Scalia's comments were offensive and racist

Erwin Chemerinsky is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law. He is the author of "The Case Against the Supreme Court" (Viking 2014).

Justice Antonin Scalia’s comments at the oral arguments last week in Fisher v. University of Texas, Austin were offensive and racist. On Dec. 9, while questioning Gregory Garre, who was defending the University of Texas’ affirmative action program, Scalia said: "There are those who contend that it does not benefit African-Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a less - a slower-track school where they do well. One of the briefs pointed out that most of the black scientists in this country don’t come from schools like the University of Texas. They come from lesser schools where they do not feel that they’re being pushed ahead in classes that are too fast for them."

There is no other way to read Scalia’s statement except as saying that "African-Americans" - and notice he did not qualify this even by saying "some" - are better off going to "lesser schools" than elite ones like the University of Texas because they should be at "slower track schools" where they do not feel pushed "too fast." Generalizing about an entire race and saying that it is less intellectually able is the essence of racism. It is astounding that a Supreme Court justice in 2015 would think, let alone say, such a thing.

The argument that Scalia was referring to is the so-called claim of "mismatch." This is the hypothesis that affirmative action causes minority students to attend "better" schools than those to which they otherwise would be admitted and that they then do less well there than they would at less prestigious schools. The conclusion drawn is that expressed by Scalia: Minority students are better off at "slower track schools."

There are countless problems with this hypothesis, most importantly that the evidence does not support it. Many have exposed the methodological flaws in studies that purport to document the mismatch theory and many studies have shown that it is simply not true. University of Michigan law professor and social scientist Richard Lempert filed a brief in the Supreme Court focusing on the mismatch hypothesis and concluded: "[T]he overwhelming weight of the evidence suggests that affirmative action, as currently practiced, does not harm minorities through academic mismatch, and may in fact benefit students who might appear overmatched. If there is a mismatch problem it is that minorities are more likely to be in situations of ‘undermatch’ - that is attending schools that are less selective than those they could be admitted to - than in situations of overmatch."

There is an easy explanation for this: Grades and test scores are a very imprecise
measure of performance and those accepted through affirmative action are qualified and capable of succeeding and doing the work. In law schools, for example, the Law School Admissions Test has only a weak correlation to first year law school grades, and no correlation to upper-level law school grades, let alone to success in the profession. The mismatch hypothesis assumes that students admitted through affirmative action with lower test scores are less likely to succeed, but the evidence does not support this. Moreover, at any school, the pool of those qualified and capable of succeeding is much greater than the number who can be accepted. Affirmative action is choosing among those who have shown the ability to succeed, and hopefully excel, at the school.

The mismatch theory also fails to account for the life-long benefits of attending a more prestigious school. I know that attending Harvard Law School gave me a very marketable diploma and made it easier for me to get hired out of law school as an attorney at the Honors Program at the U.S. Department of Justice and subsequently as a law professor. Those opportunities are available to those attending less prestigious law schools, but less so (and for legal academia, much less so). It is not coincidence that all nine of the Supreme Court justices went to Harvard or Yale for law school.

Scalia’s comment is particularly offensive because neither he nor others who put forth the mismatch theory ever complain or express concern when it is white students who are admitted to schools that are more elite than their grades and test scores warrant. Colleges long have given preference in admission to students whose parents or grandparents went to that school or whose family has donated significant funds. In fact, studies have shown that more white students benefit from such “legacy” preferences than the number of minority students who benefit from affirmative action. Yet, concern is not raised about their being mismatched and how they would be better off at “slower” schools.

Scalia’s comments at the oral arguments in Fisher, and the mismatch theory more generally, are a rationalization for eliminating affirmative action and for accepting the dramatic decrease in African-American and Latino students that would result. Because of the legacy of racism and continued dramatic inequalities in K-12 education, affirmative action remains essential. There are still fewer African-American students at UCLA than before Proposition 209 eliminated affirmative action in California in 1996. The mismatch hypothesis lets Scalia and opponents of affirmative action feel sanguine about that result by saying that what they are doing is really better for minority students. This paternalism is astounding even if it were based on evidence, which it is not.

Those who oppose affirmative action, like Scalia, must sustain one of two arguments: either that diversity in higher education does not matter or that it can be achieved at this point in time without affirmative action. Neither of these claims is sustainable.

Colleges and universities long have recognized the crucial importance of having a diverse student body. It always has been easier for an applicant from Montana or Wyoming to get into Harvard or Yale than one from Boston or New York. Schools always have taken students with lower grades and test scores who have exceptional skills or unusual life experiences. Diversity prepares all students for the multi-cultural world in which they will live and work. I have taught classes on constitutional law and criminal procedure in K-12 education, affirmative action remains essential. There are still fewer African-American students at UCLA than before Proposition 209 eliminated affirmative action in California in 1996. The mismatch hypothesis lets Scalia and opponents of affirmative action feel sanguine about that result by saying that what they are doing is really better for minority students. This paternalism is astounding even if it were based on evidence, which it is not.

Nor is there any other way to achieve racial diversity at this point in time without affirmative action. This is why colleges and universities have such programs. Some argue instead for affirmative action based on social class rather than race. Although well intentioned, the problem is that class-based affirmative action does not yield racial diversity. The percentage of African-Americans and Latinos who are economically disadvantaged is greater than the percentage of whites, but the number of whites who are disadvantaged is far greater than the number of minority students.

None of this matters to Justice Scalia. But hopefully a majority of the Supreme Court will reaffirm what the court repeatedly has held for several decades: Colleges and universities have a compelling interest in there being a diverse student body and may continue to consider race as one factor among many in admissions decisions to benefit minorities and enhance diversity.

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