

## Race-based bias is always wrong

[ODESSA AMERICAN](#)

2009-07-13 22:23:26

The U.S. Supreme Court, in perhaps the most eagerly awaited decision of the 2008-'09 term — and the last of the term to be announced, ruled 5-4 in *Ricci v. DeStefano* that the city of New Haven, Conn., violated the 1964 (revised in 1991) civil rights law when it threw out the results of a firefighter promotional test after no blacks scored high enough to qualify for promotion. In an opinion written by Justice Anthony Kennedy, the quintessential swing vote, the court ruled that this constituted discrimination on the basis of race against those who had received higher marks on the test.

The case itself was important, but it is of special interest given that President Barack Obama's nominee to the court, Judge Sonia Sotomayor, while sitting on the 2nd Circuit appellate court, ruled the other way, in favor of the city, in a one-paragraph decision that declined to engage the sticky legal questions involved.

The story behind the case is pretty well known by now. New Haven devised a test for firefighters who wanted to be promoted. Frank Ricci, a dyslexic white firefighter, paid somebody \$1,000 to tape-record the study materials so he could study more easily, and he achieved a qualifying grade. However, while one Hispanic firefighter qualified, no black candidate did. The city decided to throw out the test results, and nobody was promoted.

The city claimed that it feared black firefighters would bring a lawsuit claiming (as is permitted under civil rights law) that because the test resulted in a "disparate impact" racially, it constituted discrimination against black firefighters.

Justice Kennedy argued, based on the extensive record at the trial court level, that while such a suit might have been brought, it would have had no chance of winning. Thus to avoid the possibility of a lawsuit making an ultimately weak claim of disparate impact, the city engaged in actual disparate treatment based on race. The civil rights laws outlaw such decisions.

Given the closeness of the decision, this was a case with persuasive arguments on both sides. The fact that the final decision overruled Judge Sotomayor does not disqualify her from the high court. After all, four justices voted as she did, and the justice she has been appointed to replace, David Souter, voted that same way she did. So an argument can be made that she will not change the court's ideological balance and that she is in the liberal mainstream.

However, as Roger Pilon, vice president for constitutional studies at the libertarian-oriented Cato Institute, told us, her "summary treatment of the case could lead to some hard questioning."

Other judges on the 2nd Circuit believed that the panel that ruled in favor of New Haven had not dealt sufficiently with the issues involved. And Justice Ruth Bader Ginsburg's dissenting opinion argued that if the panel's majority had not opted to decide the issues, it should have been remanded to the lower court for more extensive argumentation. That implies that she was not content, either, with the abrupt way Judge Sotomayor's panel handled the case.

Whatever impact, if any, this decision has on Judge Sotomayor's confirmation prospects, this was

a good decision.

One can understand a desire to continue to compensate for the fact that black Americans have suffered intense discrimination (and much more) based on race. But the civil rights laws outlaw discrimination based on race, period.

When an action, however well-intended and however grounded in traditional understandings of who is likely to suffer discrimination in America, veers so far as to constitute discrimination against white Americans — or Asians or Hispanics — that also becomes discrimination based on race.

The Supreme Court was right to recognize this.