explicit) is a strained exercise.

Parks and Roberson’s attempt to distill gender bias issues in employment law is largely successful. The evidence showing the effects on the Democratic primary of more typical influences, however, reveals why the gender bias link in politics is so difficult to substantiate. If Hillary Clinton were to sue the American public for its employment decision, not only would implicit bias be difficult to prove, the issue of causation would be impossibly elusive. As the candidate herself eloquently told supporters in her concession speech, imagining

²⁶⁷ See Parks & Roberson, *Eighteen Million Cracks*, *supra* note 4, at 336–38 (providing specific examples of implicit bias from the Clinton campaign); Parks & Roberson, *Through the Lens of Title VII*, *supra* note 4, at 31–34 (discussing instances of implicit bias relating to Michelle Obama).

²⁶⁸ See FINLEY PETER DUNNE, MR. DOOLEY IN PEACE AND WAR xiii (Boston, Small, Maynard & Co. 1898).

“if only” or “what if” in politics is not an inquiry that yields any satisfactory answers.²⁶⁹ “Every moment wasted looking back keeps us from moving forward.”²⁷⁰

²⁶⁹ *Hillary Clinton Endorses Barack Obama*, *supra* note 2.

²⁷⁰ *Id.*