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Elena Kagan: Would she turn Supreme Court into We the People?

Elena Kagan, if confirmed as the next Supreme Court justice, would shift the balance dramatically – with three women and a Jewish-Catholic bloc. So would the high court look like We the People?

The US Supreme Court building: Elena Kagan is President Obama's nominee for the seat of retiring Justice John Paul Stevens. Would her confirmation make the court be more like We the People?

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By *Mike Sacks*, / Contributor / June 25, 2010

Washington

They are fathers and sons, mothers and daughters, opera lovers and salsa dancers, long-winded pedants and quick-witted conversationalists, cancer survivors and nonagenarian swimmers, West Coasters and East Coasters, Winnebago drivers and airplane pilots. Aside from being nine of the most powerful men and women in the United States, the Supreme Court justices are also a lot like We the People.

But when we talk about the court looking like America, we also mean things such as the justices' religions, races, genders, and sexual orientations. We mark our progress as a society by the diversity of these traits on the court. And President Obama's nomination of Solicitor General Elena Kagan makes plain how far we've come, and for some, how much further we have

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This article is the cover story of the June 28 issue of The Christian Science Monitor weekly magazine.

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If Ms. Kagan is confirmed after US Senate hearings scheduled to start June 28, then the court will have certain demographics represented in numbers that 50 years ago would have seemed unimaginable: three women, three Jews, six Roman Catholics. Kagan's confirmation also would mean that, for the first time, the court would be left without any white Protestant males, who until 1993, commanded a majority of the court.

Yet as commentators, court watchers, and interest groups remind us, a cast of nine characters made up of two religions, three races, one sexual orientation, and an all-Ivy-League pedigree are hardly avatars of the nation's self-image.

But would justice be served any differently if the court looked more like America? As the US political process has grown more pluralistic, that question is complicated by the debate about whether justice can be completely blind and adhere to the letter of the law as if it was unambiguously laid down by the Founding Fathers, or whether modern reality suggests that a justice's background and life experience can fairly factor into a modern interpretation of a 223-year-old Constitution.

• • •

What one looks like is not a proxy for what one believes, warned Justice Thurgood Marshall at his retirement press conference in 1991. Responding to a reporter's question about whether President George H.W. Bush had any obligation to name a minority candidate to succeed Justice Marshall, the nation's first African-American justice said, "My dad told me way back that you can't use race. For example, there's no difference between a white snake and a black snake. They'll both bite."

He meant that race should not be used as an excuse for "doing wrong"; rather it should be a factor to consider in the broader effort to "pick the best person for the job." And, for Marshall, "doing wrong" meant contributing to the increasingly conservative Supreme Court's dismantling of liberal landmarks he'd helped build as a lawyer and justice.

By those definitions, Marshall suggested, Bush's nominee, Clarence Thomas, was "the wrong Negro" to succeed him, where there was a direct line between his experiences as a black man in America to his votes in favor of affirmative action and against the death penalty. Indeed, Justice Thomas's strict originalism – adherence to a literal interpretation of the Constitution – certainly

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changed the direction of the court's so-called "black" seat.

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SUPREME FACTS

Of **111** justices since 1789:

* **53** was the average age at appointment

* **36** served in the military

* **11** had no children

* **6** never married

* **4** were divorced

* **3** did not have a private law practice

* **39** were not judges before appointment

* **39** were Episcopalian

*__18__ attended and 14 graduated from Harvard Law School

* **26** were from judicial families

* **41** had fathers who held public office

* **39** grew up in urban or small-city settings

* **40** grew up on family farms, family plantations, or rural settings

* **31** grew up in small towns

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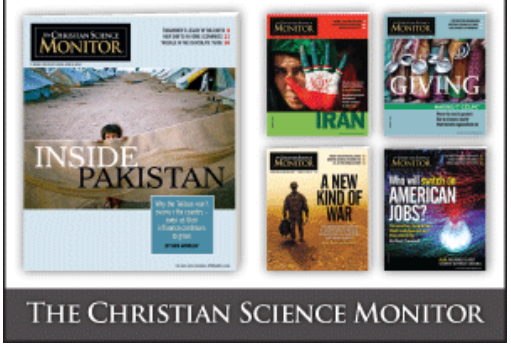

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