Should Race Matter When Rectifying Past Errors?

Alan E Garfield
One of the more contentious issues surrounding Sonia Sotomayor’s nomination to the Supreme Court is how she will decide cases when race is a factor. The topic is the issue du jour now that the Supreme Court reversed a decision Judge Sotomayor jointed permitting New Haven to discard a firefighter exam because not enough members of minorities qualified for promotion.

Certainly, evaluation of a judge’s attitudes toward race is fair game for a Supreme Court nominee. But it is important to be clear about just what aspects of the issue are under consideration. The most troubling concern would be if a judge favored parties to a lawsuit simply because of their race. This would violate the cardinal principle that justice must be blind. A litigant’s success should turn on the facts and legal rules governing a case, not the litigant’s skin color.

But those who have studied Judge Sotomayor’s record in civil rights cases have found no evidence she decides cases based on a party’s race. To the contrary, she has ruled against civil rights plaintiffs over 80 percent of the time. Her record puts her in the mainstream of what other federal judges do.

The more complex issue — and the one that is typically at stake in Supreme Court cases — is whether government should be allowed to consider race to remedy past discrimination or to promote diversity. Can a public university consider race when admitting students to ensure a diverse student body? Can a city consider race to help historically disadvantaged groups when the city awards government contracts? Can New Haven reject a firefighters’ promotion exam if minority candidates did poorly and there are questions about the exam’s legitimacy?

Conservative judges treat this “reverse discrimination” against whites as morally equivalent to the historic discrimination against minorities. Even Justice Clarence Thomas, himself a beneficiary of affirmative action, thinks such “benign prejudice” is “racial discrimination, plain and simple” and “just as noxious as discrimination inspired by malicious prejudice.”

Conservatives claim reverse discrimination leads to a “politics of racial hostility” and even harms its supposed beneficiaries. Justice Thomas ruled against the affirmative action program at the University of Michigan Law School because he said it branded minorities with the “stigma” that they could only succeed with the government’s help.

Conservatives think they are the champions of a “color-blind” Constitution. After all, they’re the ones who want the government to stop treating people as members of a racial group and start treating them as individuals. As Chief Justice John Roberts triumphantly declared when invalidating a Seattle school district policy that assigned students based on race, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Liberal judges are just as eager for color-blind government policies. They are simply not sure we’re ready for them. Instead, they see our society as still wrestling with the vestiges of historic discrimination. As Justice Ruth Bader Ginsburg explained, “the strain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital.”

Thus, in her dissent to the firefighters’ decision, Justice Ginsburg alluded to the “legacy of racial discrimination” in the firefighting profession. For years, fire departments promoted employees based on overt discrimination. Even after that practice ceased, promotions were based on nepotism and political patronage which only served to “entrench preexisting racial hierarchies.”

Centrist Justice Sandra Day O’Connor similarly thought our society was not ready for color-blind policies when she upheld (to Justice Thomas’s chagrin) the Michigan law school affirmative action program. Yet she intimated in the same decision that her tolerance of race-based selection was temporary: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

Liberal justices undoubtedly view President Obama’s election as an historic milestone in our country’s race relations. But it’s unlikely the election will cause them to forget the mass of minority children still living in poverty, the disproportionate number of minority children still visible in our society, and the determination to hasten its removal remains vital.

In short, justices across the political spectrum agree that it is best when government does not regulate based on race. But they continue to debate whether we are sufficiently beyond our history of discrimination to justify living by that ideal.

Of course, the fact that an African American woman to the Supreme Court suggests we are approaching the day when government can be color-blind. But the fact that Judge Sotomayor will be the first Hispanic ever to sit on the Court and only the third woman suggests we still have a ways to go.

Alan E. Garfield is a professor at Widmer University School of Law. He can be reached at agarfield@widmer.edu.