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Echoes from the Segregationist Past at Oral Argument

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The Supreme Court heard oral arguments in Fisher v. University of Texas, Abigail Fisher's constitutional challenge to diversity-promoting admissions initiatives at the University of Texas. Justice Antonin Scalia's remarks during oral argument in that case have received widespread attention. Yet, the most remarkable aspect of his statements has escaped notice: knowingly or not, Justice Scalia echoed a segregationist litigation theory once crafted to beat back civil rights progress.

When the University's lawyer urged that barring admissions officials' consideration of race in any way whatsoever would lead to plummeting diversity, Justice Scalia did not disagree. He instead intimated that such consequences would be desirable. Scalia said:

"There are . . . those who contend that it does not benefit African Americans to 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 slower-track school where they do well."

Justice Scalia apparently was influenced by a "friend of the court" brief touting a "mismatch" theory. This theory argues that affirmative action beneficiaries would do better attending "lesser" schools rather than more elite schools for which they are allegedly "mismatched." On its own terms, the theory is questionable. Thus, a lawyer who filed an opposing brief told the New York Times of "a vast body of social science evidence that shows exactly the opposite of what the mismatch theory purports to show."

More importantly, Justice Scalia's rhetoric of "concern" for affirmative action beneficiaries loudly echoes half-century old arguments. In the late 1950s and early 1960s, segregationists generated a litigation strategy resembling Justice Scalia's line of thought: they pointed to "science" supposedly establishing the inferiority of African American students, and used it to argue they would be "better off" segregated.

Segregationist lawyers pressed this theory in the 1963 case of Stell v. Savannah-Chatham County Board of Education. African American parents seeking desegregation of Savannah's schools originally filed the case. Segregationist lawyers entered the case on behalf of white parents. They asserted that "social science" evidence showed that "differences in specific capabilities, learning progress rates, mental maturity, and capacity for education in general" meant that desegregated schools "would seriously impair the educational opportunities of both white and Negro and cause them a grave psychological harm." This litigation theory was developed by segregationists who exploited ideas—discredited even then—now known as "scientific racism." The group's self-appointed spokesperson, Carleton Putnam, elaborated the theory in a book popularized by the White Citizens Council, entitled "Race and Reason." The segregationist trial court judge hearing the Stell case briefly endorsed the theory, but the United States Court of Appeals rejected his reasoning, and the litigation effort stalled soon after.

It was therefore startling that in 2015 a Justice of the Supreme Court of the United States even briefly sounded like the segregationists of 1963, who claimed that Brown v. Board of Education's desegregation mandate forced them to talk about African Americans' supposedly inferior intellectual capabilities. This is not to say that Justice Scalia shares the reprehensible philosophy that underpinned the Stell litigation. Nonetheless, his suggestion that African Americans as a group would be better off at "lesser" schools, coupled with his opinion that "I . . . don't think it . . . stands to reason that it's a good thing for the University . . . to admit as many blacks as possible" is striking, especially given that the University's own brief told him that it admitted just five minority, and forty-two white, applicants with lesser credentials than Ms. Fisher.

Justice Scalia's words remind us that the assumptions and rhetoric of 1963 may yet linger in the air, still susceptible to being mistaken for reason rather than reaction.

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