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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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In the tense antebellum period, presidents sought to maintain the court's sectional balance to stave off the Union's dissolution. When Taney, a slave-holding Marylander, became chief justice in 1836, he represented the sensibilities of the important border state as the court began hearing many cases that divided its justices along regional lines. But Taney's majority opinion in the 1857 Dred Scott case, which found that African slaves and their free descendants could never be US citizens, helped hurl the country toward the Civil War.

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

Although regional representation continued through and beyond the war, it ceased for a century as political shorthand. Instead, presidents sought political loyalists from every section of the country: Lincoln primarily selected Unionists, Gilded Age presidents largely nominated free marketers, and Franklin D. Roosevelt exclusively seated New Dealers.

"As we get more comfortable with ... 'firsts,' we will begin to fight more along ideological lines and not be hampered by demographic diversity," suggests Guy-Uriel Charles, founding director of the Center on Law, Race and Politics at Duke University in Durham, N.C.

If Professor Charles is correct, then Kagan is the future. She is poised to become the court's third woman and Jew on the current Supreme Court, but one would be hard-pressed to find her jurisprudence questioned or assumed on the basis of her gender or religion. Instead, she has been assailed from the right for her liberal positions in memos to Thurgood Marshall,

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for whom she clerked in the late 1980s. The left has criticized her for being too deferential to a president's wartime authority in her role as Obama's solicitor general. Further, Kagan will not be expected to speak for all women or Jews, just as Justice John Paul Stevens – whom she has been nominated to replace as he retires – was not expected to speak for all white, Anglo-Saxon Protestant men.

Nevertheless, gender and religion do remain salient in their own distinct ways, argues Charles.

"I think we would all be worried if we had a Supreme Court that was all male," Charles says. A lack of parity could appear to be "discrimination in favor of a particular group rather than the luck of the draw" now that there are so many qualified women for the job.

However, a court evenly split by sex would look suspicious to Severino of the Judicial Crisis Network. With women's "more involved child-caring responsibilities," Severino says, "the kind of person that's going to have spent the amount of time necessary to be in the pretty slim group of people qualified for a Supreme Court nomination is disproportionately going to be male."

Still, she's "happy that we're getting to a place in which Kagan wasn't necessarily chosen because she's a woman," in contrast to how the public perceived President Reagan's 1981 nomination of Justice O'Connor, who came from relative obscurity as a state appeals court judge in Arizona.

As women inch toward parity on the bench, Catholics and Jews are a Senate's vote away from constituting the entire court, reflecting the fact that these religious minorities are part of the American political mainstream. This does not mean, though, that minority religious representation will remain uncontroversial.

"When you have your first Muslim that's appointed to the Supreme Court, it will be a big deal," says Charles, considering the fact that the court and the country continue to be deeply divided on national security issues arising out of 9/11 and the wars in Iraq and Afghanistan. "It will eventually happen, whether in five or 50 years, and it's going to raise some issues for some people, but after it happens, it's going to be less of an issue."

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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