

Title: *Standing in Barack Obama's Shoes: Evaluating the President's Jurisprudence of Empathy in Light of James Wilson's Jurisprudence of "Common Sense"*

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Abstract: This article explains what President Barack Obama meant when he called empathy an "essential ingredient" in judicial decision making and, thus, the outstanding quality he would look for in his Supreme Court nominees. It also provides a comparative study between Obama's jurisprudence of empathy and Justice James Wilson's jurisprudence of common sense in order to illustrate the dangers of deciding difficult Supreme Court cases with recourse to unconventional, extra-legal tools.

Key Words: Barack Obama, James Wilson, Empathy, Common Sense, Jurisprudence, Adam Smith, Thomas Reid, Umpire Analogy, John Roberts, Supreme Court, Legal Realism, Chisholm, Eleventh Amendment

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Introduction

If theories of Supreme Court jurisprudence by major American statesmen were assembled side-by-side, the library would be small, and the works of James Wilson and Barack Obama would stand at either end. Wilson was the most sophisticated legal theorist at the Constitutional Convention,¹ a member of the first Supreme Court, and the author of a remarkable series of law lectures delivered at the College of Philadelphia, now the University of Pennsylvania, in the early 1790’s.² Obama spent a dozen years as a civil rights lawyer and lecturer on constitutional law at the University of Chicago Law School before being elected to the United States Senate in 2004 and then to the White House, just four years later.

Beyond biographical similarities and their efforts to straddle law and statesmanship, both men share an abiding concern for how justice may be served when a judge confronts the limits of the law, whether those limits be moral, in the case of Wilson, or written, in the case of Obama. Both men look beyond the law to extra-legal concepts to supplement a judge’s decision making,

¹ See, e.g., CHARLES PAGE SMITH, JAMES WILSON FOUNDING FATHER, 1742-1789 341 (1956) (observing “[a]s a practical lawyer, Wilson was one of the outstanding legal figures of his day. As a theorist, he had no serious rival.”); Robert G. McCloskey, *Introduction* to 1 THE WORKS OF JAMES WILSON 1-2 (Robert G. McCloskey ed., 1967) (calling Wilson “the most learned and profound legal scholar of his generation”).

² Here and throughout the Note, the basic facts of James Wilson’s life are taken from SMITH, *supra* note 1.

Wilson to the Scottish philosopher Thomas Reid’s “common sense” theory of human action and thought, Obama to a theory of empathy he has consistently alluded to but never bothered to succinctly define. Most importantly, both men have faced fierce criticism for advocating these extra-legal tools, in Obama’s case, criticism that persists to this day.

For Obama, the criticism was sparked by his first opportunity to nominate a Supreme Court Justice, when he called empathy “an essential ingredient for arriving at just decisions and outcomes” and, thus, the preeminent quality he would look for in his nominees.³ The reaction by Republicans was swift and scathing. Within two days of the President’s statement, Utah Senator Orrin Hatch called empathy “a code word for an activist judge.”⁴ The pundit Charles Krauthammer said, “if nothing else, [conservatism] stands unequivocally against justice as empathy – and unequivocally for the principle of blind justice.”⁵ And Wendy Long, general counsel for the Judicial Confirmation Network and a former Supreme Court clerk to Justice Clarence Thomas, accused Obama of aiming to “become the first president in American history to make lawlessness an explicit standard for Supreme Court justices.”⁶

By the time of the nomination hearings over two months later, Senate Republicans had decided to turn the hearings into a show trial over the role of empathy in Supreme Court jurisprudence. All six Republican members of the Senate Judiciary Committee singled out the President’s empathy standard for abuse in their opening statements. Alabama Senator Jeff Sessions, the Committee’s ranking Republican member, said “such a philosophy is disqualified” from any rightful place in a judge’s decision making.⁷ Iowa Senator Charles Grassley declared

³ Barack Obama, Remarks on the Retirement of Supreme Court Justice David Souter (May 1, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900317.pdf> [hereinafter Obama remarks on Souter].

⁴ *This Week* (ABC television broadcast May 3, 2009) (remarks by Senator Orrin Hatch).

⁵ Charles Krauthammer, *Sotomayor: Rebut, Then Confirm*, WASH. POST, May 29, 2009.

⁶ Wendy Long, *Opening of a Sorry Chapter*, WASH. TIMES, May 4, 2009.

⁷ *Hearing on the Nomination of Judge Sonia Sotomayor To Be an Associate Justice of the U.S. Supreme Court, Before the S. Comm. on the Judiciary*, 110th Cong. (July 13, 2009) (statement by Sen. Sessions).

“that judging based on empathy is really just legislating from the bench.”⁸ And South Carolina Senator Lindsay Graham said that picking Supreme Court nominees based on their capacity for empathy is “an absurd, dangerous standard.”⁹

For their part, the twelve Democrats on the Senate Judiciary Committee showed no interest in debating the jurisprudential merits of empathy. Only two of them mentioned empathy in their opening statements, and in subsequent colloquies with Judge Sotomayor, empathy was barely mentioned except to make absolutely clear, in the words of Wisconsin Senator Russ Feingold, that a “judge’s ability to feel empathy does not, of course, mean the judge should rule one way or another.”¹⁰

Yet, for all the hoopla surrounding the term, no one seemed to know exactly what the President meant when he called empathy an “essential ingredient” in judicial decision making. Senator Grassley averred that the President’s “empathy standard appears to encourage judges to make use of their personal politics, feelings, and preferences.”¹¹ Rhode Island Senator Sheldon Whitehouse offered that empathy made a judge appreciate that the “courtroom can be the only sanctuary for the little guy, when the forces of society are arrayed against him.”¹² New York Senator Chuck Schumer claimed that empathy is the opposite of “having ice water in your veins.”¹³ And Senator Sessions simply admitted, “I don’t know what empathy means.”¹⁴

The aim of this article is to explain what Barack Obama means by empathy. It will discuss when exactly empathy may provide an “essential ingredient” in Supreme Court

⁸ *Id.* (statement by Sen. Grassley).

⁹ *Id.* (Statement by Sen. Graham).

¹⁰ *Hearing on the Nomination of Judge Sonia Sotomayor To Be an Associate Justice of the U.S. Supreme Court, Before the S. Comm. on the Judiciary*, 110th Cong. (July 14, 2009) (statement by Sen. Feingold).

¹¹ *Hearing on the Nomination of Judge Sonia Sotomayor* (July 13, 2009), *supra* note 7 (statement by Sen. Grassley).

¹² *Hearing on the Nomination of Judge Sonia Sotomayor* (July 13, 2009), *supra* note 7 (statement by Sen. Whitehouse).

¹³ *Hearing on the Nomination of Judge Sonia Sotomayor* (July 13, 2009), *supra* note 7 (statement by Sen. Schumer).

¹⁴ John Stanton, *Sessions Is in the Spotlight*, ROLL CALL, May 6, 2009.

jurisprudence, whether it can supply a Justice a sense of certainty in her rulings, and, finally, what the risks are of looking beyond the written law to an extra-legal concept like empathy in deciding a case.

There are two significant hurdles to such an inquiry. The first is that Obama has never written about his jurisprudence of empathy; the second is that no Justice has cited Obama's empathy standard as determinative of a Supreme Court decision. This article attempts to resolve these concerns in two ways. In the first place, it takes seriously Obama's public statements and published, non-legal writing on empathy. The consistency of his remarks¹⁵ as well as his experience as a lawyer and constitutional law lecturer suggest that his use of the word empathy is neither careless nor imprecise but deserves serious consideration. In the second place, it draws on James Wilson's jurisprudence of common sense as an illustrative parallel to Obama's jurisprudence of empathy. Obama and Wilson share remarkably similar views on the law, its purpose, and its limits, and Wilson's experience trying to implement a jurisprudence of common sense as a Supreme Court Justice provides an instructive example of the dangers of a judge using an extra-legal tool, like empathy, to reach her decisions.

The article proceeds in three parts. Part I defines Barack Obama's jurisprudence of empathy and when it may be applied to judicial decisions. Part II presents James Wilson's jurisprudence of common sense as an instructive parallel to Obama's jurisprudence of empathy. Part III discusses the perils of empathy as a tool for judicial decision making by examining why Wilson abjured it when it was presented to him in Adam Smith's moral philosophy and by discussing the only major Supreme Court case where Wilson attempted to apply his common sense jurisprudence, *Chisholm v. Georgia*, to ends that proved disastrous.

¹⁵ See Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 25, 2010 (observing "Mr. Obama has been searching for empathy, or its rhetorical equivalent, in Supreme Court candidates for at least five years").

I. Barack Obama's Jurisprudence of Empathy

For those who long for sophisticated legal opinions from the Commander-in-Chief, Barack Obama seems especially promising. Before being elected to the Senate, he served as President of the *Harvard Law Review*, was a practicing civil rights attorney, and taught constitutional law at the University of Chicago. No less a legal scholar than Laurence Tribe has called him “the most impressive and talented of the thousands of students I have been privileged to teach in nearly 40 years on the Harvard faculty.”¹⁶

Nevertheless, Obama has left almost no written clues as to his own views on Supreme Court jurisprudence. He published no law journal articles during his decade long tenure at the University of Chicago, and the only piece of legal scholarship he is known to have authored is a six-page, unsigned case note in the *Harvard Law Review* on a ruling by the Illinois Supreme Court that a fetus could not sue its mother for prenatal injuries.¹⁷ The Note, which Eugene Volokh describes as “calm and fairly uncontroversial,” does little to shed light on Obama’s jurisprudential views.¹⁸

But this is not because Obama has no such views. Indeed, as a Senator evaluating Supreme Court nominees and as a President making them, he has consistently stated that the capacity for empathy is an “essential ingredient” for him in evaluating potential members of the Court. Because he has not written explicitly on the role of empathy in Supreme Court jurisprudence, what exactly Obama means by empathy and what role it ought to play in a Justice’s decision making must be inferred from remarks and speeches he has made on nominees

¹⁶ Peter Zhu, *Tribe Recalls Obama at HLS*, HARV. CRIMSON, November 4, 2008.

¹⁷ See Case Note, *Prenatal Injuries – Supreme Court of Illinois Refuses to Recognize Cause of Action Brought by Fetus Against Its Mother for Unintentional Infliction of Prenatal Injuries*, 103 HARV. L. REV. 823 (1990).

¹⁸ Eugene Volokh, *Obama’s Case Note*, THE VOLOKH CONSPIRACY, Aug. 22, 2008, <http://volokh.com/posts/1219415466.shtml>.

to the Court as well as from his book, *The Audacity of Hope*, where he singles out empathy as the lynchpin to a personal ethics.

A. Beyond the Ballpark: The Five Percent Rule

Obama was elected to the Senate in the 2004 congressional midterm elections, but it wasn't until the nomination of John Roberts to the Court in the summer of 2005 that Obama found a high-profile opportunity to discuss his views on Supreme Court jurisprudence and, specifically, what I call the Five Percent Rule.

In his opening statement before the Senate Judiciary Committee, Roberts framed the work of a Supreme Court Justice as being akin to that of a baseball umpire. Roberts said:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them.

The role of an umpire and a judge is critical. They make sure everybody plays by the rules.

But it is a limited role. Nobody ever went to the ballgame to see the umpire.¹⁹

By his “umpireal analogy,” as Richard Posner described it, “Roberts was trying to navigate the treacherous shoals of a Senate confirmation hearing,” offering a vision of a Justice’s work that seemed at once simple and mechanical and, thus, uncontroversial.²⁰ Unfortunately, for legal minds like Posner’s, it seemed deceptive as well: “Neither [Roberts] nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires.”²¹

¹⁹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005)* (statement by John G. Roberts).

²⁰ RICHARD A. POSNER, *HOW JUDGES THINK* 78 (2008).

²¹ *Id.*

If judges—and “most particularly” Supreme Court Justices—are to be profitably compared to baseball umpires, Posner argued, “in addition to calling balls and strikes,” we must “imagine” that they also “made the rules of baseball and changed them at will.”²² Which is another way of saying that, for Posner at least, Supreme Court Justices and baseball umpires are really not that much alike after all.²³

In light of the fact that he was one of twenty-two Democrats in the Senate who voted against the confirmation of Roberts, it is probably not shocking that Obama did not embrace his “umpireal analogy” of Supreme Court service. What may be surprising, however, is the degree to which he grants its underlying logic. Unlike Posner, Obama has said on at least two occasions that, in ninety-five percent of the cases that come before the Supreme Court, the “umpireal analogy”—insofar as it describes a decision making process that, to the well trained eye, is straightforward and mechanical—holds true for the Court’s decisions.

In the Senate speech where he announced he would vote against confirmation, Obama described what he called “the basic precepts that go into deciding 95 percent of cases that come before the Federal court.”²⁴ These include: “adherence to precedence, a certain modesty in reading statutes and constitutional text, a respect for procedural regularity, and an impartiality in presiding over the adversarial system.”²⁵ Obama said that it was apparent to him that Roberts “does, in fact, deeply respect” these “basic precepts” of judicial decision making, what on Roberts’s own terms might be called the “official rules” by which judges call legal balls and strikes. Moreover, such respect, when combined with Roberts’s “intellectual rigor” and

²² *Id.* at 78-79.

²³ For a novel reinterpretation of Roberts’s analogy, see Aaron Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113 (2010), <http://yalelawjournal.org/2010/03/03/zelinsky.html> (arguing “the appropriate analog for a Justice of the Supreme Court is not an umpire, but the Commissioner of Major League Baseball”).

²⁴ 151 CONG. REC. 10,366 (Sept. 22, 2005) (statement by Sen. Obama) [hereinafter Obama floor speech].

²⁵ *Id.*

“honesty” in addition to “the comportment and the temperament that makes for a good judge,” made Obama “sorely tempted” to vote for confirmation.²⁶

Yet Obama did not cast that vote, invoking the Five Percent Rule to explain his decision. As he later described it in remarks to Planned Parenthood during the presidential campaign: “Good intellect. You read the statute. You look at the case law, and most of the time, the law is pretty clear – 95% of the time. Justice Ginsburg, Justice Thomas, Justice Scalia – they’re all gonna agree on the outcome.”²⁷ Nevertheless, this leaves “those 5 percent of cases that are truly difficult,” where “the constitutional text will not be directly on point,” the “language of the statute will not be perfectly clear,” and the “[l]egal process alone will not lead you to a rule of decision.”²⁸ For Obama, these cases include

whether affirmative action is an appropriate response to the history of discrimination in this country or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions or whether the commerce clause empowers congress to speak on those issues of broad national concern that may be only tangentially related to what is easily defined as interstate commerce, whether a person who is disabled has a right to be accommodated so they can work alongside those who are nondisabled....²⁹

Such cases, on Obama’s account, are not just outside the strike zone of straightforward judicial decision making, they are beyond the ballpark. More importantly, “it’s those 5% of the cases that really count.”³⁰

What makes the difference in such cases? Empathy, Obama has repeatedly said, “that’s the criteria by which I’m going to be selecting my judges.”³¹

²⁶ *Id.*

²⁷ Abby Livingston & Mark Murray, *Context of Obama’s ‘Empathy Remarks’*, MSNBC, May 1, 2009, <http://firstread.msnbc.msn.com/archive/2009/05/01/1918695.aspx> (quoting President Barack Obama, Remarks to the Planned Parenthood Action Fund (July 17, 2007)). [hereinafter Obama Planned Parenthood remarks]

²⁸ Obama floor speech, *supra* note 26.

²⁹ *Id.*

³⁰ *Id.*

B. The Empathy Difference: A Radical Faith

Obama's nomination of Sonia Sotomayor to the Court in May of 2009 gave the newly elected President an opportunity to restate his views on the qualities he looks for in a Supreme Court Justice. As he did four years before with the nomination of John Roberts, Obama relied on the Five Percent Rule to describe those qualities that were "essential" for resolving ninety-five percent of the cases that came before the Court but "insufficient" for deciding the final five percent.³² These qualities, said Obama, were "a rigorous intellect," "an understanding that a judge's job is to interpret, not make, law," "a commitment to impartial justice," "a respect for precedent and a determination to faithfully apply the law to the facts at hand."³³ Yet for the final five percent of cases—the cases that are "truly difficult" and that "really count"—"[w]e need something more."³⁴

That "something" is empathy, what Obama calls "an essential ingredient for arriving at just decisions and outcomes" in the five percent of cases that don't allow for straightforward decision making.³⁵ But what exactly does Obama mean by empathy and what might a jurisprudence of empathy look like?

In *The Audacity of Hope*, published shortly before he began his presidential campaign, Obama illustrates what he means by empathy by invoking his friend Paul Simon, the late Senator from Illinois and a supporter of Obama during his 2004 Senate campaign.³⁶ Simon, says Obama, had the remarkable ability of "garnering support from people who disagreed, sometimes vigorously, with his liberal politics," largely because such people believed "that he cared about

³¹ Obama Planned Parenthood remarks, *supra* note 29.

³² Barack Obama, Remarks on the Nomination of Sonia Sotomayor to Be a Supreme Court Associate Justice (May 26, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900402.pdf> [hereinafter Obama remarks on Sotomayor].

³³ *Id.*

³⁴ Obama remarks on Sotomayor, *supra* note 34.

³⁵ Obama remarks on Souter, *supra* note 3.

³⁶ See Steve Neal, *Obama's Endorsements Stacking Up*, CHI. SUN-TIMES, Dec 31, 2003.

them and what they were going through.”³⁷ Obama terms this “aspect of Paul’s character” a “sense of empathy,” a trait, he says, “I find myself appreciating more and more as I get older.”³⁸ He then goes on to define empathy as the lynchpin to a personal ethics. Empathy, he says, “is the heart of my moral code, and it is how I understand the Golden Rule—not simply as a call to sympathy or charity, but as something more demanding, a call to stand in somebody else’s shoes and see through their eyes.”³⁹

Beyond what it says about his personal ethics, what is notable about this passage is the connection Obama makes between a moral act, the extension of “sympathy or charity,” and a facially neutral practice, empathy.⁴⁰ To “stand in somebody else’s shoes and see through their eyes” is no more than an imaginative exercise by which we try to gain access to and make sense of the experience of another. It does not require that we feel sympathy for the people whose experiences we attempt to share, much less does it necessarily lead to any conclusions about what actions are morally required of us vis-à-vis such people.

Yet central to Obama’s understanding of empathy and the role it plays in public life, generally, and jurisprudence, in particular, is a belief that the practice of empathy compels clear answers to what might otherwise be difficult moral questions. The strength of this belief helps to distinguish Obama from the legal realists, the school of legal theory with which his jurisprudence shares most in common. Obama agrees with a primary tenet of legal realism that “the actual deciding” of difficult cases is rarely “done by way of formal and accurate deduction in the manner of formal logic.”⁴¹ Indeed, when he says he favors a judge who “understands that justice

³⁷ BARACK OBAMA, *THE AUDACITY OF HOPE* 66 (2006) [hereinafter *AUDACITY*].

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 11 (1960).

isn't about some abstract legal theory or footnote in a case book,"⁴² he hearkens back to Oliver Wendell Holmes's declaration that the law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics"⁴³ and to Benjamin Cardozo's pronouncement that "no judge of a high court, worthy of his office, views the function of his place so narrowly."⁴⁴ Moreover, he agrees with the legal realists that a judge's decisions tend to be shaped by personal experience, citing Holmes's famous dictum, "[t]he life of the law has not been logic: it has been experience," when he nominated Elena Kagan to replace retiring Justice John Paul Stevens.⁴⁵

Nevertheless, for Holmes and other legal realists, their discussion of the relationship between experience and law aims to be a factual description of how the law evolves and how decisions are made in the courtroom. They do not make an argument on behalf of experience except to warn judges who might take Roberts's "umpireal analogy" too seriously that, in the words of Holmes, the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."⁴⁶ In fact, while the legal realists agree that personal experience informs the decision of a judge, they hold that it most often has its effect at a subconscious level. Experience, said Cardozo, creates "a stream of tendency" that "gives coherence and direction to

⁴² Obama remarks on Souter, *supra* note 3.

⁴³ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

⁴⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (1921).

⁴⁵ HOLMES, *supra* note 47, at 1 *quoted in* Remarks by President Obama on the Nomination of Solicitor General Elena Kagan to Supreme Court (May 10, 2008), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el>.

⁴⁶ HOLMES, *supra* note 47, at 1.

thought and action.”⁴⁷ Judges “cannot escape” it, he continues, though they “do not recognize and cannot name” the “forces” that “have been tugging at them.”⁴⁸

Obama’s jurisprudence distinguishes itself from legal realism in that it relies on a particular type of experience, that which comes from the practice of empathy, to help us self-consciously transcend the limits of our personal experience. When we empathize with another, Obama says, we are “forced beyond our limited vision,” and when we compare that person’s experience with our own, no matter how different it may be, we find “common ground” between us.⁴⁹ The feeling of moral imperative that comes from this experience also distances Obama from the descriptive project of legal realism. The practice of empathy, he says, has a profound impact on us – “[w]e are all shaken out of our complacency” – with the effect that we feel compelled to take actions whose moral imperative seems universal and clear.⁵⁰

To illustrate the transformative effect of empathy, consider another passage where Obama discusses what he calls an “empathy deficit” and what the moral and practical consequences would be if that deficit were overcome:

[A]s a country, we seem to be suffering from an empathy deficit. We wouldn’t tolerate schools that don’t teach, that are chronically underfunded and understaffed and underinspired, if we thought that the children in them were like our children. It’s hard to imagine the CEO of a company giving himself a multimillion-dollar bonus while cutting health-care coverage for his workers if he thought they were in some sense his equals. And it’s safe to assume that those in power would think longer and harder about launching a war if they envisioned their own sons and daughters in harm’s way.⁵¹

⁴⁷ CARDOZO, *supra* note 48.

⁴⁸ AUDACITY, *supra* note 41, at 66.

⁴⁹ *Id.* at 68.

⁵⁰ *Id.*

⁵¹ *Id.*

As this passage makes clear, Obama believes that the practice of empathy not only leads people to understand the experience of others and to find “common ground,” it compels them, regardless their differences, to recognize and confront difficult moral matters and to come to the same conclusions about how to resolve them. The CEO doesn’t simply understand what the worker might feel if his health care is cut, he feels compelled to limit the size of his own bonus. The wealthy mother doesn’t merely appreciate the differences between the scholastic experience of her son and that of a child from a poorer neighborhood, she is moved to agitate on behalf of educational equality. Here, as elsewhere, Obama never questions whether it could be the case that the practice of empathy might have different effects on people. He seems to believe that *any* parent or CEO in a similar position who exercised empathy would come to the same conclusion about the moral dimensions of the situation and feel moved to take the same action.

This is Obama’s radical faith in the power of empathy. On his account, the moral imperatives that empathy reveals to us have a self-evident, universal force such that any person who practices empathy would recognize them and feel compelled to act. Empathy, in turn, provides the key not only to Obama’s personal ethics but also to how he understands justice and how it is best served in Supreme Court cases that fall within the Five Percent Rule. As he said in his remarks on the retirement of Justice David Souter, Obama endeavors to select Justices who understand that the essence of justice is not “some abstract legal theory or footnote in a case book” but rather

how our laws affect the daily realities of people’s lives – whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their nation.

I view that quality of empathy, or understanding and identifying with people’s hopes and struggles as an essential ingredient for arriving at just decisions and outcomes.⁵²

⁵² Obama remarks on Souter, *supra* note 3.

Here we see the difference empathy can make in the cases that come before the Supreme Court. Ninety-five percent of them may be decided, and justice may be served, by recourse to “basic precepts” of judicial decision making. All that a Justice need do, according to Obama, is call legal balls and strikes—no more. However, in those five percent of cases that cannot be so straightforwardly decided, Obama believes that a Justice who practices empathy will recognize and be guided by the moral imperatives that make for just decisions. The practice of empathy will not only reveal these imperatives to her and lend them a sense of urgency, she can act on them with the belief that they have a moral salience that is universal and clear, at least to anyone else who also practices empathy.

Of course, by Obama’s own account, many people don’t bother practicing empathy, hence the “empathy deficit,” but he clearly believes such people should not have the final say in the small subset of cases where a Justice’s opinion of what makes for a just decision determines the final outcome of a case.⁵³ In “those difficult cases,” Obama has said, “the critical ingredient is supplied by what is in the judge’s heart.”⁵⁴ If that heart is a cradle for empathy, justice will be served.

II. James Wilson’s Jurisprudence of Common Sense

If Barack Obama’s efforts to articulate the role of empathy in judicial decision making represents the latest attempt by a major statesman to articulate a novel theory of Supreme Court jurisprudence, James Wilson’s was the first.

One of the most consequential minds of the founding era, Wilson’s life and accomplishments have largely been forgotten. Born in a tiny village in the Scottish Lowlands in

⁵³ AUDACITY, *supra* note 41, at 68.

⁵⁴ Obama floor speech, *supra* note 26.

1742, Wilson spent five years at St. Andrews on a scholarship studying to join the ministry before boarding a ship to the New World in 1765. He arrived in Philadelphia and not long after applied to study law as an apprentice under John Dickinson, the founder and pamphleteer who gained fame under the pen name of the “Pennsylvania Farmer”. When he had completed his legal education, in 1770, Wilson moved west to the small frontier town of Carlisle, where he established a legal practice. As a highly successful lawyer, a man of nearly unparalleled education, and a striver of unmatched ambition, he soon rose to prominence, getting himself elected to the Second Continental Congress and later to the Philadelphia Convention, making him one of only six men to sign both the Declaration of Independence and the Constitution. He was also one of the most vocal members of the Convention, and his many contributions to the Constitution, in the opinion of Max Farrand, placed Wilson “second to [James] Madison and almost on par with him.”⁵⁵

Eschewing his offer to become Chief Justice, George Washington named Wilson Associate Justice to the first Supreme Court in 1789, where he remained until his tragic and untimely passing in 1798. At the time of his death, Wilson was hiding out in the small town of Edenton, North Carolina. He was supposed to be riding circuit as part of his duties as a Justice, but the country was in the grips of a credit crisis, and Wilson, an insatiable land speculator, had been forced to flee his creditors. He was unable to make his loan repayments, and if his creditors caught up with him, he would be thrown in jail again, as he had been in New Jersey just a few weeks before. His wife Hannah found him in Edenton, in the Horniblow Tavern, a dim and

⁵⁵ MAX FARRAND, *THE FRAMING OF THE CONSTITUTION*, 197 (1913), reprinted in James McCloskey, *Introduction JAMES WILSON*, 1 *THE WORKS OF JAMES WILSON*, 6 (James McCloskey ed., 1967). Andrew C. McLaughlin seconded Farrand’s opinion of Wilson’s performance at the Philadelphia Convention, rating him “above all but one or two men of the convention.” Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 *POL. SCI. Q.*, 1, 1 (1897), reprinted in JAMES MCCLOSKEY, *Introduction JAMES WILSON*, 1 *THE WORKS OF JAMES WILSON*, 6 (James McCloskey ed., 1967).

expensive boarding house where Wilson was busy trying to untangle his finances and redeem his fate. Shortly after she arrived, a stroke crippled her husband. He died three days later and was buried in a simple grave at the estate of North Carolina Governor Samuel Johnston, the father-in-law of James Iredell, an Associate Justice like Wilson as well as his dear friend.

The embarrassing circumstances of Wilson's death cast a pall over his life and work, obscuring them before the eyes of history, which largely forgot Wilson over the next two hundred years. Recently, scholars have sought to rehabilitate his reputation, though in light of his extraordinary contributions to the Constitution and colonial thought generally, much remains to be done before Wilson is accorded his rightful place in the history of the nation's founding.

Among his written work, the project of Wilson's that is most deserving of reconsideration is his unfinished series of law lectures. Over 600 pages in length, they were never published during Wilson's lifetime and delivered only in part over a four-month period between 1790 and 1791 at the College of Philadelphia, now the University of Pennsylvania. Given his erudition and work as a jurist, the choice of Wilson to deliver the lectures was hardly surprising. "As a practical lawyer," Charles Page Smith has said, "Wilson was one of the outstanding legal figures of his day. As a theorist, he had no serious rival."⁵⁶ Despite his duties as a Justice and the demands of his business ventures, Wilson took up the challenge of devising the lectures with nothing less than the aim of "founding a new school of American jurisprudence."⁵⁷ He hoped to become the American Blackstone, and while he did not succeed, the lectures remain invaluable for the insight they shed on the early American conception of law as well as the role of the judiciary, and most particularly the Supreme Court, in the newly incorporated United States.

⁵⁶ SMITH, *supra* note 1, at 341.

⁵⁷ *Id.* at 310-11.

For our purposes, of special interest is Wilson’s discussion of what a judge ought to do when law or precedent compels an unjust decision. These are Wilson’s “truly difficult” cases, but when a judge is faced with them, Wilson would not have him turn to empathy. He would have him look to common sense, instead.

A. Wilson’s “Truly Difficult” Cases

Obama’s “basic precepts” of judicial decision making—“adherence to precedence, a certain modesty in reading statutes and constitutional text, a respect for procedural regularity, and an impartiality in presiding over the adversarial system”—are all recognized by Wilson in his law lectures as both necessary to judicial decision making and sufficient for disposing of nearly all cases.⁵⁸

In his lecture “Of Government,” Wilson frames the responsibility of judges by describing what would happen if “the legislative and judicial powers [were] united in the same person.”⁵⁹ The danger, says Wilson, is that judges could not be relied upon to dispense equal justice for they “would not be governed by any fixed or known principles of law.”⁶⁰ Judges might consult such principles, but they would not be bound by them, and thus, whenever they were confronted with a law they didn’t favor, “Proteus-like, they might immediately assume the form of legislators; and, in that shape, they might escape from every fetter and obligation of law.”⁶¹

The consequences for a free people would be dire: “The lives, liberties, and properties of the citizens would be committed to arbitrary judges, whose decisions would, in effect, be dictated by their own private opinions.”⁶² Accordingly, Wilson emphasizes that each of the three

⁵⁸ Obama floor speech, *supra* note 26.

⁵⁹ JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 705 (2007) [hereinafter WORKS].

⁶⁰ *Id.*

⁶¹ *Id.* at 705-06.

⁶² *Id.* at 705.

branches of government must “be preserved distinct, and unmingled, in the exercise of its separate powers.”⁶³ What exclusive power does the judiciary exercise? Wilson defines it succinctly: “The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.”⁶⁴

Wilson is clear that judges are charged with applying the laws, not creating them, and he sees four qualities as being necessary for their work. The first is a detailed understanding of the law, both in theory and in practice. Adjudicating legal disputes, Wilson declares, “cannot properly be made without the possession of skill in the science of jurisprudence.”⁶⁵ Second is impartiality. Judges must exhibit “the most unbiassed [sic] behavior” in discharging their duties lest their decisions appear driven by private opinions rather than the demands of equal justice.⁶⁶ The third quality is independence. Judges must be insulated from politics in “their salaries and in their offices,” for beyond being impartial, they must also “be removed from the most distant apprehension of being affected, in their judicial character and capacity, by any thing, except their own behaviour and its consequences.”⁶⁷

The fourth and final quality is a respect for precedent, a concern that takes up roughly half of a later lecture, “Of the Judges.” A judge, says Wilson, “should bear a great regard to the sentiments and decisions of those, who have thought and decided before him.”⁶⁸ He gives two reasons for such deference. The first is that people depend upon the judgments of others for guidance in their decisions, particularly those who have come before them. A “man must have

⁶³ *Id.* at 705.

⁶⁴ *Id.* at 703.

⁶⁵ *Id.* at 704.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 952.

uncommon confidence in his own talents,” Wilson says, who “feels not a sensible and strong satisfaction in the concurrence of the judgments and opinion of others, equally or more conversant than himself with the subjects” under consideration.⁶⁹ The second reason for deference to precedent is that, for judges, prior judgments in similar cases should “be considered as strong evidence of the law.”⁷⁰ Every “prudent and cautious judge will appreciate them,” Wilson says, and by appreciating them, he “will remember, that his duty and his business is, not to make the law, but to interpret and apply it.”⁷¹

However, respect for precedent is not without qualification, for it is the one quality of judicial decision making that Wilson believes a judge should not strictly adhere to. “Implicit deference to authority, as I have declared on more occasions than one, I consider as the bane of science,” he says. “*Stare decisis* may prevent the trouble of investigation; but it will prevent also the pleasure and the advantages of improvement.”⁷²

To illustrate the hazards of a judge’s blind adherence to precedent, Wilson describes the dangers of legalistic myopia, pitting the law “studied and practised as a science founded in principle” against the law “followed as a trade, depending merely upon precedent.”⁷³ The latter approach, says Wilson, is most familiar to a law office, where “even the *minutiae* of practice are objects of regard.”⁷⁴ Such attention to detail may be put to “useful, nay, to splendid purposes,” but when one is “confined to microscopick observations,” the legal mind is narrowed and stunted.⁷⁵ “Tied to the centre of precedent,” says Wilson, the lawyer “treads, for life, the same

⁶⁹ *Id.*

⁷⁰ *Id.* at 953.

⁷¹ *Id.*

⁷² *Id.* at 952.

⁷³ *Id.* at 1030.

⁷⁴ *Id.*

⁷⁵ *Id.*

dull, and small, and uniform circle around it, without daring to view or to enjoy a single object on either side.”⁷⁶

For a judge, the danger of this legalistic myopia is that he will favor the bonds of precedent over the demands of justice, and Wilson believes unequivocally that a judge must sometimes make decisions that go beyond precedent or even the written law in order to reach a just conclusion.

Wilson gives two such examples, both of which take their cue from the relationship between equity and common law courts in the English legal system. Judges in the older common law courts were bound by precedential decision making, whereas the Court of Chancery, the equity court, was an amendatory court in which the Lord Chancellor was free to make judgments that went beyond common law precedent. Such decisions, however, were only to be reached in situations where a petitioner had succeeded in convincing the Lord Chancellor that if his case were subjected to the precedents established by the common law, it would yield a grossly inequitable outcome. The Court of Chancery, in turn, did not disregard common law precedents outright. It only, in extraordinary circumstances, amended them, leading the legal historian Frederic Maitland to declare: “Equity without common law would have been a castle in the air, an impossibility.”⁷⁷

Drawing on the differences between these two courts, in his lecture “Of the Judicial Department,” Wilson describes two situations in which judges are obliged to defer to the demands of equitable justice over legal precedent or the written law. The first instance involves cases that “would have been specified and excepted” from the written law had the lawmakers

⁷⁶ *Id.*

⁷⁷ FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES 19 (J. Bruyate ed., rev. ed. 1936) (A. H. Chaytor & W. J. Whittaker eds. 1st. ed. 1909).

foreseen them.⁷⁸ Such an exercise in judicial decision making, which Wilson warns “ought to be made with the greatest circumspection,” sees the judge looking to “the spirit of the law, or the motive which prevailed on the legislature to make it” in order to decide beyond, or even in contradiction to, its written terms.⁷⁹

The second, more intriguing case involves Wilson’s discussion of the relationship between law and equity. Wilson cites the contention by one of his jurisprudential heroes, the Scottish jurist Henry Home, Lord Kames, that “the boundary between equity and common law [must] be clearly ascertained; because, otherwise, we shall in vain hope for a just decision.”⁸⁰ Given Wilson’s strong belief that the powers of the three branches of government must “be preserved distinct, and unmingled.”⁸¹ and that a judge must remember “his duty and his business is, not to make the law, but to interpret and apply it,”⁸² one might expect Wilson to support Kames’s position. He does, but not without reservation, providing a theory of the legal progress in which considerations of equity are allowed to shape a judge’s decisions when written law or precedent otherwise compels a manifestly unjust outcome.

In his theory, Wilson describes a line between law and equity that moves according to the “fluctuating situation of men and business.”⁸³ The line is initially drawn in “rude ages” when “the first decisions of judges arose, probably, from their immediate feelings; in other words, from considerations of equity.”⁸⁴ Over time, as judges ruled on similar cases, they would reach similar conclusions creating a “number of precedents” and eventually the “[g]eneral rules” which

⁷⁸ WORKS, *supra* note 63, at 924.

⁷⁹ *Id.*

⁸⁰ *Id.* at 932.

⁸¹ *Id.* at 705.

⁸² *Id.*

⁸³ *Id.* at 933.

⁸⁴ *Id.*

form the basis of law.⁸⁵ However, these rules, once enshrined in law, would often be found by judges to be, “at some times, too narrow; at other times, too broad.”⁸⁶ Judges would thus be faced with an untenable situation. To “adhere rigidly” to these laws, “at all times, would be to commit injustice under the sanction of the law.”⁸⁷ Consequently, in order to “avoid an evil so alarming,” a judge will think it “advisable, upon extraordinary occasions, to recede from general maxims, and to decide, as originally, according to the immediate sentiments of justice.”⁸⁸ These decisions, made “from considerations of equity,” serve to revise the law, creating a new legal precedent until such a time as another judge decides that, in order to “avoid an evil,” that precedent must be changed or disregarded, too.⁸⁹

Wilson’s theory of legal progress serves two purposes. On the one hand, it aims to describe how this tension between law and equity propels the development of the law, establishing a legal line which, Wilson says, “will be found to change necessarily according to different circumstances.”⁹⁰ As Wilson explains this development:

[L]aw and equity are in a state of continual progression; one occupying incessantly the ground, which the other, in its advancement, has left. The posts now possessed by strict law were formerly possessed by equity; and the posts now possessed by equity will hereafter be possessed by strict law.⁹¹

The second, more intriguing purpose of this theory is to provide the space and justification for judges in a court of law, “upon extraordinary occasions,” to look beyond precedent or even the written law “to immediate sentiments of justice” in making their decisions.⁹² Wilson not only

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 933-34.

⁹² *Id.* at 933.

grants judges such space in judicial decision making, he thinks it essential for a just society. Equity, he says, may be “deemed the conductor of law towards a state of refinement and perfection.”⁹³ Thus, he concludes, “we can find no difficulty in pronouncing, that every court of law ought also to be a court of equity; for every institution should contain in it the seeds of its perfection, as well as of its preservation.”⁹⁴

In his emphasis on the need for judges to occasionally go beyond precedent and written law in the pursuit of justice, Wilson’s theory of legal progress bears comparison to Obama’s Five Percent Rule and how he frames the limits of the law in “truly difficult” cases. True, Wilson emphasizes those moments where a judge’s decision to hew strictly to precedent or the written law would lead to a patent injustice, whereas Obama focuses on those cases where law or precedent does not dictate a clear decision. Nevertheless, both men would agree with Obama’s declaration that “in those difficult cases, the critical ingredient is supplied by what is in the judge’s heart.”⁹⁵

They would disagree, however, on what exactly that ingredient is.

B. The Common Sense Difference: Another Radical Faith

Like Obama, who believes that practicing empathy allows a judge to understand the meaning of justice beyond “some abstract legal theory or footnote in a casebook,”⁹⁶ Wilson holds that a judge must sometimes look beyond the “general maxims” of written law or precedent to “the immediate sentiments of justice” in order to decide a case.⁹⁷ However, for

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Obama remarks on Souter, *supra* note 3.

⁹⁶ *Id.*

⁹⁷ *Id.*

Wilson, empathy does not provide access to such sentiments. Instead, he looks to a particular conception of “common sense.”

In the “Plan” for his law lectures, Wilson approvingly cites the claim by another of his jurist-heroes, Henry St. John First Viscount Bolingbroke, that in order for law to be “ranked among the learned professions, one of the vantage grounds, to which men must climb, is metaphysical,” a task that demands students of the law to “pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws.”⁹⁸ Accordingly, before he discusses any discrete areas of law, Wilson devotes much of his second lecture to exploring “the philosophy of the human mind” – what he takes Bolingbroke to mean by “metaphysical” knowledge – a study he believes will provide “the abstract reason of all laws” and, thus, the key to understanding and administering justice.⁹⁹

In order to “pry into the secret recesses of the human heart,” Wilson turns to the Scottish philosopher Thomas Reid and his common sense theory of human thought and action. A rebuttal to the philosophical skepticism of his contemporaries Bishop Berkeley and David Hume, Reid’s theory describes a series of intuitive principles divinely implanted in the mind that provide human beings access to certain knowledge and “irresistibly govern the belief and conduct of mankind in the common concerns of life.”¹⁰⁰ A number of these principles are revealed to us by “an original power or faculty in man” that is known by various names, “the *moral sense*, the *moral faculty*, *conscience*.”¹⁰¹ This faculty enables us to determine “what is morally good, and

⁹⁸ HENRY ST JOHN, 1ST VISCOUNT BOLINGBROKE, LETTERS ON THE SPIRIT OF PATRIOTISM, ON THE IDEA OF A PATRIOTIC KING 149 (1749) reprinted in WORKS, *supra* note 63, at 458.

⁹⁹ *Id.*

¹⁰⁰ THOMAS REID, AN INQUIRY INTO THE HUMAN MIND ON THE PRINCIPLES OF COMMON SENSE 77 (Derek R. Brookes ed., 1997).

¹⁰¹ THOMAS REID, ESSAYS ON THE ACTIVE POWERS OF THE HUMAN MIND, 231 (1969) [hereinafter ACTIVE POWERS].

what is morally ill,” informing us about the world of human conduct in the same way the five senses – touch, taste, smell, and so forth – describe for us the physical world.¹⁰² As Reid explains it, as “by the Eye we judge of Light and Darkness of Colour and Figure,” so “by our Moral Faculty we judge of right and wrong in Conduct.”¹⁰³ The feelings supplied by this moral sense, “whose truth is immediately perceived without reasoning, by all men come to years of understanding,” provide a kind of divine moral compass that all human beings share, hence a common sense.¹⁰⁴

Wilson calls upon Reid’s theory of common sense, and the theory of the mind implied by it, to provide Bolingbroke’s “vantage ground” to survey “the whole moral world” and thereby discover the “abstract reason of all laws.”¹⁰⁵ Wilson says that, in addition to the “revealed law” of “holy scriptures,” human law is “promulgated by reason and the moral sense,” what Wilson calls “the divine monitors within us.”¹⁰⁶ These two sources of law form the basis of natural law, and together they propel the development of written law and common law precedent, acting as “one united stream, which, by its combined force and just direction, will impel us uniformly and effectually towards our greatest good.”¹⁰⁷

This development helps to spur “the progress of societies toward perfection.”¹⁰⁸ Yet, Wilson says, this progress has “hitherto been but slow,” and “by many unpropitious events, it has often been interrupted.”¹⁰⁹ One such interruption is the situation described above, where judicial precedent compels a decision that would result in a manifest injustice. Another more jarring

¹⁰² *Id.*

¹⁰³ THOMAS REID, UNPUBLISHED LECTURE NOTES in J.C. Stewart-Robertson and David Fate Norton, *Thomas Reid on Adam Smith’s Theory of Morals*, 45 J. OF THE HIST. OF IDEAS 309, 321 (1984) [hereinafter LECTURE NOTES].

¹⁰⁴ ACTIVE POWERS, *supra* note 105, at 94.

¹⁰⁵ WORKS, *supra* note 53, at 458.

¹⁰⁶ *Id.* at 498.

¹⁰⁷ *Id.* at 522.

¹⁰⁸ *Id.* at 524.

¹⁰⁹ *Id.*

interruption is when a legislature issues what Wilson calls “repugnant commands.”¹¹⁰ Both interruptions may be resolved, however, and progress may be furthered by a judge having recourse to “the immediate sentiments of justice,” sentiments that spring from a divinely appointed faculty, the moral sense. Acting on this sense, a judge in the first case may overrule precedent, establishing a new and better one. Similarly, in the second case, when confronted with a “repugnant” law, the moral sense may compel a judge to “pronounce it void.”¹¹¹ That Wilson grants judges such license may seem surprising given his strong feelings about the need for the separation of powers as well as his belief that the duty and business of a judge is to not to make law, but to interpret and apply it. Nevertheless, Wilson makes clear that a legislature “may unquestionably, be controlled by natural or revealed law, proceeding from *divine* authority.”¹¹² The United States Congress is no exception.

By this light, Wilson’s faith in common sense appears no less radical than Obama’s faith in empathy. On the contrary, it is surely more so. As Arthur Wilmarth describes it, “Wilson’s confidence in the divine authority of the moral sense led him to view federal judges as pathfinders for the rest of society in discovering and enforcing the unwritten dictates of natural law.”¹¹³ Obama, for his part, has never suggested that judges be allowed to strike down laws and upend precedent in the furtherance of divinely appointed social progress. And while he does believe that the practice of empathy gives human beings a better understanding of the demands of justice, as a jurisprudential matter, he only allows for empathy to be determinative in those Supreme Court cases where the law is unclear. Wilson’s jurisprudence, by contrast, holds that

¹¹⁰ *Id.* at 524.

¹¹¹ Wilson also observes, “In the United States, the legislative authority is subjected to another control, besides that arising from natural and revealed law; it is subjected to the control arising from the constitution.” *Id.* at 724.

¹¹² *Id.* at 723-24.

¹¹³ Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 193 (2003).

the dictates of the moral sense, insofar as they provide access to “*divine* authority,” provide a judge legitimate grounds to revise clear legal precedents and even to “void” laws that appear manifestly unjust. Judges may not have the responsibility of writing the laws – that is the duty of the legislator – but they act as God’s agents in striking them down whenever enforcing them would commit a grave injustice.¹¹⁴

III. The Bedrock of Jurisprudential Certainty

Though they differ in form and application, Obama’s jurisprudence of empathy and Wilson’s jurisprudence of common sense both provide Justices with decision making tools to call upon when the law fails to provide clear guidance or, in Wilson’s case, when it compels a manifest injustice. Yet they also present the same problem of the manner in which a judge establishes legal certainty when she decides to anchor her decision beyond precedent or written law.

One can speculate that this very concern helped persuade Wilson to anchor his jurisprudence in common sense rather than in empathy. Indeed, though the word empathy was coined in the late 19th century, the idea was familiar in Wilson’s day, finding a formidable exponent in the Scottish philosopher Adam Smith. Smith’s fame now rests upon *The Wealth of Nations*, but long before its publication, he was well known as a moral philosopher, holding the prestigious position of Professor of Moral Philosophy at the University of Glasgow until 1764, just a year before Wilson sailed for the New World, when he was succeeded by his friend and intellectual adversary Thomas Reid.

Smith’s great work of moral philosophy, *The Theory of Moral Sentiments*, was first published in 1759. It describes a human world where the practice of empathy shapes our

¹¹⁴ Regarding judges as “pathfinders” for natural law, Wilmarth further observes that Wilson “was convinced that, with the help of the courts, these noble principles would eventually be written on the hearts of the people.” *Id.*

personal ethics and prompts moral action. The work, briefly explained, holds that, while human beings are largely selfish, there are “evidently some principles” in human nature by which we take an “interest in the fortune of others.”¹¹⁵ Yet because “we have no immediate experience of what other men feel,” when we encounter someone who appears to be suffering, using our imaginations, “we enter as it were into his body, and become in some measure the same person with him.”¹¹⁶ By this imaginative act, “we conceive ourselves enduring all the same torments” as the other man, and his “agonies” are “thus brought home to ourselves.”¹¹⁷

This is the practice of empathy as Smith describes it. By it, we grow accustomed to comparing with others what our responses would be to a wide range of situations while also watching other spectators to determine if their responses mirror our own.¹¹⁸ Such routine comparisons provide our social world with moral contours, for when we find that “the original passions of the person” in a particular situation are in “perfect concord with the sympathetic emotions of the spectator,” these passions appear to us “just and proper.”¹¹⁹ These observations, and the conclusions we draw from them, show us how we should act in social situations and what is morally required of us vis-à-vis others; they also compel us to observe our own actions by positing an imaginary third person, what Smith famously calls the “impartial spectator.” In order to make “any proper comparison between our own interests and those of other people,”¹²⁰ Smith says we must view those interests neither from our own standpoint nor theirs, but “from the place and with the eyes of a third person, who has no particular connexion with either, and

¹¹⁵ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS*, 9 (Liberty Fund 1982) [hereinafter *MORAL SENTIMENTS*].

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Says Smith, “To approve or disapprove . . . of the opinions of others is acknowledged, by every body, to mean no more than to observe their agreement or disagreement with our own. But this is equally the case with regard to our approbation or disapprobation of the sentiments or passions of others.” *Id.* at 17.

¹¹⁹ *Id.* at 16.

¹²⁰ *Id.* at 134.

who judges with impartiality between us.”¹²¹ Drawing on our experience watching others and putting ourselves in their shoes, this phantom of our imaginations, the impartial spectator, acts as “the great judge and arbiter of [our] conduct,”¹²² shaping our actions by his approval and disapproval of them such that “[t]he man of the most perfect virtue . . . is he who joins, to the most perfect command of his own original and selfish feelings, the most exquisite sensibility both to the original and sympathetic feelings of others.”¹²³

This is a very brief overview of a rich and complex work, but insofar as it describes how empathy shapes our social world, directs our action, shows us right from wrong, and gives us special access to impartial judgments, it is clear that Wilson could have looked to *The Theory of Moral Sentiments*, rather than Reid’s work, to inform his jurisprudence. Moreover, we know that Wilson studied Smith, whose influence is found throughout his writing, from his first published work in 1768, a series of anonymous essays titled *The Visitant*,¹²⁴ to his 1785 pamphlet “Considerations on the Bank of North America,” where he cites Smith by name as an authority on economic matters.¹²⁵ On a few occasions, Wilson even draws on *The Theory of Moral Sentiments* in his law lectures, using Smith’s distinction between praise and praiseworthiness¹²⁶

¹²¹ *Id.* at 135.

¹²² *Id.* at 130.

¹²³ *Id.* at 152.

¹²⁴ *The Visitant* essays, written by Wilson and his friend William White, were published over sixteen issues of *The Philadelphia Chronicle* between January 25 and May 9 of 1786. The essays aim “to examine, in a moral view, the sentiments and manners of the world.” William White & James Wilson, *The Visitant [No. 1]*, PENNSYLVANIA CHRONICLE, Feb. 1, 1768. Though Smith is never named, the influence of *The Theory or Moral Sentiments* is keenly felt. One example will suffice. Explaining why we sometimes betray the “appearances of bashfulness, without any fault in ourselves which can give rise to them,” Wilson and White say that this “proceeds from sympathy; we suppose ourselves in the situation of the person who occasions our confusion, and have the same sensations which we think he ought to feel.” William White & James Wilson, *The Visitant [No. 6]*, PENNSYLVANIA CHRONICLE, Feb. 29, 1768.

¹²⁵ See James Wilson, *Considerations on the Bank of North America* in WORKS, *supra* note 63, at 73-76.

¹²⁶ Compare WORKS, *supra* note 63, at 836 (Wilson declaring “indiscriminate praise, misplaced praise, flattering praise, interested praise have no bewitching charms. But when publick approbation is the result of publick discernment, it must be highly pleasing to those who give, and to those who receive it”), with MORAL SENTIMENTS, *supra* note 109, at 117 (Smith arguing that “Nature” has endowed every human being “not only with a desire of being approved of, but with the desire of being what ought to be approved of; or of being what he himself approves of in other men”).

and citing an anecdote about the attachment of a lonely prisoner to a spider in his cell,¹²⁷ both without attribution.

Why, then, did Wilson not draw on Smith more extensively in his jurisprudence? A likely answer is that Smith's theory omitted anything resembling Reid's moral sense and the divine certainty it promised. Reid himself criticized Smith for only discussing how we compare the relative merits of actions and opinions by the practice of empathy, not how we guarantee their moral certainty. As Reid described Smith's theory, "I judge of your Resentment by my Resentment, of your Love by my Love," and "I neither have nor can have any other way of judging about them."¹²⁸

Reid rejects this account of morality, saying of Smith's work, "the ultimate Measure & Standard of Right and Wrong in human Conduct according to this System of Sympathy, is not any fixed Judgment grounded upon Truth or upon dictates of a well formed Conscience but the variable passions of men."¹²⁹ Reid's objection was not that we should be so compelled by the joys or pains of others, but that, according to Smith, these reactions gave no certain evidence of right or wrong. They were simply facts of our immediate emotional state, not divine signs of moral approval or disapproval, and thus could provide us no certain direction for our actions or judgments.

This problem of moral certainty is one that Obama never wrestles with in his own jurisprudence of empathy. He never considers the possibility that the practice of empathy might lead us to moral conclusions that will vary over time or even to different conclusions at the same time. On the contrary, he seems to have an abiding belief that, by practicing empathy, we will

¹²⁷ See WORKS, *supra* note 53, at 622. The editors of the standard Clarendon Press edition of *The Theory of Moral Sentiments* have said of the spider anecdote that they "cannot trace" its source, making it seem almost certain that Wilson took it from Smith's work. See MORAL SENTIMENTS, *supra* note 119, at 149.

¹²⁸ LECTURE NOTES, *supra* note 107, at 316.

¹²⁹ *Id.* at 318.

come to a shared moral clarity about the actions demanded of us. As a jurisprudential matter, he thus sees empathy as an “essential ingredient for arriving at just decisions and outcomes” not because it provides a Justice one possible way of resolving “truly difficult” cases, but because it provides her decision the same bedrock of certainty and moral imperative that anchors Wilson’s jurisprudence of common sense.

I have called this a radical faith in empathy, and like any faith, it is not shared by everyone, perhaps most notably Justice Sonia Sotomayor. In her now famous “wise Latina” speech, she expressed her belief that human differences may be so resilient that no type of experience, that provided by empathy or otherwise, will see judges come to the same conclusions on difficult matters. Indeed, her controversial remark—“I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life”¹³⁰—reflects the fact that, as a jurisprudential matter, when one doesn’t believe that individuals can ever fully transcend the limits of their experience, she is left to “hope” that certain life experiences dispose a judge to reach “better” conclusions in “truly difficult” cases than the life experiences of other judges.¹³¹ To that end, it should come as no

¹³⁰ Sonia Sotomayor, *A Latina Judge's Voice*, 13 LA RAZA L.J. 87, 92 (2002).

¹³¹ The “wise Latina” remark was made as part of a lecture Sotomayor gave at The University of California, Berkeley, School of Law in 2001 titled “A Latina Judge’s Voice.” As it underscores her skepticism over the ability of a single person to transcend the limits of her experience, the context of that remark is worth quoting at length:

Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Id.

surprise that Justice Sotomayor vests her own hope for judicial wisdom in the very life experiences that are essentially her own.

Obama's jurisprudence of empathy aims to elide any battles over the relative merits of a judge's biography. The only experience that matters to him is the one by which we transcend our differences by learning "to stand in somebody's else's shoes and see through their eyes."¹³² Yet even if we grant Obama his article of faith in empathy, we are still left with Reid's problem of moral certainty. So what if a Justice can, in fact, transcend the limits of her personal experience by the practice of empathy? Why should we believe her decisions to be any more just than those of a Justice who doesn't practice empathy? What gives them their certainty, their moral imperative?

Obama has never directly addressed such questions, but Wilson takes up a similar concern when he discusses the divine imprimatur of the moral sense. Declaring that "the will of God" is "the supreme law," Wilson says:

If I am asked—why do you obey the will of God? I answer—because it is my duty so to do. If I am asked again—how do you know this to be your duty? I answer again—because I am told so by my moral sense or conscience. If I am asked a third time—how do you know that you ought to do that, of which your conscience enjoins the performance? I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no farther. The science of morals, as well as other sciences, is founded on truths, that cannot be discovered or proved by reasoning.¹³³

For Wilson, who later declares that "[o]ur instincts are no other than the oracles of eternal wisdom," the reference to divine authority is the beginning and end of his argument in favor of

¹³² AUDACITY, *supra* note 41, at 66.

¹³³ WORKS, *supra* note 63, at 508.

following the commands of the moral sense.¹³⁴ Feeling, not reason, is proof enough. Indeed, it is proof enough for all the “oracles” of Reid’s common sense.

Obama never invokes the almighty as a guarantor of empathic wisdom, yet the logic of his argument veers in a similar direction. He believes that practicing empathy will lead us to the same conclusions on difficult matters, but the certainty and moral imperative of these conclusions will be felt, not reasoned. “We are shaken out of our complacency,” Obama says of those who practice empathy. “We are forced beyond our limited vision. No one is exempt from the call to find common ground.”¹³⁵

As a jurisprudential matter, the intensity of such feelings provides a Justice the bedrock of certainty to which she can anchor her opinions in the five percent of “truly difficult” cases. Yet, the strength of that bedrock is ultimately determined not by her feelings, but by the degree to which they accord with everyone else who practices empathy. Indeed, these are the high stakes for both Wilson and Obama of appealing to a sense of justice that purports to be universal and keenly felt, the first as a matter of instinct, the second as the result of a particular practice. When people feel the same way, the sense of justice is validated. When they diverge, it is critically undermined.

No Justice has yet cited empathy as an essential part of her decision in a “truly difficult” case, but the experience of James Wilson in his one enduring Supreme Court opinion may serve as a warning. That opinion came in *Chisholm v. Georgia*, what Akhil Amar has called “the first constitutionally significant case ever decided by the Supreme Court.”¹³⁶ The case turned on the question of state sovereignty and whether, under Article III, the Court had jurisdiction over controversies between a State and a citizen of another state. The plaintiff, Alexander Chisholm,

¹³⁴ *Id.* at 518.

¹³⁵ AUDACITY, *supra* note 41, at 68.

¹³⁶ AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 323 (2005).

brought an original action in assumpsit against the state of Georgia for Revolutionary War debts owed to a South Carolina merchant, Robert Farquhar, over whose estate Chisholm served as executor. Georgia refused to appear, claiming in a written objection that, as Georgia was a sovereign state, the Supreme Court had no jurisdiction over the matter and could not force it to appear. The Court, in a 5-1 decision, disagreed. All six Justices wrote separate opinions, but Wilson's was the most sweeping, examining the dispute from three vantage points, in their order, "the principles of general jurisprudence," "the laws and practice of States and Kingdoms," and "the Constitution."¹³⁷

Though he does not discuss the moral sense, Wilson uses Reid's "excellent enquiry into the human mind, on the principles of common sense" to frame the first part of his argument.¹³⁸ Georgia's defense of state sovereignty, says Wilson, is consequent to a "perverted use" of "metaphysics" by which a people is regarded as subordinate to, rather than constitutive of and superior to, a state.¹³⁹ This misconception, says Wilson, is an inversion of "the natural order of things" by which a state is "useful and valuable as a contrivance" to man, from whose "native dignity [a state] derives all its acquired importance."¹⁴⁰ Consequently, says Wilson, the "basis of sound and genuine jurisprudence" is not that state sovereignty elevates a state over and above its people, but that the "sovereign, when traced to his source, must be found in the man."¹⁴¹ Accordingly, in light of the fact that a state is coextensive with man – or, more specifically, the men who make up its enfranchised citizenry – when a "State, like a merchant, makes a contract,"

¹³⁷ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.).

¹³⁸ *Id.* at 454-55.

¹³⁹ *Id.* at 455.

¹⁴⁰ *Id.* at 458.

¹⁴¹ *Id.* at 461.

such as the contract Georgia made with Farquhar, if either one “willfully refuses to discharge it,” they must be “amenable to a Court of Justice.”¹⁴²

Having resolved what was, for him, the central jurisprudential issue at stake in the case, in the second part of the opinion, Wilson goes on a brief historical tour of “the law and practices of different States and Kingdoms” regarding state sovereignty before finally coming to the specific constitutional questions at the very end of the opinion.¹⁴³ There, he addresses two questions: “1. Could the Constitution of the United States vest jurisdiction over the State of Georgia? 2. Has that Constitution vested such jurisdiction in this Court?”¹⁴⁴ He answers the first of them drawing on the “sound and genuine jurisprudence” of the first part of the decision. If the origin of sovereignty is vested in man, and not in the state somehow apart from him, by ratifying the Constitution, “the people of Georgia, could vest jurisdiction or judicial power over [the other] States and over the State of Georgia in particular.”¹⁴⁵ He then considers whether the people of Georgia have, in fact, done so. He answers yes, “the people of the United States intended to bind the several States, by the Legislative power of the national Government” and, by extension, they “did vest this Court with jurisdiction over the State of Georgia.”¹⁴⁶

Wilson’s constitutional analysis dovetails with that of the four Justices in the majority, one of whom, John Blair, was also a member of Philadelphia Convention. The lone dissent by Justice Iredell notably avoids what he calls the “general [question], viz. Whether, a State can in any instance be sued” in the Supreme Court, focusing instead on whether the Court could compel a state to appear specifically for an action in assumpsit.¹⁴⁷ He concludes that the Court was not

¹⁴² *Id.* at 456.

¹⁴³ *Id.* at 459.

¹⁴⁴ *Id.* at 461.

¹⁴⁵ *Id.* at 464.

¹⁴⁶ *Id.* at 464-65.

¹⁴⁷ *Chisholm v. Georgia*, 2 U.S. (2. Dall.) 419, 430 (1793) (opinion of Iredell, J.).

vested with this particular power, though he does not challenge the conclusions of Wilson or the majority regarding state sovereignty and the general jurisdiction of the Court.

Notwithstanding the broad majority and the points conceded to it by Justice Iredell, the *Chisholm* decision “burst on the country like a bombshell,” dividing staunch Federalists who supported the majority in its assertion of the Court’s power from the Anti-Federalists who were zealous to protect the rights of the states against the encroachment of the federal government.¹⁴⁸ The day after the decision, an amendment was introduced in Congress, making states immune to suits by individuals of another state. Within two years, it would be ratified as the Eleventh Amendment, an event seen by some to be the only time “in its history [when] the federal judiciary [has] had its jurisdiction directly curtailed by constitutional amendment.”¹⁴⁹

There is ongoing debate over the merit of Georgia’s specific claims against *Chisholm*, but in terms of the substantive decision of the majority, Caleb Nelson notes, “[m]ost modern scholars . . . see nothing wrong with the Court’s decision to entertain *Chisholm*’s lawsuit in the first place and to order Georgia to respond.”¹⁵⁰ James Wilson certainly believed he was on the right side of this argument. He had been part of the five-member committee that drafted the relevant Article III language at the Philadelphia Convention. More importantly, he believed that his jurisprudential claims, insofar as they were made with reference to the principles of common sense, were supposed to have universal purchase and the certainty of divine authority. Consequently, the fact that the *Chisholm* decision sparked an immediate popular backlash that ultimately saw it overturned by constitutional amendment must have confounded and chagrined James Wilson. By his *Chisholm* opinion, he had raked the coals of a fierce and ongoing debate

¹⁴⁸ SMITH, *supra* note 1, at 357.

¹⁴⁹ Stephen A. Conrad, *Metaphor and Imagination in James Wilson’s Theory of Federal Union*, 13 L. & SOC. INQUIRY 1, n.292. (1988).

¹⁵⁰ Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1562 (2002)

over states rights. Yet, as Stephen Conrad says, “it seems to have been his *style* and his *way* of “reasoning,” even more than his holding, that proved the most provocative.”¹⁵¹ Conrad cites a letter written by the framer William Davie to Justice Iredell as “so illustrative of the predominant reaction to Wilson’s opinion that it deserves to be quoted at length.”¹⁵² Because its sardonic tone highlights the dangers of a Justice locating the “essential ingredient” of her decision beyond law or precedent in some novel theory of jurisprudence, I think the letter is also worth quoting at length:

I confess I read some of these arguments [in *Chisholm*] and particularly that by Mr. Wilson with astonishment: however, the scope and propriety of this elaborate production called an argument, were expressly reserved for the contemplation of “a few, a very few comprehensive minds;” and, perhaps, notwithstanding the tawdry ornament and poetical imagery with which it is loaded and bedizened, it may still be very “profound.” On this I shall give no opinion: but as a law argument it has certainly the merit of being truly “original.” His definition of the American States as sovereignties is more like an epic poem than a Judge’s argument, and we look in vain for legal principles or logical conclusions . . . [T]his whole argument of his seems to be the rhapsody of some visionary theorist.¹⁵³

Davie’s letter illustrates the danger of a Justice having recourse to a novel theory of jurisprudence in making her decisions, particularly in what ultimately proved to be a “truly difficult” case. Wilson’s common sense arguments clearly overshadowed the substantive merits of the majority decision. Their exotic quality, more “epic poem than a Judge’s argument,” made them appear to men like Davie as neither certain nor credible nor even clear. If this was the fruit of common sense, a judge would be well advised to take his basket and go find some other tree.

¹⁵¹ *Id.* at 67.

¹⁵² *Id.*

¹⁵³ GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 382 (Peter Smith ed., 1949), reprinted in Stephen A. Conrad, *Metaphor and Imagination in James Wilson’s Theory of Federal Union*, 13 L. & SOC. INQUIRY 1, 67-68 (1988).

Conclusion

It remains to be seen whether new members of the Court will embrace President Obama's jurisprudence of empathy or, for that matter, whether the President himself will stand by it in the face of criticism like Senator Charles Grassley's that the "empathy standard appears to encourage judges to make use of their personal politics, feelings, and preferences" instead of helping judges to transcend them.¹⁵⁴ That the word empathy went unmentioned in the nomination of Elena Kagan to replace retiring Justice John Paul Stevens suggests the President may be having second thoughts, if not about his jurisprudential views then at least about discussing them so openly.

Still, even if the President has shied away from using the word empathy, his praise of Kagan for her "understanding of law, not as an intellectual exercise or words on a page, but as it affects the lives of ordinary people" suggests that the "essential ingredient" he looks for in a Supreme Court Justice has not changed.¹⁵⁵ Moreover, for better or for worse, the President's empathy standard has become a permanent part of the debate over his nominees, and it seems certain that the Justices he appoints will be judged by that standard for as long as they are on the bench.¹⁵⁶

Should he not disavow his jurisprudential theory outright, this article has argued that the experience of James Wilson and his jurisprudence of common sense may be instructive to

¹⁵⁴ *Hearing on the Nomination of Judge Sonia Sotomayor* (July 13, 2009), *supra* note 7 (statement by Sen. Grassley).

¹⁵⁵ President Obama on the Nomination of Solicitor General Elena Kagan to Supreme Court (May 10, 2008), available at <http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el>.

¹⁵⁶ See, e.g., Dahlia Lithwick, *John Paul Stevens's Real Legacy: Empathy*, NEWSWEEK, Apr. 9, 2010; Jonah Goldberg, *When Empathy's Unjust*, BOSTON HERALD, Apr. 13, 2010; Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 25, 2010; John Dickerson, *Empathy in Academia: Obama's Case that Elena Kagan Has a Special Understanding of Ordinary People*, SLATE.COM, May 10, 2010; John Paul Rollert, *Elena Kagan: Would she embody empathy as a Supreme Court Justice?*, THE CHRISTIAN SCIENCE MONITOR, May 10, 2010; Kurt Schlichter, *A Code Word for Bias*, WASH. TIMES, May 18, 2010; John Paul Rollert, *Thurgood Marshall's return*, THE BALTIMORE SUN, July 12, 2010.

President Obama. Both men believe there to be a small subset of cases where a Justice should look beyond written law and precedent in order to reach just decisions, and while each man champions a different jurisprudential tool for use in such cases, both aspire to the kind of certainty that makes Chief Justice Roberts's "umpireal analogy" so attractive.

No doubt, this is a laudable goal, but it is also impractical, for it burdens their jurisprudence with unreasonable expectations. Whether in adherence to a jurisprudence of empathy or common sense, judicial decisions that look beyond law and precedent to moral arguments that claim universality and self-evidence aspire to a standard so high they inevitably fall short. This does not mean that one must dispense with empathy or common sense in Supreme Court decision making. Rather, one must be careful to treat them not as bellwethers of moral certainty, but as a resource for judicial decision making that, while not infallible, may nonetheless be the best tool available for deciding those cases where the law, for whatever reason, simply falls short.