

Anthony LoCoco: Affirmative action on campus goes beyond admissions

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The Supreme Court's decision in *Students for Fair Admissions v. Harvard* reaffirmed the court's view that race-based governmental decision-making as a general matter is hardly ever permissible. Universities hoping to escape constitutional scrutiny won't be able merely to change their admissions practices. Affirmative action in faculty hiring is the next frontier in Equal Protection Clause litigation.

The University of Wisconsin-Madison, the flagship of the UW system, proudly operates the so-called Target of Opportunity Program (TOP). It allows academic departments to obtain waivers from the requirement to post job positions publicly and instead hire "diverse" candidates directly. The university provides the irresistible incentive of salary funding for approved hires. Public records of internal TOP requests obtained by my group, the Institute for Reforming Government, show blatant, widespread and pernicious racial classification of faculty applicants that is difficult to reconcile with the Supreme Court's recent decision.

Similar to Harvard's and the University of North Carolina's admissions policies, the actions of several UW departments approximated racial balancing, which the court called "patently unconstitutional." The university's business school supported its proposal for TOP funding with a helpful chart showing faculty race by percentage with categories such as "Asian," "White," and "African American" and expressed a desire that faculty and student racial diversification proceed "at the same rate." The school of medicine and public health argued that a targeted hire was necessary in part because "there are only 4.2% of dermatologists of Hispanic origin compared with 16.3% in the general American population."

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“As recently as five years ago,” boasted the department of gender and women’s studies in another TOP proposal, “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.” Perhaps those recruits whose race unlocked a separate hiring track felt lucky. It’s doubtful the rest of the applicants did.

The Supreme Court reminded Harvard and UNC that the court 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,’ ” and that the application of that worldview in admissions decisions was constitutionally impermissible. But such stereotypes were frequent in TOP proposals.

Staff in the department of human development and family studies, for instance, asked for TOP approval to hire a minority applicant because 25% of departmental majors were “students of color” and it was “imperative” that the faculty diversity was similarly diverse “to ensure student retention and relevant mentoring.” The economics department noted a “unique opportunity to hire a quantitatively minded Indigenous scholar” given that “talented and ambitious Native American students tend to specialize in law and humanities.” The hire would “help encourage Indigenous students to study applied economics.” Similarly, the psychology department 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 mantra is clear: Students will adequately respond only to professors who share their skin color.

These faculty affirmative-action programs don’t stand up well against the Supreme Court’s recent decision or the many cases it builds upon. The high court reiterated that its “acceptance of race-based state action has been rare,” writing that it had previously permitted it in the admissions context or with the goal of “remediating specific, identified instances of past discrimination that violated the Constitution or a statute.” But the TOP program bears all the same flaws that sank race-based admissions policies: amorphous goals, arbitrary racial categories, racial stereotyping, the penalization of disfavored races, and the lack of a logical end point. That door is now closed. And while a university could theoretically seek to remedy actual instances of past discrimination through a carefully designed program, that isn’t what is happening on most American campuses.

Wisconsin Assembly Speaker Robin Vos has vowed that the Legislature will re-examine the state's numerous race-conscious laws in light of the Supreme Court's decision. The Republican and his allies are withholding \$32 million in funding from the University of Wisconsin system until it eliminates its diversity, equity and inclusion projects. Expect more litigation if TOP and similar programs aren't forbidden by law. The Supreme Court has made clear that it takes seriously the Equal Protection Clause's "core purpose" of abolishing "all governmentally imposed discrimination based on race." Faculty diversity programs should be the next target for those seeking to vindicate the Constitution.

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