# TOP Down?

*The University of Wisconsin-Madison's Racially Discriminatory Faculty Hiring Program after* Students for Fair Admissions


**Summary**

- **The Supreme Court's decision in *Students for Fair Admissions* reaffirmed that race-based governmental decision-making is reserved for the rarest of circumstances and then only under tight controls**

- **Despite the Constitution's clear disapproval of the use of race by government entities, the University of Wisconsin-Madison operates a highly race-conscious faculty hiring initiative called the Target of Opportunity program**

- **Documents obtained by the Center for Investigative Oversight exposing the inner workings of this program disclose racial balancing and stereotyping, among other problems, as faculty candidates of targeted races are given a special advantage over supposedly non-diverse peers**

- **Wisconsin's public deserves full transparency regarding the operation of the TOP program and its constitutionality; if it cannot be defended, it should be ended**


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"As recently as five years ago, our department had only one faculty member who identified as a person of color. Through targeted recruiting and lucky opportunities, roughly 30 percent of our faculty now so identify."

– TOP Proposal, Department of Gender and Women's Studies, University of Wisconsin-Madison

"We are asking for a [waiver from the usual hiring process] because of a nationwide shortage of PhD trained economists from minority groups. Hiring, retaining, and promoting minority scholars in Ag & Applied Economics and Economics is difficult. . . . PhD economists with Native American ancestry are even rarer and harder to hire in a traditional hiring process. Talented and ambitious Native American students tend to specialize in law and humanities rather than quantitative fields like agricultural and applied economics."

– TOP Proposal, Department of Agricultural & Applied Economics, University of Wisconsin-Madison

"The loss of [a particular minority professor] further reduces the number of non-White faculty [in our department]. . . . [O]ur department has committed to hiring a cohort of 6 faculty of color. We believe this cohort approach is essential for both recruitment and retention of scholars of color."

– TOP Proposal, Department of Psychology, University of Wisconsin-Madison

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On June 29, 2023, the Supreme Court of the United States issued a landmark 6-3 decision concluding that the admissions systems used by Harvard College and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment because of their unjustifiable use of race in the decision-making process.[1]

In the wake of *Students for Fair Admissions v. President and Fellows of Harvard College* ("*SFA*"), universities across the country are reassessing their admissions policies. But *SFA*'s pronouncements on the Equal Protection Clause clearly extend beyond admissions programs. The Supreme Court once again reaffirmed in *SFA* that the use of racial classifications *as a general matter* is not permitted outside of the narrow circumstances it identified.

This report calls attention to one unconstitutional race-based Wisconsin program that can no longer stand: the University of Wisconsin-Madison's ("UW") Target of Opportunity Program (the "TOP program"). The TOP program permits UW to hire and specially fund applicants to the school's faculty at least partly on the basis of race. Documents obtained by the Center for Investigative Oversight discloses blatant, widespread, and pernicious racial classification of faculty applicants by UW employees. It is difficult to reconcile the program with Supreme Court case law.

This report begins with a summary of *SFA* for context, then discusses the TOP program and its operation in greater detail.

## ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College***

The "'core purpose' of the Equal Protection Clause," Chief Justice Roberts explained in his majority opinion for the Court in *SFA*, is "do[ing] away with all governmentally imposed discrimination based on race": "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[2] The Court had accordingly allowed governmental racial classifications only in three limited circumstances to date: (1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" (as opposed

[1] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, No. 21-707, 2023 WL 4239254 (June 29, 2023).
[2] *Id.* at *11-*12 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)) (alteration in original).

to more general contexts, such as a desire "to remedy the effects of societal discrimination"; (2) "avoiding imminent and serious risks to human safety in prisons, such as a race riot"; and (3) in the context of university admissions.[3]

Under the third exception, the one claimed by Harvard and UNC in defense of admissions policies that allowed staff to consider the race of student applicants, the Court allowed use of race-based governmental action "only within the confines of narrow restrictions."[4] The Court applied the most stringent review to Harvard and UNC's policies—both of which explicitly allowed admissions staff to consider race—and found them lacking in three major respects.

First, the interests the schools promoted as justifying their race-based actions—various "educational benefits" like "better educating . . . students through diversity," were not "sufficiently coherent" in that no Court could measure whether and when those goals had been reached.[5] Likewise, the admissions policies were not actually carefully designed to achieve those goals, given that they focused on avoiding underrepresentation of "imprecise," "arbitrary," and/or "undefined" racial categories among the student body, namely "Asian," "Native Hawaiian or Pacific Islander," "Hispanic," "White," "African-American," and "Native American."[6]

Second, the admissions policies impermissibly used race as a "negative" and a stereotype. With respect to the former, for example, "Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard."[7] With respect to the latter, the schools' programs operated on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue"—that "there is an inherent benefit . . . in race for race's sake."[8]

Third, and finally, the Court observed that neither admissions program contained a "logical end point"—a time when racial discrimination to achieve the desired educational goals would no longer be necessary.[9] In particular, the Court rejected the schools' attempt to tie the necessity of their programs to the percentage share in each class of certain underrepresented minorities as "patently unconstitutional" "[o]utright racial balancing."[10]

Ultimately, Harvard and UNC had, by allowing race to enter into admissions decisions, "concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice."[11]

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[3] *Id.* at *12, *21.
[4] *Id.* at *6-*7, *15.
[5] *Id.* at *15-*16.
[6] *Id.* at *16-*17.
[7] *Id.* at * 17.
[8] *Id.* at *18 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).
[9] *Id.* at *19 (quoting *Grutter*, 539 U.S. at 342).
[10] *Id.* at *21 (quoting Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 311 (2013)).
[11] *Id.* at *23.

## The University of Wisconsin-Madison's Target of Opportunity Program

UW describes its TOP program as "enabl[ing] academic departments to hire exceptional faculty members who would greatly enhance the quality and diversity of the department."[12] The program "is designed to specifically support the recruitment of outstanding faculty members among historically underrepresented groups, with a particular emphasis on race, ethnicity and gender (in disciplines where women are underrepresented)."[13]

In practice, the TOP program creates a two-track system by which departments can hire "diverse" candidates outside of the normal hiring process, giving the candidates a leg up over non-diverse candidates. An academic department that identifies a prospective faculty hire who is diverse can submit a proposal with the Office of the Provost and Division of Diversity, Equity, and Educational Achievement to obtain a waiver from the need to formally post a job, which would permit others to apply and compete, and hire the candidate directly. If the diverse hire is identified during an "already-authorized faculty recruitment," the department can likewise submit a proposal to separately hire a candidate who has applied for the posting but does not match listing requirements.[14] If approved, UW central administration "provides 100% salary support (up to $90,000) for six years for assistant professors and five years for tenured professors," and "50% salary support (up to $45,000)" thereafter.[15]

Although UW summarizes the TOP briefly on its website, the CIO wanted to see how the program actually operates and obtained records of all TOP proposals submitted last year (2022). The results show a blatantly race-conscious faculty hiring process.

## The 2022 TOP Proposals

Although at times UW publicly purports to define diversity with respect to the TOP program broadly,[16] the proposals obtained show that the vast majority highlight race at least in part. This was not surprising given UW's announced focus on "race and ethnicity." What was surprising was the candor with which departments and schools across UW openly sorted individuals by racial characteristic, at times with attempted mathematical precision, discussed their desire to increase the population of particular races "for race's sake,"[17] and engaged in offensive stereotyping. Notable findings from the records, some of which are covered in the CIO's *Wall Street Journal* op-ed on the topic, include:

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[12] Office of the Provost, *TOP Program*, University of Wisconsin-Madison (2023), https://facstaff.provost.wisc.edu/faculty-diversity-initiative/.
[13] Käri Knutson, *Enhancement to faculty recruitment program to help diversify faculty*, University of Wisconsin-Madison (Sept. 26, 2018), https://news.wisc.edu/enhancement-to-faculty-recruitment-program-to-help-diversify-faculty/.
[14] *TOP Program*, *supra*.
[15] *Id.*
[16] *See* Knutson, *supra*.
[17] *SFA* at *18.

**Conduct approximating racial balancing was common.** Departments requesting TOP approval frequently discussed a desire to increase minority groups or particular minority groups simply for the sake of having more of that race present, often citing to general numbers like the percentage of members of the race in the community. For example, the School of Medicine and Public Health, when asking for a TOP hire, argued that "[n]ationwide, there are only 4.2% of dermatologists of Hispanic origin compared with 16.3% in the general American population." UW's School of Business provided a table showing faculty race by percentage with imprecise categories like "Asian," "White," and "African American." The School indicated that it wanted faculty and student racial diversification to proceed "at the same rate." UW's Department of Gender and Women's Studies boasted: "As recently as five years ago, our department had only one faculty member who identified as a person of color. Through targeted recruiting and lucky opportunities, roughly 30 percent of our faculty now so identify."

**UW-Madison staff engaged in offensive stereotypes.** In *SFA* the Supreme Court explained that it had "rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike,'"[18] and that use of that assumption in admissions decisions was constitutionally impermissible. But stereotypes occurred often in UW TOP proposals. A proposal from the Department of Human Development and Family Studies noted that "students of color constituted 25% of HDFS majors" and that it was "imperative that the diversity of HDFS faculty keeps pace . . . to ensure student retention and relevant mentoring." An economics department highlighted a "unique opportunity to hire a quantitatively minded Indigenous scholar," explaining that as "[t]alented and ambitious Native American students tend to specialize in law and humanities," the hire would "help encourage Indigenous students to study applied economics." UW's Department of Psychology asserted that its commitment to "hiring a cohort of 6 faculty of color" was "essential for both recruitment and retention of scholars of color." The same type of thinking undergirds each of these comments: students will best respond only to professors who share their skin color.

**It's unclear to what extent merit is being sacrificed in the name of diversity.** One obvious concern when faculty members are chosen on the basis of characteristics other than merit is whether merit is being sacrificed in the pursuit of those other characteristics. Although UW publicly notes that TOP proposals must discuss a "candidate's excellence in teaching, research, and service,"[19] records released give some cause for concern. For example, when one proposal asked for help hiring a minority candidate, it observed that while it had had an open vacancy, the department gave it to the other finalist. Another request acknowledged that the TOP candidate's "publication record [was] . . . shorter than one would hope for scholars of his vintage," but asked for the waiver anyway "because of a nationwide shortage of PhD trained economists from minority groups." Would the same candidate have been recommended for hire if he were not a minority?[20]

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[18] *Id.* at *18 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

[19] *TOP Program*, *supra*.

[20] Although the CIO does not have records of ultimate decisions by the Office of the Provost, most individuals featured in TOP proposals appeared to hold positions at UW at the time of printing.

## The Legislature Should Investigate and Ultimately Halt the Operation of the TOP Program

The Supreme Court stressed in *SFA* that its "acceptance of race-based state action has been rare,"[21] and as noted above permitted in just three circumstances to date. None appear to justify UW's TOP program.

First, the Court has permitted the use of race. to "avoid[] imminent and serious risks to human safety in prisons, such as a race riot."[22] Obviously this has no application at UW. Second, the Court has allowed the government to consciously rely on race when "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."[23] Theoretically, this might be able to justify TOP-like activities in targeted areas of the university if UW's program was sufficiently narrowly tailored to address historical, discriminatory practices. But UW does not purport to be engaged in this kind of precise corrective activity and indeed the records uncovered show the opposite. The Court has said time and again that the state may not seek to "remedy the effects of societal discrimination through explicitly race-based measures";[24] but it is at best this type of generic goal, phrased as vague concerns about current "underrepresentation," that appears to drive many of the TOP proposals.

Finally, the Court has allowed the consideration of race in the student admissions context. Assuming that this circumstance could be applied in the faculty context, as already shown above, the TOP program suffers from the same flaws that rendered Harvard's and UNC's programs unconstitutional in *SFA* such as unmeasurable goals, racial stereotyping, racial balancing, and a lack of any termination date.

Put more succinctly, the TOP program appears to violate the Constitution. This underscores the need for prompt legislative action. The Legislature should demand full transparency from UW regarding its race-based hiring practices and consider questioning UW leadership like the Office of the Provost and the Division of Diversity, Equity, and Educational Achievement. Assuming UW fails to justify the constitutionality of the TOP program—and it is difficult to see how it could—it should be ended. Wisconsin taxpayers should not be required to subsidize a university that engages in open and pervasive racial discrimination in hiring.

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*Because the records recovered by the CIO are voluminous and contain substantial personal data, the CIO is providing them on request only.*

*For more information or to request the records, contact Anthony LoCoco, Chief Legal Counsel and Director of Oversight at IRG, at al@reforminggovernment.org.*

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[21] *Id.* at *12.
[22] *Id.*
[23] *Id.*
[24] *Id.* at *21.