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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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Then there's the question of limited seating. "The court only has nine members, so you can't do an adequate job of representing all of America at once," says David Lat, founding editor of Above the Law and a right-leaning libertarian. As a gay Asian-American, he runs the numbers per his own demographics. Asian-Americans are 5 percent of the population and gays are 10 percent. Both groups currently claim no justices, but will be proportionally overrepresented upon the confirmation of just one.

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

Kevin Cathcart, the executive director of Lambda Legal, a gay rights advocacy organization, takes a longer view and finds that the court has some catching up to do. "If you look at the justices over the court's history or even in the last 20 years, the number of them that have been women or people of color is staggeringly low."

Nevertheless, says Mr. Cathcart, "the likelihood of getting an openly gay person on the Supreme Court will be much improved when we live in a society in which openly gay people can more reasonably aspire to positions throughout the federal bench."

But rising through the judicial system is hardly the only route to a seat on the court – 39 of the 111 justices over time have not been judges before. By nominating Kagan, Obama may have started a trend back toward tapping nonjudges for the court, which had not been repeated after President Nixon's 1971 nominations of William Rehnquist, a Justice Department lawyer, and Lewis Powell, a prominent corporate attorney in private

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But although Cathcart has seen "dramatic increases" in the acceptance of gay people in law firms, academia, and elected office over the past two decades, he believes the confirmation process for openly gay nominees selected from those fields will be a significant obstacle as long as sexual orientation remains politicized in the Senate.

• • •

Gender, race, religion, ethnicity, and sexual orientation are all critical components in the court's most politically charged and bitterly divisive issues, from abortion and affirmative action to national security and gay rights. Even if the results in these cases often seem zero-sum, all sides recognize the symbolic importance of a more diverse bench making the decisions.

But when those decisions ultimately boil down to answering "yes" or "no" on questions of great public interest, explains Friedman, the author of a book on the court and public opinion, "it's not going to be uncommon for people to divide 5-4," whatever their backgrounds.

So the court, staffed by men and women nominated and confirmed for their ideological fealty to one of two political parties, doesn't threaten kaleidoscopic chaos in its judgments.

Rather, the court is more like an ever-improving pair of 3-D glasses. Whether a justice comes to a decision aided by – or in spite of – his or her life experiences, a diverse bench enriches the court, united or divided, and may more clearly see and reflect American attitudes in their most true-to-life details.

It may be a gradual evolution for minority justices who start out as "avatars of their entire communities" to be regarded as fully absorbed additions to age-old ideological factions, says Wajahat Ali, a Pakistani-American lawyer and political commentator. "But America is one of those places, just by virtue of its creation, [where] these things really can occur."

• *Matt Rocheleau contributed research.*

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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

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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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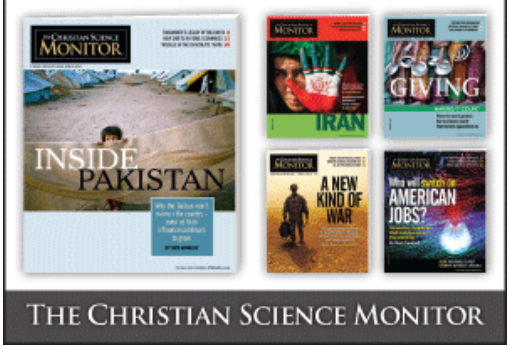

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