**Reverse discrimination? Justices weigh case**

**City threw out promotion test for firefighters after few minorities passed**



Gary Tinney is one of a group of African-American firefighters in New Haven, Conn., at the center of a controversy over promotions, a case that has worked its way to the U.S. Supreme Court.

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[WASHINGTON](http://www.bing.com/maps/?v=2&where1=WASHINGTON&sty=h&form=msdate) — The Supreme Court appeared divided Wednesday over whether a Connecticut city's decision to scrap a promotion exam for firefighters because too few minorities passed violates the civil rights of top-scoring white applicants.

As is often the case with closely fought social issues at the court, Justice Anthony Kennedy appeared to hold the key to the outcome. He seemed concerned that New Haven, Conn., scuttled the test after it learned that no African Americans and only two Hispanic firefighters were likely to be promoted based on the results.

"It looked at the results and classified successful and unsuccessful applicants by race," said Kennedy, who often frowns on racial classifications, yet is not as opposed to drawing distinctions on the basis of race as his more conservative colleagues.

But where Kennedy saw shades of gray, the rest of the court seemed to view the case clearly in terms of black and white.

The court's conservative bloc seemed inclined to side with the white firefighters. "You had some applicants who were winners and their promotion was set aside," Justice Antonin Scalia said.

The liberals indicated that New Haven did nothing wrong by throwing out the test over concerns that it had a "disparate impact" on minorities in violation of the 1964 Civil Rights Act.

A ruling against the city, Justice David Souter said, could leave employers in a "damned-if-you-do, damned-if-you-don't situation." Souter's comment reflected the concern of business interests who said in a court filing that a decision in favor of the white firefighters would place employers in an untenable position of having to choose whether to face lawsuits from disgruntled white or minority workers.

The discrimination lawsuit brought by 20 white firefighters — one also is Hispanic — challenges New Haven's decision to throw out promotion exams for lieutenants and captains in its fire department.

The plaintiffs, in their dark blue dress uniforms, posed for photographs Wednesday morning in front of the court.

The city argues that if it had gone ahead with the promotions based on the test results, it would have risked a lawsuit claiming that the exams had a "disparate impact" on minorities in violation of the 1964 Civil Rights Act.

The federal appeals court in New York upheld a lower court ruling dismissing the lawsuit.

The case has drawn input from interest groups across the ideological spectrum. The Obama administration has weighed in mainly on the city's side, although it recommends allowing the lawsuit to proceed on a limited basis.

Besides affecting how race can be considered in filling government and perhaps even private jobs, the dispute also addresses broader questions about racial progress: Do minorities and women still need legal protection from discrimination, or do the monumental civil rights laws that created a more equal nation now cause more harm than good?

Also, beneath the specific details of the firefighters' lawsuit lies an uncomfortable truth: On most standardized tests, regardless of the subject, blacks score lower than whites.

**Looking at percentages**   
New Haven's population is 44 percent white, 36 percent black and 24 percent Hispanic (who can be any race). At the time of the 2003 test, 53 percent of the city's firefighters, 63 percent of lieutenants and 86 percent of captains were white. Blacks were 30 percent of the firefighters, 22 percent of lieutenants and 4 percent of captains.

The promotion exams were closely focused on firefighting methods, knowledge and skills. The first part had 200 multiple-choice questions and counted for 60 percent of the final score. Candidates returned another day to take an oral exam in which they described responses to various scenarios, which counted for 40 percent.

New Haven residents Matthew Marcarelli and Gary Tinney are on opposite sides of the lawsuit.

Marcarelli was one of the 20 white firefighters who passed a promotion exam, but then the city threw out the test because no blacks would have been promoted, saying the exam had a "disparate impact" on minorities likely to violate the 1964 Civil Rights Act.

Tinney, a black lieutenant who has been a firefighter for 14 years, was seeking a promotion to captain when he took the exam.

He says both the test and his fire department have hidden biases against minorities: The department is historically white, with the first blacks joining in 1957, and jobs, relationships, knowledge and choice assignments are passed on from friend to friend and generation to generation.

"I just call it 'the network,'" Tinney says.

The white firefighters' attorney, Karen Torre, said they would not be interviewed for this story. In a conversation on Fox News' "Hannity" program, Marcarelli said it was "gut wrenching" to learn that he was No. 1 on the test but would not get promoted.

"It's something that shakes what you believe in. Because you believe if you work hard, you're rewarded for that, and that's not necessarily the case," Marcarelli said.

Torre said whites have no special advantage in promotions because of laws requiring use of a race-blind, score-based system. She added that many blacks have relatives on the force, including high-ranking officers.

One hundred and eighteen people took the tests; 56 passed. Nineteen of the top scorers were eligible for promotion to 15 open lieutenant and captain positions. Based on the test results, the city said that no minorities would have been eligible for lieutenant, and two Hispanics would have been eligible for captain.

The exams were designed by a professional testing firm that followed federal guidelines for mitigating disparate racial outcomes, the plaintiffs say.

But after the results came back, the city says it found evidence that the tests were potentially flawed. Sources of bias included that the written section measured memorization rather than actual skills needed for the jobs; giving too much weight to the written section; and lack of testing for leadership in emergency conditions, according to a brief filed by officers of the Society for Industrial and Organizational Psychology.

"I'm sure there are numerous reasons why (blacks didn't do as well), and not because we're not as intelligent," Tinney says. "There's a lot of underlying issues to that ... these folks are saying, 'We studied the hardest, we passed the test, we should be promoted.' But they're not talking about all the other things."

Torre argues that discarding a test because no minorities would have been promoted violates the equal protection clause of the U.S. Constitution and Title VII of the Civil Rights Act, which forbids discrimination because of race.

Call it a legal riddle only the Supreme Court could solve: The white firefighters say Title VII prohibits discrimination against them for being white; New Haven says Title VII prohibits it from using a test that has a disparate impact against blacks.

"All were afforded the same notice, the same study period, the same exam syllabi, etc.," said Torre, who would only answer questions by e-mail. "The rest was up to the individual."

There are long-standing divisions over the concept of hardworking, qualified whites being "victimized" by laws or practices designed to help minorities overcome America's history of racism. What's different today is that the landscape has shifted in many ways, big and small.

The biggest is the election of President Barack Obama, and the support he received from millions of white voters.

"It is not white racism that plays the deciding role in the success of minorities anymore," says Edward Blum, a visiting scholar at the American Enterprise Institute who believes that race should not be considered in employment decisions.

"That was the case in the '60s and '70s and maybe even part of the '80s," he says. "But it is no longer the case in the 21st century that because you are black you are being held back from achieving what your parents and your ambitions will allow you to achieve. I think that has been crystallized with the election of President Obama."

**Justices to hear voting case soon**   
Obama's election has been a boon to the movement that developed years ago seeking to reshape civil rights laws designed to remedy discrimination.

Besides the firefighters' lawsuit, the Supreme Court will soon hear a case seeking to overturn a Voting Rights Act requirement that all or parts of 16 states with a history of discrimination must get approval from the Justice Department before changing election procedures. And in 2007, the court struck down voluntary integration plans in two public school districts.

Even though it may result in less opportunities for qualified minorities, "the use of race does greater harm to our social fabric by being there than by being eliminated," Blum says.

Another major shift has been in the balance of the Supreme Court. Conservatives gained a 5-4 majority during the Bush administration, although Justice Anthony Kennedy is seen as a potential swing vote.

In Chief Justice John Roberts' majority opinion in the 2007 school ruling, one line rang loudest: "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

That statement was seen as a harbinger of future rulings that would end the use of race in employment, voting and awarding government contracts. It also rebutted a famous statement by Justice Harry Blackmun in the landmark Bakke affirmative action case: "In order to treat some persons equally, we must treat them differently."

Mary Frances Berry, a history professor at the University of Pennsylvania and head of the U.S. Commission on Civil Rights during the Clinton administration, said the firefighters' case has broad implications.

"This is about whether we are going to see a sea change in how the judiciary looks at the need for these (protections), and how the popular culture and electoral politics influence their perceptions," Berry said.

**Justice Dept. backs New Haven**The Obama administration has said such laws are needed and it is committed to enforcing them. The Justice Department's brief in the firefighters case supports New Haven's position that the city acted properly in throwing out the tests.

But in what many call a political maneuver designed to avoid taking sides, the Justice Department stopped short of saying the firefighters' case should be dismissed, instead recommending that it be remanded to a lower court to determine if city's decision was a pretext for intentional discrimination.

Supreme Court observers predict the firefighters' lawsuit will be decided by a 5-4 margin, with Justice Kennedy casting the deciding vote.

His past decisions give hope to both sides.

In the recent Voting Rights Act decision that made it harder for some minority candidates to win election when voting districts are redrawn, Kennedy wrote in the majority opinion that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."

"It would be an irony, however," Kennedy continued, if civil rights laws were used to "entrench racial differences."