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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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Yet when it came time for Sotomayor to defend her speech, she repeatedly demurred, casting herself as a strict constructionist on the Constitution's text and history.

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

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

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Unseized upon by either side in the Sotomayor hearings was her comment in the same "wise Latina" speech that "Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects." Indeed, his personal experience with affirmative action left him feeling as if he'd been stamped with a "badge of inferiority," as he put it in a 1995 opinion. To this day, according to his autobiography, his Yale diploma, upon which he placed a sticker reading "15¢," sits in his basement.

• • •

But diversity as simply an aesthetic versus experience that comes to bear in interpreting the law will not disappear. It affects every potential next "first" on the court – such as the first Asian-American, the first gay, or the first atheist.

But are identity politics antithetical to an independent judiciary?

"The court is not a representative body, and it's not clear its function is to be a representative body in any way," says Barry Friedman, vice dean of the New York University Law School in New York City and author of

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Supreme Court nominee

Supreme Court confirmations, as Elena Kagan saw them

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"The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution." However, Mr. Friedman concedes, "in deciding legal questions, it does become important for the court's long-term credibility to reach conclusions that are acceptable to the American people."

One way to stay credible is to have justices whom Americans identify with and admire.

"As a minority, it is gratifying and yes, important, for me to see people of color on the Supreme Court and in other positions of leadership," says Viet Dinh, a law professor at Georgetown University in Washington, D.C., and a former high-ranking official in George W. Bush's Department of Justice. "When I see a Justice Thomas or a Justice Sotomayor," continues Mr. Dinh in an e-mail interview, "I am inspired by their example, for the simple reason that they have overcome so much, that they made it there not because of their race, but in spite of it."

Dinh, too, may one day be another's inspiring example. A prominent conservative lawyer who came to the United States in 1978 as a 10-year-old Vietnamese refugee; clerked for Justice Sandra Day O'Connor; and went on to help draft the USA Patriot Act after the terrorist attacks of Sept. 11, 2001; he could very well end up on a Republican president's shortlist for a Supreme Court vacancy.

And if high-profile nominations to the federal courts of appeal are any indication of which demographic is next in line for Supreme Court representation, Asian-Americans appear to be on deck.

Mr. Obama recently nominated Goodwin Liu, whom The New York Times called a "liberal legal rock star," to the San Francisco-based Ninth Circuit Court of Appeals. Professor Liu, a 39-year-old University of California, Berkeley, law professor, has faced the kind of Republican Senate scrutiny reserved for lower-court nominees whose confirmations appear to be little more than steppingstones to the Supreme Court.

In endorsing Liu, the National Asian Pacific American Bar Association (NAPABA) trumpets on its website his many qualifications, then states that the "confirmation of Professor Liu would help promote diversity in the federal judiciary, where Asian Pacific Americans are significantly underrepresented." Such a broad reason for support could as easily apply to Dinh, despite his and Liu's ideological differences.

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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

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* **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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