

Militant Covering

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INTRODUCTION

In his now historic campaign address on race, “A More Perfect Union,” President Obama pointed toward a new and effective black politics in America. In contrast to the antagonistic, “Us” v. “Them” tone that has sometimes characterized demands for racial justice, President Obama stated that for blacks the:

path [forward] means . . . continuing to insist on a full measure of justice in every aspect of American life. But it also means binding our particular grievances—for better health care, and better schools, and better jobs—to the larger aspirations of all Americans—the white woman struggling to break the glass ceiling, the white man whose [sic] been laid off, the immigrant trying to feed his family.¹

By these words, Obama did not urge blacks to forget their particular grievances; however, he urged blacks to adopt a pluralistic politics of group power that pursues black interests within a framework that has the potential to appeal to a wide range of other Americans.²

Instead of taking as its chief focus the development of an effective black pluralist politics reflecting President Obama’s vision, this Article seeks to render clear how a distortion in the values of the

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1. Barack Obama, A More Perfect Union, Address at the National Constitution Center (Mar. 18, 2008), *available at* http://www.barackobama.com/2008/03/18/remarks_of_senator_barack_obam_53.php.

2. *See id.*

black power era presents an obstacle to realizing such a politics.³ In particular, by examining a discourse in the legal academy (described by Professor Richard Ford as “rights-to-difference discourse”⁴) concerning whether antidiscrimination law should provide, in some contexts, what would be a right to blackness, this Article illuminates how the cultural legacy of black power—black pride in black identity—has taken precedence over what was black power’s organizing and governing goal: increasing black power.⁵ Moreover,

3. This Article’s chief focus is addressing an impediment to a politics that pursues black interests within a widely appealing framework. As such, theorizing such a politics is not the priority here. In a manuscript, which should soon be published, I offer a detailed interpretation of Obama’s racial politics and explain that some critics have erroneously characterized Obama’s campaign and politics as postracial. In particular, I offer a racially progressive interpretation of Obama’s racial politics and explain why it is essential for progressives to focus on promoting a constructive, non-postracial understanding of Obama’s politics.

4. Ford describes “rights-to-difference discourse” as “arguments hold[ing] that a just society could and should prohibit discrimination on the basis of [sic] the cultural difference (thereby establishing a “right-to-difference”) for the same reasons it should prohibit discrimination based on statuses such as race.” RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 4 (2005).

Importantly, Barbara Flagg has cogently criticized Ford’s account of “rights-to-difference” discourse. She has specifically taken issue with Ford characterizing “rights-to-difference proponents . . . [as subscribing to] a relatively sharp distinction between mainstream and minority cultures (cultural distinctiveness), and . . . [arguing] that such proponents must believe in the unitary (‘authentic’) nature of any given minority culture (cultural essentialism).” Barbara J. Flagg, *An Essay for Keisha (and A Response to Professor Ford)*, 14 *DUKE J. GENDER L. & POL’Y* 179, 182 (2007). She has also indicated that she does not “think there is much fit at all between [Ford’s] account of ‘rights-to-difference’ proponents and [her] work.” *Id.* at 180. Flagg also has noted:

[O]ne could adopt a vision of multiculturalism that understands cultural difference as fluid, overlapping, and contingent (as does Ford himself). He fails to support either the descriptive claim that *all* proponents of cultural rights adopt the more rigid, categorical conception of cultural difference, or the normative claim that any rights-to-difference proposal would *require* such a conception. Along similar lines, it clearly is possible to conceive of culture as a set of social practices, norms, and ideologies that are internally varied, partially inconsistent, and sometimes contested.

Id. at 182 (footnotes omitted). I fully agree with Flagg’s position that proponents of difference need not subscribe to a “rigid, categorical conception of cultural difference,” and my use of the term “rights-to-difference discourse” should be understood as including a fluid conception of cultural difference. *Id.* Moreover, notwithstanding her disagreements with Ford’s characterization of her position, Flagg has herself described her arguments as constituting some variety of “rights-to-difference.” *Id.* at 198 (noting that her proposals do constitute “some variety of ‘right to difference,’ though . . . not the variety Ford describes”).

5. Because this Article is not chiefly concerned with black power and its various articulations, it does not take up the task of carefully differentiating between black power’s pluralist and nationalist conceptions. It is limited and borrows from all instantiations of black

in addition to posing an obstacle to an effective pluralist politics directed toward serving black interests, the distortion of black power's values has resulted in an emphasis on achieving acceptance of blackness and a failure to appreciate how black instrumental conformity to white norms can be consistent with increasing black power, economically and politically as well as individually and communally.

In contrast to rights-to-difference discourse, which conceives of the assertion of black identity primarily as a psychological event and the suppression of blackness primarily as a symptom of racial subordination, and which focuses on legally protecting displays of blackness in the interests of multiculturalism, individual authenticity, combating racial subordination, or enabling black identity to function as a symbol of resistance to assimilation, this Article urges a circumstantial comparison of the relative costs and benefits of displaying blackness in light of a self-conscious and substantive (as opposed to merely symbolic) politics of empowering black people. Blacks who possess political commitments to the black community but tactically cover⁶ blackness to succeed in mainstream endeavors engage in what the Article terms "militant covering," which stands in sharp contrast to rights-to-difference discourse's emphasis on downplaying racial difference as a symptom of subordination rather than as a struggle against racial inequality.⁷

power their governing goal—increasing the power wielded by the black community. *See generally* IS IT NATION TIME? CONTEMPORARY ESSAYS ON BLACK POWER AND BLACK NATIONALISM (Eddie S. Glaude Jr. ed., 2002); STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION (1967); WILLIAM L. VAN DEBURG, NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE, 1965–75 (1992).

6. The term "covering," coined by sociologist Erving Goffman, has been recently popularized by law professor Kenji Yoshino. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (noting that Goffman invented the term and concept of covering). It describes the act of deemphasizing a stigmatized trait, such as "blackness," so that "the underlying identity is neither altered nor hidden, but is downplayed," making it easier for others to disattend the stigmatized trait. *Id.* at 772.

7. Although arguably not within rights-to-difference discourse because it does not focus on whether to legally proscribe discrimination based on cultural difference, Devon Carbado and Mitu Gulati's article, *Working Identity*, 85 CORNELL L. REV. 1259 (2000), uses the term "working identity" to describe the "coping mechanisms" that outsiders use to counteract workplace discrimination and stereotyping. *Id.* at 1262. In their terminology, these coping mechanisms include "passing" (where an "outsider pretends to be an insider") and "partial

Fundamental to militant covering is the understanding that when racism is viewed from a larger historical and structural perspective, it is clear that refusing to cover in response to the racist demands of any contemporary individual or group is not necessarily a significant act of resistance or the wisest tactical deployment of resources in the larger struggle to overcome the tragic legacy of racism. Militant covering is therefore presented as a method of gaining access to the economic and social capital that is critical to improving the circumstances of black people.

The argument of the Article will begin by briefly describing how black identity functions within the politics of black power. It will then turn to a description of the “rights-to-difference” discourse. The intention in this portion of the Article will be to capture how law professors Barbara Flagg, Kenji Yoshino, and Richard Ford’s approach to “rights-to-difference” exemplifies how, distinct from black power’s emphasis on the expression of black cultural traits as a basis for the political empowerment of blacks as a group, expressing blackness is now the subject of a debate concerning whether individual blacks ought to be legally protected from the psychological harms associated with conforming to white cultural

passing” (“actions that make the outsider ‘one of the guys,’ despite his outsider status”). *Id.* at 1300–03. According to Carbado and Gulati, their partial passing is similar to Yoshino’s “covering.” *Id.* at 1304 n.125. Although Carbado and Gulati acknowledge, as does Yoshino, *see* discussion *infra* p. 201 on attorney Lawrence Mungin, that some minorities attempt to combat negative stereotypes through covering strategies, they, like Yoshino, *see* discussion *infra* pp. 202–05, focus on the costs associated with such strategies, instead of focusing on how such strategies can constitute a struggle against racial subordination. Carbado & Gulati, *supra*, at 1277 (noting that covering strategies give rise to opportunity costs (the extra work entails a tradeoff), psychic costs (they are self-denying and self-negating), and risk costs (they can backfire)). Indeed, Carbado and Gulati describe as “victims [those] who do identity work to prevent employment discrimination and preempt stereotyping.” *Id.* at 1262. While this Article acknowledges the costs associated with strategic covering, *see* discussion *infra* pp. 172–74, it is focused on achieving recognition of circumstantial “militant covering” as a viable and self-conscious political act that may be engaged in by those who refuse to be victims, “while the primary project of [Carbado and Gulati’s *Working Identity*] is to flesh out the kinds of work outsiders often feel pressured to do because of negative assumptions about their identities.” Carbado & Gulati, *supra*, at 1262.

norms and the racial subordination that pressures blacks to discard black cultural traits.⁸

8. While this Article focuses on a trio of rights-to-difference theorists—Flagg, Yoshino, and Ford—whose work together captures the core of the rights-to-difference debate, and the arguments essential to this Article, a number of other scholars have made important contributions to the literature. Compare Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); FORD, *supra* note 4; Yoshino, *supra* note 6; and KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (paperback ed. 2007); with Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 867–68 (1994) (“[A]spects of our identities with which we are born, or that develop as a result of our families, do not become less important because we choose to, or must, maintain them. Nor are aspects of our identities less important because we have chosen them, if we have ability to choose. . . . The same thing [employer enforced white supremacy excluding persons of color from workforces or relegating them to subservient positions] happens now with respect to ethnic traits, in the absence of explicit [Title VII] statutory protection.”) (footnotes omitted); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 391–93 (1991) (“The writings of black women confirm the centrality of hair in the psychological abuse of black women . . . What links Afro or natural hairstyles and so-called ‘artificial’ ones (such as braids), is a question of assimilation. Blacks who challenge the status quo, especially its dominant cultural manifestations, are identified as major threats to central national values. Those who do not exercise volition in favor of such values are seen as having the stereotypical characteristics commonly associated with black will and willpower—undisciplined, insubordinate, unwilling to melt. Blacks are thus the cause of their low socioeconomic status rather than victims of that status. . . . What appears to be merely an aesthetic judgment [to wear cornrows] is part of the subordination of black women and is inextricably connected to the more obvious economic judgments reflected in other cases that affect black women.” (citing *Rogers Renee Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981)) (footnotes omitted); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719–28 (2001) (arguing that identity performances (acts of covering) are workplace discrimination because they burden “some employees (e.g., blacks) more than others (e.g., whites),” that identity performances are a problem “compounded by the fact that [such] performances constitute work, a kind of ‘shadow work’ . . . [that] can be at odds with the employee’s sense of her identity,” that “[t]o the extent the employee’s continued existence and success in the workplace is contingent upon her behaving in ways that operate as a denial of self, there is continual harm to that employee’s dignity,” and that Title VII protection against racial discrimination can be understood to encompass situations in which employers differentiate “between black people who do (or whom the firm perceives as performing) identity work to fit in at the firm and black people who do not perform (or whom the firm perceives as not performing) such work”; and Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1400 (1991) (“Title VII should prohibit accent discrimination”. . . . “In arguing for accent tolerance, the rationale of accent as immutable is thus a dangerous one [because it feeds into a hierarchy that privileges ‘the core group of the entitled’]. A more progressive argument is that even if accent is changeable, no citizen should have to alter core parts of identity in order to participate in society. A true antiracial subordination agenda would apply reasonable accommodation to all differences, whether chosen or immutable, that are historically subject to exploitation or oppression by dominant groups.”). While these scholars’ contributions develop in important

Following this discussion, the Article undertakes an examination of Barack Obama's presidential campaign, which is argued to be a nationally accessible example of a black man's successful and tactical "covering" in pursuit of power. From Obama's successful presidential campaign and coalition building, I seek to support the Article's major claim: that militant covering can be an effective means of obtaining both individual black success and building a black pluralist politics directed to securing black America's place in American society.⁹

Having described the usefulness of covering for Obama's successful presidential bid, I will then describe how the "rights-to-difference" literature's focus on the harms associated with covering black traits neglects to emphasize: (1) that tactical, militant covering can be a viable strategy directed toward improving the circumstances of individual blacks and black people, and so can support a politics of black empowerment; and (2) that those who self-consciously engage in militant covering are not necessarily best understood as victims of racism, and can instead be understood as engaged in a method of fighting racial subordination. The basic point in this portion of the Article is that "rights-to-difference" discourse's emphasis on the injuries and costs of covering fails to appreciate the connection between covering and power.

Before beginning the argument, three provisos are appropriate. First, in contrast to "rights-to-difference" discourse's concern with the normative wrongfulness of particular covering demands, this Article casts such questions of normativity aside in favor of focusing on covering as a source of empowerment. While militant covering acknowledges that a world without covering demands would be normatively better than the one in which we find ourselves, it understands that such is not the world in which we live. Accordingly, rather than focusing on the wrongfulness of covering demands, militant covering represents a pragmatic response to unfair circumstances that seeks the normative end of empowering black people. In particular, militant covering acknowledges the difficulties

ways the "rights-to-difference" literature, their works do not require alteration of the position taken in this Article.

9. See *infra* note 29.

and psychological strain of covering but understands that blacks who value their blackness can militantly shoulder these burdens in order to facilitate their individual success and to increase the power wielded by the black community.¹⁰

Second, this Article maintains that political commitment to the black community is distinct from how individual blacks publicly identify with blackness. Along with maintaining the analytical

10. In the context of discussing minority membership in the corporate bar, Professor David B. Wilkins notes the following ways in which blacks as a group may benefit from the achievements and existence of black corporate lawyers:

First, if nothing else, the presence of blacks within these elite ranks undermines the stereotype of black intellectual inferiority. . . . Second, as a corollary to the first point, the achievements of black corporate lawyers might inspire other young black women and men to strive harder to become successful in their own right. Indeed, in addition to being passive role models, black corporate lawyers might work actively to open up additional opportunities for blacks, in law or elsewhere. Third, corporate law practice gives black lawyers access to money and other resources that can be directed toward projects to benefit the black community. Fourth, in addition to offering material rewards, corporate law practice traditionally has been a stepping stone to politics and political influence. As a result, black corporate lawyers may be able to translate their private power into public power in ways that benefit the black community. Finally, the very fact that corporations have such power to impose costs on the black community underscores the benefits that could accrue if black lawyers are able to persuade corporations to act in ways that are less harmful (and perhaps even beneficial) to the black community.

David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1991–92 (1993) (footnotes omitted). As is readily apparent, with the exception of the connection between corporate legal practice and occupying political office, the benefits Wilkins identifies as potentially accruing to black people vis-à-vis the presence of black corporate attorneys will also result from the presence of blacks in influential but non-legal mainstream positions, such as CEO, CFO, Controller, VP of Sales, etc. Importantly, these benefits are potentially available whether or not blacks obtain influential positions as a result of militant covering. *But see* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1692 (2004) (arguing that “strong incentives exist for minorities to race to the top of the corporation and pull the ladder up behind them when they get there,” and noting that “racial types [who reach the top of the ladder] might not have the racial commitment, or feel institutionally empowered, to lift as they climb.”) Importantly, Carbado and Gulati’s argument indicates only that there are reasons for minorities at the top of corporate organizations not to assist minorities in their climb up such organizations. Of course, such reasons do not preclude any particular minority from assisting others in their climb. More generally, Carbado and Gulati’s argument is not directed to whether minorities who have reached the top of the corporate ladder will or will not assist minority communities generally, whether by directing resources to minority communities, mentoring youth, making charitable donations, etc. Carbado and Gulati are instead focused on whether minorities at the top of the corporate hierarchy will assist minorities at the bottom of the corporate ladder).

distinction between political commitment to the black community and the display of black cultural traits, this Article takes the position that today when the diversity within the black community (socially, economically, and culturally) is increasingly apparent to all, we can no longer pretend that blackness has a universal definition. More specifically, African-Americans hail from inner city ghettos, Manhattan penthouses, and rural farmlands; they spend vacations on Martha's Vineyard and descend from peoples of African origin who have come to America from all over the world, including, the Caribbean, South America, and from virtually every country in the continent of Africa. Although understandings of blackness vary both within and between these peoples of African origin now living in the United States, such diversity does not preclude a common political commitment to improving the circumstances of black people.

Third, anticipating criticisms that militant covering advocates a form of "selling out" for individual advancement, this Article acknowledges that the strategy of militant covering is just as easily deployed by those who do not possess a political commitment to the black community as it is by those who do. In other words, militant covering does not necessarily entail anything other than individual advancement. Yet, this fact does not disturb the position this Article advances, because individual refusals to cover do not necessarily improve the circumstances of black people any more than do acts of militant covering. In each case, individual blacks must make substantive commitments to improving the circumstances of black people, whether, for example, in the form of donating to black organizations, mentoring black youth, or supporting causes relevant to the black community. Because militant covering can facilitate mainstream success, it can enable substantive efforts on behalf of the black community vis-à-vis enlarged black influence and resources.¹¹ As a result, militant covering should be seen as a viable and acceptable strategy to those who seek to improve the circumstances of black people.

11. *See supra* note 10.

I. THE RIGHTS-TO-DIFFERENCE DEBATE & BLACK IDENTITY:
IRONIC ALLIES

A. Black Power

“Rights-to-difference” discourse distorts the priorities of black power politics by failing to understand the radical difference between the role of “blackness” in the “rights-to-difference” discourse and the role of black pride in its modern progenitor, the politics of black power. In addition, understanding the differing role of blackness in “rights-to-difference” discourse and the politics of black power helps to illuminate why expressing “blackness” in integrated environments should not always take priority over the more substantive goal of increasing the power wielded by black people.

Two observations about black identity in the politics of black power help clarify the difference between black identity in the politics of black power and in the “rights-to-difference” discourse. First, black power understood the adoption of a self-conscious black identity as essential to a liberated black people.¹² This is to say it

12. CARMICHAEL & HAMILTON, *supra* note 5, at 45 (arguing that “[t]he extent to which black Americans can and do trace their roots to Africa, to that extent will they be able to be more effective on the political scene”); VAN DEBURG, *supra* note 5, at 5 (quoting Malcolm X stating that “[w]e must recapture our heritage and our identity if we are ever to liberate ourselves from the bonds of white supremacy”).

Although the 1960s black power movement was not the first manifestation of the ethic of black self-definition, which predates the Civil War, it has had the most impact over contemporary black understandings of self-identity and pride in blackness. Compare VAN DEBURG, *supra* note 5, at 35 (noting that “[t]he concept of establishing a powerful black nation outside the United States was formulated prior to the Civil War, most notably by Martin Delany and Henry Highland Garnett”), with JAMES H. CONE, MARTIN & MALCOLM & AMERICA: A DREAM OR A NIGHTMARE 9–10 (Orbis Books ed. 2007) (1992) (“Martin Delany, often called the father of black nationalism, boasted that there lived ‘none blacker’ than himself. While [Frederick] Douglass, in typical integrationist style, said, ‘I thank God for making me a man simply,’ he reported that ‘Delany always thanks Him for making him a black man.’”); VAN DEBURG, *supra* note 5, at 304 (1992) (noting that “even Black Power’s most severe critics recognize[] [that] the movement raised both individual and group expectations, made black folk feel good about themselves, and steered them away from ‘cultural homicide’”); and *id.* at 307 (citing an oral history documenting the enduring power of black power’s black pride message and observing that “[t]he Black Power movement brought irrevocable changes in the Afro-Americans’ attitudes both about themselves and about the legitimacy of the white world order,” and further noting that “[e]ven if certain of its achievements are, today, either ignored or taken for granted, Black Power’s unconquerable spirit and its message of self-definition are visible to all who take the time to familiarize themselves with contemporary Afro-American culture”).

understood black identity within the context of a political agenda of a people, and not solely or even primarily as a program of self-esteem building or self-affirmation.¹³ Second, within the framework of black power, “black consciousness” or the “new blackness,” as it was called, aimed to defeat white America’s long history of viewing and treating blacks as sociocultural inferiors by reversing “traditional color associations” by viewing black skin and physical features as “good, not bad characteristics.”¹⁴ Thus, as had been argued by Malcolm X, through the cultural revolution of positive self-definition, black power sought to “unbrainwash an entire people” as a necessary component of black liberation.¹⁵ Indeed, some black power activists, described as cultural nationalists, asserted that black “cultural distinctives via clothing, language and hairstyle” were the political “movement’s life blood.”¹⁶

While the political agenda of black power has lost its vitality and appeal, the psychological impact of black power’s message of black pride has had lasting influence on American blacks, even as the symbols of black pride (the afro, the power sign, etc.) have receded from focus. However, removed from its political framework, black pride is no longer directed at the liberation of black people. Ironically, the lifeblood of a movement that expressly rejected any suggestion that black prosperity required whites to validate or accept blacks is now the subject of a discourse that inquires whether blacks ought to have a right to express their blackness. In particular, and as will be discussed more fully in the next Part, the “rights-to-difference” discourse puts the cultural legacy of black power at the center of arguments designed (1) to secure legal protection for the psychological well-being of blacks who wish to display blackness in integrated institutions and/or (2) to address racial subordination by providing legal protection against disadvantage caused by the display of traits that are not perceived as conforming to the cultural norms of institutions that are numerically dominated by whites.

13. *See supra* note 12.

14. VAN DEBURG, *supra* note 5, at 51–52.

15. *Id.* at 5.

16. *Id.* at 171.

It goes without saying that it is difficult to imagine a clearer attitudinal contrast than that between seeking legal protection to display blackness and the declarative militancy of Kwame Ture, formerly known as Stokely Carmichael, who in 1966 said: “We have to stop being ashamed of being black. A broad nose, a thick lip and nappy hair is us and we are going to call that beautiful *whether they like it or not*.”¹⁷ Of course, it is important to recall that in contrast to the integrationist agenda of rights-to-difference discourse, Ture’s unrelenting defiance arises from within the framework of black power’s political philosophy, which in both its pluralist and nationalist instantiations envisioned the assumption and cultivation of black identity as a critical component of a program aimed toward achieving black political and economic independence.¹⁸ Accordingly, at least one major difference between, on the one hand, the position articulated in this Article and, on the other hand, the ideology of black power is that the former focuses on accumulating power while pursuing an integrationist agenda of racial interdependence, while the latter is directed to achieving black independence. As a result, while black power demands a categorical approach to the assertion of blackness and “rights-to-difference” requests a right to blackness, the path presented here permits situational emphasis of black identity in the service of pursuing power. Having noted the irony of “rights-to-difference” discourse preserving the cultural legacy of black power known as black pride, I now turn to describing the essential divides in the rights-to-difference debate.

17. *Id.* at 201 (emphasis added).

18. Compare CARMICHAEL & HAMILTON, *supra* note 5, at 46 (“[B]lack people must lead and run their own organizations.”), with VAN DEBURG, *supra* note 4, at 115 (quoting Boston black power activist Virgil Wood that “[o]ur long range goal ought to be economic independence, educational self-reliance, political empowerment, cultural development and exchange, institutional development—the networking of those institutions”).

*B. The Rights-to-Difference Debate*¹⁹

On one side, Professors Barbara J. Flagg and Kenji Yoshino have, respectively, argued in favor of interpreting antidiscrimination law to prohibit employers from failing to promote or hire minorities for lacking characteristics usually associated with whites and to protect employees against illegitimate demands to “cover,” that is, pressure to deemphasize a stigmatized trait, such as the stigma that blackness constitutes for black people.²⁰ On the other side, Professor Richard T. Ford has argued against legislating “rights-to-difference” on the basis that such rights would reify stereotypes associated with membership in oppressed groups. To illustrate Ford’s worry, a right to speak Ebonics would reify stereotypes that black people do not speak Standard English.²¹

Describing this debate broadly, we can further say that the essential line dividing those scholars for and against “rights-to-difference” is whether the law should protect some cultural traits because discrimination against them constitutes racial subordination. While Flagg and Yoshino subscribe to a theory of performative identity in which racial identity can be constituted by cultural practices,²² and so in their views discrimination against culture can

19. As indicated in *supra* note 8, the rights-to-difference debate has many participants. In this Article, prepared for a symposium, my major aim is to introduce the concept of militant covering. As a result, I do not provide an exhaustive description of the rights-to-difference debate but rather provide a description that is sufficient to situate the concept and importance of militant covering.

20. Flagg, *supra* note 8, at 2029, 2041 (“Transparently white decisionmaking consists of the unconscious use of criteria of decision that are more strongly associated with whites than with nonwhites.” Under the foreseeable impact model that Flagg proposes as a modification to Title VII, a plaintiff “would only have to show that her employer’s conformity requirement implicitly incorporated characteristics more often found in whites than in nonwhites.”). Compare Yoshino, *supra* note 6, at 937 (noting that “energies should be devoted to contesting [covering] demand[s], rather than to ascertaining whether . . . conformity to [a] demand is due to choice or chance”), with *id.* at 883–84 (describing African-American attorney Lawrence Mungin’s covering performances and Mungin’s efforts “to join a select group of individuals of African-American ancestry—including Tiger Woods, Colin Powell, and Arthur Ashe—who are seen ‘not as unblack but as not merely, not primarily, black’” (quoting PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 282 (1999))).

21. See FORD, *supra* note 4, at 20 (noting his “attempt to demonstrate that a seemingly benign ‘recognition’ of group cultural difference can be a means of forcing group members into confining social roles”).

22. Flagg, *supra* note 4, at 198 (noting that she did not have “this [‘identity performance’]

constitute status-based discrimination, Ford insists on sharply distinguishing cultural practices from the ascribed identity of race, thus leading him to conclude that cultural discrimination cannot constitute racial discrimination.²³

Notwithstanding the disagreement concerning whether to protect cultural expression, these scholars seem to agree that blacks who mute their blackness incur costs or shoulder a burden. For Ford, the incursion of such costs becomes a question about who should bear the costs of integration: on the one hand, blacks who endure the psychological costs of integration or, on the other hand, integrated blacks and the society as a whole that will bear the cost of the former's failure to integrate.²⁴

In contrast to Ford's allocative approach, in early writings on the topic Flagg clearly emphasized the harm these costs impose on blacks. However, in more recent writings, she has moved away from justifying legal intervention on the basis of such costs and has moved toward protecting cultural difference to the extent that it is intertwined with ascriptive identity and so is an instance of impermissible discrimination.²⁵ Nevertheless, there is no indication

vocabulary in 1995" but that her description of cultural traits associated with race "falls within that general frame of thought").

23. Compare FORD, *supra* note 4, at 117 (arguing that "there is no necessary correspondence between the ascribed identity of race and one's culture or personal sense of self"), with Flagg, *supra* note 4, at 201 ("I can envision a degree of protection for cultural difference because (and when) I see it as intertwined with other aspects of identity, such as ascriptive status. Because I don't see ascribed, cultural, or other aspects of identity as distinct from one another in the way Ford does, addressing status hierarchy may well take the form of protection of cultural difference."), and Yoshino, *supra* note 6, at 888 ("[U]nder culture-race, covering can constitute race. The culture-race conception deems race to be formed at least in part by the racial performances in which one engages.").

24. FORD, *supra* note 4, at 10.

25. Compare Flagg, *supra* note 4, at 191 (arguing that the costs of "conforming to the norms of a white cultural setting" are greater for blacks than for whites), with *id.* at 197 (responding to Ford's claim that she subscribes to a subjective, psychological theory of identity, and explaining that the passage giving rise to Ford's charge that she subscribes to a subjective, psychological theory of identity plays no role in her models of disparate impact liability because "[t]he foreseeable effects model turns on the criterion of decision itself, with no reference to the self definition costs it does or does not impose on an adversely affected employee," and "[i]n looking to structural considerations [(racial subordination)], the alternatives model moves even further away from concern about self-definition," and thus "[n]either model bears any resemblance that I can see to Ford's account"), and *id.* at 203-04 (explaining that both her models of liability can be and should be understood as directed against racial subordination rather than as concerned with cultural pluralism).

from Flagg that she now disavows the view that some blacks incur psychological costs as a result of conforming to white cultural norms. Similarly, Yoshino describes deemphasizing blackness as work that can be exhausting and describes covering as a burden “imposed on all groups outside the mainstream.”²⁶ Thus, notwithstanding whatever differences exist between Yoshino and Flagg, they each implicitly compare the phenomenon of conforming to majority norms against an ideal of fairness in which blacks would not have to endure disadvantage or incur costs as a result of cultural differences that constitute racial identity.

II. A MODEL CASE OF COVERING & POWER: BLACKNESS & BARACK OBAMA²⁷

If covering occurs when “the underlying identity is neither altered nor hidden, but is downplayed,”²⁸ perhaps the most prominent and successful example of tactical covering occurred during President Obama’s historic presidential campaign. Specifically, Obama understood that his presidential victory depended on downplaying

26. Yoshino, *supra* note 6, at 885.

27. While I focus on Obama’s campaign covering, it bears noting that covering remains tactically important for Obama even though he now occupies the most powerful position in the world. Indeed, the importance of covering was highlighted in July of 2009 when President Obama said a police officer acted “stupidly” upon arresting famed Harvard professor Henry Louis Gates, Jr. in his own home in an incident that some described as an instance of racial profiling. Marisol Bellow & Kevin Johnson, *Racial Profiling Debate Not Over*, USA TODAY, July 23, 2009, available at http://www.usatoday.com/news/nation/2009-07-22-racial_N.htm (“Gates’ supporters say the incident was a classic case of racial profiling.”); Melissa Trujillo, *Henry Louis Gates Jr. Arrested, Police Accused of Racial Profiling*, THE HUFFINGTON POST, July 20, 2009, http://www.huffingtonpost.com/2009/07/20/henry-louis-gates-jr-arre_n_241407.html (“Some of Gates’ African-American colleagues say the arrest is part of a pattern of racial profiling in Cambridge.”). Because Obama had not learned all of the facts of the incident before describing the officer’s actions as “stupid,” some perceived him as unfairly siding with Professor Gates. See Robert A. George, *Obama’s “Stupid” Response on Gates: A “Stupid” Response to A Question on Race*, NBC L.A., July 24, 2009, <http://www.nbclosangeles.com/news/archive/Skipping-The-Record.html> (describing Obama as instinctively siding with Gates). While the President could have chosen his words more judiciously, they were words undoubtedly motivated by his sensitivity as a black man to racial profiling. See Jonathan Weisman & Simmi Aujla, *Obama Scrambles to Defuse Race Flap*, THE WALL ST. J., July 25, 2009, available at <http://online.wsj.com/article/SB124844815302279253.html>. Had he “covered” this sensitivity, he would not have amplified and become the focus of what already was a racially charged event.

28. Yoshino, *supra* note 6, at 772.

race by emphasizing his message of unity and vision of an America free of identity politics.²⁹ Moreover, as will be discussed in more detail, Obama's choice to forego complaining about his competitors' attempts to undermine his campaign by drawing attention to his race, as well as his masterful management of the Reverend Wright controversy, show how Obama prioritized the pursuit of power over the pursuit of racial justice and black identity.

Obama understood, as do many blacks, that his mainstream appeal depended on his ability to triangulate his political commitment to being black (on several occasions over his political career, Obama and his wife, Michelle Obama, implicitly and explicitly affirmed the President's commitment to the black community)³⁰ with his task of

29. It bears noting that while militant covering may at times be necessary to securing success, it is likely rarely, if ever, sufficient for achieving success. While I argue that militant covering was necessary for Obama's election as president, I do not claim that militant covering was sufficient. In this connection, readers can consider various factors at play in Obama's election to the presidency (the unpopularity of the Republican Party, the Republican presidential and vice presidential candidates, Obama's opponents in the Democratic Party, the 2008 economic meltdown, etc.).

30. Obama's self-identification as a black man is well known. But it is helpful to catalogue some of his and the First Lady's more widely reported responses to question's concerning the President's blackness. When addressing during the presidential campaign whether her husband was black enough, Ms. Obama stated: "We're still playing around with the question of, 'Is he Black enough?' That's nonsense . . . Stop it! . . . If a man like Barack isn't Black enough, then who is?" Dana Slagle, *Michelle Obama: Juggles Marriage, Motherhood & Work on the Campaign Trail*, JET, Sept. 10, 2007, available at http://findarticles.com/p/articles/mi_m1355/is_10_112/ai_n27395122/. The First Lady "called questions early in the campaign about whether her biracial husband was 'black enough' to appeal to African-American voters 'silly.' *Michelle Obama: Questions about Husband Being 'Black Enough' Silly*, CNNPolitics.com, Feb. 1, 2008, <http://www.cnn.com/2008/POLITICS/02/01/michelle.obama/index.html>. During Obama's unsuccessful congressional bid against Bobby Rush, Ms. Obama had this to say about those who questioned her husband's commitment to the black community and his blackness:

I've grown up in this community. I'm as black as it gets. I put my blackness up against anybody's blackness in this state. And Barack is a black man. And he's done more in terms of meeting his commitments and sticking his neck out for the community than many people who criticize him. . . . And I can say that, cause I'm black.

LIZA MUNDY, MICHELLE: A BIOGRAPHY 135 (2008). Asked by 60 Minutes reporter Steve Kroft about his blackness and questions raised concerning whether he is black enough, then-Senator Obama responded, "I . . . notice when I'm catching a cab, nobody's confused about that." Candidate Obama's Sense of Urgency, CBSNews.com, Feb. 11, 2007, <http://www.cbsnews.com/stories/2007/02/09/60minutes/main2456335.shtml>. Finally, in his widely read memoir, President Obama details his early struggles with racial identity and his identification as an African-American. BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND

persuading all Americans that he would fairly represent their interests, and not, as Fox News commentator Glenn Beck has accused Obama, attempt to right all the racial wrongs in American history.³¹ Moreover, by limiting his expression of black identity, Obama abated fears of the sort also expressed by Beck: that Obama “has a deep-seated hatred for white people, white culture.”³² While Beck’s foregoing accusations strike many as, frankly, crazy, it is important to understand that self-conscious black identity arouses this fear in some segment of American whites. Thus, covering black identity can be tactically sound because it diminishes stigma and reduces white fear, making whites more comfortable elevating black people to positions of power.

Even a casual observer of Obama’s run for the presidency could not fail to notice the racial tightrope that he managed to traverse. While wisely seeking to prevent race from becoming the focus of his campaign during the democratic primaries and general election, Obama deftly avoided several political landmines that threatened to render him the “black candidate.” Perhaps the first widely reported and well-publicized “racemine” was former President Bill Clinton’s remarks following Obama’s victory in the South Carolina primary, in which Clinton said, “Jesse Jackson won South Carolina in ’84 and ’88. Jackson ran a good campaign. And Obama ran a good campaign here.”³³ Although President Clinton rejected accusations that his comments were intended to paint Obama as the black candidate, many commentators felt otherwise.³⁴ Wisely, candidate Obama and his campaign publicly dismissed suggestions that Clinton was

INHERITANCE 284 (Three Rivers Press 2004) (1995). In the memoir Obama also describes as sensible his church’s “guiding principles—a ‘Black Value System’”—which includes “a commitment to the black community and black family, education, the work ethic, discipline, and self-respect.” *Id.*

31. Fox News host Glenn Beck described Obama as a racist with a social justice agenda to right all of the wrong. See Fox & Friends (Fox television broadcast July 28, 2009), available at <http://www.youtube.com/watch?v=-ndc2LX2u98&feature=related>.

32. Fox News Host Says Obama Is ‘a Racist’, ASSOCIATED PRESS, Aug. 3, 2009, available at <http://www.msnbc.msn.com/id/32197648/>.

33. ABC News Political Punch, *Bubba: Obama Is Just Like Jesse Jackson*, <http://blogs.abcnnews.com/politicalpunch/2008/01/bubba-obama-is.html> (Aug. 8, 2008, 20:18 EST).

34. See, e.g., Posting of Dave Nalle to Blogcritics Politics, *Obama’s Astonishing Victory in South Carolina*, <http://blogcritics.org/politics/article/obamas-astonishing-victory-in-south-carolina/> (Jan. 27, 2008, 14:06 EST).

attempting to inject race into the campaign.³⁵ By denying that Clinton's comments had a racial character, Obama successfully transcended race by refusing to fall into a racial stereotype—the race card playing black man who complains of racism and expresses racial grievances.

As the primary unfolded, “race card” allegations were leveled in response to several additional incidents involving persons associated with Hillary Clinton's campaign. One much remarked instance occurred when high profile Hillary supporter New York Attorney General Andrew Cuomo described Obama as “shucking and jiving” with the media.³⁶ While not publicly condemning Clinton's camp of playing the race card, Obama's campaign team drafted a memo believed to be for activists compiling racially charged comments.³⁷ While noting that the memo was not circulated to the press, the Obama team rejected suggestions that the memo was designed to gain a political advantage by fostering the view that the Clintons were seeking to use race against Obama.³⁸ In another much-publicized racial controversy, 1984 Democratic Vice Presidential Candidate and Clinton campaign finance committee member Geraldine Ferraro stated that, “‘if Obama was a white man, he would not be in this position’ as a leading presidential contender.”³⁹ Similar to the way he responded to Bill Clinton's South Carolina comment and Cuomo's description of Obama as “shucking and jiving,” Obama refused to

35. Marc Ambinder, *The Crucible of Racial Politics*, THE ATLANTIC, Jan. 11, 2008, available at <http://www.theatlantic.com/politicsarchive/2008/01/the-crucible-of-racial-politics/51567/> (“Obama has not accused the Clintons of racism and an Obama campaign aide said that the campaign does not believe that the Clintons themselves were attempting to sow racial discord.”).

36. Will Thomas, *Hillary Supporter Cuomo: Obama Tried To “Shuck And Jive” with Media*, THE HUFFINGTON POST, Jan. 10, 2008, http://www.huffingtonpost.com/2008/01/10/hillary-supporter-cuomo-o_n_80914.html.

37. Sam Stein, *Obama Camp's Memo on Clintons' Politicizing Race*, THE HUFFINGTON POST, Jan. 12, 2008, http://www.huffingtonpost.com/2008/01/12/obama-camps-memo-on-clin_n_81205.html (describing the Obama campaign's memo on race).

38. *Id.*

39. Patrick Healy & Jeff Zeleny, *Racial Issue Bubbles up Again for Democrats*, N.Y. TIMES, Mar. 13, 2008, available at <http://www.msnbc.msn.com/id/23605070/> (noting that Obama's aides tried to keep the Ferraro race controversy alive by arranging a press conference, despite Obama himself later stating that he did not believe Ferraro intended her comments to be racist).

adopt a confrontational stance against race baiting, and thereby avoided becoming the black candidate.⁴⁰

Despite Obama's masterful management of race and his efforts to transcend it, he was ultimately and unsurprisingly unable to avoid giving race a prominent and critical place in his run for the presidency. In March 2008, controversial sermons surfaced from his longtime pastor, the Reverend Jeremiah Wright, in which Wright labeled the American government as historically and contemporaneously racist, shouted "God damn America," and declared that Barack Obama, not Hillary Clinton, understands what it is like to grow up as a black boy in a rich white man's country.⁴¹

In addition to employing racially divisive language totally at odds with Obama's campaign message, Wright's sermons were criticized as anti-Semitic and unpatriotic, and reports emerged that while Obama was a member of Wright's congregation, the church, Trinity United Church of Christ, honored the controversial Minister Louis Farrakhan of the Nation of Islam.⁴² With Wright's sermons under fire

40. *See id.*

41. *See* David Edwards & Nick Juliano, *ABC: Is former Reverend a liability for Obama?*, THE RAW STORY, Mar. 13, 2008, http://rawstory.com/news/2008/ABC_Is_former_Reverend_liability_for_0313.html (describing television network ABC's March 2008 airing of controversial sermons by the Reverend Jeremiah Wright); ABC News Political Punch, *Obama's Spiritual Mentor: "Hillary Ain't Never Been Called a N-----"*, <http://blogs.abcnews.com/politicalpunch/2008/03/obamas-spiritua.html> (Mar. 13, 2008, 09:39 EST) (quoting Wright as preaching that "[t]he government gives them the drugs, builds bigger prisons, passes a three strikes law and then wants us to sing 'God bless America,' No, no, no, not 'God bless America,' God damn America—that's in the Bible, you're killing innocent people, God damn America for treating us citizens as less than human," and because "Hillary was not a black boy raised in a single parent home, [and] Barack was[,] Barack knows what it means living in a country and a culture that is controlled by rich white people" and "Hillary can never know that").

42. Tony Jingo, *Barack Obama's Church Honors Nation of Islam Leader Louis Farrakhan*, ASSOCIATED CONTENT, Jan. 8, 2008, http://www.associatedcontent.com/article/528635/barack_obamas_church_honorsnation.html; Richard Cohen, *Obama's Farrakhan Test*, WASH. POST, Jan. 15, 2008, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/14/AR2008011402083.html> ("For most Americans . . . Farrakhan epitomizes racism, particularly in the form of anti-Semitism. Over the years, he has compiled an awesome record of offensive statements, even denigrating the Holocaust by falsely attributing it to Jewish cooperation with Hitler—'They helped him get the Third Reich on the road.'"); Prisonbreak, March 17, 2008, Pastor Wright's Fierce Anti-semitism Tirade, *available at* <http://mydd.com/users/prisonbreak/posts/new-videopastor-wrights-fierce-anti-semitism-tirade> (referring to a FoxNews clip allegedly showing "Wright's vicious anti-semitism sentiment as demonstrated by a variety of sermons").

as racially hostile, anti-Semitic and unpatriotic, and the revelation that the church honored a man, Farrakhan, widely known for controversial views on the advancement of black interests and the relationship between Jews and blacks, Obama chose to directly confront the issue of race in a major address to the nation, entitled “A More Perfect Union.”⁴³

With American flags lined up behind him, then-Senator Obama delivered a profoundly honest and direct meditation on race in America. Early in this historic address, he noted how his campaign had demonstrated America’s hunger for a message of unity. Yet he lamented how race had “bubble[d] to the surface” in the week leading up to the South Carolina primary and had taken a particularly divisive turn precipitating his speech.⁴⁴ In describing this racially charged atmosphere, Obama again rose above racial conflict rather than becoming party to it. He described the destructive views of Reverend Wright and referred to claims that his candidacy constituted a form of affirmative action.⁴⁵ Obama, the racially transcendent candidate, had set the tone for the remainder of his address.

Senator Obama went on to describe Reverend Wright’s description of America as distorted; instead of approaching America’s continuing racial problems from a perspective of hope, particularly in light of the progress that America has made, Wright only described what is wrong with America. In Obama’s words, instead of understanding that the genius of America is that it can and has changed, Wright “spoke as if our society was static.”⁴⁶ While agreeing with Wright that racial disparities continue to exist, Obama described his own reaction to inequality as sharply different than Wright’s.⁴⁷ Because Wright lived through a period of intense racial oppression, he and others of his generation continue to see the world in essentially black versus white terms.

In stark contrast to Reverend Wright’s one-sided approach to racial grievances in America, Obama demonstrated his understanding

43. Obama, *supra* note 1.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

of both black anger at continuing racial disparities and hardworking but struggling white resentment toward affirmative action for injustices in which they had no part. Labeling both attitudes as counterproductive, Obama said that members of both groups must come together to fight the real enemies of their well-being: “the middle class squeeze—a corporate culture rife with inside dealing, questionable accounting practices, and short-term greed; a Washington dominated by lobbyists and special interests; economic policies that favor the few over the many.”⁴⁸

III. TOWARD A PLURALIST BLACK POLITICS

A. Pragmatic Politics & Militant Covering

Having completed his argument for blacks and whites joining together to pursue their common interests, Obama offered his alternative to Wright’s angry sermons. As noted at this Article’s opening, Obama argued that for blacks:

[The] path [forward] means embracing the burdens of our past without becoming victims of our past. It means continuing to insist on a full measure of justice in every aspect of American life. But it also means binding our particular grievances—for better health care, and better schools, and better jobs—to the larger aspirations of all Americans—the white woman struggling to break the glass ceiling, the white man whose [sic] been laid off, the immigrant trying to feed his family.⁴⁹

By urging blacks to address their “particular grievances” by furthering justice “in every aspect of American life,” Obama suggested that an effective black politics pursues black interests not in black versus white terms but within a framework that is integrated with the hopes of all Americans. Accordingly, in contrast to an antagonistic approach to racial justice, Obama articulated a universal

48. *Id.*

49. *Id.*

and politically expedient approach to addressing the “particular grievances” of black Americans.⁵⁰

However, in order for this black politics to be practiced widely, a psychological turn must be taken. We must psychologically assume our now established position as full participants in the great experiment of America. This means that we must view ourselves as potentially occupying positions of great power, and so must seek to balance our pursuit of racial justice with a position as insiders, rather than wronged outsiders.⁵¹

Thus, the new black politics understands that the era in which we live requires a careful balance of calls to remedy racial injustice with the necessity of individual blacks being perceived as persons who are individually powerful and potential partners with white Americans in the pursuit of a better life for all Americans. This is to say, the new politics seeks to project an image that is more consistent with power than with disempowerment—the status of a person who has suffered a wrong. Thus, the chief quality of the new politics is a results-oriented pragmatism, in which the pursuit of power reconciles the cultural legacy of the black power era (pride in black identity and the black community) with the integrationist agenda of the civil rights movement. Moreover, in the spirit of President Obama’s national address on race, the new politics seeks reconciliation and coalitions with non-black groups, because it serves black interests to build coalitions with groups having common aspirations.

Thus, the new politics seeks to introduce a new but not wholly new black identity. Because it is focused on power, it reminds us of the black power era. Yet unlike the black power era, because it need

50. *Id.*

51. Understanding what it means to be an outsider on the inside is now occupying many. For example, the theme of LatCrit XIV (the 2009 LatCrit conference), *Outsiders Inside: Critical Outsider Theory and Praxis in the Policymaking of the New American Regime*, reflects focus on what it means to be an outsider on the inside. The conference’s registration materials note that one topic of focus is “the significance and complexities of having an ‘outsider inside’ legal scholar President.” LatCrit XIV Registration Materials, http://www.law.du.edu/latcrit/AnnualConferences/ACXIV/LatCrit-XIV-Registration-Materials_final.pdf. While this Article focuses on the possibility of increased power resulting from greater access to the “inside” vis-à-vis militant covering, it is also appropriate to focus on the risk that President Obama’s ultimate insider status will cause policymakers to turn away from the pressing problems confronting racial minorities.

not be preoccupied with building self-esteem and pride, it eschews explicit antagonism in favor of power.⁵² And unlike the civil rights movement, the new politics is not chiefly focused on sustaining and cultivating claims blacks possess against whites as a result of contemporary and historical racial injustice. While it understands the continuing existence and justness of such claims, and will at times pursue racial justice, it realizes that today's political environment demands a different approach, and that black aspirations in any event exceed the scope of racial justice. And so, in response to the current political environment, the new politics focuses on transcending racial strictures, while demanding that the collective energies of America be focused on building a more just society for all. In this way, race-based remedies are sought in the name of simply doing the "right thing" because it benefits us all, rather than because of any benefit specifically accruing to blacks.

Just as "binding our particular grievances" to the aspirations of all Americans can be cast as a failure to press for the racial justice that we know is owed but can also be understood as necessary to address our most pressing problems, individual blacks, in their workplaces and elsewhere, can look upon covering not as a capitulation to racism, but as a tactic that is consistent with the pragmatic pursuit of success and power. While expressing blackness—and being one's self—in institutions numerically dominated by whites is an understandable desire, and discrimination against blackness, as Flagg and Yoshino argue, may very well, in most instances, be tied to white

52. In a manuscript, which should soon be published, I engage in a detailed discussion of the extent to which the post-civil rights generation makes possible greater focus on obtaining power and building cross-racial understanding as opposed to continued focus on bitter racial divisions and the repairing of psychological wounds caused by racism. In this connection, while campaigning, then-Senator Obama noted that younger people "[are] much less caught up in these neatly packaged orthodoxies" of the 1960s. Donkey Path, *Barack Obama and the 1960s*, <http://www.donkeypath.blogspot.com/2006/12/barack-obama-and-1960s.html> (Dec. 19, 2006, 13:38 EST). Reflecting his view that it is time to move beyond the divisions that have defined American politics since the turbulent period of the '60s, upon winning the Democratic primary in South Carolina, Obama declared: "[t]he choice in this election is not between regions or religions or genders. . . . It's not about rich versus poor; young versus old; and it is not about black versus white. It's about the past versus the future." CNN.com, *Obama Claims Big Win in South Carolina*, Jan. 27, 2008, <http://www.cnn.com/2008/POLITICS/01/26/sc.primary/index.html>.

supremacy or racial subordination,⁵³ the new politics understands that insisting upon white acceptance of black cultural identity is sometimes futile and favors the acquisition of power over making unsatisfied demands.

Moreover, because the new politics tactically employs covering in the service of black interests, it aspires to cultivate an understanding of racial identity and politics in which the former may be outwardly (though not internally) modified to realize individual success and the political objective of improving the circumstances of black people.⁵⁴ As a result, this politics accommodates the preservation of black cultural identity and the situational expression of black or majority cultural orientations. For example, at a white shoe law firm, a black associate striving to make partner may at times deemphasize black cultural traits by such things as choices in sartorial style or efforts to speak in a manner sure to be described as “very articulate,” while robustly expressing black traits in other business affairs, community events, religious services, or any number of venues.⁵⁵ Further, because the test of blackness (as consistent with the diversity present within the black community) is not the expression of stereotypically black traits but one’s identification with and commitment to black people, a black associate’s selective and tactical covering is not properly understood as an accommodation of or capitulation to racism.

53. See *supra* notes 6–8 and accompanying text.

54. While this Article distinguishes between political and cultural commitments, see discussion *supra* pp. 167–68, *infra* pp. 184, 204, an important issue that I am unable to adequately explore in the context of an Article prepared for a symposium is whether and how militant covering can be reconciled with a performative theory of racial identity similar to the theory to which Yoshino and Flagg subscribe. More specifically, a theoretical issue (which I will take up in a future paper) exists regarding how and whether racial identity can be internally maintained if racial identity is constituted by performance. In addition, while militant covering appears compatible with Ford’s claim that “there is no necessary correspondence between the ascribed identity of race and one’s culture or personal sense of self,” FORD, *supra* note 4, at 117, Flagg has observed that “a fixed, entirely socially given ascriptive identity seems at odds with Ford’s own conception of identity as performance,” Flagg, *supra* note 4, at 202 (referring to Ford’s performative conception of social identities found at FORD, *supra* note 4, at 61–64). Here I neither endorse nor reject Ford’s distinction between ascriptive identity and culture, and reserve for a future paper my views on this issue.

55. See discussion *infra* pp. 201–02 on Yoshino describing attorney Lawrence Mungin as having covered through sartorial style, manner of speech, and disregard of perceived racial slights.

When considering covering in relationship to racism, we must be clear that resistance to racism is not limited to refusing racist demands in our encounters with racist individuals or groups but includes overcoming the relatively disempowered position in which black people find themselves because of historical racism. When racism is viewed from a larger historical and structural perspective, it becomes clear that refusing to cover in response to the racist demands of any contemporary individual or group is not necessarily a significant act of resistance or the wisest tactical deployment of resources in the larger struggle to overcome the tragic legacy of racism. In contrast, militant covering is clearly focused on this larger picture. Aspiring to enable persons with political commitments to improving black circumstances to gain access to the economic resources and social capital of mainstream America, militant covering seeks to overcome the continuing devastation wrought by racial subordination. As a result, militant covering can be a more effective method of overcoming the downward pull of contemporary and historical racism than are individual refusals to cover. But unlike refusals to cover, which can be immediately gratifying, militant covering requires a steely and militantly disciplined disposition focused on the long, rather than short-term struggle against racism.

Even as the new politics encourages recognition of the utility of covering as individual judgment dictates, it also appreciates and supports the protest and advocacy activities of those who pursue justice and reform from “outside” the mainstream. It understands that the problems of economic and racial inequality demand activity on multiple fronts, and that just as Malcolm made Martin more palatable and as Movement activists aided President Johnson’s successful passage of landmark civil rights legislation, those both inside and outside the mainstream can be essential to an effective politics.⁵⁶

56. Malcolm once told Coretta King: “I want Dr. King to know that I didn’t come to Selma to make his job difficult. I really did come thinking I could make it easier. If the white people realize what the alternative is, perhaps they will be more willing to hear Dr. King.” CONE, *supra* note 12, at 210. Bill Moyers, a former White House assistant, described President Johnson as putting “his hand on Martin Luther King’s shoulder, and sa[ying], in effect: ‘OK. You go out there Dr. King and keep doing what you’re doing, and make it possible for me to do the right thing.’” Bill Moyers Journal, *Moyers on Clinton, Obama, King and Johnson*, Jan. 18, 2008, <http://www.pbs.org/moyers/journal/01182008/profile4.html> (last visited Sept. 1, 2010).

Analogously, those who refuse to cover in mainstream institutions may aid those who do so by rendering the latter more appealing to nonblack colleagues. Yet because of the potential career costs to individuals who refuse to cover, decisions to forego covering ought to be well considered and connected to a meaningful politics rather than a mere desire to be accepted as one is.

B. African-Americans: Too American to Cover?

Conceiving of covering as a tactical choice has analogs in the history of American immigrant groups, notably Italians, Irish, and Jews.⁵⁷ In particular, these groups' distinctive cultural practices were stigmatized, and part of the basis of their exclusion from whiteness.⁵⁸ Significantly, as these immigrant groups discarded or covered their cultural practices, they gained acceptance as Americans.⁵⁹ But in the case of African-Americans, however 'white' their cultural practices, they are excluded from whiteness and have historically been treated as *not* American.⁶⁰

Moyers further reports:

Lyndon Johnson was no racist but he had not been a civil rights hero, either. Now, as president, he came down on the side of civil disobedience, believing it might quicken America's conscience until the cry for justice became irresistible, enabling him to turn Congress. So King marched and Johnson maneuvered and Congress folded.

Id.

57. See generally MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 56–62 (1998) (discussing Italians' historical exclusion from whiteness, and stating that "[i]t was not just that Italians did not look white to certain social arbiters, but that they did not *act* white"); *id.* at 174, 171–99 ("[A] writer defending the 'better' Jews (what a later generation would call 'white Jews') in the *North American Review* in 1891 could collapse the distinction between behavior and physicality, arguing that 'among *cultured* Jews the racial features are generally less strongly defined.' When Jews are of the 'better' type, that is, the observing eye need not scout their Jewishness.") (emphasis added). See generally NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 96 (1995) (reporting that for the Irish "[t]o become white they had to learn to subordinate county, religious, or national animosities, not to mention any natural sympathies they may have felt for their fellow [black] creatures, to a new solidarity based on color—a bond which, it must be remembered, was contradicted by their experience in Ireland").

58. See sources cited *supra* note 57.

59. See generally MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* 115–31 (1964) (describing melting pot and assimilationist, "transmuting pot" approach to immigrant groups).

60. *Scott v. Sanford (Dred Scott)*, 60 U.S. 393 (1856) (holding that persons descended

Yet even while blacks have been legally and factually treated as not American, there can be no question that white resistance to viewing blacks as American is rooted in irrational discrimination against skin color and genetic heritage and not in deep differences between the substantive values held by black and white Americans.⁶¹ Indeed, it is plausible to assert that no American groups have more in common than the whites and blacks whose ancestors have occupied North America since the earliest period of the American colonies: the two peoples share a common historical experience, have no memory of a nation other than America, and largely share in subscribing to Protestant Christianity. We can further state that unlike some voluntary immigrant groups who enter the United States with foreign cultural heritages and values not inseparable from the core of America's cultural character, African-Americans (by far the largest black group in America) are, along with Anglo-Saxon Americans, unquestionably at the center of America's history, cultural makeup, and identity.⁶²

It is thus surprising, because it is too often unsaid, but intuitively correct, to speak of the brotherhood and sisterhood as well as cultural affinity of black and white Americans, even while the two are often

from black slaves could not become United States citizens). Shortly following the invalidation of *Dred Scott* vis-à-vis the Civil War Amendments, Jim Crow laws rendered blacks second-class American citizens. See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 31-43 (6th ed. 2008) (describing the political and social status of blacks from *Dred Scott* through the emergence of Jim Crow in the post-Reconstruction era).

61. See RALPH ELLISON, SHADOW AND ACT 25 (Random House 1995) (1964) (“[A]s passionate believers in democracy Negroes identify themselves with the broader American ideals . . . when the white American, holding up most twentieth-century fiction, says, ‘This is American reality,’ the Negro tends to answer (not at all concerned that Americans tend generally to fight against any but the most flattering imaginative depictions of their lives), ‘Perhaps, but you’ve left out this, and this, and this. And most of all, what you’d have the world accept as *me* isn’t even human.’”).

62. Of course, we must also recognize the important contributions other groups have made to America. Identifying African-Americans and Anglo-Saxons as the two groups persistently at the center of American history is a reference to American self-understanding. See Mari Matsuda, *Planet Asian America*, 8 ASIAN L.J. 169, 170 (2001) (“I do not reject the Black/White paradigm of racial oppression in the United States. There is criticism of the civil rights movement for excluding the perspective of Asian Americans. In any coalition, it is critical to incorporate the unique perspective and experiences of those who sit at the margins. *We must not let this quest for inclusion, however, destroy a key insight of the Black liberation movement: Fear of blackness and oppression of African Americans formed American culture.*”) (emphasis added) (footnotes omitted).

discussed as though they are the ultimate contrast. In fact, it is precisely because of the cultural affinity between black and white Americans that Black Nationalists thought it necessary to establish an African identity among black Americans by insisting that the white slave master had erased the memory of the “black man’s” true, African identity. While the Black Nationalist is indisputably correct when viewed from an historical perspective, and accurately identified a sorely lacking self-esteem in the black community resulting from an environment that thoroughly denied black humanity and dignity, the effort to recover African identity was centuries too late. This is to say, by the time Elijah Muhammad and Malcolm X sought to “unbrainwash” black America, black Americans had already established a uniquely American culture, even if most of white America—and some of black America—was unwilling to acknowledge this fact.⁶³ Indeed, the underlying affinity and troubled indivisibility, but ultimate oneness, of black and white Americans accounts for what many perceive as the justice inherent in the nation’s first minority President being a self-identified African-American.⁶⁴ In this connection, it is not insignificant that Obama’s

63. See ELLISON, *supra* note 57, at 17–18, 21–22 (stating that, “I felt it important to explore [in writing] the full range of American Negro humanity and to affirm those qualities which are of value beyond any question of segregation, economics or previous condition of servitude. The obligation was always there and there is much to affirm. In fact, all Negroes affirm certain feelings of identity, certain foods, certain types of dancing, music, religious experiences, certain tragic attitudes toward experience and toward our situation as Americans. . . . Like most Americans we are not yet fully conscious of our identity either as Negroes or Americans. . . . [W]hat I have tried to commemorate in fiction is that which I believe to be enduring and abiding in our [Negro] situation, especially those human qualities which the American Negro has developed despite and in rejection of obstacles and meanness imposed upon us. . . . I speak of the faith, the patience, the humor, the sense of timing, rugged sense of life and the manner of expressing it which all go to define the American Negro. . . . For better or worse, whatever there is of value in Negro life is an American heritage and as such it must be preserved.”).

64. It bears noting that some African-Americans have suggested dissatisfaction with President Obama’s African derivation, believing that the first black president should have been a black American descended from slaves. See Debra J. Dickerson, *Colorblind: Barack Obama Would Be the Great Black Hope in the Next Presidential Race—If He Were Actually Black*, <http://www.salon.com/news/opinion/feature/2007/01/22/obama/index.html> (“Notwithstanding their silence on the subject, blacks at the top are aware (and possibly troubled?) by Obama’s lottery winnings: ‘black’ but not black. Not descended from West African slaves brought to America, he steps into the benefits of black progress (like Harvard Law School) without having borne any of the burden, and he gives the white folks plausible deniability of their unwillingness to embrace blacks in public life. . . . You’re [whites] replacing the black man

background (a Muslim father and upbringing in Hawaii and Indonesia) was a much larger campaign issue than his self-identification as an African-American.⁶⁵

Unlike the voluntary immigrant groups who have often expected to assimilate to the cultural heritage of their new country, it is unsurprising and normatively justifiable that descendants of Africans involuntarily brought to North America would choose to preserve the homegrown American-black cultural identity that has sustained their humanity and dignity and arguably formed the basis for the solidarity necessary to gain first-class American citizenship, despite having been historically designated as chattel property and then as second-class citizens.⁶⁶ Thus, in light of African-Americans' history in

with an immigrant of recent African descent of whom you can approve without feeling either guilty or frightened. If he were Ronald Washington from Detroit, even with the same résumé, he wouldn't be getting this kind of love. Washington would have to earn it [the democratic nomination for President], not just show promise of it, and even then whites would remain wary.”).

65. Peter Beinart, *Is Barack Obama American Enough?*, TIME, Oct. 9, 2008, <http://www.time.com/time/magazine/article/0,9171,1848755,00.html> (reporting Republican vice presidential candidate Sarah Palin's statement that “I am just so fearful that this is not a man who sees America the way that you and I see America;” noting that Obama's political opponents used his unusual background to describe him as insufficiently American, “even [while] racists couldn't deny that Jackson and Sharpton are fully American;” reporting that Democratic campaign guru Mark Penn urged Hillary Clinton to exploit Obama's “lack of American roots” and “limited” connection to “basic American values and culture;” and noting that while Fox News attempted to paint Obama as a “closet racial militant” by linking him to Jeremiah Wright, in the general election Republicans focused on questioning Obama's Americanism rather than his links to Wright). While some might suggest that efforts to paint Obama as foreign were subtle methods of amplifying his race, the fact remains that American politics are such that race was given a less prominent role than Obama's roots in America. Indeed, if Obama's father were African-American and not Kenyan, it is very doubtful that a top political advisor, like Mark Penn, would think it possible to persuasively call into question his connection to “basic American values and culture.”

66. On the topic of black Americans wishing to preserve their culture, Ralph Ellison observed, “[m]uch of Negro culture might be negative, but there is also much of great value, of richness, which, because it has been secreted by living and has made their lives more meaningful, Negroes will not willingly disregard.” ELLISON, *supra* note 57, at 316.

Separately, it bears noting that many of the perceived cultural differences between black and white Americans are actually differences between Southern and Northern American culture. See Thomas Sowell, *Black Rednecks and White Liberals*, TownHall.com, May 5, 2005, http://townhall.com/columnists/ThomasSowell/2005/05/05/black_rednecks_and_white_liberals (“[F]ew people are aware of how much of what passes as black identity today, including ‘black English,’ has its roots in the history of those whites who were called ‘rednecks’ and ‘crackers’ centuries ago in Britain, before they ever crossed the Atlantic and settled in the South. Most Southern blacks and whites moved away from that redneck culture over the generations, as its

America, we may state that African-Americans are *too American to cover* both normatively and literally: (1) blacks should not be expected to cover because their cultural identity is native, not foreign to America; and (2) black American culture is in any event inseparable and constitutive of white American culture.

While some black Americans may deem themselves too American to cover, and conceive themselves as dissimilarly situated as compared with voluntary immigrant groups, a pragmatic approach to covering nevertheless offers a route to improving black circumstances for those who would choose to adopt the tactic. Moreover, despite the black-white paradigm that has defined American discussions of difference, rendering blacks and whites the ultimate contrast, unlike the relationship between some voluntary immigrant groups and America, black and white American cultures and identities are inextricably woven and bound together in a single tapestry of American identity.⁶⁷ For this reason, American black covering responds exclusively to racism, whereas voluntary immigrant covering may, in part, be a response to American xenophobia and hostility to foreign values.⁶⁸

consequences proved to be counterproductive or even disastrous. But it survives today among the poorest and least educated ghetto blacks.”). For a full treatment of this topic, see Sowell’s book, *BLACK REDNECKS AND WHITE LIBERALS* (2005). Until the Great Migration, ninety percent of black Americans lived in the American South. Derron Davis, *Toward a Socio-Historical and Demographic Portrait of Twentieth Century African-Americans*, in *BLACK EXODUS: THE GREAT MIGRATION FROM THE AMERICAN SOUTH* 1, 7 (Alferdteen Harrison ed., 1991). Upon moving to the American North, cultural dissimilarities between blacks from the South and white and black northerners were apparent. See Austin Zeiderman, *Ruralizing the City: The Great Migration and Environmental Rehabilitation in Baltimore, Maryland*, 13 *IDENTITIES: GLOBAL STUD. CULTURE & POWER* 209, 213–21 (2006) (describing cultural differences during the Great Migration between newly arrived southern blacks and those blacks established in the North).

Notwithstanding the Southern American origin of what is often perceived as exclusively black American culture, in the early twentieth century blacks developed a self-consciously black identity that arguably enabled the Civil Rights Movement. JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 152, 169, 183 (1995) (arguing that the Harlem Renaissance produced a self-consciously Negro culture that made the Civil Rights Movement possible).

67. LEON E. WYNTER, *AMERICAN SKIN: POP CULTURE, BIG BUSINESS, AND THE END OF WHITE AMERICA* 6–7, 34 (2002) (arguing that while Africans were the “seminal, disproportionate creators of American culture,” whites have historically refused to acknowledge this).

68. See Neil Gotanda, “*Other Non-Whites*” in *American Legal History: A Review of Justice at War*, 85 *COLUM. L. REV.* 1186, 1188 (1985) (reviewing PETER IRONS, *JUSTICE AT*

Despite resistance to black American identity, the Civil Rights Movement, unlike the ideology of black power, tactically drew upon the ideal of a culturally Christian democracy shared by both blacks and whites to establish one nation, undivided by race.⁶⁹ To secure black prosperity in the only nation of which most black Americans have any memory or substantive connection, which blacks have literally shared in building from its infancy, and which blacks have defended in every war, like Martin King and his fellow architects of the August 28, 1963, March on Washington, who were careful to avoid threatening remarks in their historic addresses to the nation, contemporary blacks can at times be strategic in their comportment.⁷⁰

Accordingly, notwithstanding the normative arguments in favor of rights-to-difference and the psychological costs of covering, militant covering reflects a politics designed to secure the black share of America, and represents an evolution from the Civil Rights Movement and the black power era. While Martin Luther King, Jr. and the mainstream Civil Rights Movement's strategy of "pricking the white conscience" by focusing on black suffering was entirely appropriate and even necessary in light of blacks' near categorical exclusion from power in the 1960s, emphasizing black suffering is not always the most effective strategy for overcoming the unfair burdens that blacks face today.⁷¹ Likewise, black power correctly perceived the need to build black self-esteem and confidence following hundreds of years of slavery, then Jim Crow in the South and white brutality in the North. However, this strategy, like the

WAR (1983); discussing the stigma of foreignness attaching to non-Black racial minorities).

69. See CONE, *supra* note 12, at 135, 140 (observing that "King's appeal to whites and their religious values was the chief reason why he became an influential leader in the society and was subsequently elevated to the status of a national hero" and noting that King's "Letter from a Birmingham Jail" expresses King's view of "segregation as a double contradiction: of America's democratic faith and of its religious heritage").

70. BlackPast.org, March on Washington for Jobs and Freedom, <http://www.blackpast.org/?q=aah/march-washington-jobs-and-freedom-august-28-1963> (last visited Sept. 1, 2010) (reporting that the architects of the March on Washington agreed to deliver moderate speeches to minimize political opposition to pending civil rights legislation).

71. CONE, *supra* note 12, at 69, 78 ("Martin King's articulation of the American dream . . . was primarily for the white public. He wanted to prick their consciences and motivate them to create a society and a world that was free of racial discrimination . . . [with respect to nonviolence,] [t]his refusal to hit back will cause the oppressors to become ashamed of their own methods and we will be able to transform enemies into friends.").

focus on black suffering, must be understood in its historical context. Black self-confidence and self-esteem is now sufficient to render unnecessary affirmative rejections of all things white in favor of a self-presentation that is self-consciously and exclusively black.⁷²

IV. OVERLOOKING POWER IN THE RIGHTS-TO-DIFFERENCE DEBATE

A. Ford's Cosmopolitan Disinterest in Black Power

For Ford, a cosmopolitan, individual freedom is maximized “through the ability to negotiate a multiplicity of social styles and influences,” and people should “worr[y] little about the erosion of cultural continuity or the destruction of traditional ways . . . [and they should be] suspicious of claims of tradition and of group solidarity and loyalty.”⁷³ Because of these normative commitments, Ford focuses on the ways in which legal rights to cultural difference threaten to perpetuate stereotypes and may negatively affect members of groups who do not wish to adhere to the identities/traits that are made the subject of a legal right.

Ford's focus on individual autonomy is unequivocally expressed in his discussion of the *Rogers v. American Airlines* case, wherein a court rejected a plaintiff's claim that American Airlines' policy

72. A respondent to a 1986 longitudinal oral history of U.S. race relations stated, “I don't think it's ‘Black is beautiful’ [anymore]. It's ‘I am beautiful and I'm black[.]’ . . . It's not the symbolic thing, the afro, power sign. . . . That phase is over and it succeeded. My children feel better about themselves and they know that they're black.” VAN DEBURG, *supra* note 5, at 307.

In his film *Good Hair* (Chris Rock Entertainment 2009), entertainer Chris Rock interviews black women about their reasons for straightening their hair or wearing weaves. From these interviews it is clear that many black women do not consider choosing to forego natural hair as evidence of racial insecurity or as an attempt to be white. Indeed, the Reverend Al Sharpton goes as far as saying that black people invented hair straightening and that wearing straight hair is just as black as a natural style. See Maria Puente, *Chris Rock's 'Good Hair' Gets Tangled up in Controversy*, USA TODAY, Oct. 25, 2009, available at http://www.usatoday.com/life/movies/news/2009-10-22-good-hair-main_N.htm (quoting Mikki Taylor, beauty and cover editor for *Essence*, which had actress Nia Long and the film *Good Hair* on the cover of its November edition, as stating that “it's a ‘good thing’ that everybody is talking about the subject [because of Rock's film], but the old concept of ‘good hair’ is antiquated and no longer relevant to most black women, especially young women”). Taylor further stated that “[g]ood hair now is healthy hair,” and asked, “[w]hen will our hair cease to be political? Every other group of women can do what they want with their hair, and it's not seen as making a statement. We're over that, and we wish everyone else would be over it, too.” *Id.*

73. FORD, *supra* note 4, at 162–63.

prohibiting all-braided hairstyles and the wearing of cornrows impermissibly discriminated against her as a black woman.⁷⁴ Criticizing the plaintiff Rogers's argument that cornrows are "part of the cultural and historical essence of Black American women,"⁷⁵ Ford argues:

Even if we take it on faith that cornrows represent black nationalist pride as against the integrationist and assimilationist coiffure of chemically straightened hair, it's clear that a right to cornrows would be an intervention in a long-standing debate *among* African-Americans about empowerment strategies and norms of identity and identification. . . . A right to group difference may be experienced as meddlesome at best and oppressive at worst even by some members of the groups that the rights regime ostensibly benefits. For the black woman who dislikes cornrows and wishes that no one—most of all black women—would wear them, the right not only hinders her and deprives her of allies, but it also adds insult to injury by proclaiming that cornrows are *her* cultural essence as a black woman.⁷⁶

In other words, Ford's argument is directed against the legal system intervening in an ongoing political disagreement within the black community. Moreover, Ford worries that legal recognition of cornrows as the essence of black women will increase pressure on black women to wear cornrows as an expression of authentic identity; he fears the threat such rights-to-difference pose to individual autonomy.

Because of Ford's cosmopolitan commitment it is not surprising that his focus is on illuminating how "rights-to-difference" discourse both imposes constraints on individual autonomy and urges the law to endorse a controversial conception of black identity.⁷⁷ Yet because

74. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

75. FORD, *supra* note 4, at 23.

76. *Id.* at 25.

77. *But see* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1266 (2004) (maintaining that if courts hear Title VII discrimination claims based on race/ethnicity performances, courts "could use our existing antidiscrimination regime to interrupt the processes by which race is used to

Ford's concern is limited to assuring that the law does not limit autonomy and that it remain neutral with respect to controversial political views, his arguments are not directed to the normative status of individual refusals to cover or to whether rights-to-difference discourse is consistent with the black power politics that gave birth to modern notions of black pride. Indeed, Ford tells us that his "objections [to legal recognition that cornrows are the historical essence of black women] do not necessarily go to the substantive outcome of the dispute," and that he "think[s] she [Rogers] should have been allowed to wear her braids."⁷⁸ Further, Ford indicates that he would have rewritten American's grooming policy "to exclude the prohibition against braids," and as "a member of Congress I [Ford] would consider legislation to prohibit employers from adopting rigid grooming policies generally as a matter of federal labor law."⁷⁹ Thus, while Ford rejects extending legal protection to traits associated with race, he favors minimizing limits on individual expression.

The question for Ford is whether particular practices "merit [legal] protection [subsidy] because the behavior in question is worth protecting and because the group of people who enjoyed the behavior in some sense deserve the redistribution of social resources that such protection would entail."⁸⁰ Having framed cultural practices in terms of worth and desert, Ford goes on to argue that certain cultural practices are more suited to particular enterprises than others, and that institutional cultures can in their own right be "valuable and praiseworthy."⁸¹ As a result, the value of a particular minority cultural practice may not outweigh the costs of a particular institutional culture accommodating the minority cultural practice. Moreover, argues Ford, some degree of assimilation is "integral to the formation of cohesive social institutions," because "institutions

stigmatize ethnic groups in the workplace . . . [and thus] create the atmosphere of free choice necessary for the development of a cosmopolitan citizenry willing to make its affiliation choices purely on individual desire"). Importantly, Rich does not deny Ford's (whose book postdates her article) worry that rights-to-difference can perpetuate stereotypes and thus work against a cosmopolitan citizenry. She states that "[w]hile these concerns about judicial stereotyping are valid, I think they are often overstated." *Id.* at 1240.

78. FORD, *supra* note 4, at 28.

79. *Id.*

80. *Id.* at 142.

81. *Id.* at 144.

and societies often require *some* set of shared norms.”⁸² Noting that some assimilation is required, Ford concludes that it is “unrealistic to imagine that any such process could be entirely voluntary, painless or easy,” and that it is therefore expected that “some individuals and groups find many social norms frankly oppressive.”⁸³

To set the stage for his argument that most workplaces and institutions are composed of hybrid cultures—that include elements of minority and majority cultures—Ford writes that the sacrifices of individuals who endure oppressive norms will hopefully “smooth the way for future generations to enjoy the benefits of belonging in a stable, prosperous mutually supportive society.”⁸⁴ Continuing to explain his position, Ford says that “[r]ights-to-difference claims are most persuasive where the cultural traits to be protected are not obviously related to the legitimate objectives of the institution that would be required to accommodate them.”⁸⁵ Thus, according to Ford, Rogers’s claim is compelling because “the cornrow hairstyle strikes many people today as unrelated to job qualifications.”⁸⁶

Nevertheless, because stereotypes would be reified by extending legal protection to traits like cornrows on the basis that they are racially correlated, Ford stands against such legal protection and argues that the “social integration of minority groups is an important social goal, more important in a great many cases than the attachment of some individuals to the social practices associated with group difference.”⁸⁷ Moreover, in Ford’s view, “historically, minority cultural styles have not been systematically rejected. Instead the *culture* has been embraced and the *people* have been rejected.”⁸⁸ In fact, according to Ford, most workplaces and institutions today are cultural hybrids of minority and majority cultures,⁸⁹ and it is anti-cosmopolitan to enact legislation that seeks to protect minority cultures in an effort to enable “canonized social groups . . . to present

82. *Id.* at 152–53.

83. *Id.* at 153.

84. *Id.*

85. *Id.* at 154.

86. *Id.*

87. *Id.* at 162.

88. *Id.* at 157.

89. *See id.* at 156–57.

their culture whole cloth to other rights-bearing cultures.”⁹⁰ “Individual freedom is better realized,” Ford argues, “through the ability to negotiate a multiplicity of social styles and influences than as an exclusive option on the one associated with one’s ascribed identity.”⁹¹

While Ford is correct that most workplaces and institutions are in fact hybrid cultures, insofar as white Americans all partake in the broader American culture that is heavily influenced by black Americans, his point is not responsive to the particular covering demands black Americans encounter in mainstream workplaces. In particular, though black and white American cultures are not walled off, as Barbara Flagg has argued, transparently white decision-making can result in discrimination against persons displaying American black culture.⁹² In this connection, it is relevant that Ford provides no citations or references that support his claim that most workplaces are cultural hybrids and that, while minority people have been rejected, minority cultures have been embraced.⁹³ Specifically, rather than providing *any* examples demonstrating hybridity in workplaces or *any* reasons to believe that most workplaces have *embraced* minority culture, Ford provides examples of American culture failing to acknowledge the minority origin of famous recordings of white musicians, such as, Ford tells us, “Elvis Presley’s largely unacknowledged cover of Big Mama Thornton’s ‘Hound Dog,’ the Rolling Stones’ stylistic mimicking of American blues artists or Led Zeppelin’s direct quotation of the standard blues double entendre: ‘squeeze my lemon till the juice runs down my leg.’”⁹⁴ Thus, while Ford provides evidence that white Americans have co-opted and absorbed the cultural contributions of black Americans, he provides no evidence to support his *implicit* claim that because whites are in fact culturally black and white, workplace culture is not often hostile to traits associated with black American culture. In other

90. *Id.* at 161.

91. *Id.* at 162.

92. See *supra* note 4 and discussion *supra* pp. 173–74.

93. Of course, Ford is correct that minority people have historically been rejected. Our disagreement exclusively concerns the extent to which most workplaces embrace minority culture.

94. FORD, *supra* note 4, at 157.

words, Ford too quickly jumps from an accurate observation about the fluidity, hybridity, and non-hermetic nature of cultures to a conclusion about how individuals perceive cultures in different contexts.⁹⁵

Yet, because my argument concerns re-associating black identity with a politics directed toward increasing the power wielded by black people, my disagreement with Ford on the extent to which workplaces embrace minority cultures need not detain us. Whereas Ford is arguing against rights-to-difference chiefly because of his cosmopolitan commitments and concern that providing legal rights-to-difference will perpetuate stereotypes, my argument is focused on how black people who value their blackness can respond to what they experience as pressure to conform to norms that they perceive as white. As a result, unlike Ford, I am not interested in arguing that such norms are not in fact predominately associated with whites and are hybrid. I am instead interested in providing black people who value blackness a politically conscious response to pressures to discard their blackness. Further, the response I recommend is not situated in cosmopolitan aspirations of radical individualism, as are Ford's commitments. It is instead rooted in a politics of commitment to the black community and in increasing the power wielded by black people, and therefore has the hope of appealing to black people who possess a political commitment to the black community.

Consistent with this political vision, we have misevaluated what is at stake when confronting pressure to conform to white cultural norms. Rather than insisting on a right to express blackness, which cannot propel blacks to the apex of their individual endeavors in the mainstream,⁹⁶ blacks can militantly cover in order to obtain success.

As I will more fully develop in the next section's discussion of Yoshino's work, once we distinguish between political and cultural commitments, we can view adapting to what are perceived as white norms as a viable tactic deployed in the pursuit of success and power. By understanding adaptation in this way, blacks who value their blackness can understand covering as a means of pursuing both

95. See *supra* note 88, discussing Ford's fluid conception of majority and minority cultures.

96. See discussion *infra* Part IV.C.

individual success and political and economic commitments to the black community. Thus, unlike Ford, I provide a political framework for blacks who value their blackness and pursue mainstream endeavors.

B. Rethinking Covering as an Instrument of Power Rather than an Assault on Authenticity

In contrast to Ford, Yoshino's project is directly concerned with how we ought to respond to demands to cover. More specifically, Yoshino's project aims to illuminate the ways in which antidiscrimination law proscribes racial discrimination based on immutable characteristics, such as skin color, but extends no protection against discrimination directed at what Yoshino calls mutable traits that can be constitutive of racial identity, such as cornrows.⁹⁷ In Yoshino's view, coerced covering is the result of the law's failure to address this kind of discrimination.⁹⁸

As an illustration of an illegitimate demand to cover, Yoshino turns to *Rogers v. American Airlines*, discussed above.⁹⁹ While Yoshino persuasively demonstrates how the law's failure to protect against discrimination directed at mutable traits biases the law in favor of assimilation, his analysis of the *Rogers* case reveals his concern with gaining acceptance of stigmatized traits, such as blackness, as opposed to a focus on empowering black people.¹⁰⁰ Noting a fact not mentioned by Ford, Yoshino reveals that in

97. Yoshino, *supra* note 6, at 891.

98. *Id.* at 782, 937–39.

99. *Id.* at 890.

100. As evidence of the law's protection of immutable but not mutable traits, Yoshino points to the following observation of the *Rogers* court:

[B]anning a natural hairstyle [such as the Afro/Bush] would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics . . . an all-braided hairstyle is an "easily changed characteristic," and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.

Id. at 891. Yoshino concludes that in *Rogers*, "[m]utable traits, no matter how race-related were not protected" under Title VII. *Id.* Building on this quote, Yoshino fashions an argument that highlights the ways in which antidiscrimination law's protection of immutable but not mutable traits supports rather than contests illegitimate demands to cover. *Id.* at 933, 938–39.

rejecting Rogers's argument that the airline's policy had racially disparate impacts, the court noted that the defendant had "alleged without contravention" that the plaintiff began wearing cornrows only after it "had been popularized by a white actress [Bo Derek]." ¹⁰¹ In other words, even if, as Rogers claimed, the "cornrow style has been and continues to be part of the cultural and historical essence of Black American women," Rogers did not contest the allegation that she did not adopt the cornrows style for these reasons. ¹⁰² As a result, the court called into question the basis and relevance of Rogers's claim that the airline's policy prohibiting cornrows discriminated against her as a black woman.

Yet Yoshino's argument is untroubled by the court's arguably well-founded belief that the plaintiff's argument was, in her case, disingenuous. ¹⁰³ Indeed, even if Rogers's cornrows were *in fact* inspired by a white actress, Yoshino could cogently present his argument that the cornrows style nevertheless *became* "a symbol of resistance to assimilation, and therefore a symbol of insubordination;" ¹⁰⁴ whereby, in the words of Paulette Caldwell, the plaintiff was "seen as having the stereotypical characteristics commonly associated with black will and willpower—undisciplined, insubordinate, unwilling to melt." ¹⁰⁵

To bridge the disjunction between Rogers's alleged inspiration for cornrows—a white actress—and black identity, Yoshino asks readers to consider a hypothetical in which an employee's supervisor instructs her to remove from her office bulletin board a "Black Power" button she picked up at a political rally. ¹⁰⁶ Further, while at

101. *Id.* at 890.

102. Yoshino, *supra* note 4, at 892–93 (quoting *Rogers v. Am. Airlines*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981)).

103. Importantly, Rogers's failure to contest the allegation that she began wearing cornrows following a white actress popularizing the style may have been a strategic choice made by her lawyer. It is quite possible that Rogers's argument that cornrows reflected her cultural history as a black woman was made in good faith, and that she simply became more comfortable wearing cornrows following its popularization. Significantly, if Rogers became more comfortable wearing cornrows following its popularization by a white actress, such wearing would not constitute the defiant display of blackness of which Kwame Ture spoke. See discussion *supra* p. 171.

104. Yoshino, *supra* note 6, at 896.

105. *Id.* (quoting Caldwell, *supra* note 8, at 365, 392–93).

106. *Id.*

the time of posting the button, the employee was indifferent to having the button in her work environment. Yoshino posits that she can rationally insist on its presence following the employer's prohibition.¹⁰⁷ Explaining, Yoshino argues that "[a]t the point where the supervisor has insisted on the button's removal, the button changes in social meaning. It becomes fraught with meanings it did not have before."¹⁰⁸ To square the button analogy with Rogers's dialogue with American, we must conclude that American's prohibition on cornrows caused Rogers to focus on the political significance of her hairstyle. As a result, Yoshino's argument does not require that Rogers originally wore cornrows for political reasons. For Yoshino, the important point is that the hairstyle became a site of racial contest.

Yet, despite the apparent similarities between Rogers and Yoshino's hypothetical employee, in at least one important respect the two are not analogous. While Yoshino's hypothetical employee attended a political rally, and so had interest in and perhaps even a commitment to the politics of black power, Rogers failed to contest the allegation that she drafted black politics/identity to the service of a white actress-inspired desire to wear cornrows. As a result, although a court would have a difficult time calling into question the sincerity of the former's commitment to black politics, the *Rogers* court plausibly implied that Rogers disingenuously associated cornrows with an expression of black identity.

Yet this dissimilarity between Rogers and Yoshino's hypothetical does not render Yoshino's hypothetical unhelpful to his argument. The reason is that neither Yoshino's hypothetical employee nor Rogers originally intended to actively pursue a political agenda in their capacities as employees. And for Yoshino's purposes, these facts work well. The takeaway point is that, following their employers' prohibition, both Rogers and Yoshino's hypothetical employee self-consciously wished to have expressions associated with black people accepted in the workplace and to be "themselves."¹⁰⁹ Thus, Yoshino's analysis of racial covering is

107. *Id.*

108. *Id.*

109. One might argue, as did the court, that the plaintiff in *Rogers* did not begin wearing

primarily about individuals' right to define their social identities, particularly where those identities are associated with subordinated groups, and not about rights to self-conscious political identities.¹¹⁰

Because Yoshino's project is concerned with confronting unjust discrimination against social identities and with permitting people to be their authentic selves,¹¹¹ the *ex ante* absence of a political reason for Rogers's wish to wear cornrows is unimportant and does not figure into his calculus. For Yoshino, forcing Rogers to cover a cultural trait associated with blackness constitutes an assault on her authentic self, whether or not the trait is displayed for a self-conscious political reason. It is precisely this way of conceiving racial covering—in terms that suggest covering race-related traits is a capitulation to racism—that I am contesting. While such demands to cover may be normatively wrong, accommodating the airline's demands would not necessarily constitute surrendering one's authentic self to the assault of racial subordination. A militant coverer could choose to abide by the airline's policy with the steely resolve of someone who takes a wider view of the historical legacy of racism.

While covering can be conceived as a tactic deployed in the pursuit of power, Yoshino's argument does not emphasize this

cornrows to be her authentically black self. *See* *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981). Nevertheless, Rogers argued that the airline's policy prevented her from doing exactly that. Similarly, displaying a black power button may have become important as an elaboration of self-identity only after the display was disallowed.

110. It is worth noting that Yoshino's analysis of covering gay identities advances ultimate political ends in ways that do not obtain for his arguments on racial covering. In particular, if achieving full acceptance of the moral equality between gay and straight identities is the major objective of the gay rights movement, achieving legal protection against demands to cover queer identities advances this ultimate end. *Compare* Yoshino, *supra* note 6, at 840 (denominating "queers" as "gays who refuse to cover"), *with id.* at 840 ("[Q]ueers' generally choose to emphasize their difference from the mainstream. Through that emphasis, 'queers' not only seek to maintain the integrity of their group, but also to transform existing social institutions."). Because blacks are disproportionately disadvantaged in virtually every area of American life, mere acceptance of blacks cannot be the ultimate objective of a black politics. To put the point clearly, while sexual orientation has no apparent connection with the socioeconomic conditions into which a gay individual is born, race has a definite connection with where one starts in life. As a result, closing the racial gap requires more than persuading whites that blacks are without question in every way the equals of whites.

111. YOSHINO, *supra* note 8, at 184, 187, 190–91 (arguing that "[t]he new civil rights must harness th[e] universal impulse toward authenticity," and that his (Yoshino's) proposal to move from an equality paradigm to a liberty paradigm will "better protect the authentic self").

possibility.¹¹² Specifically, and somewhat surprisingly because he notes examples of blacks who he describes as having “covered successfully,” such as Tiger Woods, Colin Powell, and Arthur Ashe, Yoshino does not focus on how covering can facilitate success.¹¹³ In discussing black attorney Lawrence Mungin’s “unsuccessful race discrimination suit against his law firm employer, Katten Muchin & Zavis,” which failed to consider Mungin for partnership despite his extensive efforts to cover, including his sartorial style, efforts to speak “with a precision that guaranteed his being described as ‘very articulate,’” and disregard of perceived racial slights, Yoshino only emphasizes that Mungin’s covering strategy did not succeed;¹¹⁴ he fails to acknowledge that while covering may not be sufficient to overcome all encounters with racism, it may at times be useful, and may have even aided Mungin. Indeed, although we will never know how Mungin would have fared in his firm had he not covered, there is some basis to believe he would have fared worse:

[A] former partner at Mungin’s former firm, who had never met Mungin told Barrett [the author of a book chronicling Mungin’s story] just what the problem was: “Anyone who spends any time in the profession would know that there are lots of minorities, African-Americans especially, who are running around with Harvard and Yale degrees who are not qualified in any sense. They have been solicited and tutored and polished up and sent out to the profession and they’re not up to grade, for whatever reason.”¹¹⁵

If, as the foregoing suggests is possible, a belief in black incompetence prevailed at Mungin’s former firm, it is not unreasonable to conclude that covering may have aided Mungin’s effort to make partner, but was simply insufficient to overcome old-fashioned racism.

112. Cf. Yoshino, *supra* note 6, at 879–89.

113. *Id.*

114. *Id.* at 879–85 (quoting BARRETT, *supra* note 20).

115. David Garrow, *The Hidden Wound: The Story of a Black Lawyer Who Tried and Failed to Ignore His Race*, THE WASH. MONTHLY, Mar. 1999, available at <http://www.washingtonmonthly.com/books/1999/9903.garrow.wound.html> (reviewing BARRETT, *supra* note 20) (discussing Mungin’s experiences and lawsuit).

Why does Yoshino fail to emphasize the potential utility of covering? I believe the answer lies primarily in his ideological commitments to individual authenticity/expression, and also in his appealing but unwarranted belief that group conflict will be overcome.¹¹⁶

Reminding us of Ford's cosmopolitanism, Yoshino writes of "civil rights [having always aspired] to permit people to pursue their human flourishing without limitations based on bias"¹¹⁷ and declares that his "ultimate commitment is to autonomy as a means of achieving authenticity."¹¹⁸ He urges us to "think[] of civil rights less in terms of groups than in terms of our common humanity."¹¹⁹ While we hear an attractive program—who can disagree with an aspiration toward "human flourishing"?—like Ford's cosmopolitanism, Yoshino relies on a presently unwarranted commitment to and belief in the ability of human beings to transcend their groups, writing that "[t]he explosive pluralism of contemporary American society will inexorably push this country away from group-based identity politics—there will be too many groups to keep track of, much less to protect."¹²⁰ Reading this, it is difficult not to think, "if only this were true . . .," for in order for there to be much less to protect, we would have to witness a great contraction in the continuing inequalities between whites and blacks.¹²¹

116. Although Yoshino notes that "[g]roup-based identity politics is not dead," and indicates his continued belief "in a group-based accommodation model for existing civil rights groups," he believes that "the explosion of diversity in this country" may be what finally makes us realize what we have in common." YOSHINO, *supra* note 8, at 191–92. He further notes his

worry about our current practice of fracturing into groups, each clamoring for state and social solicitude. For this reason [he] do[es] not think that we can move forward by focusing on old-fashioned group-based identity politics. We must instead build a new civil rights paradigm [his liberty paradigm] on what draws us together rather than on what drives us apart. Because covering applies to us all, it provides an issue around which we can make common cause. This is the desire for authenticity, our common human wish to express ourselves without being impeded by unreasoning demands for conformity.

Id. at xii.

117. *Id.* at 195.

118. *Id.* at 190.

119. *Id.* at 187.

120. *Id.* at 183.

121. See Barbara Ehrenreich & Dedrick Muhammad, *The Destruction of the Black Middle Class*, THE HUFFINGTON POST, Aug. 4, 2009, <http://www.huffingtonpost.com/barbara->

While I do not share Yoshino's belief that group-based identity politics will recede because there will be less to protect, the individualism that he exalts and hopes for does threaten to bring about its decline. Although I will not argue the point here, I believe Yoshino's radical individualism to be a decidedly bad development for both black and white America, primarily because my normative commitments are sympathetic to communitarianism. In keeping with the scope of this Article, what I will argue is that Yoshino's insistence on viewing demands to cover as infringing on the "project of self-elaboration emblematic of the search for authenticity all of us engage in as human beings," mistakenly—and unnecessarily—prioritizes individual expression over the attainment of power and the well-being of black people.¹²²

Instead of focusing on how demands to cover limit one's authenticity, as I have argued, covering black identity can be understood as a tactic employed to facilitate mainstream success and

ehrenreich/thedestruction-of-the-bl_b_250828.html ("Black unemployment is now at 14.7 percent, compared to 8.7 for whites."); National Conference of State Legislatures, Disparities in Health, <http://www.ncsl.org/?tabid=14494> (last visited Sept. 1, 2010) ("Life expectancy for black men is approximately 5 years less than that of white men." (citing MELONIE HERON ET AL., NATIONAL VITAL STATISTICS REPORTS, DEATHS: FINAL DATA FOR 2006 (Apr. 2009), http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf)); Kevin Sack, *Research Finds Wide Disparities in Health Care by Race and Region*, N.Y. TIMES, June 5, 2008, at A18 (reporting that a Dartmouth study examining Medicare claims for evidence of racial and geographical disparities "found that on a variety of quality indices, blacks typically were less likely to receive recommended care than whites within a given region"); Thomas Shapiro, *Commentary: Close the Racial Wealth Gap*, CNN.com, June 10, 2009, <http://www.cnn.com/2009/LIVING/06/10/shapiro.wealth/index.html> ("In 1998, the net worth of white households on average was \$100,700 higher than that of African-Americans. By 2007, this gap had increased to \$142,600. The SCF survey, which is supported by the Federal Reserve Board, collects this data every three years—and every time it has been collected, the racial wealth gap has widened."); Walter E. Williams, *Achievement Gap Grows in U.S. Schools*, WASH. TIMES, June 6, 2009, <http://www.washingtontimes.com/news/2009/jun/06/achievement-gap-grows-in-us-schools/> ("On average, black and Latino students are roughly two to three years of learning behind white students of the same age. This racial gap exists regardless of how it is measured, including both achievement (e.g., test score) and attainment (e.g., graduation rate) measures. Taking the average National Assessment of Educational Progress (NAEP) scores for math and reading across the fourth and eighth grades, for example, 48 percent of blacks and 43 percent of Latinos are 'below basic,' while only 17 percent of whites are, and this gap exists in every state. A more pronounced racial achievement gap exists in most large urban school districts.' 'Below basic' is the category the NAEP uses for students unable to display even partial mastery of knowledge and skills fundamental for proficient work at their grade level." (quoting MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS (Apr. 2009))).

122. YOSHINO, *supra* note 8, at 184.

as a personal performance that is emblematic of one's political commitment to increasing the power wielded by the black community. Moreover, by reconnecting black traits with a self-conscious politics, we can distinguish between expressing blackness and political commitment to the black community. Covering can thus be seen as serving the latter, even while the expression of blackness is, according to circumstances, circumspectly expressed. Accordingly, whereas Yoshino's argument is undisturbed even if Rogers adopted cornrows following a white actress popularizing the style, my position views as critical Rogers's reasons for wearing cornrows. Insisting on the expression of blackness in the absence of a self-conscious political agenda is seen as a mere self-indulgence (or in Yoshino's description, an elaboration of the self). Indeed, within a political framework, assuming the burden of covering can be properly understood as a discomfort shouldered in the pursuit of power.

Thus, in contrast to Yoshino, this Article undertakes a comparison of the relative value of acceptance and power, and concludes that the acceptance sought by rights-to-difference proponents, such as Yoshino, causes them to overlook the value of covering as a tactic in the pursuit of power. This is chiefly because, in the ideological framework of rights-to-difference advocates, even while the political function of black identity continues to act as a symbol of resistance to assimilation, the political significance (i.e., the fostering of multicultural tolerance, combating racial subordination, and individual authenticity) bears only a weak, if any, connection to a robust and self-conscious black political agenda.¹²³ Moreover, we can also state that for rights-to-difference advocates, the assertion of black identity becomes primarily a psychological event for the individual and, as I will focus on in the coming discussion of Barbara Flagg's work, the suppression of blackness is primarily understood as a symptom of racial subordination. But as we saw with Obama in the political context, and as I will soon discuss in the economic context,

123. Resembling the point here, in the context of describing his view of the left having been maneuvered into the rhetoric of diversity following the Supreme Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Ford notes that black nationalism's "goal of social, economic and cultural autonomy was reduced in its multicultural knockoff to ethnic theme houses and an empty and defensive celebration of isolated and impoverished ghettos under the rubric of 'community.'" FORD, *supra* note 4, at 43 (2005).

covering blackness can be a necessary tactic for securing power in the political and social environment in which we live. Thus, given the reality of our situation, blacks can (and I believe many already do) understand covering not as an infringement on their individual rights but as a resource to be drawn on in the pursuit of power. In the following discussion of Flagg's work, we see why such an understanding is critical.

C. The Advantage of Militant Covering in Entrepreneurship and High-Level Positions

Flagg comes closer than do either Ford or Yoshino to appropriately framing the problem at the backside of rights-to-difference discourse. In the context of arguing that a promotion denial for failure to conform to white cultural norms preserves racial hierarchy, Flagg argues that "giving nonwhite employees the ability, backed up by law, to initiate conversations about nondiscriminatory ways of doing things is a step toward the redistribution of racial power."¹²⁴ Thus, Flagg's approach seeks to redistribute power in the world in which we find ourselves, and so has the virtue of being pragmatic. Nevertheless, her approach to discrimination against persons lacking white cultural characteristics has the limitation of perceiving illegitimate demands to "cover" in terms that do not acknowledge the pragmatic value of covering performances.¹²⁵

124. Flagg, *supra* note 4, at 204.

125. Flagg has suggested to me that her character Yvonne, Keisha's sister, in Flagg, *supra* note 8, precludes my claim that her work does not acknowledge the pragmatic benefits of covering performances. While Flagg describes Yvonne as someone who does not "den[y] her African heritage, but . . . interprets it differently; she sees being black as congruent with many of the norms of the dominant culture," *id.* at 2010 n.3, she also states that "Yvonne always was comfortable conforming to the norms of the corporate culture at Goodson, and in fact has been comfortable with 'white' norms since childhood. Her manner of speech, dress, and hairstyle, as well as many of her attitudes and beliefs, fall well within the bound of whites' cultural expectations." *Id.* at 2009. From the foregoing and Flagg's additional statement that "Keisha places an emphasis on her African heritage that Yvonne does not," Yvonne appears to me as someone who does not perceive her cultural orientation as inconsistent with white norms. *Id.* at 2010. Had Yvonne perceived such a conflict and accordingly modified her presentation, I would understand Yvonne as representing Flagg acknowledging the pragmatic value of covering. Of course, apart from whether Yvonne can be said to be an acknowledgement of the utility of covering, my broader point is that Flagg's rights-based/antisubordination approach focuses on the normative wrongfulness of covering demands but elides the extent to which

Moreover, as will be discussed, such discrimination can rarely be legally remedied when it prevents blacks from attaining the most powerful positions.

In her article, *Fashioning a Title VII Remedy for Transparently White Subjective Decision Making*, Professor Flagg introduces a hypothetical employee, Keisha, a member of a research team at a small firm who wishes to have her identification with and displays of black culture and African heritage accepted in the workplace.¹²⁶ While “[f]or the most part, the firm planned to elevate each of the original members of the research team to positions as department heads . . . Keisha was not asked to head a department because the individuals responsible for making that decision felt that she lacked the personal qualities that a successful manager needs.”¹²⁷ Following her failure to be promoted, Keisha indicated to management that the personal qualities she lacks may be race-dependent. But the firm replied that they apply “the same conformity-related criteria to white candidates.”¹²⁸

Taking issue with promotion criteria that require Keisha “to shed or disavow crucial facets of blackness, if she wants to get ahead in her place of employment,”¹²⁹ Flagg argues in favor of “Keisha’s individual right not to be disadvantaged by an unjustified criterion of decision [(that is, characteristics associated with whites)] that negatively affects black persons like her.”¹³⁰ While Flagg correctly criticizes a process that denies promotions for failing to exhibit characteristics associated with whites (i.e., white cultural norms as opposed to Keisha’s self-consciously black cultural orientation), and has offered reasonable legal remedies designed to combat such unfair decisions,¹³¹ it is important to understand that her proposal is unlikely

covering performances can be necessary to combat racial discrimination. *See* discussion *supra* p. 205 (on the value of covering performances for high-level jobs and entrepreneurship); *see also* discussion *supra* p. 184 (on militant covering’s utility for combating the historical legacy of racism).

126. Flagg, *supra* note 8, at 2011.

127. *Id.*

128. *Id.*

129. *Id.* at 2034.

130. *Id.* at 2026.

131. *See* Flagg, *supra* note 4, at 198–204 (discussing her proposals for a foreseeable impact model or alternative model of disparate impact liability to combat discrimination against

to dramatically redistribute racial power. Moreover, although Keisha's insistence on black identity may be good for her personal psychological well-being, and while Flagg's proposed legal remedy may secure Keisha's promotion, it is at best unclear whether Keisha and Flagg's approach to addressing the disadvantages, unfairness, or racial subordination that arise from exhibiting minority cultural norms in a majority institution are the best ways to redistribute racial power or to limit white supremacy and racial subordination. Indeed, there are clear limitations to a rights-based approach to changing the proportionate power enjoyed by blacks and whites.

One obvious limitation of Flagg's approach is that racial subordination on the basis of cultural characteristics is difficult, if not impossible, to detect when it occurs in decisions to promote or hire candidates to senior executive-level positions. This is to say that while Keisha was denied a promotion generally extended to adequately performing employees hired into her original position, the most prestigious and powerful positions (for example, those of CEO, CFO, and COO) are simply not offered through a process that enables one to clearly separate objective and subjective criteria and to construct counterfactuals of the sort, "if X candidate were not culturally black, the board would have chosen X as the new CEO."¹³² As a result, in the absence of documents or statements indicating a

persons not exhibiting cultural characteristics associated with whites); Flagg, *supra* note 8, at 2038–51 (also discussing her proposals for a foreseeable impact model or alternative model of disparate impact liability to combat discrimination against persons not exhibiting cultural characteristics associated with whites).

132. Because companies usually only have one senior executive for specific functions (CFO, COO, etc.), Keisha's expectation of promotion along with her cohorts is simply not analogous to senior executive hiring/promotion. Moreover, senior executive positions frequently are not filled from within a company's ranks but by resort to an executive search firm, which identifies and screens candidates from the national and even international talent pool. It is very difficult, and indeed sometimes impossible, to identify discrimination occurring in this screening. Regardless of whether companies promote from within, it is worth noting that the necessity of looking to subjective qualities in senior-level hiring arguably explains why courts have been reluctant to extend Title VII protections to senior hiring. *See* Bell, *supra* note 56, at 219–24 (describing the judiciary's "reluctance to extend [Title VII] remedies beyond blue-collar workers," noting that "[b]ecause upper-level jobs are more likely to be filled on the basis of subjective judgments, women vying for upper-level jobs are more likely to suffer the effects of unconscious biases than are women competing for lower-level jobs," and explaining that "[f]or blacks and other nonwhites seeking access to higher-paying, higher-status positions, Title VII has not proved to be particularly useful").

racial component to decision-making, there is little possibility of enforcing legal remedies directed at rooting out unnecessary application of decision criteria associated with whites in filling senior executive-level positions.¹³³

In addition, and independently, legal remedies designed to offset the advantages of white cultural norms cannot hope to remedy societal discrimination against black cultural orientations. This is because the law cannot compel the formation of key business relationships or the landing of a large account. Thus, the CEO or Sales Vice President whose blackness inhibits her efforts to develop critical business relationships will have no recourse. For the same reasons, legal remedies can never hope to root out the disadvantages that culturally black entrepreneurs endure.

Because of the law's substantial inability to remove the barrier that discrimination against cultural blackness presents to the executive suite, performance once there, and to entrepreneurs, culturally black individuals who refuse to cover risk exclusion from the most powerful and lucrative positions. Accordingly, while Flagg is correct that remedying promotion denials like Keisha's is a step toward the redistribution of racial power, it is a limited step toward real power. While decreasing the frequency with which black professionals are denied promotion to mid-management is an undoubtedly good direction in which to head, we live in a time in which blacks can realistically aspire to greater heights, even if realizing their goals requires them to deploy the tactic of covering.¹³⁴

CONCLUSION

I have argued that militant covering is a resource to be drawn upon in the pursuit of power and that rights-to-difference discourse characterizes covering as a burden against which the law ought or ought not to protect blacks. While I have acknowledged that

133. *See id.*

134. While, for the reasons I provide, remedying cultural discrimination directed against black entrepreneurs and executives is less feasible than remedying such discrimination against lower-level employees, by making this argument I do not mean to suggest that militant covering cannot be as useful in lower-level positions as it can be in higher-level positions and entrepreneurial endeavors.

circumstances that dictate the covering of blackness are not fair, I have definitively rejected the implication of rights-to-difference discourse that covering is a shameful capitulation to white racism and have sought to connect covering with a meaningful politics, rather than a wish for mere acceptance. In particular, to ascend to the highest positions in American society, as I argued in our discussion of Flagg, some amount of covering race-related traits is likely necessary, and the law is at any rate simply unable to protect against many instances of cultural discrimination occurring in the hiring and working lives of senior level executives, in entrepreneurial endeavors, and in political elections. Thus, if black ambition is to be the equal of white ambition, and if we are to aspire to the highest heights, blackness should be expressed as circumstances dictate and as our wise judgments indicate.

This position is emphatically pragmatic in that it encourages blacks to weigh the costs of covering against its benefits, but normative in both its identification of covering as a means of bringing about the normative ideal of increased black power and presence in the nation's mainstream life as well as its insistence upon the historically unfolding unity, reconciliation as well as brother and sisterhood of black and white Americans. Rather than an exclusive focus on fairness, I have essentially urged that blacks become ever more mindful of Machiavelli's observation that, "the gap between how people actually behave and how they ought to behave is so great that anyone who ignores everyday reality in order to live up to an ideal will soon discover he has been taught how to destroy himself, not how to preserve himself."¹³⁵ While cultural discrimination, as others have argued, can sometimes be an expression of white supremacy, in the spirit of Machiavelli's long looked-to wisdom, I have argued that we must attend to reality and function according to it. Covering must, therefore, be seen as an opportunity to follow another bit of Machiavelli's often sage advice: "[we] must be [like] fox[es] when it comes to suspecting a trap, and [like] lion[s] when it comes to making the wolves turn tail. Those who simply act like a

135. NICCOLO MACHIAVELLI, *THE PRINCE* 48 (David Wootton ed. & trans., Hackett Publishing Company 1995) (1532).

lion [refusing to cover] all the time do not understand their business.”¹³⁶

136. *Id.* at 54.