



## Opinion: An affirmative choice

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**Let's stipulate here, as** lawyers like to say, that President Joe Biden's decision to choose a Black woman as his Supreme Court nominee is, in fact, affirmative action.

But only if we agree first to understand the term to mean that we must act affirmatively to end discrimination. And that presidents have been doing this for a while.

As President John F. Kennedy wrote in an executive order way back in 1961, government contractors must "take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin."

This was not a neutral, gender-blind, color-blind, religion-blind executive order. It was an order meant to take action to stop, and to rectify, widespread employment discrimination in the days of Jim Crow.

As we know, there has never been a Black female justice on the court. There have been only two Black justices of any gender — and never more than one on the court at the same time. There can only be a few reasons to explain the situation, and not a single one of the reasons has anything to do with coincidence.

Just as for many years, back when America was presumably great, there would always be one Jewish seat on the court and one Catholic seat on the court. One and only one.

Just as the only Black justice today, Clarence Thomas, was named to succeed Thurgood Marshall, the first Black justice. So we have one and only one, even if today's lone Black justice is clearly the anti-Thurgood Marshall.

It was not due to some random flip of the coin that in every case but seven, a white male has been picked as the next justice. The coin flip had long been rigged. To put it another way, there have been 115 Supreme Court justices — and 108 of them have been white males.

Unless you believe that white males are inherently more qualified for the job — and you shouldn't have to be particularly woke to reject that thinking — the numbers are nearly as disturbing as they are unsurprising.

Which is why it's not a coincidence that four of the last nine justices have been women. Ronald Reagan, after vowing during his 1980 campaign that it was "time for a woman to sit among the highest jurists," affirmatively picked Sandra Day O'Connor as the first woman on the court. It has been a while, but I don't remember anyone saying Reagan was discriminating against men, even though he also promised to pick more women as judges throughout the system "to bring about a better balance on the federal bench."

When Donald Trump chose Amy Coney Barrett for the court to replace Ruth Bader Ginsburg just before the 2020 election, he had said at a campaign stop that his choice "will be a woman, a very talented, very brilliant woman. I haven't chosen yet, but we have numerous women on the list." At another point, Trump said, "I think it should be a woman because I actually like women much more than men." Yes, he did.

Again, I don't remember anyone saying Trump was discriminating against men. I mean, you think Trump might have picked a woman to help shore up the female suburban vote in the coming election?

We know Biden made a campaign promise to choose a Black woman for the court. And, yes, it was a political move at least as much as a justice issue. In order to win the endorsement of South Carolina's James Clyburn, the influential Black congressman, before the state's heavily Black Democratic primary, Biden needed to make that pledge.

Without it, Biden might never have won in South Carolina, in which case he almost certainly wouldn't have become president.

So, now he'll make history.

Naming a Black female is not a quota pick, or a token pick, as some on the right are already suggesting — any more than O'Connor or Barrett were tokens. These suggestions, too, are all political, just as was the warning by Mitch McConnell for Biden not to choose a "radical" for the court, even as the court, thanks to McConnell's own brand of affirmative action, has turned radically to the right.

In today's world, the opposition party, whether Democrat or Republican, dependably looks for any reason to combat a Supreme Court nominee, even before, as in this case, one has been named.

And so *The National Review* said that "in a stroke, [Biden] disqualified dozens of liberal and progressive jurists for no reason other than their race and gender." They could have mentioned, I

guess, that presidents no longer seem to pick anyone older than 55, so they can stay on the bench for decades. Race, gender, age?

And in a tweet from Nikki Haley, who wants to run for president and is worried that she has a problem with Trump's base, "Wouldn't it be nice if Pres Biden chose a Supreme Court nominee who was best qualified without a race/gender litmus test?"

I'm still looking for a similar tweet from Haley on Trump's litmus test.

How about this from Ilya Shapiro, who was just hired from the Cato Institute to head a research department at Georgetown's law school: In a tweet saying that Biden's obvious best pick was Sri Srinivasan, an Indian-American judge, he wrote Srinivasan "doesn't fit into latest intersectional hierarchy so we'll get [a] lesser black woman."

He also tweeted that Biden's decision to pick a Black woman "will always have an asterisk attached." The law school dean called the tweets, which Shapiro has taken down, "appalling."

What's also appalling is that this court has just decided to hear a pair of affirmative action cases, one against admissions practice at Harvard and the other against the University of North Carolina. The court has narrowed the use of affirmative action over the years, but still allows schools to use race as a so-called plus factor in admission.

But as Nicholas Lemann points out in *The New Yorker*, there was always a moderate conservative justice around — usually Anthony Kennedy — to side with four liberals to allow schools to try to remedy a lack of diversity on campus. Now there's no Kennedy, there's no O'Connor and there's no moderate. And with the death of Ginsburg, there are not four liberals.

There's a 6-3 conservative supermajority now that will almost certainly rule, in Breyer's last few months on the court, for "color-blind" admissions only. Just as that supermajority is expected to either end or gut *Roe v. Wade* this term and to further limit state gun-safety laws, just for starters.

Naming a presumably liberal Black woman won't change any of that. But it will be a change, a historic change, and one that, like many historic changes before it, is long overdue.