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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

Tuesday, December 15, 2015

Litigation
Investigative reporter fends off subpoena for unpublished research notes
A Central District magistrate judge denied a motion to compel a reporter to turn over any unpublished notes to a coal company defendant in a class action over a 50-year-old mining disaster.

Corporate
Superior National liquidation may conclude in 2018
After 15 years of liquidation proceedings, the California Insurance Commissioner has said the Superior National Insurance Co. estate is expected to close out by 2018.

Mergers & Acquisitions
Skadden tops deal advising with over $1 trillion this year
Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates breaks record in 2015 while advising chemical giant DuPont in a possible $130 billion merger with rival Dow Chemical Co.

Litigation
Riverside County jury awards $10 million to ousted company owner
A Riverside County jury has awarded more than $10 million to a San Diego-based plaintiff whose shares in a skincare company were dissolved without its other owners consulting about the action or paying him.

Bar Associations
Seven attorneys compete for two State Bar board seats
Seven attorneys will compete next year for two seats representing Northern California on the State Bar's Board of Trustees

Litigation
Homeowners settle copper pipe suit for $7M
A $7 million settlement was approved Friday between William Lyon Homes Inc and nearly 450 homeowners over defective copper pipes causing leaks in Orange County.

U.S. Supreme Court
Supreme Court denies review

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 to almost all-white classes and those with a substantial number of students of color. Discussions of topics like racial profiling by the police are vastly different.

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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Without comment, the U.S. Supreme Court turned down an appeal from Los Angeles City Attorney Mike Feuer to review a verdict against two LAPD officers accused of excessive force in the shooting of an unarmed and fleeing suspect.

Litigation
Appellate court stays Riverside County debt-relief deal
A state court of appeal put a hold on a debt-relief deal between Riverside County and several of its cities Friday, giving some more time for a battle over the county's discretionary authority to play out.

Preliminary proceedings begin in Berkeley balcony collapse case
Judge rules Monday that 13 separate suits will be bundled into a single, complex case

Corporate Counsel
Michael J. Callahan
Vice President, General Counsel and Secretary, LinkedIn Corp., Mountain View

Mergers & Acquisitions
Dealmakers
A roundup of recent transactions across the state and the lawyers involved.

U.S. Supreme Court
Scalia's comments were offensive and racist
Generalizing about an entire race and saying that it is less intellectually able is the essence of racism. By **Erwin Chemerinsky**

California's experience shows importance of affirmative action
Life or death for campus diversity? The U.S. Supreme Court is poised to decide whether strategies to ensure diversity on university campus have survived long enough. By **Monte Cooper and Kimberly Rapp**

***Shapiro* will affect election law docket for years to come**
On Dec. 8, the U.S. Supreme Court decided the election law case, *Shapiro v.* McManus. Coming less than five weeks after the case was argued, it was little surprise that the ruling was unanimous. By **Rajeev Muttreja**

Criminal
State high court clarifies proper hearsay use in mentally disordered offender hearings
Last week, the California Supreme Court said an expert could not rely on hearsay reports to prove a defendant committed a commitment offense under the state's Mentally Disordered Offender Act. By **Frank Loo**

He is the author of "The Case Against the Supreme Court" (Viking 2014).

International

A conversation with a PNG Supreme Court justice

Last month, I found myself in Papau New Guinea's remote Hela province. Forty years after independence, PNG is still steeped in history, mystery and myth. By **Julie L. Kessler**

Judicial Profile

Terry Truong

Superior Court Commissioner Los Angeles County (Monterey Park)

U.S. Supreme Court

Supreme Court strengthens Federal Arbitration Act in split decision

The U.S. Supreme Court bolstered its landmark opinion in Concepcion Monday with a 6-3 decision that further holds the Federal Arbitration Act preempts state rules that render class-arbitration bans unenforceable.

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