

## The People's Justice?

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*Over the past few decades, the liberal Justices on the Supreme Court have made their most notable extrajudicial communications about the Constitution in academic venues discussing academic issues. This has limited their appeal to broader audiences. In this Essay, Professor David Fontana explores the distinctive path that Justice Sotomayor has pursued during her first five years on the Court. Justice Sotomayor has spoken to academic audiences, as past liberal Justices have. What is most notable about Justice Sotomayor, though, is that she has also appeared in locations and addressed issues that make her and what she discusses of broader appeal; that gives her the potential, as this Essay discusses, to become the "People's Justice." Justice Sotomayor thus may make liberal perspectives on the Constitution more known, more liked, and more comprehensible. For those concerned with pursuing a liberal vision of the Constitution, this could be an important development.*

### INTRODUCTION

No moment better represented why Justice Sonia Sotomayor could be a different kind of Supreme Court Justice than the events of the Sunday before the second presidential inauguration. Vice President Joseph Biden selected her to administer his oath of office. Justices often play a role during inaugurations, from administering oaths to sitting among other dignitaries in the audience. This time was different, though: Sotomayor agreed to administer the oath to Vice President Biden, but requested that she do so early in the day so she could attend a book signing event open to the general public that afternoon at Barnes & Noble in New York City.<sup>1</sup> This moment illustrated what has made Justice Sotomayor unique on the Court during her first five years: Her role as the first publicly affiliated liberal Justice during the past generation to use the unique opportunities Justices have to communicate *outside* of their judicial opinions with *average* Americans.

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1. See David G. Savage & Michael A. Memoli, *Sotomayor Scheduling Conflict Leads to Biden's Early Swearing-In*, L.A. TIMES, Jan. 18, 2013, <http://articles.latimes.com/2013/jan/18/news/la-pn-sotomayor-biden-inauguration-20130118>.

Liberal Justices during the past few decades<sup>2</sup> have used their communications outside of their opinions—what this Essay will call “extrajudicial communications”—to play the role of what we might call the “Academic’s Justice.” The content and locations of their extrajudicial communications have been most notable for their academic, intellectual, and technical nature. Their most significant appearances have been at universities, law school moot courts, law school lectures, or meetings of elite bar associations. Their writings have been focused on the law as an academic exercise. The public coverage of the Justices on the left side of the jurisprudential spectrum has mirrored this, often focusing on the liberal need to find an “*intellectual counterweight*”<sup>3</sup> to conservative Justices.<sup>4</sup>

This academic audience is important for liberal Justices, but the audience for liberal Justices is plural, not singular. By focusing too much on academic topics before academic audiences, liberal Justices have not used their extrajudicial communications to reach broader audiences.

What makes Sotomayor potentially different is her ability to fix this—to serve as the “People’s Justice”<sup>5</sup> instead of the “Academic’s Justice.” Sotomayor

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2. I will include in this list Justice David Souter (appointed by a Republican President but a reliable liberal vote for most of his career). I will also include Justice John Paul Stevens, who was not appointed during this time period but became a reliable liberal vote during this period, as well as the three other Justices appointed by Democratic Presidents: Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan. Cf. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1455-56 tbl. 8 (2013) (referencing these Justices as “liberals”). The other liberal Justices on the Court during this period had either largely stopped their public communications by the time the 1990s started (Harry Blackmun) or had not been publicly affiliated with the liberal cause for some time (Byron White). The Essay is limited to recent history because it is the most relevant to what is transpiring now and will transpire in the future, and it is the time period when conservative Justices first comprehensively “went public” with their constitutional arguments. See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 10-11 (2008).
  3. Adam Cohen, *Editorial Observer: Justice Breyer Proposes a New Path for the Post-Rehnquist Court*, N.Y. TIMES, Sept. 26, 2005, <http://www.nytimes.com/2005/09/26/opinion/26mon4.html> (emphasis added).
  4. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 91-92 (2012) (“It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never converged on an appealing and practical alternative.” (quoting RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004))); Cass Sunstein, *The Philosopher-Justice*, NEW REPUBLIC, Sept. 19, 2005 (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)) (“At last there has appeared a direct and substantial challenge . . . to the constitutional thought of Justice Antonin Scalia . . .”).
  5. The reference here is, of course, to the phrase popularized during Prime Minister Tony Blair’s remarks about the late Princess Diana. See *Blair Pays Tribute to Princess Diana*, BBC, <http://www.bbc.co.uk/news/special/politics97/diana/blairreact.html> (last visited Feb. 19, 2014) (“They liked her, they loved her, they regarded her as one of the people.”).

has made her share of appearances at academic institutions like law schools and has discussed academic topics.<sup>6</sup> More notably, though, Sotomayor has made a large number of appearances at events geared toward other audiences. If the medium is the message, then part of what makes Sotomayor different is where she is appearing. Sotomayor has used these appearances (and her best-selling book<sup>7</sup>) to discuss her life – and the law – in a less academic fashion.

By appearing in different places and talking about the law in a different language, Sotomayor has the potential to be a new kind of liberal Justice by appealing to broader audiences. Her fame might bring new followers to the liberal cause. Her humanity might make them appreciate the liberal cause even more. And her language might make the liberal cause sound different – and more appealing to a broader range of audiences.<sup>8</sup>

There is an emerging academic literature about the relevance of these audiences to what the Supreme Court does.<sup>9</sup> If members of the general public are convinced by what Justices say in their public appearances, they might play a role (via public opinion polls) in influencing what types of federal judges or Supreme Court Justices can be nominated or approved.<sup>10</sup> If members of the general public are convinced by what Justices say in their public appearances, that could even play a direct role in influencing how Justices might decide later

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6. Because the number of appearances that the Justices have made is large, I have instead provided an illustrative list of appearances. Particularly since so much of their tenure was before the Internet, and because there is no other database about the public appearances by Justices, this Essay makes “no claim to systematicity or comprehensiveness” by capturing every public appearance. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 520 n.21 (2013). Instead, the examples are meant to “add sufficient texture to merit mention, notwithstanding their evident limitations.” *Id.*

7. See SONIA SOTOMAYOR, *MY BELOVED WORLD* (2013).

8. There has been some media discussion of Sotomayor’s public appearances, but it has not considered their significance, their originality, and their long-term implications. See Jodi Kantor, *On Book-Tour Circuit, Sotomayor Sees a New Niche for a Justice*, N.Y. TIMES, Feb. 3, 2013, <http://www.nytimes.com/2013/02/04/us/politics/book-tour-rock-star-sotomayor-sees-an-even-higher-calling.htm>. Parts of the argument made here about Justice Sotomayor were briefly previewed in David Fontana, *Sonia Sotomayor: How She Became the Public Face of the Supreme Court’s Liberal Wing*, NEW REPUBLIC ONLINE, June 29, 2011, <http://www.newrepublic.com/article/politics/91013/sonia-sotomayor-supreme-court-liberal-voice>.

9. For some helpful examples, see Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 110 (2008); TELES, *supra* note 2.

10. See Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 385.

cases.<sup>11</sup> This literature suggests that what Sotomayor can offer liberals might be particularly useful.

This is a short Essay, but some caveats are still important: This Essay is limited to the strategic significance of Justice Sotomayor's role as the first Justice conventionally classified as a liberal in the past generation to communicate so often to lay audiences. It could be that her public outreach is significant for the entire Supreme Court, and not just for liberals, but that is beyond the scope of this Essay.<sup>12</sup> Being a true "People's Justice" might require a decisional jurisprudence and an opinion-writing style in addition to a public presence. The focus of this Essay is on the extrajudicial dimension of her tenure on the Court—and the tenure of other liberal Justices—because that is where Sotomayor has been the most different, original, and influential in filling gaps left by other liberal Justices. If conservative Justices have been "selling originalism,"<sup>13</sup> Justice Sotomayor could help liberals sell their constitutional theory.<sup>14</sup>

### I. THE AUDIENCES FOR LIBERAL JUSTICES

Liberal Justices have several different constituencies that could be helpful supporters of their causes, and that they therefore have an interest in cultivating. Academics and others with an academic interest in the law are a key constituency for Justices, particularly for liberals. But other legal and political elites and activists—and the hundreds of millions of other Americans—are also key, non-academic constituencies for the Supreme Court.

Scholars are just starting to develop accounts of why public communications matter for Supreme Court Justices. In political science, the

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11. See, e.g., Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 3 U. PA. J. CONST. L. 263, 263 (2010) ("When the 'mood of the public' is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions.").

12. If this were the focus, though, it would be more complicated, because at least Justice Antonin Scalia among the conservative Justices has engaged in extensive and quite effective public outreach. See, e.g., Guinier, *supra* note 9, at 120 (highlighting how oral dissents can likewise play this important communicative role); *id.* at 110 ("Justice Scalia has mastered . . . reach[ing] out to the people. He speaks frankly, memorably, and with absolute certainty about the very meaning of our democracy."). Justice Thomas used his autobiography to engage in outreach somewhat comparable to what Justice Sotomayor has done. In her desire to communicate to wider audiences, Justice Sandra Day O'Connor could be a wonderful analogue to Justice Sotomayor.

13. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

14. For the purposes of this short contribution focusing just on the strategic values of Justice Sotomayor's extrajudicial communications, I will also largely bracket some of the larger, normative questions about whether Justices should be appearing in public in this fashion.

importance for the President and Congress of “go[ing] public”<sup>15</sup> has been a major topic of discussion,<sup>16</sup> and scholars have started to examine foreign constitutional courts going public.<sup>17</sup> The importance of public communications for Justices has proven to be more controversial.<sup>18</sup>

While the few scholars to discuss these public communications have largely (with some notable exceptions<sup>19</sup>) focused on the judicial opinion,<sup>20</sup> either written or oral, extrajudicial communications are arguably even more important. We do not have comprehensive data on the issue, but because of the broader media coverage and ease of comprehension of the topics, these extrajudicial communications could be an even more potent form of public communication.<sup>21</sup> Regardless, the reasons public communication through

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15. Jeffrey K. Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50 AM. J. POL. SCI. 98, 98 (2006) (“In presidential studies, the ability to go public is considered among the chief executive’s most powerful tools.”).
  16. On the presidency and public communications, see, for instance, Matthew Eshbaugh-Soha, *The Politics of Presidential Press Conferences*, 41 AM. POL. RES. 471 (2013); and Lyn Ragsdale, *The Politics of Presidential Speechmaking, 1949-1980*, 78 AM. POL. SCI. REV. 971 (1984). On the Congress, see, for instance, Timothy E. Cook, *The Negotiation of Newsworthiness*, in THE PSYCHOLOGY OF POLITICAL COMMUNICATION 11 (Ann N. Crigler ed., 1996). On the bureaucracy, see, for instance, Daniel P. Carpenter, *Groups, the Media, Agency Waiting Costs, and FDA Drug Approval*, 46 AM. J. POL. SCI. 490 (2002).
  17. See JEFFREY K. STATON, *JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO* (2010); GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2009).
  18. See Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563 (2009) (arguing that these public communications do not matter). Note that there are many features of Rosenberg’s account that might make us question whether his is a general account of public communications by the Justices. First, there is more to the public communications of the Justices than just “the language of judicial opinions.” *Id.* at 564. Second, the studies on the empirical impact of public communications—apart from compliance with judicial outcomes—are limited, meaning there is not much direct empirical information to support the account that Rosenberg might be understood to make at his broadest. See Staton, *supra* note 15, at 98 (“[S]cholars largely ignore the interest high court judges take in shaping public information.”). In part, this is because the evidence about the Justices’ public activities, which this Essay presents in summary form, is not generally available and/or compiled and examined by scholars. For a notable exception, see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1539 tbl.1 (2010).
  19. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 566 (2006) (referencing at different points “the rousing talks that Thomas and Scalia routinely give to organized political constituencies”); Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1408 (2009) (highlighting “speeches” by conservative Justices in particular).
  20. See Post & Siegel, *supra* note 19, at 566-67 (“We mean . . . to call attention to the way in which these Justices use their judicial opinions as conscious tools to . . . fan the fires of political mobilization.”).
  21. See Guinier, *supra* note 9, at 14 (highlighting how oral dissents can reach broader audiences for similar reasons).

judicial opinions might matter are similar to the reasons extrajudicial communications might matter.

Public communication by Justices can persuade other legal and political actors, as well as members of the general public. Justices can provide “authority, legitimation and status”<sup>22</sup> for existing constitutional arguments. Justices can make the implausible into the plausible, by “mov[ing] otherwise marginal ideas into the intellectual mainstream.”<sup>23</sup> In addition to the *persuasion* of others, public communication by Justices can *motivate*. Not only can preferences be altered, but preferences can also be made more intense. Justices can “inspire[] and motivate[] the claims of politically engaged agents.”<sup>24</sup> This motivation can facilitate organization and the provision of labor and other forms of material support for causes consistent with the messages of the Justices.

#### A. *The Academic Audience for Liberal Justices*

For all Justices—but particularly for liberal Justices—academic audiences are crucially important. It may be the case that the opposite of what makes other audiences interested makes academics interested.<sup>25</sup> A focus on the complexity that comes from larger, less practical issues addressed using a technical language tends to mark the social space of the academic world.<sup>26</sup> Academic communication is frequently characterized by a sense of exclusion and exclusivity. It takes place in locations where entry is socially restricted, and focuses on content that not everyone can understand.<sup>27</sup>

Academic discussions can therefore be identified by their more exclusive *location* and *content*. To communicate with academic audiences, it is best to go to the kinds of exclusive settings where the academically inclined are located—universities, law school moot courts, law school lecture series, or national, elite bar association gatherings that feature more academic discussions. Given these exclusive settings, and these exclusive audiences, the *content* of these

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22. See Post & Siegel, *supra* note 19, at 589.

23. Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. POL. DEV.* 61, 67 (2009).

24. Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 *B.U. L. REV.* 581, 581 (2009).

25. See Andrew Abbott, *Status and Status Strain in the Professions*, 86 *AM. J. SOC.* 819 (1981) (highlighting this feature of specialized professions like the academic profession).

26. See *id.* at 822.

27. See, e.g., Robert J. Brym, *Sociology of Intellectuals*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* (James D. Wright ed., 2d. ed. 2015), <http://projects.chass.utoronto.ca/brym/intellectuals.pdf> (forthcoming) (focusing on exclusion as a historically central feature of academic life, including in the modern university).

conversations tends to be more academic as well. The conversation is more likely to be focused on issues like originalism or judicial restraint—the more technical and therefore more exclusive subject matters of academic legal discussions.<sup>28</sup>

Academics are an important audience for Justices because they are an attentive audience, with the time and leisure to follow the Court.<sup>29</sup> Academics have incentives to critique the Court. Academics who make important arguments regarding the work of the Court—for instance, John Hart Ely's book justifying the work of the Warren Court<sup>30</sup>—will receive professional acclaim in the legal community for their insights.

For liberals, academics have played a particularly crucial role for at least the past few decades. Liberals dominate law faculties.<sup>31</sup> Law professors have held important roles in Democratic administrations.<sup>32</sup> Law professors have been instrumental in the creation and operation of liberal legal organizations that have been “rising to power,”<sup>33</sup> like the American Constitution Society for Law and Policy.<sup>34</sup>

There are also other lawyers who might take a more academic approach to the Supreme Court, and thus might helpfully be grouped within this “academic” audience. The emergence of a “Supreme Court bar,” for instance, has meant that lawyers who follow the big theories as well as the small details that the Justices care about might fare better in the cases they brief and argue to

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28. See Abbott, *supra* note 25, at 825 (highlighting the “discourse norms” of academic environments).
  29. See Neil Gross & Scott Frickel, *A General Theory of Scientific/Intellectual Movements*, 70 AM. SOC. REV. 204, 215-16 (2005) (highlighting how academics use their differential flexibility).
  30. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). See also Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 11 (2012) (noting that “Ely’s theory of judicial review [is] rooted in the Warren Court years”).
  31. See John L. McGinnis, Matthew Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1169 (2005).
  32. See Erin Geiger Smith, *Law Professors from Across the Land Serving in Obama Administration*, BUS. INSIDER, Sept. 29, 2009, <http://www.businessinsider.com/obama-administration-takes-law-professors-from-all-over-2009-9#ixzz2om7eJv3s>.
  33. Charlie Savage, *Liberal Legal Group is Following New Administration’s Path to Power*, N.Y. TIMES, Dec. 10, 2008, <http://www.nytimes.com/2008/12/11/us/politics/11network.html>.
  34. Note that two law professors, Peter Rubin and Walter Dellinger, founded ACS and some of its major publications have been edited by law professors and primarily featured contributions by law professors. See *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009); *KEEPING FAITH WITH THE CONSTITUTION* (Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder eds., 2010).

the Court.<sup>35</sup> Many of the members of the Supreme Court bar are former Court clerks<sup>36</sup> or otherwise clerked for federal judges who closely follow the main theories about the Court.

The academic audience is an important one not just because it listens, but also because of what it can do with what it hears. Academics play a crucial role in influencing whether what the Justices are saying is persuasive or not by defining the acceptable boundaries of constitutional arguments. Defining what constitutional arguments are “off the wall” or “on the wall” is important,<sup>37</sup> and academics can play a crucial role in defining whether Justices’ comments are “off the wall” or “on the wall.” Academics can take not just to the law reviews but also to the halls of Congress or the opinion pages of newspapers to criticize or praise what the Justices are saying.

Academic audiences can also help the public comments by Justices be more motivating and therefore more mobilizing. Academics can draw attention to comments by the Justices by writing about what they are saying, thereby generating recognition and status for members of the Court. Consider, for instance, the significant quantity of legal scholarship devoted to originalism, conferring status on Justice Scalia as an important Justice because of his interest in originalism.<sup>38</sup>

If law professors are persuaded by what the Justices say, they can serve as a “support structure”<sup>39</sup> for the Justices—defending them in academic and popular writing and in teaching the next generation of lawyers. Justices may also motivate those who are academically inclined but are not law professors to bring cases to help the Justices advance their constitutional agendas. If Justices persuade these lawyers, they might present in their brief or oral argument the precise arguments that the Justices themselves articulated in their extrajudicial communications.

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35. See, e.g., KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* (1993); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

36. William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1780-82 (2009).

37. Cf. Balkin & Siegel, *supra* note 9, at 948 (discussing how redefining what arguments are considered acceptable and unacceptable plays a crucial role in generating or preventing constitutional change).

38. For an example, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

39. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 44-71 (1998).

*B. The Other Audiences for Liberal Justices*

Democratic Party politicians face a similar dilemma to that faced by liberal Justices: their supporters tend to be found among the most academically elite, but also the least academically elite.<sup>40</sup> Consider, for instance, the last two Presidents elected from the Democratic Party: one was a Rhodes Scholar and Yale Law School graduate who served as a part-time law professor before entering political office. The other was the President of the *Harvard Law Review* and also a part-time law professor before his political career advanced. What Presidents William Jefferson Clinton and Barack Obama both have done so well is combine these elite academic backgrounds with the capacity to communicate with lay audiences. It is the magic potion for liberal politics.

The situation is no different for liberal Justices trying to cultivate all of their audiences. Large portions of their audiences—if not most of their audiences—are not academics. This means that these audiences want to hear different things from the Justices. Unlike academic audiences, they are less concerned with the complexity of the Justices' extrajudicial communications, and more concerned with their accessibility and relevance.<sup>41</sup> Unlike for academic audiences, exclusion and exclusivity are not as important as practical implications explained comprehensibly.

Communications with non-academic audiences will therefore tend to differ in *location* and *content*. Rather than taking place at universities, law schools, or elite bar associations, events will be at the kinds of places that are less exclusive—that are formally or functionally more open to the general public, or at least to a broader cross-section of individuals. In these settings, the *content* of the remarks by Justices will tend to differ as well. Speakers tend to self-consciously and subconsciously change their remarks to fit their audience,<sup>42</sup> and so speaking to a less academic audience will produce less academic remarks. The combination of a more accessible location and more accessible content might also make for broader media coverage of these non-academic extrajudicial communications, thus multiplying the breadth and depth of the audience.

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40. See *How Groups Voted in 2012*, ROPER CENTER FOR PUB. OPINION RES., [http://www.ropcenter.uconn.edu/elections/how\\_groups\\_voted/voted\\_12.html](http://www.ropcenter.uconn.edu/elections/how_groups_voted/voted_12.html) (last visited Mar. 1, 2014).

41. See, e.g., Robert D. Benford, "You Could be the Hundredth Monkey": *Collective Action Messages and Vocabularies of Motive Within the Nuclear Disarmament Group*, 34 *SOC. Q.* 195 (1993) (noting that more accessible and relevant messages can be more motivating to groups).

42. For general discussions of this, see, for instance, Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *PSYCHOL. BULL.* 497 (1995); and Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 *ANN. REV. PSYCHOL.* 133 (1992).

For liberal Justices, these non-academic audiences come in many forms. It is important to reach other parts of the “liberal legal network.”<sup>43</sup> These other parts of the network include other legal elites, but legal elites without as much interest as academics in the big theory that dominates academic discussions. This includes organizations like the ACLU or the AFL-CIO. Other liberal elite audiences might be political elites, like Democratic members of Congress, who care about the Court, but usually do not care as much or as often about academic discussions.<sup>44</sup> There are approximately one million lawyers in the United States,<sup>45</sup> and most of them are supporters of the causes that liberal Justices support<sup>46</sup> and could be motivated and persuaded to take up legal arms to support what these Justices are saying. The largest potential constituency for liberal Justices might be average members of the public, who are overwhelmingly supportive of liberal touchstones like *Roe v. Wade*<sup>47</sup> and opposed to liberal villains like *Citizens United*.<sup>48</sup>

Using extrajudicial communications to speak effectively to these audiences can persuade and motivate them in important ways. If elite legal interest groups like the ACLU support what Justices state, they might be more inclined to host the Justices for lectures or publicize their messages to their stakeholders. If members of Congress are convinced by what Justices state, they might be more inclined to introduce supportive legislation, hold supportive hearings, or give supportive speeches.

As the scholarship about the public and the Court has demonstrated, the non-elite, average members of the public can also be helpful if motivated. They can convince their members of Congress or their President to nominate or support different judicial nominees, or even influence voting on constitutional issues by members of the political or judicial branches.

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43. TELES, *supra* note 2, at 22 (identifying the “liberal legal network” as including “the collection of individuals and organizations in the legal profession, law schools and public interest law groups”).

44. Some members of Congress might be exceptions, and might take an interest in the theoretical debates on their own terms, rather than as windows into practical consequences of particular decisions. See, e.g., Glenn Thrush, *Obama Doesn't Want SCOTUS Fight*, POLITICO (Apr. 10, 2010, 8:11 PM), <http://www.politico.com/news/stories/0410/35604.html> (quoting Senator Charles Schumer saying that liberals most need “someone in the image of Justice Stevens who was well known as somebody who could influence other justices”).

45. See, e.g., *Lawyer Demographics*, ABA (2013), [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer\\_demographics\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf) (reporting that there were 1,268,011 licensed lawyers in the United States in 2012).

46. See, e.g., *Lawyers/Law Firms*, CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/industries/indus.php?ind=K01> (last visited Dec. 1, 2013) (listing law firm contributions to federal political candidates and political committees).

47. 410 U.S. 113 (1973).

48. 558 U.S. 310 (2010).

Likewise, if this non-academic audience is more motivated, it can serve the interests of liberal Justices. If elite legal interest groups are motivated, for example, they can serve as a “support structure” finding favorable clients and cases to bring to the Court to further the Justices’ pet causes. If these groups – or members of Congress – are motivated, they can also use what the Justices state to raise money and mobilize voters.<sup>49</sup>

## II. THE ACADEMIC’S JUSTICES

The past several liberal Justices have been mostly focused in their extrajudicial communications on academic audiences. This has meant that the public events they have received the most attention for have been at universities, particularly law schools, and at elite bar association gatherings. Their remarks in those settings – and their writings in other settings – have focused mostly on the technical, academic dimensions of the constitutional issues they address in their work on the Court. By focusing on academic audiences, other relevant and potentially helpful audiences have been neglected.

### A. *The Academic Nature of Recent Liberal Justices*

The publicly affiliated liberal Justices of the past generation have had a significant voice and presence in the academic world of law. Justice John Paul Stevens, nominated by President Gerald Ford in 1975, became known as one of the liberal members of the Court.<sup>50</sup> A former part-time law professor at the University of Chicago Law School, Justice Stevens was a frequent lecturer at bar association and law school events during his career.<sup>51</sup> Right before and after his retirement, the content of these appearances became more provocative, because Justice Stevens addressed the technical errors of specific Court decisions<sup>52</sup> or constitutional theories.<sup>53</sup> Justice Stevens made many appearances

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49. See Post & Siegel, *supra* note 19, at 546 & n.11 (noting that “[o]riginalism remains even now a powerful vehicle for conservative mobilization”).

50. One study found him to be the most liberal member of the Court circa 2003. See Keith T. Poole & Howard L. Rosenthal, *The Unidimensional Supreme Court*, VOTEVIEW.COM (July 10, 2003), [http://pooleandrosenthal.com/the\\_unidimensional\\_supreme\\_court.htm](http://pooleandrosenthal.com/the_unidimensional_supreme_court.htm) (describing Lawrence Sirovich, *A Pattern Analysis of the Second Rehnquist U.S. Supreme Court*, 100 PROC. NAT’L ACAD. SCI. 7432 (2003)).

51. For a rather typical example of the type of event that Justice Stevens would speak at, see, for instance, ABA, *American Legal Issues*, C-SPAN (Aug. 6, 2005), <http://www.c-span.org/video/?188425-1/american-legal-issues>.

52. See, e.g., John Paul Stevens, Justice (Ret.), U.S. Sup. Ct., Remarks to the Brady Center to Prevent Handgun Violence (Oct. 15, 2012), <http://www.supremecourt.gov/publicinfo>

to promote his book on the history of the Court,<sup>54</sup> although these appearances were generally before bar associations and at law schools and not at events appealing to the general public.<sup>55</sup> Justice Stevens also wrote several essays for the most academic of general publications, *The New York Review of Books*.<sup>56</sup>

After joining the decisive opinion in *Planned Parenthood v. Casey*<sup>57</sup> upholding *Roe v. Wade*, Justice David Souter, who had been appointed by President George H.W. Bush in 1990, became known as a member of the liberal wing of the Court.<sup>58</sup> Justice Souter rarely attended public events of any sort, academic or otherwise.<sup>59</sup> When he did appear in public or produce content for the public, his engagement was of a more academic nature. He was still the author of at least four academic articles before retiring from the Court in 2009.<sup>60</sup> After retiring, he delivered a “remarkable speech”<sup>61</sup> at the Harvard University Commencement that received widespread attention for laying out a theory of constitutional interpretation. This speech was then printed in the *Harvard Law Review*.<sup>62</sup>

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/speeches/JPS%20Speech(DC)\_10-15-2012.pdf (addressing the constitutional dimensions of firearm regulation).

53. See, e.g., John Paul Stevens, Justice (Ret.), U.S. Sup. Ct., Remarks to the American Constitution Society (June 14, 2013), [http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech\\_6-14-13.pdf](http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech_6-14-13.pdf) (addressing originalism and its applications to certain doctrinal areas).
54. JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR (2011).
55. Justice Stevens did, however, appear on the *Colbert Report*. See *Colbert Report: John Paul Stevens* (Comedy Central television broadcast Jan. 19, 2012), <http://www.colbertnation.com/articles/john-paul-stevens>.
56. For a complete list of his essays in this publication, see *John Paul Stevens*, N.Y. REV. BOOKS, <http://www.nybooks.com/contributors/john-paul-stevens> (last visited Mar. 3, 2014).
57. 505 U.S. 833 (1992)
58. See, e.g., Dan Coats, *Anatomy of A Nomination: A Year Later, What Went Wrong, What Went Right and What We Can Learn from the Battles over Alito and Miers*, 28 HAMLINE J. PUB. L. & POL’Y 405, 411 (2007) (featuring a Republican senator’s comment that “[s]ixteen years later, many senators who supported Souter’s nomination have been surprised and disappointed with his rulings and lack of judicial restraint”).
59. See Linda Greenhouse, *Justice Souter’s Class*, N.Y. TIMES: OPINIONATOR (June 3, 2010, 9:47 PM), <http://opinionator.blogs.nytimes.com/2010/06/03/justice-souters-class> (describing Souter as “this most private of public figures”).
60. See David H. Souter, *Gerald Gunther*, 55 STAN. L. REV. 635 (2002); David H. Souter, *Tribute to the Honorable Edward R. Becker*, 149 U. PA. L. REV. 1229 (2001); David H. Souter, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1 (1997); David H. Souter, *A Tribute to Justice Harry A. Blackmun*, 104 YALE L.J. 5 (1994).
61. E.J. Dionne Jr., *David Souter vs. the Antonin Scalia*, WASH. POST, June 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/02/AR2010060203496.html>.
62. See David H. Souter, *Harvard University’s 359th Commencement Address*, 124 HARV. L. REV. 429 (2010).

Justice Ruth Bader Ginsburg was the next liberal Justice appointed to the Court, nominated in 1993, and her public profile, too, has been very academic. Before her nomination, Ginsburg was perhaps best known for her work litigating cases for the ACLU. She argued six cases before the Court and filed amicus briefs in many others,<sup>63</sup> pushing new theories about how the Constitution should be interpreted to protect against gender discrimination.<sup>64</sup> These innovations in theoretical understandings of the Constitution's treatment of gender became a part of the narrative surrounding her nomination and early years on the Court.<sup>65</sup> Ginsburg was a faculty member at different law schools for nineteen years, writing about the technical dimensions of civil procedure<sup>66</sup> as well as the constitutional dimensions of gender.<sup>67</sup> She eventually became the first female tenured faculty member at Columbia.<sup>68</sup>

Her public appearances while on the Court receiving the most attention have been at universities, law schools, and judicial conferences, and before bar associations or similar gatherings of lawyers.<sup>69</sup> The arguments she has presented in these places mirror her public appearances while she was still a judge on the United States Court of Appeals for the District of Columbia

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63. See Frank M. Coffin, Senior Circuit Judge, Introduction of the Honorable Ruth Bader Ginsburg at the Eighth Frank M. Coffin Lecture on Law and Public Service (Nov. 22, 1999), in Daniel Wathen & Barbara Riegelhaupt, *The Speeches of Frank M. Coffin: A Sideline to Judging*, 63 ME. L. REV. 467, 492 (2011).

64. See Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143-44 (1978) ("Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. . . . This is a constitutional issue, . . . surely one of the most important in this final quarter of the twentieth century."). For a helpful discussion of Ginsburg's role in many of these debates, see Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63 (2013).

65. See Richard Berke, *Ruth Bader Ginsburg: Clinton Picks a "Healer" With Few Detractors for the Supreme Court*, N.Y. TIMES, June 20, 1993, <http://www.nytimes.com/1993/06/20/weekinreview/june-13-19-ruth-bader-ginsburg-clinton-picks-healer-with-few-detractors-for.html> (referencing Ginsburg's "pathbreaking" work developing new theories of constitutional law in support of women's rights).

66. See, e.g., Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last In-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969); Ruth B. Ginsburg, *Special Findings and Jury Unanimity in Federal Courts*, 65 COLUM. L. REV. 256 (1965).

67. See, e.g., Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1 (1975).

68. See Martha Minow, *Essays in Honor of Justice Ruth Bader Ginsburg: Introduction*, 127 HARV. L. REV. 423, 423 (2013).

69. See, e.g., Ruth Bader Ginsburg, Remarks for the American Constitution Society (June 15, 2012) [http://www.supremecourt.gov/publicinfo/speeches/Remarks\\_for\\_ACS.pdf](http://www.supremecourt.gov/publicinfo/speeches/Remarks_for_ACS.pdf) (noting major doctrinal issues the Court faces); Ruth Bader Ginsburg with Linda Greenhouse, *A Conversation with Justice Ginsburg*, 122 YALE L.J. ONLINE 283 (2013), <http://yalelawjournal.org/2013/03/01/ginsburg&greenhouse.html>.

Circuit<sup>70</sup>: discussions about the role of gender in American constitutional doctrine<sup>71</sup> and about general questions related to judicial behavior and the judicial role.<sup>72</sup> During her time on the Court, Justice Ginsburg has either written or been interviewed for approximately ninety law review articles.

Justice Stephen Breyer, appointed to the Court in 1994, was a law professor for thirteen years before his appointment to the United States Court of Appeals for the First Circuit.<sup>73</sup> Breyer's interest in topics like administrative law led some to predict at the time of his nomination to the First Circuit that he would take an academic, technical approach to judging.<sup>74</sup> During his time on the Court, Justice Breyer's most notable public appearances have been prominent endowed lectures at universities, like the Tanner Lectures on Human Values at Harvard University,<sup>75</sup> the Madison Lecture at New York University,<sup>76</sup> or a series of lectures at Yale University.<sup>77</sup>

Within a year of his nomination, Justice Breyer authored a book on risk regulation.<sup>78</sup> He is also the primary author of an administrative law casebook.<sup>79</sup> His two more recent books<sup>80</sup> were attempts to provide an alternative theory of

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70. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *On Women and the Law* (1987), reprinted in *In Her Own Words: Ruth Bader Ginsburg*, N.Y. TIMES, June 15, 1993, <http://www.nytimes.com/1993/06/15/us/the-supreme-court-in-her-own-words-ruth-bader-ginsburg.html>.

71. See Dahlia Lithwick, *Ruth Bader Ginsburg Shows How Feminism Is Done. Again.*, SLATE (Aug. 30, 2010, 6:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/08/the\\_mother\\_of\\_all\\_grizzlies.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/08/the_mother_of_all_grizzlies.html).

72. See, e.g., Ruth Bader Ginsburg, Assoc. Justice, U.S. Sup. Ct., Remarks at Chautauqua (July 29, 2013), [http://www.supremecourt.gov/publicinfo/speeches/RBG\\_Speech\\_Chautauqua\\_NY\\_7-29-13.pdf](http://www.supremecourt.gov/publicinfo/speeches/RBG_Speech_Chautauqua_NY_7-29-13.pdf) (speaking on opera and the law); Ruth Bader Ginsburg, Assoc. Justice, U.S. Sup. Ct., The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), [http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp\\_10-21-07.html](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_10-21-07.html).

73. See Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1045 (2000).

74. See Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 760-61 (2006) (reviewing BREYER, *supra* note 4).

75. Stephen Breyer, Assoc. Justice, U.S. Sup. Ct., The Tanner Lectures on Human Values at Harvard University: Active Liberty: Interpreting Our Democratic Constitution (Nov. 17-19, 2004), [http://tannerlectures.utah.edu/\\_documents/a-to-z/b/Breyer\\_2006.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/b/Breyer_2006.pdf).

76. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

77. Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999 (2011).

78. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

79. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* (7th ed. 2011).

80. BREYER, *supra* note 4; STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010) [hereinafter BREYER, *MAKING*].

constitutional interpretation to that provided by Justice Scalia and others.<sup>81</sup> The two recent books were clearly attempts to appeal to a wider audience; his prior books were with Harvard University Press, while these two books were with more popular presses.

Justice Breyer's attempt in these two books to transcend his prior status as an Academic's Justice was met with only limited success—at best. The two books address relatively academic topics (e.g., originalism and textualism), and were only reviewed in more highbrow newspapers and magazines<sup>82</sup> and in law reviews.<sup>83</sup> Justice Breyer appeared on a few more mainstream media outlets (*PBS NewsHour* and *Fox Sunday Morning*), but beyond that, he previewed and discussed the book mostly through his university and law school lectures.

Elena Kagan, like Ginsburg and Breyer before her, had spent many years as a full-time academic—first as a law professor at the University of Chicago, then at Harvard, and then as the Dean at Harvard Law School. From the moment she first came to widespread public attention after her nomination, her academic background was part of the public narrative of her career. When she was nominated, the *New York Times* headline stated that President Obama had nominated “Kagan, Scholar But Not Judge, for Court Seat.”<sup>84</sup> President Obama mentioned her skills as a professor and dean when introducing her to the media and the public at the White House.<sup>85</sup> In her three years on the Court, Kagan has made notable appearances at Harvard Law School to speak and to

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81. See, e.g., Emily Bazelon, *Take That, Nino*, SLATE, Sept. 12, 2005, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2005/09/take\\_that\\_nino.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/take_that_nino.html) (describing Breyer's book as comforting for “liberals who want their side to have a fighter in the ring with Scalia”); Jeffrey Rosen, *Pragmatism Strikes Back*, NEW REPUBLIC, Sept. 28, 2010, <http://www.newrepublic.com/book/review/pragmatism-strikes-back-stephen-breyer-democracy-supreme-court> (reviewing BREYER, *MAKING*, *supra* note 80) (describing Breyer's second book as an attempt to respond to Scalia and address “liberals . . . still hungry for a constitutional vision”).

82. See sources cited *supra* note 81.

83. See, e.g., Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675 (2006) (reviewing BREYER, *supra* note 4); Kersch, *supra* note 74 (reviewing BREYER, *supra* note 4); Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699 (2006) (reviewing BREYER, *supra* note 4); James E. Ryan, *Does It Take A Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623 (2006) (reviewing BREYER, *supra* note 4); Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719 (2006) (reviewing BREYER, *supra* note 4).

84. See Peter Baker & Jeff Zeleny, *Obama Picks Kagan, Scholar But Not Judge, for Court Seat*, N.Y. TIMES, May 10, 2010, <http://www.nytimes.com/2010/05/11/us/politics/11court.html>.

85. See *id.*; Laura Meckler, *Kagan's Harvard Stint Could Be Selling Point*, WALL ST. J., Apr. 27, 2010, <http://online.wsj.com/news/articles/SB10001424052748704464704575208562540464720>.

teach a class,<sup>86</sup> at law school moot court competitions,<sup>87</sup> and at the Aspen Institute to discuss constitutional theory.<sup>88</sup>

*B. The Limitations of Being an Academic's Justice*

The academic audience, as Part I highlighted, is a crucial audience for liberal Justices, and thus it is important that recent liberal Justices have been appearing at academic locations and offering academic content. The academic audience might be frustrated with these Justices and desire a more “powerful” liberal voice,<sup>89</sup> but these Justices are at least speaking their language. Because other audiences have gone relatively ignored, it has meant a less compelling message about what liberal Justices value in the Constitution for other audiences.

If these other audiences are to be reached, then the location and content of extrajudicial communications by liberal Justices must be aligned with what these audiences can understand and appreciate. There must be what social movement scholars often call “frame alignment.”<sup>90</sup> For audiences not persuaded by academic ideas, a non-academic message will be more compelling.

Consider, for instance, the standard that President Obama set for his nominee to the Court before naming Sotomayor: “I view that quality of empathy, of understanding and identifying with people’s hopes and struggles,” he said, “as an essential ingredient for arriving at just decisions and outcomes.”<sup>91</sup> Delivered with millions of Americans watching—and millions more to read about it in the weeks and months to come—President Obama’s call for judging with “empathy” seemed more comprehensible for non-academics than Justice Breyer’s “democratic pragmatism” or Justice Souter’s “fair reading of the Constitution.” Large majorities of Americans expressed

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86. See *Back at Harvard Law, Kagan Reflects*, HARV. L. SCH. (Sept. 24, 2013), <http://www.law.harvard.edu/news/spotlight/alumni-pursuits/back-at-hls-justice-kagan-reflects.html>.

87. See, e.g., Cory Weinberg, *Justice Kagan to Judge Moot Court Contest*, GW HATCHET (May 16, 2011), <http://www.gwhatchet.com/2011/05/16/justice-kagan-to-judge-moot-court-contest>.

88. See, e.g., *A Conversation with Elena Kagan*, ASPEN INST. (Aug. 2, 2011), <http://www.aspeninstitute.org/video/conversation-justice-elena-kagan-moderated-elliott-gerson>.

89. Adam Liptak, *To Nudge, Shift or Shove the Supreme Court Left*, N.Y. TIMES, Jan. 31, 2009, <http://www.nytimes.com/2009/02/01/weekinreview/01liptak.html> (quoting former University of Chicago Law School Dean Geoffrey Stone).

90. See David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986) (noting the importance of altering the message to reach and motivate different audiences).

91. See Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 25, 2010, <http://www.nytimes.com/2010/04/26/us/politics/26memo.html>.

their approval for the President's "empathy" standard<sup>92</sup> (even if Justices Sotomayor and Kagan abandoned it during their hearings).<sup>93</sup> No such majorities have endorsed any other message that liberals have produced about what judging means.<sup>94</sup>

Crisp and memorable phrases are more persuasive to broader public audiences,<sup>95</sup> and this is probably just as true in discussions about the Constitution. (One thinks of phrases like "[s]eparate educational facilities are inherently unequal."<sup>96</sup>) Justices presenting remarks in academic settings or discussing academic topics are less likely to produce these talking points. Instead, remarks in these settings come off as more "lengthy, detailed and dense."<sup>97</sup>

The natural comparison is with conservative Justices, and the crisp phrases they have utilized to persuade. As Senator Al Franken said of conservatives compared to liberals: "[T]heir bumper sticker, . . . it's one word: No. . . . Our bumper sticker has—it's just way too many words. And it says, 'Continued on next bumper sticker.'"<sup>98</sup> Think of the phrases that have come from the mouths

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92. See, e.g., Eric Kleefeld, *Poll: Public Overwhelmingly Says Sotomayor Not Racist, and Empathy Is Important*, TALKING POINTS MEMO (June 5, 2009, 5:34 PM), <http://talkingpointsmemo.com/dc/poll-public-overwhelmingly-says-sotomayor-not-racist-and-empathy-is-important> (reporting nearly two to one support for the empathy standard).

93. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 120 (2009) (statement of Sonia Sotomayor) ("I don't—wouldn't approach the issue of judging in the way the President does."); *Kagan Disregards Obama View on Empathy*, LEGALTIMES (June 29, 2010, 12:51 PM), <http://legaltimes.typepad.com/blt/2010/06/kagan-disregards-obama-view-on-empathy.html> ("As Justice Sonia Sotomayor did a year ago, Supreme Court nominee Elena Kagan backed away today from President Barack Obama's statements about the role of empathy in judging.").

94. See Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 391-400 (2001). The empathy standard also persuaded and motivated academics to write about it. For examples, see Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012); and Kim McLane Wardlaw, *Umpires, Empathy and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629 (2010).

95. See, e.g., Christ'l De Landtsheer, Phillippe De Vries & Dieter Vertessen, *Political Impression Management: How Metaphors, Sound Bites, Appearance Effectiveness, and Personality Traits Can Win Elections*, 7 J. POL. MKTG. 217 (2008).

96. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

97. Guinier, *supra* note 9, at 9.

98. Eric Kleefeld, *Franken: Pro-Reform Bumper Stickers Have "Just Way Too Many Words,"* TALKING POINTS MEMO (Jan. 28, 2010, 10:17 PM), <http://tpmdc.talkingpointsmemo.com/2010/01/franken-pro-reform-bumper-stickers-have-just-way-too-many-words.php>.

of conservatives outside of judicial opinions: Judging is like being an umpire.<sup>99</sup> One can be an originalist without being a nut.<sup>100</sup>

For audiences not generally motivated by academic ideas, the academic location and content of the “Academic’s Justice” are hardly compelling. Part of evaluating the potency of a message for an audience is examining the resonance or salience of the message, or “how essential the beliefs, values, and ideas associated with group messages are to the lives of the targets of mobilization.”<sup>101</sup> The deeper and more intensely felt the beliefs that the messages are targeting, the more effective they will be as tools of mobilization and coordination.<sup>102</sup>

Messages about the Constitution framed in an academic fashion will not motivate the core selves and professional identities of non-academic audiences. For instance, the democratic pragmatism espoused by Justice Breyer is “context-specific, non-categorical, [and] expertise-driven.”<sup>103</sup> Context-specific messages do not mobilize local members of the ACLU or NAACP to give millions of dollars or organize meetings or marches. If Justice Breyer’s expertise-driven vision of the Constitution is explained instead as a means of permitting minority students to have a chance at a decent education in the school districts in *Parents Involved*,<sup>104</sup> the ACLU or NAACP’s local members might find themselves motivated. Justice Souter’s Harvard graduation speech about the importance of a “fair reading model”<sup>105</sup> of the Constitution may not stimulate the core beliefs of civil rights organizations, members of Congress, or average Americans. If the alternative to that model is taking away the power of the elected branches of government to do their jobs, framing it in those terms might stimulate the core beliefs of members of Congress or the voters that elected them, and motivate them to take action.

One reason that Justices on the left appeal less often to non-academic audiences is a perceived comparative disadvantage: They recognize the

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99. See Jeffrey Rosen, *Promises, Promises, Promises*, NEW REPUBLIC, Mar. 10, 2010, <http://www.newrepublic.com/article/politics/promises-promises-promises>.

100. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 103 (2007) (quoting an often-repeated line from one of Justice Scalia’s speeches).

101. See Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIOLOGY 611, 652 (2000).

102. For case studies making this point and drawing general conclusions, see, for example, William K. Carroll & Robert S. Ratner, *Master Frames and Counter-Hegemony: Political Sensibilities in Contemporary Social Movements*, 33 CAN. REV. SOC. ANTHROPOLOGY 407 (1993).

103. Richard Schragger, *The Last Progressive: Justice Breyer, Heller, and “Judicial Judgment,”* 59 SYRACUSE L. REV. 283, 284 (2008).

104. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745 (2007).

105. See Souter, *supra* note 62, at 430.

“particular knack for attracting and holding the attention of a nonlegal audience”<sup>106</sup> that some conservative Justices like Justice Scalia have.<sup>107</sup> Justice Scalia makes “every effort to insure his politically volatile statements are media-friendly,”<sup>108</sup> and often speaks as if he is “explaining his constitutional views to laypersons.”<sup>109</sup> Even his more academic book, *A Matter of Interpretation*, makes a point of saying that it “is addressed not just to lawyers but to . . . all thoughtful Americans,”<sup>110</sup> and is written in more comprehensible language than either of Justice Breyer’s books.<sup>111</sup> Chief Justice John Roberts used his confirmation hearing to introduce the easily intelligible and compelling analogy of judges as umpires,<sup>112</sup> a phrase that on its own stimulated massive discussion in many quarters.<sup>113</sup>

This comprehensibility means that conservative Justices are able to motivate using a “rare mix of legal analysis, emotional pique, and ideological fervor.”<sup>114</sup> Justice Scalia speaks of originalism with the passion of someone who believes not only that originalism is right, but that it will “save us all.”<sup>115</sup> He motivates by using “doses of mockery, humor, and insult” as well as “expressions of alarm.”<sup>116</sup> Justices Scalia and Thomas both use originalism “as

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106. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 546 (2009).

107. Note that Laurence Tribe has said that Justice Breyer was “mushy and unconstrained by comparison” to conservatives. See Letter from Laurence H. Tribe, Professor, Harvard Law School, to President Barack Obama, May 4, 2009, [http://www.eppc.org/docLib/20101028\\_tribeletter.pdf](http://www.eppc.org/docLib/20101028_tribeletter.pdf).

108. Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N.Y. L. SCH. L. REV. 907, 919-20 (2006) (footnotes omitted).

109. Greene, *supra* note 13, at 710.

110. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

111. See Greene, *supra* note 13, at 710.

112. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of John G. Roberts, Jr., J.).

113. See, e.g., Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006); Lee Ross, *Chief Justice Roberts Diverts Attention at Sotomayor Hearing*, FOX NEWS (July 13, 2009), <http://www.foxnews.com/politics/2009/07/13/chief-justice-roberts-diverts-attention-sotomayor-hearing>.

114. Dahlia Lithwick, *Talk of the Gown: What the Supreme Court Justices Won’t Say Speaks Volumes*, SLATE (Jan. 27, 2007), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/01/talkof\\_thegown.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/01/talkof_thegown.html).

115. Dahlia Lithwick, *I Need A Hero*, SLATE (Feb. 3, 2009), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/02/i\\_need\\_a\\_hero.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/02/i_need_a_hero.html).

116. Newman, *supra* note 108, at 919-20.

[a] conscious tool[] to excite the anger, fears, and resentments of conservative constituencies, and thus to fan the fires of political mobilization.”<sup>117</sup>

### III. THE PEOPLE’S JUSTICE?

In her first five years on the Court, Justice Sotomayor’s extrajudicial communications have been quite different than those of the recent liberal Justices. At times, the location and content of her communications have been academic. More prominent—and more notable, different, and promising for liberals—has been her constant capacity to communicate with non-academic audiences, to relate herself and the Constitution to lay audiences. The location and content of her extrajudicial appearances is what makes a more diverse range of audiences “like[] her, love[] her [and] regard[] her as one of the people.”<sup>118</sup>

#### A. *The Sotomayor Difference*

From time to time, there have been exceptions to the academic nature of the extrajudicial appearances by liberal Justices, particularly in the past few years.<sup>119</sup> Justice Stevens generally avoided extrajudicial appearances outside of law schools and bar associations, but in more recent years has appeared on *60 Minutes*.<sup>120</sup> Justice Ginsburg sat for several interviews with popular newspapers and television programs in the past few years.<sup>121</sup> Justice Breyer promoted his books on television programs like the *Charlie Rose Show*, *Fox News Sunday*, and *PBS NewsHour*.<sup>122</sup> Justice Kagan, while appearing at more academic locations

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117. Post & Siegel, *supra* note 19, at 566-67.

118. *Blair Pays Tribute*, *supra* note 5.

119. See Dahlia Lithwick, *Why Are the Justices Popping Up All over the Tube?*, AM. LAWYER (Feb. 28, 2007), <http://www.americanlawyer.com/id=900005474942/Why-Are-the-Justices-Popping-Up-All-Over-the-Tube>.

120. See *60 Minutes: Supreme Court Justice Stevens Opens Up* (CBS television broadcast Nov. 28, 2010), <http://www.cbsnews.com/video/watch/?id=7096996n>.

121. See, e.g., Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, Oct. 5, 2009, [http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm).

122. See Lithwick, *supra* note 119. Chief Justice John Roberts, perhaps following a path like Justice Scalia, has been a regular and headline-grabbing participant in events outside of law schools and bar associations. See *Nightline* (ABC television broadcast Nov. 13, 2006); *The Supreme Court* (PBS television broadcast Jan. 31 & Feb. 6, 2007); Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559>. See also Dahlia Lithwick, *The High Court Goes Courting*, SLATE (Nov. 14, 2006, 4:33 PM), [http://www.slate.com/articles/news\\_and\\_politics](http://www.slate.com/articles/news_and_politics)

and talking about more academic topics, has tried to simplify the language she uses in her appearances—and in her opinions. This has led to many proclaiming her the future key liberal communicator on the Court.<sup>123</sup>

Justice Sotomayor's five years on the Court, though, have featured a more frequent pattern of extrajudicial communications clearly outside of the normal academic circles inhabited by liberal Justices. Justice Sotomayor has appeared at her fair share of elite law schools.<sup>124</sup> At these appearances, though, the content of her remarks has been partially academic, but also partially personal. At her public interview at Northwestern University Law School, for instance, Justice Sotomayor remarked on how female judges are different by using anecdotes from her own confirmation process. She illustrated these remarks with a particularly vivid personal anecdote: She told a friend that the questions asked of her were so personal that she felt others "already know the color of my underwear."<sup>125</sup> When asked about how she approaches deciding cases, she indicated that having some "passion" for the cases and the parties involved in these cases is important.<sup>126</sup> She did not discuss originalism or pragmatism in any great detail—but nor did she avoid touching on what judges do and how they should do it. She expressed her convictions in a more personal and accessible fashion, one less characterized by technical, inaccessible content.

Contrast these comments by Sotomayor with the other liberal Justices' appearances at elite law schools. Justice Breyer's Yale lectures—the basis of his latest book—were almost entirely about different theories of constitutional interpretation.<sup>127</sup> Justice Ginsburg's Yale lectures this past year were about the role that gender should play in constitutional interpretation, but only occasionally mentioned the personal difficulties that Justice Ginsburg faced as a female lawyer earlier in her career.<sup>128</sup> Justice Kagan's interview with Dean

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[/jurisprudence/2006/11/the\\_high\\_court\\_goes\\_courting.html](#) ("Not only is the new chief justice unafraid of the media spotlight, he . . . has figured how to use it to his advantage.").

123. See, e.g., Adam Winkler, *The Coming of the Kagan Court: Why Elena Kagan Is the Most Influential Liberal Justice*, SLATE (Oct. 6, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/10/elena\\_kagan\\_is\\_the\\_most\\_influential\\_liberal\\_justice.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/elena_kagan_is_the_most_influential_liberal_justice.html).

124. See, e.g., Adam Liptak, *Sotomayor Reflects on First Years on Court*, N.Y. TIMES, Jan. 31, 2011, <http://www.nytimes.com/2011/02/01/us/politics/01sotomayor.html> (University of Chicago); James Warren, *Sonia Sotomayor on Dating, Deciding, and Being the Newest Supreme Court Justice*, ATLANTIC MONTHLY, Mar. 7, 2011, <http://www.theatlantic.com/politics/archive/2011/03/sonia-sotomayor-on-dating-deciding-and-being-the-newest-supreme-court-justice/72168> (Northwestern).

125. Warren, *supra* note 124.

126. See Pat Vaughan Tremmel, *Long Way Up to Highest Court of the Land*, NW. U. (Mar. 9, 2011), <http://www.northwestern.edu/newscenter/stories/2011/03/sotomayor-trienens-judicial-scholar.html>.

127. See BREYER, MAKING, *supra* note 80.

128. See Ginsburg & Greenhouse, *supra* note 69.

Martha Minow at Harvard Law School was a wide-ranging reflection on her career on and before the Court.<sup>129</sup>

Justice Sotomayor has received substantial amounts of media attention for her extrajudicial appearances at events that are not geared towards academics, and instead are watched by a cross-section of millions of Americans. Sotomayor has talked with the women of *The View* (who called her “Sonia”), spoken to the hosts of *The Today Show*, and has been interviewed by Katie Couric, Oprah Winfrey, Jon Stewart, and Stephen Colbert.<sup>130</sup> She has been featured in the more middle- or upper-brow strata of liberal media: *60 Minutes*, National Public Radio, CNN, and C-SPAN.<sup>131</sup> She made two appearances on a program that appeals to everyone: *Sesame Street*.<sup>132</sup>

A similar pattern of appearing in accessible and non-academic locations has characterized her extrajudicial communications outside of the mass media. Immediately after her Senate confirmation, she made sure to be available in Manhattan to greet “neighbors who lined the sidewalks.”<sup>133</sup> She threw out the

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129. See *Back at Harvard Law, Justice Kagan Reflects*, *supra* note 86.

130. See *The Colbert Report: Sonia Sotomayor* (Comedy Central television broadcast Feb. 4, 2013), <http://www.colbertnation.com/the-colbert-report-videos/423505/february-04-2013/sonia-sotomayor>; *Justice Sotomayor's Awkward Moment with President Obama*, KATIE, <http://katiecouric.com/videos/justice-sotomayors-awkward-moment-with-president-obama>; *Oprah's Next Chapter: Sheryl Sandberg and Sonia Sotomayor* (Oprah Winfrey Network television broadcast Mar. 24, 2013), <http://www.oprah.com/own-oprahs-next-chapter/Oprahs-Next-Chapter-Sheryl-Sandberg-and-Sonia-Sotomayor>; *The Daily Show with Jon Stewart: Sonia Sotomayor* (Comedy Central television broadcast Jan. 21, 2013), <http://www.thedailyshow.com/watch/mon-january-21-2013/sonia-sotomayor>; *The View* (ABC television broadcast May 6, 2013), [http://abc.go.com/shows/the-view/video/PL5554876/\\_m\\_VDKAo\\_v7ozw9xr](http://abc.go.com/shows/the-view/video/PL5554876/_m_VDKAo_v7ozw9xr); *Today: Sonia Sotomayor: "Each Decision Comes at a Cost,"* (NBC television broadcast Jan. 14, 2013), <http://www.today.com/video/today/50456015#50456015>.

131. See *Justice Sotomayor Prefers "Sonia from the Bronx,"* 60 MINUTES (CBS News television broadcast Jan. 13, 2013), <http://www.cbsnews.com/video/watch/?id=50138923n>; *Supreme Court Justice Sonia Sotomayor in Multipart Interview with NPR News, Airing January 14-19*, NAT'L PUB. RADIO (Jan. 12, 2012), <http://www.npr.org/about/press/2013/11213.SotomayorNPRNewsInterview.html>; *Interview with Justice Sonia Sotomayor*, C-SPAN (Sept. 16, 2009), [http://supremecourt.c-span.org/Video/JusticeOwnWords/SC\\_Jus\\_Sotomayor.aspx](http://supremecourt.c-span.org/Video/JusticeOwnWords/SC_Jus_Sotomayor.aspx); *Justice Sotomayor Talks with CNN's O'Brien*, CNN PRESS ROOM (Jan. 21, 2013, 9:09 AM), <http://cnnpressroom.blogs.cnn.com/2013/01/21/sotomayor-i-was-an-alien-talks-affirmative-action-experience-and-the-affect-on-rulings>.

132. See *Sotomayor Acquits Goldilocks on Sesame Street*, FOX NEWS LATINO (Feb. 8, 2012), <http://latino.foxnews.com/latino/entertainment/2012/02/08/supreme-court-justice-sotomayor-appears-on-sesame-street-and-aquits-goldilocks>; *Sesame Street, Sesame Street: Sonia Sotomayor and Abby—Career*, YOUTUBE (Nov. 9, 2012), <http://www.youtube.com/watch?v=EHICz5MYxNQ>.

133. Charlie Savage, *Sotomayor Confirmed by Senate, 68-31*, N.Y. TIMES (Aug. 6, 2009), <http://www.nytimes.com/2009/08/07/us/politics/07confirm.html>.

first pitch at a New York Yankees game<sup>134</sup> and later greeted the Yankees in her chambers with the World Series trophy.<sup>135</sup> She regularly appears at high schools and other educational institutions for children,<sup>136</sup> and at universities beyond just the very elite schools.<sup>137</sup> She appears at bookstores across the country.<sup>138</sup> She regularly appears before groups of lawyers—particularly public interest groups—that are not the most elite groups of lawyers.<sup>139</sup>

As with her appearances at elite law schools, these appearances can sometimes be purely personal, sometimes partly about the Constitution, and sometimes a combination of the two. During her *60 Minutes* interview, for instance, she spoke of the importance of affirmative action by highlighting that it “changed the course of my life.”<sup>140</sup>

A big part of Justice Sotomayor’s appearances at these other events is her unprecedented, headline-grabbing autobiography, published less than four years after her elevation to the Court. This book was the number one book on the *New York Times* best-seller list for several months.<sup>141</sup> This book was almost the opposite of an appearance at an elite academic institution—open to millions of Americans who purchased it from bookstores or Amazon.

Like most of her extrajudicial communications, the book is targeted at a wider audience. Without mentioning specific academic phrases or debates, Sotomayor still does manage to make points that implicate some constitutional debates. Sotomayor argues that even minorities who feel the legal system is

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134. See Anthony DiComo, *Justice Sotomayor Throws Out First Pitch*, YANKEES.COM (Sept. 26, 2009, 8:45 PM), [http://newyork.yankees.mlb.com/news/article.jsp?ymd=20090926&content\\_id=7169594&c\\_id=nyy&vkey=news\\_nyy](http://newyork.yankees.mlb.com/news/article.jsp?ymd=20090926&content_id=7169594&c_id=nyy&vkey=news_nyy).

135. See Mark Sherman, *Off the Bench: Yankees Fan Sotomayor Meets World Series Trophy*, FACEBOOK (Apr. 27, 2010, 4:26 PM), [https://www.facebook.com/note.php?note\\_id=10150184356000651](https://www.facebook.com/note.php?note_id=10150184356000651).

136. See, e.g., *Lincoln High Students Get to Quiz Sotomayor*, OREGONIAN (May 11, 2010, 1:51 PM), [http://www.oregonlive.com/portland/index.ssf/2010/05/lincoln\\_high\\_students\\_get\\_to\\_quiz\\_sotomayor\\_visits\\_her\\_nyc\\_school\\_housing\\_project](http://www.oregonlive.com/portland/index.ssf/2010/05/lincoln_high_students_get_to_quiz_sotomayor_visits_her_nyc_school_housing_project); *Sotomayor Visits Her NYC School, Housing Project*, N.Y. POST, June 5, 2010, <http://nypost.com/2010/06/05/sotomayor-revisits-her-nyc-school-housing-project>.

137. See, e.g., *Supreme Court Justice Sonia Sotomayor Launches Hostos Lecture Series in Grand Style*, HOSTOS COMMUNITY COLLEGE (Feb. 13, 2013), <http://www.hostos.cuny.edu/news/press/JusticeSotomayor@HostosLectureSeries.html>.

138. See, e.g., Lisa Fernandez & Stephanie Chuang, *Supreme Court Justice Sonia Sotomayor on Bay Area Book Tour*, NBC BAY AREA (Jan. 28, 2013, 8:17 PM), <http://www.nbcbayarea.com/news/local/Supreme-Court-Justice-Sonia-Sotomayor-Visits-Bay-Area-188700511.html>.

139. See, e.g., Robert L. Smith, *Justice Sotomayor Charms and Inspires a Crowd in Cleveland*, CLEVELAND PLAIN DEALER (Sept. 10, 2010, 11:30 PM), [http://blog.cleveland.com/metro/2010/09/justice\\_sotomayor\\_thanks\\_legal.html](http://blog.cleveland.com/metro/2010/09/justice_sotomayor_thanks_legal.html).

140. See *Justice Sotomayor Prefers “Sonia from the Bronx,”* *supra* note 131.

141. See Mark Sherman, *Sonia Sotomayor Tells Yale Graduates that Her Job Isn’t All Glamour*, HUFFINGTON POST (May 22, 2013, 8:58 AM), [http://www.huffingtonpost.com/2013/05/22/sonia-sotomayor-yale\\_n\\_3318773.html](http://www.huffingtonpost.com/2013/05/22/sonia-sotomayor-yale_n_3318773.html).

against them, as she has at different points, should try to work within the system.<sup>142</sup>

*B. The Potential of Sotomayor as the People's Justice*

*1. Potential Contributions*

One difference that Justice Sotomayor could make is not to *alter* what liberal Justices are saying about the Constitution, but to attract more people to listen to what she—and the other liberal Justices—are already saying. She could become the People's Justice by making the people pay more attention to existing debates about the Constitution and existing liberal arguments. Justice Sotomayor seemed to make this point in her interview with Jodi Kantor of the *New York Times*,<sup>143</sup> and there are good reasons to think she might be right.

Academic locations and academic content generally do not receive widespread attention,<sup>144</sup> but Sotomayor's appearances have been heavily covered. We know, for instance, that during high-salience moments for the Supreme Court, the American public tends to pay more attention to the work of the Court.<sup>145</sup> One technique for heightening issue salience is making the issue more personal and immediate to the general public.<sup>146</sup> Putting a face on an issue can give it higher salience.<sup>147</sup>

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<sup>142.</sup> See SOTOMAYOR, *supra* note 7, at 165.

<sup>143.</sup> See Kantor, *supra* note 8 (“I would like there to be no child in America who grows up not knowing what the Supreme Court is,” she said.”).

<sup>144.</sup> Relatedly, Chief Justice John Roberts has identified the excessively academic nature of some Justices as a weakness. See Rosen, *supra* note 122 (noting that Chief Justices can go wrong when they act as “law professors rather than as leaders of a collegial Court” and that “the brilliant academics are less successful, over time”). See also Larry Kramer, *Believing in the Goodness of People*, 89 TEX. L. REV. 1403, 1405 (2011) (reviewing SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010)) (noting that Justice William J. Brennan, Jr., was successful even though he was surpassed by many other Justices “as a lawyer or an intellectual”).

<sup>145.</sup> See, e.g., Gregory A. Calderia, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1144 (1987); James G. Gimpel & Robin M. Wolpert, *Opinion-Holding and Public Attitudes Toward Controversial Supreme Court Nominees*, 49 POL. RES. Q. 163, 164 (1996).

<sup>146.</sup> See Benford, *supra* note 41, at 203-04.

<sup>147.</sup> See Deborah A. Small, George Lowenstein & Paul Slovic, *Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims*, 102 ORG. BEHAVIOR & HUMAN DEC. PROC. 143, 144-45 (2007).

For many reasons—but surely in part because of her public appearances—Sotomayor is the third-most-known Justice on the Court.<sup>148</sup> Supreme Court reporters for major newspapers cover her, but so do culture reporters, entertainment reporters, and general news reporters, one of whom called Sotomayor “the nation’s most high-profile Hispanic figure.”<sup>149</sup> For non-academic audiences to be persuaded by liberal Justices, they must know who they are and what they are saying. Sotomayor’s pervasive fame could popularize the liberal constitutional product, and by popularizing the product it could persuade new audiences.

There is another difference embedded in Sotomayor’s appeals to other audiences that could make a difference without changing the message of liberal Justices: Sotomayor could make the message of liberal Justices more appealing by affiliating it with an appealing messenger. How messages are received has to do with how appealing the messenger appears to the audience.<sup>150</sup> The academic location and academic content of the extrajudicial communications by the other Justices might be more or less compelling, but it does not operate at the emotive, personal level that creates affection from the audience.<sup>151</sup>

By contrast, Sotomayor has been appealing to a wide variety of audiences in part because of where she has made her public appearances. Appearances that are closer to the social and physical locations that feel like home to audiences—that is, locations that are most socially and physically proximate to these audiences—can make a person more appealing.<sup>152</sup> For instance, when Sotomayor visited the law school at the University of California, Berkeley, she judged a moot court competition and met with faculty and students there, appearing on the home turf of the academic audiences for liberal Justices. That same day, though, she went to an elementary school and met with local students, teachers, and parents, meeting them on their—quite different—home turf.

Her presence at the law school might have made her, and therefore her message, more appealing to academics. Her presence at the elementary school might have made her, and therefore her message, more appealing to her other

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148. See Debra Cassens Weiss, *In Appearances and on Court, Sotomayor Becomes More of a Public Figure*, ABA J. (Feb. 4, 2011, 6:00 AM), [http://www.abajournal.com/news/article/in\\_appearances\\_and\\_on\\_court\\_sotomayor\\_becomes\\_more\\_of\\_a\\_public\\_figure](http://www.abajournal.com/news/article/in_appearances_and_on_court_sotomayor_becomes_more_of_a_public_figure).

149. Kantor, *supra* note 8.

150. See Benford & Snow, *supra* note 101, at 620-21.

151. Abstract, academic discourse might not create the kind of emotional reaction in non-academics that is crucial to “motivate[] action.” Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 642 (2011).

152. See Xiaoli Nan, *Social Distance, Framing, and Judgment: A Construal Level Perspective*, 33 HUM. COMM. RES. 489, 489 (2007) (highlighting the role that closer physical proximity can play in persuasive impact).

audiences that day. The decision to appear in the home location of diverse audiences can make Sotomayor appealing and thereby persuade and motivate her audiences in a way purely theoretical messages cannot.

Sotomayor has also been appealing to a wide variety of audiences because of what she says during her appearances. One way that speakers relate to audiences is by saying to them, “I am one of you.”<sup>153</sup> Because Sotomayor makes her communications personal—disclosing her own life story and her own vulnerabilities—she seems like an average member of the public. Consider, for instance, her book, in which Sotomayor says that she has “ventured to write more intimately about my personal life than is customary for a member of the Supreme Court.”<sup>154</sup> She describes herself as an “ordinary person”<sup>155</sup> who knows she will be “judged as a human being.”<sup>156</sup> She “disclose[s] every fear [she’d] ever had.”<sup>157</sup> Sotomayor writes that she has “spent [her] whole life learning how to do things that were hard for [her.]”<sup>158</sup>

Sotomayor makes similar comments during her public appearances. In an appearance at the Juvenile Diabetes Research Foundation, Sotomayor “open[ed] up about her diabetes” with “heartfelt remarks.”<sup>159</sup> Her sometimes physical embrace of audience members accentuates this sense that Sotomayor can relate to these audiences of average people. She embraced Tabbie Major, age seven, at one public appearance when their conversation turned to Nancy Drew mysteries.<sup>160</sup>

A common feature of her public appearances, then, is how much her audience responds positively to her in a personal fashion. One story summarizing the reaction to all of her public appearances said that, because of Sotomayor, “the Supreme Court appears to have a warm and motherly Oprah

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153. See, e.g., HENRI TAJFEL, DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS (1978); Marilyn B. Brewer, *The Many Faces of Social Identity: Implications for Political Psychology*, 22 POL. PSYCHOL. 115, 119 (2001).

154. SOTOMAYOR, *supra* note 7, at viii.

155. *Id.*

156. *Id.*

157. See Kantor, *supra* note 8 (quoting Sotomayor’s remarks at an event for her book).

158. SOTOMAYOR, *supra* note 7, at 288.

159. Joan Biskupic, *Sotomayor Opens Up About Her Diabetes*, USA TODAY, June 24, 2011, [http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2011-06-21-sotomayor-diabetes-court\\_n.htm](http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2011-06-21-sotomayor-diabetes-court_n.htm).

160. See Loretta A. Ragsdell, *Supreme Court Justice Sotomayor Discusses Memoir at Washington Library*, AUSTIN WKLY. NEWS, Feb. 6, 2013, <http://www.austinweeklynews.com/News/Articles/2-6-2013/Supreme-Court-Justice-Sotomayor-discusses-memoir-at-Washington-Library>.

type” because Sotomayor has “off-the-charts emotional intelligence.”<sup>161</sup> The personal bonding that transpires between Sotomayor and her audiences makes her more appealing to a wider range of audiences. It might be that academic audiences prefer the dry, the complex, and the technical.<sup>162</sup> It might be that personal bonding therefore turns academic audiences off from what Sotomayor says to her audiences, and makes them less likely to be persuaded by the substance of her remarks.

At the same time, though, the more practical, comprehensible, and personal nature of her comments might make non-academic audiences appreciate her more, appreciation that might help to persuade them. This personal appreciation is a key component of persuasion for these less technocratic audiences.<sup>163</sup> This personal appreciation is also a key component of motivation for less technocratic audiences – who may be motivated as much by the person behind an idea as by the idea itself.<sup>164</sup>

Finally, Sotomayor could make a difference in her capacity as the People’s Justice if inhabiting that role transforms the content of liberal constitutional law. There is no reason, so far at least, to believe she will transform that content through explicitly academic or theoretical interventions. Unlike Justice Scalia’s originalism, Justice Breyer’s pragmatism, or even Justice Souter’s fair reading model, there is little in what she states in her extrajudicial remarks that indicates a brave new theory of the Court or the Constitution.

What could make the liberal message different is not that it is materially different, but that it is delivered differently. The same message in a different package might become a different message. The same speech or book in the hands of the Academic’s Justice could read differently than it would in the hands of the People’s Justice. Messages that are particularly easy for non-academic audiences to understand and appreciate could be particularly compelling. Lani Guinier, for instance, has argued that oral dissents are easier to understand and less technical, and therefore could be effective tools to communicate with the public.<sup>165</sup>

The non-academic content of Sotomayor’s remarks might therefore be transforming the liberal message by popularizing it. Sotomayor’s extrajudicial

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161. Kat Stoeffel, *Sonia Sotomayor Quickly Becoming the Oprah of the Supreme Court*, N.Y. MAG., (Feb. 4, 2013, 11:14 AM) <http://nymag.com/thecut/2013/02/sonia-sotomayor-is-the-oprah-of-supreme-court.html>.

162. Cf. Brym, *supra* note 27, at 5-7.

163. See Small et al., *supra* note 147.

164. See *id.* at 146.

165. See Guinier, *supra* note 9, at 12 (highlighting how oral dissents can “spark a lively conversation among, and with, a decidedly non-professional and non-elite audience”).

communications feature “evocative [and] plain-spoken prose.”<sup>166</sup> Rather than talking about a “fair reading model”<sup>167</sup> or the limited technical capacity of the judiciary to assess the policy outcomes of affirmative action programs,<sup>168</sup> for example, she highlights how affirmative action uplifted her life and how she used it for the best.<sup>169</sup>

This kind of extrajudicial communication is also more likely to mobilize non-academic audiences. For those concerned more about particular policies or particular outcomes than the theories or principles behind them, it can be frustrating when Justices only talk about underlying theories or principles. Some professors have assigned her book to undergraduate students as a way to motivate conversations about the Constitution.<sup>170</sup> The NAACP can better mobilize its members to contribute by pointing to Sotomayor’s defense of affirmative action, rather than to the limited judicial capacity to evaluate the policy merits of affirmative action.

## 2. *Reactions to the People’s Justice*

In her first five years on the Court, Sotomayor has attracted considerable attention. The commentary on her tenure thus far—by academics and by journalists and public intellectuals—has not responded to her promise as a new and promising voice for liberal constitutional law. The commentary has focused on her failure to articulate liberal alternatives to conservative constitutional law. There is reason to believe this commentary may be right. There is also reason to believe this commentary might reflect what has happened in liberal circles as both a cause and an effect of the number of “Academic’s Justices”—namely, a failure to appreciate how liberal constitutional thought can be furthered even without being articulated in an academic fashion. Whether sympathetic or unsympathetic responses to this commentary prove to be more accurate will only be clear decades from now.

Sotomayor’s extrajudicial appearances are not as obviously directed towards supporting a liberal vision of constitutional law as the extrajudicial

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166. Michiko Kakutani, *The Bronx, the Bench and the Life in Between*, N.Y. TIMES, Jan. 21, 2013, <http://www.nytimes.com/2013/01/22/books/my-beloved-world-a-memoir-by-sonia-sotomayor.html>.

167. Souter, *supra* note 62, at 430.

168. See BREYER, *supra* note 4, at 75-85.

169. See *Justice Sotomayor Prefers “Sonia from the Bronx,” supra* note 131.

170. See Jessica Parks, *Sotomayor to Arcadia Students: Take It One Step at a Time*, PHILA. INQUIRER (Oct. 24, 2013), [http://articles.philly.com/2013-10-24/news/43327493\\_1\\_sotomayor-beloved-world-justice-system](http://articles.philly.com/2013-10-24/news/43327493_1_sotomayor-beloved-world-justice-system).

appearances of other liberal Justices. She usually talks about “her own story.”<sup>171</sup> She indicates that she will not “address any issue before the court.”<sup>172</sup> She usually takes that to preclude discussion not only of specific cases, but also of the larger issues implicated by those cases. There are no remarks about originalism, or judicial restraint, in academic or in non-academic language. By some measures, then, Sotomayor is notable for how little she talks about these issues in extrajudicial appearances.<sup>173</sup>

Nonetheless, there are discussions of constitutional law—and discussions sympathetic to liberals—in Sotomayor’s extrajudicial appearances. Justice Sotomayor does not mention the Warren Court’s “strict’ in theory, fatal in fact”<sup>174</sup> approach when discussing affirmative action, for instance, but did praise how affirmative action affected her personally on *60 Minutes*.<sup>175</sup> She did not mention the flawed doctrinal apparatus of Chief Justice Roberts’s opinion in *Parents Involved*, but she did state that his opinion reflected a “too simple” view of racial justice.<sup>176</sup> During a recent NPR interview, Sotomayor referenced her disagreement with Justice Clarence Thomas (by name) about affirmative action.<sup>177</sup>

Justice Sotomayor does not talk about living constitutionalism, but she does indicate the importance of considering realities on the ground.<sup>178</sup> She did not criticize *Citizens United* for misunderstanding the history of the First Amendment, but she did say at Fordham that it is important to ensure popular

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171. See, e.g., Robert Barnes, *Why Sonia Sotomayor Doesn't Wear Dentures*, WASH. POST, Jan. 9, 2014, [http://www.washingtonpost.com/politics/why-sonia-sotomayor-doesnt-wear-dentures/2014/01/09/51fb0b5a-7926-11e3-8963-b4b654bcc9b2\\_story.html](http://www.washingtonpost.com/politics/why-sonia-sotomayor-doesnt-wear-dentures/2014/01/09/51fb0b5a-7926-11e3-8963-b4b654bcc9b2_story.html).

172. *Id.*

173. There might be a good strategic reason for her silence. There is much research suggesting that social pressures lead audiences to respond better to those who are seen as independent. See, e.g., Samara Klar & Yanna Krupnikov, *Social Desirability Bias in Measures of Partisanship* (unpublished manuscript), [http://www.yannakrupnikov.com/uploads/3/3/1/2/3312716/klar\\_krupnikov\\_p.pdf](http://www.yannakrupnikov.com/uploads/3/3/1/2/3312716/klar_krupnikov_p.pdf) (last visited Jan. 8, 2014) (describing how public opinion research suggests that “political independence is viewed as an aspirational ideal” in social settings).

174. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

175. See *Justice Sotomayor Prefers “Sonia from the Bronx,” supra* note 131.

176. Liptak, *supra* note 124.

177. Nina Totenberg, *A Justice Deliberates: Sotomayor on Love, Health and Family*, NAT’L PUB. RADIO (Jan. 12, 2013), <http://www.npr.org/2013/01/14/167699633/a-justice-deliberates-sotomayor-on-love-health-and-family>.

178. *Sotomayor Touts Bipartisan Seating at Obama Speech*, USA TODAY, Jan. 27, 2011, [http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2011-01-27-sotomayor\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2011-01-27-sotomayor_N.htm).

participation in the legal system.<sup>179</sup> In her appearance at George Washington University, echoing her “Wise Latina” remarks, she highlighted the importance of diversity on the bench, and the importance of having defense or civil rights lawyers deciding cases too.<sup>180</sup>

Rather than the signs of a Justice not speaking to substance, these are more indicative of a Justice speaking substance, but to a wider audience. One might look for discussions of constitutional law not only in the specific content of Sotomayor’s extrajudicial appearances, but also in the subtle message being conveyed. She references many of the cultural priors that appeal to liberals, even if she does not specify the programmatic content that might follow from these priors. For instance, while conservatives talk about color-blindness, Sotomayor highlights the discrimination she faced for being typecast as the emotional Latina<sup>181</sup> and how it made her have to work harder to get to where she is.<sup>182</sup>

Commentators might have missed these substantive dimensions to Sotomayor’s extrajudicial appearances for many reasons. Her discussions are not as open and obvious about substance as other appearances by liberal Justices. She does not use constitutional buzzwords (e.g., “living constitutionalism” or “originalism”). She does not appear at ideologically affiliated gatherings like Federalist Society or ACS conferences.

Commentators might also miss how she talks about constitutional law because of their constant focus on what Justices can contribute to “the cause of progressive *thought*.”<sup>183</sup> The primary metric used to evaluate the contribution of a Justice to public discussion about constitutional law by academics and commentators has been a more academic metric.<sup>184</sup> If she has no distinctive

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179. See Matthew Archbold, *Justice Sotomayor Lectures at Fordham University*, CARDINAL NEWMAN SOCIETY (July 30, 2013, 9:34 AM), <http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/2409/Justice-Sotomayor-Lectures-at-Fordham-University.aspx>.

180. See Barnes, *supra* note 171.

181. See *As a Latina, Sonia Sotomayor Says, “You Have to Work Harder,”* NAT’L PUBLIC RADIO (Jan. 13, 2014), <http://www.npr.org/2014/01/13/262067546/as-a-latina-sonia-sotomayor-says-you-have-to-work-harder> (interview with Terry Gross on NPR program *Fresh Air*).

182. See *id.*

183. Amy Goldstein & Paul Kane, *Liberalism Had Little Presence in Sotomayor Hearings*, WASH. POST, July 19, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/18/AR2009071801787.html> (emphasis added).

184. See, e.g., MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 94 (2013) (discussing the possibility and importance of Elena Kagan as the “intellectual leader” of the Court); Jeffrey Rosen, *The Case Against Sotomayor*, NEW REPUBLIC, May 4, 2009, <http://www.newrepublic.com/article/politics/the-case-against-sotomayor> (assessing Sotomayor’s potential to “provide an intellectual counterweight to the conservative justices”).

approach to “liberal thought,”<sup>185</sup> then her value in communicating to the public is understood to be limited or zero. The contrast, so far, is with Justice Kagan, who has been praised for writing opinions that reflect and reinforce deep liberal theories, but also feature “pithy one-liners” that “brush away the legalistic smokescreens of justices on the opposing side.”<sup>186</sup> The academic audience sees Kagan as the liberal counterweight, according to these scholars, to the “intelligence”<sup>187</sup> of Justice Scalia.

As this Essay has highlighted, though, there are more audiences for liberal Justices than just academics, and these audiences might actually respond more favorably to Sotomayor’s way of communicating substance. And readable judicial opinions will not reach as many individuals as readable opinions plus a Justice appearing on *Oprah* and *The Today Show*.

Some have argued not just that Sotomayor contributes nothing to the “cause of progressive thought,” but that her approach of communicating to wider audiences is “undignified.”<sup>188</sup> One scholar, for instance, criticized as “disrespectful” Justice Sotomayor’s decision to push back the swearing in of Vice President Biden so she could attend her signing at Barnes & Noble.<sup>189</sup> Whether these arguments are right about what it means to act judicially is a larger question, beyond the scope of this short Essay.

Two quick comments are in order, though. Some research suggests that exposure to the “symbols” of judging leads lay observers to support judicial review even more.<sup>190</sup> The capacity of lay observers to notice the difference between appearing at an elementary school and at a law school might not implicate concerns about acting unlike a judge. More to the point, there is also evidence suggesting that lay observers do not necessarily have the image of judges as detached, formalist, and unavailable.<sup>191</sup> Bracketing the empirical

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185. See Goldstein & Kane, *supra* note 183.

186. Jeffrey Rosen, *Strong Opinions*, NEW REPUBLIC, July 28, 2011, <http://www.newrepublic.com/article/politics/magazine/92773/elena-kagan-writings>.

187. Stanley Fish, *A Dollar is a Dollar: Elena Kagan’s Style*, N.Y. TIMES: OPINIONATOR (Apr. 11, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/04/11/a-dollar-is-a-dollar-elena-kagans-style>.

188. See Peter Grier, *Justice Sotomayor to Lead Times Square Ball Drop. Undignified?*, CHRISTIAN SCI. MONITOR, Dec. 30, 2013, <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2013/1230/Justice-Sotomayor-to-lead-Times-Square-ball-drop.-Undignified>.

189. Josh Blackman, *Did Justice Sotomayor Reschedule the Swearing In of VP Biden So She Could Attend Her Book Signing?*, JOSH BLACKMAN’S BLOG (Jan. 19, 2013) <http://joshblackman.com/blog/2013/01/19/did-justice-sotomayor-reschedule-the-swearing-in-of-vp-biden-so-she-could-attend-her-book-signing>.

190. See JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS* (2009).

191. See John M. Scheb & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2001)

effects of Sotomayor's extrajudicial appearances for one moment suggests a deeper truth: how strongly deviations from the detached, formal, unavailable judge are policed. The "persistent cultural script of judicial dispassion" is alive and well.<sup>192</sup>

## CONCLUSION

At the end of her fifth calendar year on the Supreme Court, Justice Sotomayor was not in her chambers, or at home. She was in Times Square in New York City, alongside Miley Cyrus, to lead the countdown to midnight and push the button to drop the ceremonial ball in Times Square. She became the first Justice ever to do this.<sup>193</sup> This Essay highlights how these sorts of appearances are merely visible instances of a pervasive, and pervasively different, approach that Sotomayor has taken during her years on the Court.

Right now, though, to say that this strategy will actually change how Americans perceive liberal Justices is merely "aspirational."<sup>194</sup> With time, and with more examination, a symposium at the end of Justice Sotomayor's career might have the evidence to make a more definitive assessment. For now, though, we can simply assert that Sotomayor's approach has been different, and there are many reasons to believe it could change how the liberal Justices on the Court communicate with the public. If this approach resonates, it could be that someday there will not just be a People's Justice at One First Street, NE in Washington, but an entire People's Court.

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192. Maroney, *supra* note 151.

193. See Grier, *supra* note 188.

194. Guinier, *supra* note 106, at 548.