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## The Supreme Court is just as divided as the rest of the nation

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Viewed one way, Judge Neil M. Gorsuch's confirmation will not do much to change the dynamics of the Supreme Court. His appointment is a one-for-one swap, a conservative replacement for another conservative.

But there is a more instructive way to think about what Gorsuch's impact will be after he is sworn in Monday. It is to consider how the court would have been reshaped by President Barack Obama's pick for the same seat, Judge Merrick B. Garland.

The answer shows just how polarized the Supreme Court has become. The titanic struggle over who would replace Justice Antonin Scalia was nothing if not partisan, and for good reason — the Supreme Court is just as divided as the rest of the nation.

Had Garland replaced Scalia, the court would have immediately shifted to the left. A majority of its members would have been Democratic appointees for the first time in almost 50 years. And, in a shift in recent years, partisan affiliation has become a very strong predictor of voting trends for all its members.

All four of the court's current Republican appointees are more conservative than all four of the Democratic ones, and that familiar dynamic seems very likely to hold when Gorsuch joins the court. But it has not always been thus. As recently as 2009, two Republican appointees to the court, Justices John Paul Stevens and David H. Souter, were members of the court's liberal wing.

In losing the 2016 presidential election, Democrats may have given up the chance to change the balance of power on the Supreme Court for a generation. Gorsuch is 49. If he serves as long as Stevens, the last member of the court to retire, he will still be hearing cases in 2052. He would be 84, as old as Justice Ruth Bader Ginsburg is now.

Actuarial realities suggest that President Donald Trump will have additional chances to move the court to the right. The court's three oldest members are Anthony M. Kennedy, 80, a moderate conservative who holds the decisive vote in many closely divided cases, and the court's two senior liberals, Stephen G. Breyer, 78, and Ginsburg.

Were Trump to replace any of the three, a court that generally leans right would have a rock-solid conservative majority.

Were Trump to replace all three, the court's remaining liberals — Sonia Sotomayor, 62, and Elena Kagan, 56 — could find themselves in a sort of judicial exile, writing lonely dissents for years to come.

Until the Democrats' surprise loss on Election Day in November, liberals had been anticipating something entirely different.

“A Garland appointment would have swapped a centrist justice for a conservative one,” said Pamela S. Karlan, a law professor at Stanford University. “This means Garland would have been more likely to be a key vote on more issues than Gorsuch is likely to be, because Kennedy remains the critical vote for a five-justice conservative bloc, while Kennedy or Garland could have been the fifth vote for a liberal result.”

Not only would Kennedy have been ousted from his central role, but Chief Justice John Roberts would have been thrust into the ideological minority. That would have put the Roberts court's least popular precedent in immediate peril, said Jamal Greene, a law professor at Columbia.

“The biggest substantive change would probably have been in the area of campaign finance,” he said. “Citizens United would almost immediately have been on the chopping block with a liberal majority.” That decision allowed corporations and unions to do what individuals had long been able to do: spend as much as they liked to support or oppose political candidates.

“I can even imagine a court with Garland on it chipping away at the four-decades-old rule that forbids limits on individual campaign expenditures,” Greene said. “That kind of ruling could have produced a sea change in the political process.”

A range of other liberal policy priorities could also have been preserved, even though Garland is not especially liberal.

“With a Justice Garland,” said Elizabeth Wydra, president of the Constitutional Accountability Center, “the right for women to choose an abortion and exercise equal citizenship would have been comfortably protected. The ability of agencies to safeguard clean air and water, civil rights and workplace safety would be less threatened. Gay men and lesbians would rest secure in their marriages and not feel vulnerable to discrimination based on who they love.”

On the other hand, some said that Garland would have been unlikely to stand up to government overreach. Trump, they said, delivered on his campaign promise and found a nominee whose views reflected, among other things, his hostility to the administrative state, a position Garland does not share.

“Garland has a record of deferring to the government on pretty much everything, be it labor regulation or law enforcement, while Gorsuch is much more skeptical both of government action and of judicial deference to executive agencies,” said Ilya Shapiro, a fellow at the Cato Institute, the libertarian group.

Gorsuch is very likely to be precisely the sort of conservative Trump promised his supporters. “The justices that I’m going to appoint will be pro-life,” Trump said at the third presidential debate in October. “They will have a conservative bent. They will be protecting the Second Amendment.” Liberal despair over the future of the Supreme Court is compounded by hostility to Trump. “A president with unprecedented ignorance of, and contempt for, fundamental constitutional values has gotten the opportunity to fill Justice Scalia’s seat with a nominee who is likely to have a 30-year career of moving the court to the right,” Karlan said.

In some ways, Gorsuch’s impact in the short term will be modest. He will very likely vote much as Scalia did. The court will thus be basically unchanged since 2006, when Justice Samuel A. Alito Jr.’s appointment moved it to the right. Kennedy will retain his role at the court’s center, generally leaning right but occasionally joining the court’s four-member liberal bloc, as he has in important decisions on gay rights, abortion and affirmative action.

Those decisions are probably secure for now, but a newly empowered conservative majority is likely to continue the signature projects of the Roberts court: deregulating campaign finance law, allowing states to limit voting, expanding gun rights and viewing race-conscious decisions by the government with skepticism.

A threat to public unions, averted by a 4-4 deadlock in the wake of Scalia’s death, is likely to re-emerge. Breyer’s campaign to do away with the death penalty will almost certainly founder.

Richard H. Pildes, a law professor at New York University, said the array of cases in which the actual Gorsuch and the hypothetical Garland might differ is vast, including on campaign finance, affirmative action, voting rights, religious freedom, class actions and aspects of criminal and immigration law.

But he cautioned in an email that the two judges should not be reduced to stereotypes. “Neither Gorsuch nor Garland has written opinions in most of these areas,” he wrote, “but if you treat them as place holders for ‘conservative’ or ‘liberal’ outcomes — which is too simplistic and unfair to both of them — these are where those fault lines have been in recent years.”