

Reflections of an "Unqualified Affirmative Action Hire"

Paul Gowder (Northwestern University)

November 1, 2024

With apologies to Professor Carter

Stephen L. Carter
Reflections
of an
Affirmative
Action Baby



37. During the 2019–2020 academic year, Northwestern extended an offer to Paul Gowder, a black professor from the University of Iowa. Although Gowder had produced scholarship and obtained tenure from Iowa in 2017, he was hired by Northwestern because he is black, and it was made clear to the faculty throughout the hiring process that only a black person would be considered for the position that Gowder was chosen for. If Gowder had been white, he would not have been considered for any type of faculty appointment at Northwestern.

Paul Gowder

Last update: October 7, 2024
at paul.gowder@law.northwestern.edu
@gowder10

Academic Positions

- 2023- Professor of Law, Northwestern University Pritzker School of Law, Chicago, IL.
- 2023- Associate Dean of Research and Intellectual Life 9/2023-8/2024
- 2012-2020 Professor of Law and O.K. Patton Fellow in Law, University of Iowa College of Law, Iowa City, IA.
- Associate Professor of Law (part-tenure) 2012-17; Professor of Law (tenure): 2017-2020
- Professor of Law and O.K. Patton Fellow in Law 2019-20, courtesy appointments in Political Science 2012-20, Philosophy 2016-20
- Fall 2019 Visiting Professor of Law, Boston University, Boston, MA.

Education

- 2012 Ph.D., Political Science, Stanford University.
- 2000 J.D., Harvard Law School.
- 1997 B.A., Political Science, California State University, Los Angeles.

Publications

Books

- 2023 *The Networked Leviathan: For Democratic Platforms*, Cambridge University Press.
- 2021 *The Rule of Law in the United States: An Unfinished Project of Black Liberation*, Fordham University Press.
- 2016 *The Rule of Law in the Real World*, Cambridge University Press.

Peer-Reviewed Journal Articles

- 2024 *Flipping Leviathan*, *Journal of Law and Philosophy*, 53(1):1-24.
- 2023 *The Dangers of the American Rule of Law Will Outlast the Next Election*, *Cornell Law Review* 108(1):126-164. (online law review)
- 2023 *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, *Northwestern University Law Review*, 116(2):335-413.
- 2018 *Reinventing the Rule of Law*, *State University of New York Law Journal*, 42(2):133-329.
- 2016 *Democratic Paternalism, not Libertarian Paternalism and Jürgen Habermas*, *Northwestern University Law Review*, 101(4):747-797.

Reviews

- 2015 *Critical Race Science and Critical Race Philosophy of Science*, *Fordham Law Review*, 84(6):1855-1877. (invited contribution)
- 2015 *The Rule of Law Against Sovereign Immunity in a Democratic State*, *Texas Law Review* 101(1):1-47.

Book Reviews

- 2014 *Democracy, Solidarity and the Rule of Law: Lessons from Athens*, *Buffalo Law Review*, 59(1):1-47.
- 2014 *Equal Law in an Unequal World*, *Iowa Law Review*, 99(1):1-101.
- 2014 *Racial Classification and Ascriptive Injury*, *Washington University Law Review*, 92(2):125-196.

Book Chapters

- 2024 *Remote Purchasing and Fundamental Fairness: The Sales and Use Tax Equalization Act*, *Harvard Journal on Legislation*, 40:537-559. (major contribution within Harvard Legislative Research Bureau)
- 2023 *Quasi-Public Executives*, *Yale Law Journal*, 133(5):2254-2278. (co-author with K.A.D. Casson)
- 2008 *The Countermajoritarian Complaint*, *Washington University Law Review*, 77(1):1-33. (invited contribution)

- 2014 *Institutional Corruption and the Rule of Law*, *Los Anales de Ética/The Ethics Forum*, 15(1):66-104.
- 2014 *Institutional Values, or How to Say What Democracy Is*, *Northwest Political Science Review*, 9(1):90-104.
- 2014 *Market Unfreedom*, *Critical Review*, 26(3-4):159-147. (joint-edited, invited contribution, see final version)
- 2012 *Death and Taxes in NFIB v. Sebelius*, *Public Affairs Quarterly*, 27(1):1-14.
- 2012 *The Rule of Law and Equality*, *Law & Philosophy*, 31(1):1-14.
- 2010 *Secrecy as Mystification of Power: Monitoring and Ethics in the Security State*, *US: A Journal of Law and Policy for the Information Society*, 2(1):1-28. (inspired by the Cheney Foundation; updated in *Mark and Gidycz, eds., Understanding Government Secrecy—Class and Contemporary Readings*)

Law Review (Student Edited) Articles

- 2024 *An Old-Fashioned Blackbook Burning*, *Northwestern Law Journal* 108(4):611-639.
- 2021 *Anti-Liberal Rights Retrenchment as a Threat to the Rule of Law*, *Emory Law Journal*, 71(1):179-194.
- 2021 *Constitutional Bookends*, *Georgetown Law Journal*, 111(3):1407-1438.
- 2021 *Wanda's Epistemology, the First Amendment, and the First Amendment*, *William & Mary Bill of Rights Journal*, 30(1):99-104.
- 2020 *In-Civitas*, *Georgetown Law Journal*, 110(1):1-14.
- 2020 *The Rule of Law and the First Amendment*, *William & Mary Bill of Rights Journal*, 29(1):1-14.
- 2020 *Why the First Amendment Should Not Be Accused of Government Terror*, *Georgetown Law Journal*, 110(1):1-14.
- 2020 *Why the First Amendment Should Not Be Accused of Government Terror*, *Georgetown Law Journal*, 110(1):1-14.



Miscellaneous

- 2022 *Law for Black Radical Liberation*; Boston Review Forum XXII (Spring 2022), pp. 117-161.
- 2016 *The Rule of Law*, entry in Oxford Bibliographies in Political Science.
- 2014 *Procedural Due Process*, the Missing Casebook Chapter, open access casebook chapter, released on SSRN.
- 2014 *The Rule of Law*, entry in Sage Encyclopedia of Criminal Justice Ethics.
- 2013 *The Serious Point*, a micro-contribution to the Green Bag/Journal of Law micro-symposium on Orin Kerr's "Theory of Law".
- 2009 "Shopping Malls and the First Amendment," "Mason v. New Yorker Magazine," and "Pruneyard Shopping Center v. Robbins," entries in *Encyclopedia of the United States Constitution (Facts on File)*.
- 2008 "Noerr-Pennington Doctrine," "Pruneyard Shopping Center v. Robbins," and "Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.," entries in *Encyclopedia of the First Amendment*, (Congressional Quarterly Press).
- 1999 *Recent Developments: Antitrust*, 27 *Journal of Law, Medicine, and Ethics* 278 (student comment).

Grants, Awards, Honors

- 2022 Dorothy Ann and Clarence L. Ver Steeg Distinguished Research Fellowship Award, Northwestern University.
- 2020- American Law Institute, elected member (beginning December 2020).
- 2020-1 Knight Foundation, grant funding (\$100,000) to support research that applies principles from constitutional law and institutional political science to the challenges of platform governance.
- 2014-5 Institute for Advanced Study, Princeton, NJ: Member (School of Social Science).
- 2014-5 Law and Public Affairs Program, Princeton University (LAPA/Perkins Fellow, offered but declined).
- 2014-5 Edmund J. Safra Center for Ethics, Harvard University: Network Fellow.
- 2014 Montreal Political Theory Manuscript Award, Groupe de recherche interuniversitaire en philosophie politique de Montréal (for *The Rule of Law in the Real World*), *Revue de philosophie politique de Montréal*.

Book Reviews

- 2023 *Unfulfilled Review of Cass Sunstein and Adrian Vermeule, Law and Leviathan: Redesigning the Administrative State*, *Law and Politics Book Review*, 30(1):13-42.
- 2023 *Unfulfilled Review of Federico Cingolati, Creating a Constitution: Law, Democracy and Growth in Ancient Athens*, *Law and Politics Book Review*, 29(1):130-141.
- 2023 *Institutions and Instrumentalization in International Law (Review of Tim Donnet and Criddle, Fabricates of Humanity)*, *Texas Law Review*, 55(2):361-398. (Texas Law Review Book Review Bonus)
- 1989 *Book Note: Data Mining/The Transparent Society*, *Harvard Journal of Law and Technology*, 11(2):513-521. (invited book note, fairly recent)
- 1989 *Book Note: Losing the Vote, the Impact of Prisoner Disenfranchisement*, *Harvard Human Rights Journal*, 11:104-105. (invited book note, fairly recent)

Forthcoming (All categories)

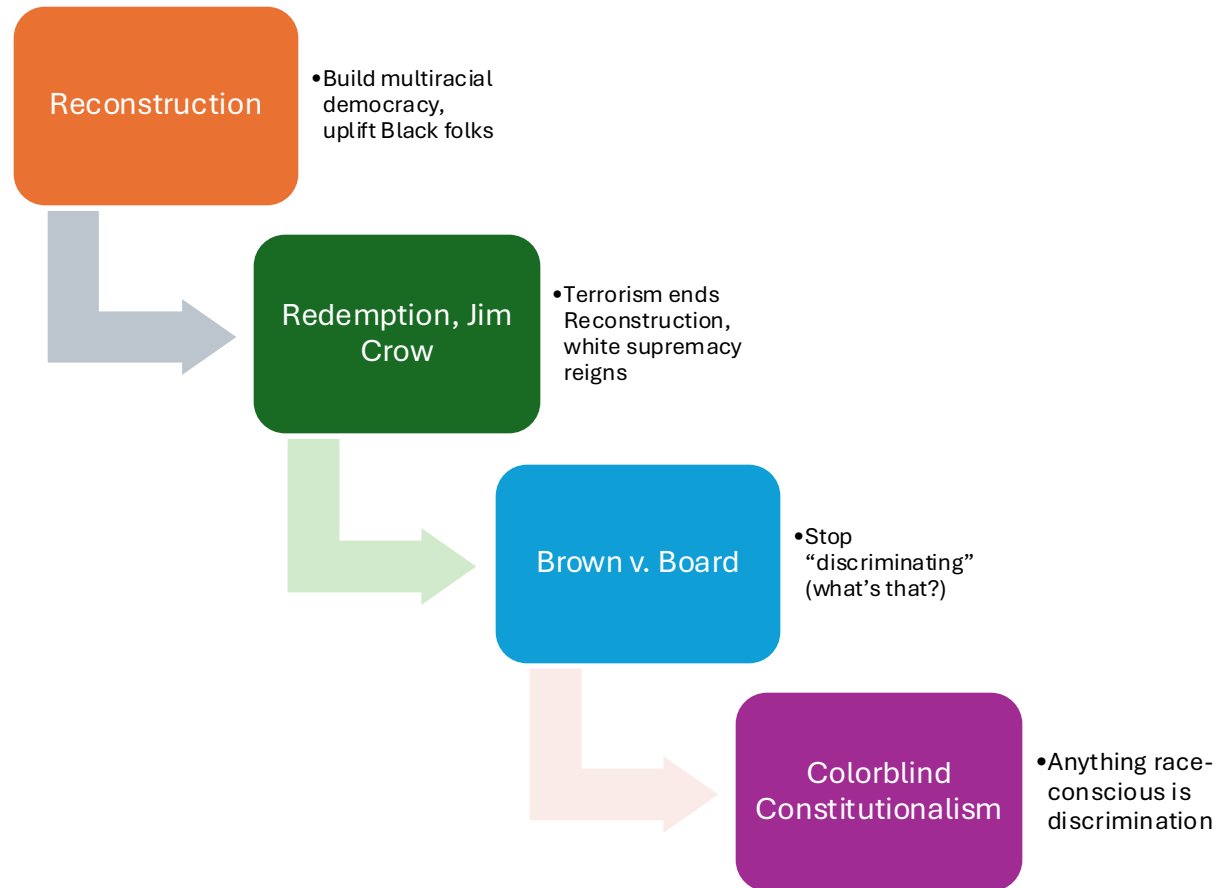
(And you should see the garbage they said about the *Black women*.)

So how did we get from *Brown v. Board of Education* to a Trump lawyer* suing Northwestern University for hiring too many Black folks?

well...

* Jonathan Mitchell, who in addition to representing Trump and suing Northwestern is notorious for being the guy behind Texas's S.B. 8, the "bounty" law letting total randoms sue anyone involved in an abortion. He also graduated from the University of Chicago law. Charming fellow, I'm sure.

Abbreviated history of the 14th Amendment



What's "Discrimination?" The Trojan Horse

Brown v. Board

- Stop "discriminating" (what's that?)

Colorblind
Constitutionalism

- Anything race-conscious is discrimination

We might have thought we knew what discrimination was

Loving v. Virginia, 388 U.S. 1 (1967)

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1965 decision in *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.* at 90, 87 S.E.2d at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

But 40 years later...

The apotheosis of
the so-called
“anti-
classification”
(colorblind)
approach,
prohibiting
voluntary busing to
create integrated
schools

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)

The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I*, O. T. 1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: “We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” Tr. of Oral Arg. in *Brown I*, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was “[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*,” and what was required was “determining admission to the public schools *on a nonracial basis*.” *Brown II*, *supra*, at 300–301 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis? Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” *Brown II*, 349 U. S., at 300–301, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

The case for classification vs. subordination:

- Sociological uncertainty (is racial injustice always one way? What about non-racial kinds of discrimination?)
- Stigma, stereotyping, tokenization, distraction (cf. Carter)
- Brutish “equal means same” formalism

These are all respectable critiques of racially progressive policies (though I think there are good replies to them)

But lately things have gotten dark...

FIRST AMENDED COMPLAINT

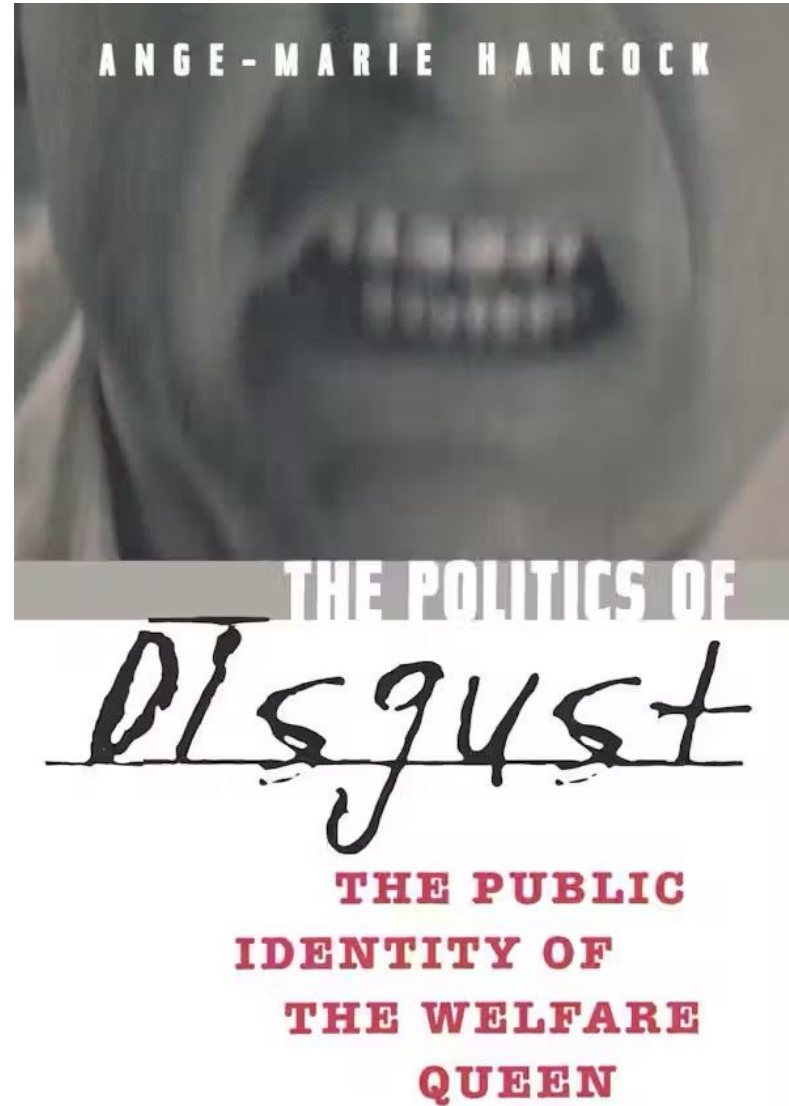
Faculty hiring at American universities is a cesspool of corruption and lawlessness. For decades, left-wing faculty and administrators have been thumbing their noses at federal anti-discrimination statutes and openly discriminating on account of race and sex when appointing professors. They do this by hiring women and racial minorities with mediocre and undistinguished records over white men who have better credentials, better scholarship, and better teaching ability. This practice, long known as “affirmative action,” is firmly entrenched at institutions of higher learning and aggressively pushed by leftist ideologues on faculty-appointment committees and in university DEI offices. But it is prohibited by federal law, which bans universities that accept

What the...?

FIRST AMENDED COMPLAINT

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We've seen this
before



Racist caricatures of the undeserving Black, the bad Black



Willie Horton 1988 Attack Ad



Willie Horton

MORE VIDEOS

0:13 / 0:32

CC Settings YouTube

nytimes.com

U.S. | Michael Brown Spent Last Weeks Grappling With Problems and Promise

New York Times

Michael Brown, 18, due to be buried on Monday, was no angel, with public records and interviews with friends and family revealing both problems and promise in his young life. Shortl...

Is it affirmative action and other race-conscious progressive state action that creates a stigma ... or is the stigma created by the revanchist white supremacist attack on any policy of inclusion?

Three different ways of seeing AA

- Individual: someone (maybe not *deserving*) is benefited, someone else is harmed
- Internal: there are institutional reasons for a school, employer, etc., to shape its composition
- External: *Social Justice*[™]

Three different ways of seeing AA

- Individual: someone (maybe not *deserving*) is benefited, someone else is harmed
 - Conservative courts love to focus on this dimension, supposing that there is an externally given *merit hierarchy* that AA upsets
- Internal: there are institutional reasons for a school, employer, etc., to shape its composition
- External: *Social Justice*[™]

Three different ways of seeing AA

- Individual: someone (maybe not *deserving*) is benefited, someone else is harmed
- Internal: there are institutional reasons for a school, employer, etc., to shape its composition
- External: *Social Justice*[™]
 - Conservative public commentators love to focus on this one (Chris Rufo, etc.): the imaginary is that schools are filled with sinister CRT practitioners trying to create fully automated luxury gay space communist Wakanda (*in reality, it's mostly just bureaucrats bureaucrating*)

Three different ways of seeing AA

- Individual: someone (maybe not *deserving*) is benefited, someone else is harmed
- Internal: there are institutional reasons for a school, employer, etc., to shape its composition
- External: *Social Justice*[™]
 - There are some real social justice rationales out there, but often they're remedial.
 - e.g. Evanston's reparations program
 - some remedial programs are still allowed...?

Three different ways of seeing AA

- Individual: someone (maybe not *deserving*) is benefited, someone else is harmed
- Internal: there are institutional reasons for a school, employer, etc., to shape its composition
 - Here's where all the action is. Diversity rationale quintessential example, but also possible First Amendment rationales, rationales rooted in error theory of simplistic credentialism (GPA misses the student who worked 2 jobs, etc.)
- External: *Social Justice*[™]

Focusing on internal defangs “deservingness”

- Critique of meritocracy: merit-based challenges assume an externally given ranking. But ranking is actually relative to internal goals
 - E.g., why should selective high school want student with highest G.P.A. over the cello player?
- But: the most effective right-wing challenges can then shift to *internal critique*
 - This is why levying plagiarism allegations against university leaders have been so effective: focused on consensus internal standard

Conclusion: Schools at all levels need to develop robust accounts of *what they're doing*, their goals and their institutional teleologies. Combine with robust social scientific accounts of how it works.

This can be expected to differ: high schools have different goals from colleges, research universities have different goals from liberal arts colleges, religious institutions have different goals from secular institutions.

(Part of the reason that religious exemptions from even equality-focused law seem more plausible sometimes is because we know they have a sincere and well-developed *telos*)

Concrete examples

- Secular private institutions: lean in much harder on First Amendment rights to build an effective classroom, and, at the university level, a lab
 - Develop and deploy empirical research about things like pedagogy and race
- School districts and municipalities: incremental pushing back on *Parents Involved* with more robust account of sociological consequences of past de jure discrimination (also useful for Evanston)
 - We have to fix SCOTUS's bizarre allergy to social science (see also partisan gerrymandering, death penalty)
- Religious institutions can actually pursue social justice (but caution about expanding religious exceptionalism)—Quakers a key example.

Thank you!

- Further reading:
 - Paul Gowder, *Standpoint Epistemology, the First Amendment, and University Affirmative Action*, 32 WILLIAM & MARY B. OF RTS. J. 979 (2024) offers a case for university affirmative action based on the consensus *telos* of doing excellent teaching and research.
 - Paul Gowder, *Why Majority Religions Should Not Be Accommodated*, 108 IOWA L. REV. 2153 (2023) highlights the dangers of religious accommodations in particular, which limits the wisdom of relying on a religious *telos*.