July 30, 2012

**Texas Lawsuit Complicates Presidential Race**

Candidates likely to face questions on affirmative action

*By Peter Schmidt*

Being rejected by the University of Texas at Austin has not kept Abigail Noel Fisher from having a big influence on the nation's affairs. Her lawsuit challenging Texas' race-conscious undergraduate admission policy has landed at the U.S. Supreme Court just in time to inject the politics of affirmative action into this year's presidential campaigns.

The court has set an August 6 deadline for briefs supporting the university, and the Obama administration, which backed Texas when the case was before a federal appeals court, is expected to again weigh in on the university's behalf. The justices plan to hear oral arguments on October 10, just after the first of four scheduled presidential debates.

President Obama and his presumptive Republican challenger, Mitt Romney, will probably be asked to react to the *Fisher v. University of Texas at Austin* case in debates and on campaign stops. Its presence on the Supreme Court docket will give both the Democratic and Republican parties, which typically adopt planks on affirmative action, reason to discuss it at their conventions this summer.

Mr. Romney's campaign has yet to make any major pronouncements on affirmative action and did not respond to requests for comment. The Obama administration declined last week to discuss any plans to file a Supreme Court brief, although not doing so would be unusual and would itself have political ramifications.

"It is hard to say how this will go. There is a lot of room for different calculations," said John D. Skrentny, a professor of sociology at the University of California at San Diego, who traced the origins of federal affirmative-action programs in *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (University of Chicago Press).
Echoing the views of several pollsters and political strategists interviewed by The Chronicle, he said, "There are risks on both sides."

**Swings and Misses**

Any public debate arising from the Fisher case is unlikely to persuade a large share of the electorate to change its vote, political analysts said, especially given the current level of political polarization. Where such a debate could play a role, they said, is in influencing voter turnout or the decisions of some swing voters.

Blunting the Fisher dispute's likely impact on voters is the complexity of the affirmative-action issue, and of this case in particular. The term "affirmative action" has historically covered a wide assortment of policies, ranging from fairly uncontroversial efforts to protect minority members from discrimination to the widely resented, and generally illegal, use of strict racial quotas. How Americans feel about it generally depends on the specific policy they have in mind when asked.

"There is no evidence that most Americans are conversant with a working definition of affirmative action, let alone the specifics of the case," said Kellyanne E. Conway, a Republican strategist and president of the Polling Company Inc.

The Fisher case involves complicated questions, such as whether the University of Texas, before adopting its race-conscious admission policy, had already achieved sufficient levels of diversity for educational purposes through a state law guaranteeing admission to Texas high-school graduates in the top tenth of their class.

Fisher is unlike past Supreme Court affirmative-action cases, which focused on strict quotas or obvious race-based double standards. In those, "the public instinctively knew what the issues were and chose up sides," said George R. LaNoue, a professor of political science at the University of Maryland-Baltimore County, who has held several federal civil-rights posts and has signed on to a brief opposing Texas.

"It is the rare Supreme Court case that breaks through to commanding real public attention, and to the extent that cases break through, it usually occurs when the decisions are rendered," said Geoffrey D. Garin, president of Hart Research Associates, a Democratic polling firm.

Although affirmative action has been a wedge issue for both Democrats and Republicans, pollsters said voters this year have
other matters on their minds. Mark Mellman, who oversees polling on behalf of Democrats as chief executive of the Mellman Group, said, "The public is singularly focused on the economy at this point, and it is really hard for any issue to muscle its way past economic concerns."

How the candidates respond to the *Fisher* case could have a significant effect, however, on voters who are Hispanic or working-class and white. Scott W. Rasmussen, president of Rasmussen Reports, a polling firm, said both Mr. Obama and Mr. Romney have had trouble connecting with working-class white people. That demographic group has favored Mr. Romney over Mr. Obama in recent polls but tended to vote for other candidates in the Republican primaries.

Although polls show Hispanic voters leaning toward President Obama, their support for him is not strong enough to leave Democratic strategists confident they will vote for him in large numbers. While Mr. Rasmussen expressed doubt that the *Fisher* case will have much impact on the election, he noted that "the election is very close," and that "anything could be a decisive issue."

A 2009 survey of 3,000 voters on questions related to affirmative action found opposition to outright preferences among solid majorities of two groups of swing voters: political independents and members of the working class. Hispanics appeared evenly divided in the survey, conducted by the Quinnipiac University Polling Institute.

But whether members of any of those constituencies would change their vote, or be less likely to show up at the polls, on the basis of a candidate's stand on affirmative action remains unclear. "The question is not how they feel about this issue. The question is how they act," said Peter A. Brown, assistant director of the Quinnipiac institute.

**Avoidance of Alienation**

Arthur L. Coleman, who was the Education Department's deputy assistant secretary for civil rights under President Bill Clinton, said he would be surprised if the Obama administration does not submit a Supreme Court brief in support of Texas, especially given the administration's role among those who persuaded the U.S. Court of Appeals for the Fifth Circuit to rule in the university's favor.

"Then again, filing before the Supreme Court is a somewhat different enterprise," said Mr. Coleman, now a managing partner at EducationCounsel, a legal and consulting firm. Officials of the
White House, Justice Department, and Education Department almost certainly are all engaged in closed-door discussions over how to proceed.

A strong, unqualified stand by the administration in favor of Texas' race-conscious admission policies would be somewhat at odds with the image President Obama projected in his 2008 campaign and in office. In the last election, "clearly, he and his advisers decided not to talk about affirmative action or racism if they could possibly avoid it, and they were extraordinary successful in doing that," says Joe R. Feagin, a professor of sociology at Texas A&M University and an author of *Yes We Can?: White Racial Framing and the 2008 Presidential Campaign* (Routledge). "They did not want to alienate white voters," he said.

In a 2007 interview with *The Chronicle*, Mr. Obama expressed support for "properly structured" affirmative-action programs, but added that his daughters "should probably be treated by any admissions officer as folks who are pretty advantaged," and that colleges' admission policies should give extra consideration to white applicants who have overcome disadvantage.

In a 2008 speech, he acknowledged how the political fallout from policies such as affirmative action complicates efforts to heal the nation's racial divisions. He urged his audience to try to understand working- and middle-class white Americans who "don't feel that they have been particularly privileged by their race" and who feel resentment upon hearing that a black applicant for a job or college seat was being given an advantage over them, "because of an injustice that they themselves never committed."

The brief that the Obama administration submitted in 2010 to the Fifth Circuit on Texas' behalf displayed little such nuance, accepting the university's assertions that it needed to ensure racial and ethnic diversity at the classroom level and could not enroll sufficient numbers of black and Hispanic students through the state's race-neutral, class-rank-based admissions guarantee.

Richard D. Kahlenberg, a senior fellow at the Century Foundation and a prominent advocate of class-based affirmative action, has described that brief as "unimaginative and politically tone deaf," considering public opposition to affirmative-action preferences.

**An Issue to Be Avoided?**

On the other side of the affirmative-action debate, several conservative and libertarian groups, as well as a long list of current and former Republican appointees to federal civil-rights posts, have
already signed on to briefs urging the Supreme Court to rule against Texas. Some of the briefs argue that the university's policy should be struck down as exceeding the limits the court placed on race-conscious admissions in its 2003 decision in *Grutter v. Bollinger*, involving the University of Michigan's law school. Others call on the court to overturn *Grutter* and its holding that race-conscious admission policies can serve a compelling government interest.

The Republican Party's membership is hardly monolithic, however, in its views on race-conscious admissions policies, which in the month leading up to the *Grutter* decision were supported by many business leaders and a long list of former high-ranking military officers. President George W. Bush was discouraged from taking a hard line in opposition to Michigan's policies by members of his own cabinet.

Complicating the GOP's discussion of how to approach the *Fisher* case is the involvement of the Republican governor of Texas, Rick Perry, in appointing the University of Texas board members who oversaw the Austin campus during its adoption of the policy in question.

Mr. Romney's record on affirmative action is difficult to parse. As governor of Massachusetts, he ended that state's affirmative-action policies through a 2003 executive order, only to backpedal in the face of intense criticism from advocates for minority groups and leave the old policies in place. In the past he has expressed support for diversity but opposition to racial quotas.

Roger B. Clegg, president of the Center for Equal Opportunity, a group urging the court to overturn *Grutter*, predicted that Mr. Romney will take a stand against race-conscious admissions, because to do otherwise "will be inconsistent with the Republican platform, and will cause huge problems with him in the election with people who might otherwise be willing to vote for him and will decide to stay home."

Ms. Conway, of the Polling Company, said she could foresee Republicans responding to a strong Obama-administration stand in support of Texas by airing new allegations that the Justice Department, under Attorney General Eric Holder, has become excessively politicized.

But Steve McMahon, a Democratic strategist and co-founder of Purple Strategies, which advises political campaigns in swing states, said affirmative action, "in all likelihood, is an issue to be avoided by both sides."
"Mitt Romney already underperforms miserably among black and brown voters and does not need to do anything to make his problem worse," Mr. McMahon said. "President Obama has an enormous advantage with minority voters, and there is little to be gained for him in pressing the case on affirmative action, because the reward is very minimal, and the risk is significantly higher."

The evidence is overwhelming that African American voters will vote as a bloc for Obama. Romney has nothing to gain by pandering. Some hispanic voters may be swayed, but Hispanics are a far more heterogenous group and not so monolithically in favor of preferences. Romney gains here by taking a strong, principled stand against any form of discrimination.

Agreed and well said. Grades and work ethic should be considering factors to get into school, not the color of your epidermis or where you were born.

I'm of two minds about affirmative action, mostly agreeing with you. But the question of 'where you were born' is not just about ethnicity (which in most cases means where your parents or ancestors were born).

Suppose you grew up somewhere where the prospect of decent, permanent employment among your adult role models was virtually nil. You were surrounded by drug dealers and drug users and gang members. Many of your school friends had been shot, and many had been arrested and jailed. Your study and sleep were always disturbed by drunken fights. You lived in fear of your neighbors, the police, and maybe your own parents and relatives.

If somehow you managed to do well enough in school to barely make it into college, I'd give brownie points for that kind of determination. I know that's not a matter of race or ethnicity. I'd want to favor anyone who overcame steep odds like that. So I guess I'd argue for some preference on the basis of socioeconomic status, if that were possible.

Then, too, I don't discount the subtler forms of racism, even in good public schools and nice neighborhoods, that can affect one's motivation, one's hopes and expectations for the future, one's view of one's own place in society. Sometimes these are imagined -- I've seen that -- but I've also witnessed the real variety.

Did you hear that news item this morning about the Mississippi pastor who refused to marry a black couple in his church ... because they were black? Tell me that
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The Chronicle of Higher Education 1255 Twenty-Third St, N.W. Washington, D.C. 20037