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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?

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"The point of the 'black' seat," says Elie Mystal, editor of the popular online legal tabloid Above the Law, "is to recognize and appreciate the fact that there was in this country a people with a historical position of servitude and our commitment to work our way out of that. Thomas goes against those things."

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

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Graphic
Chart: Majority of Supreme Court justices hail from east of the Mississippi

And, echoing Marshall, Mr. Mystal adds: "It's not about black and white; it's about where you stand on civil rights."

Yet to many, Thomas is a political and jurisprudential ideal. In his 19 years on the bench, he has held fast to the "colorblind Constitution," consistently coming to conservative results in cases in which race has played a role. Where Marshall looked favorably upon affirmative action policies, calling them "race-conscious measures designed to remedy past discrimination," Thomas believes they constitute "racial discrimination, plain and simple." And where Marshall cited contemporary studies showing racial imbalance to insist that the death penalty "is in all instances cruel and unusual punishment forbidden by the Eighth Amendment" to the Constitution, Thomas looks to the Founders' generation and their comfort with capital punishment to conclude that "it is clear that the Eighth Amendment does not prohibit the death penalty."

"Thomas approaches the law by trying to look at the history or intent of the Constitution and its framers,"

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says Carrie Severino, policy director of the Judicial Crisis Network, a conservative advocacy group. Thomas's rock-ribbed originalism, then, as opposed to "voting differently based on your identity," Ms. Severino insists, "is the test of whether one is being principled judicially."

Thomas's approach received a public relations boost in the 2005 confirmation hearings for Chief Justice John G. Roberts, when Justice Roberts compared the judges' work to that of umpires – simply calling balls and strikes within the Constitution's preset strike zone. His compelling metaphor – and his flawless performance in those hearings – changed the game for future nominees who might dare to suggest they'd judge any differently.

Under Roberts's rubric, minority candidates would now have to testify that they, like Thomas, would engage in cold constitutional calculus, not Marshall's empathy-inflected jurisprudence.

Accordingly, when Sonia Sotomayor sat before the Senate Judiciary Committee last summer, she appeared positively robotic in agreeing with the Republicans' demands that she disavow any suggestion that her life experience would influence her judging.

Specifically, she sought to obscure the real significance of her oft-delivered line: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

The "wise Latina" statement clashed with the notion that judges must do nothing more than look to the history or intent behind the law at issue. Justice Sotomayor's Democratic supporters, not at all willing to turn the historic nomination of the first Latin-American to the Supreme Court into a dragged-out national referendum on constitutional interpretation, claimed the quote was taken out of context. But the entire speech, given in 2001, was about "whether by ignoring our differences as women or men of color we do a disservice both to the law and society." She claimed that "aspiration to impartiality is just that – it's an aspiration because it denies the fact that [women and people of color] are by our experiences making different choices than others."

Page: 1 | 2 | 3 | 4 | 5 | 6

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

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* **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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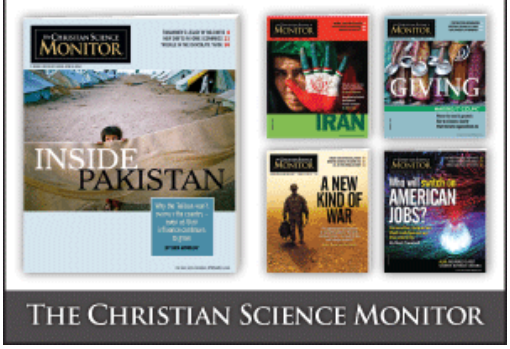

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