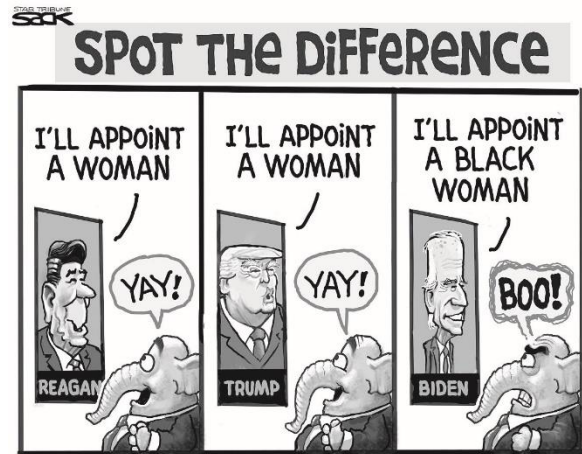


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## **New mandate: Black woman for SCOTUS**

By Steve Bakke  February 16, 2022



*Even this cartoonist doesn't understand the problem!*

“Black woman” is Biden’s requirement for any candidates to succeed Justice Breyer on the U.S. Supreme Court. That sounds fine, and it’s as expected. So, what’s the issue? Following is some context.

In 2003, President Bush nominated Janice Rogers Brown to serve on the D.C. Circuit Court of Appeals, generally considered to be the country’s second most important court. It was understood to be a preliminary step to elevating Brown to the Supreme Court. This republican nominee was Black, and a woman. Then-Senators Biden and Obama repeatedly, and successfully for a while, filibustered Brown’s confirmation. In 2005 she was finally seated on the D.C. court. Biden had voted against her three times.

Shortly thereafter, Brown made the short list as a possible replacement for retiring Supreme Court Justice Sandra Day O’Connor. Senator Biden once again declared that a nomination of Brown would face a filibuster. Our current President insisted that if President Bush nominated Judge Brown, “I can assure you that would be a very, very, very difficult fight and she probably would be filibustered.....” Joseph Epstein, in his February 14 WSJ column concluded: “They opposed her because of her judicial philosophy.....intensified because they especially despised the prospect of a libertarian conservative justice who was a black female.”

None of the other conservative “short listers” for O’Conner’s seat were threatened with a filibuster. Only this Black woman, by our current President, who now refers to filibuster as a “relic the Jim Crow era.” Samuel Alito was eventually seated. Our President’s apparent motivation is to guild his legacy, leaving his dedication to diversity way down his list of priorities.

Two events are now in process that many observers don’t know are related: Biden’s SCOTUS nomination, and a Supreme Court ruling regarding racial considerations in higher education admissions. The Court ruling will inevitably include debating the applicability of the 1978

“Bakke” reverse discrimination decision. That ruling stated: “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”

George Washington University Professor Jonathan Turley wrote in 2020 that Biden’s campaign pledge seemed to be against the law: “It is precisely what the Supreme Court already declared to be unconstitutional discrimination...in [Bakke], the Supreme Court found quota and affirmative action admissions policies based on race to be unconstitutional.”

Given that context, consider the President’s announcement the same day as Justice Breyer’s retirement announcement: “I will nominate...someone with extraordinary qualifications, character, experience, and integrity. And that person will be the first Black woman ever nominated to the United States Supreme Court.” Biden was emphatic in his racial requirement. It was subject to no other contingencies. Continuing with words from the 1978 ruling, “This the Constitution forbids.”

Politicians, journalists and even cartoonists must be careful when plying their trade. They shouldn’t mislead their readers because of ignorance of important legal nuances. The problem Biden will face in this nomination has nothing to do with diversity, gender, or anything else other than the ham-handed way it is being handled by requiring the choice to be a Black woman. That makes the process unconstitutional, thereby illegal.

South Carolina Democrat Representative Jim Clyburn, House Majority Whip and Congress’ highest ranking Black member, has given Biden an opportunity to tiptoe out of this predicament. Call it an “off-ramp” from the unconstitutional corner he painted himself into. It doesn’t remove the administration’s blunders but may partially quiet the opposition.

Clyburn considers lack of law school diversity more concerning than race. Eight of nine current SCOTUS justices attended Harvard or Yale law schools. Clyburn wants the new justice to have a non-Ivy League degree. His preferred candidate is J. Michelle Childs. And he has bipartisan support from Republican South Carolina Senators Lindsey Graham and Tim Scott.

Childs, a South Carolina federal judge, is currently under consideration for the D.C. Court of appeals. She has a record of strong bipartisan support, was the first person from her family to attend college, and graduated from the University of South Carolina law school. She is understood to be on Biden’s “short list.” And she happens to be Black.

Childs is a smart diversity pick, a unifying pick – the right pick for sure.