Words have a way of coming back to haunt you, especially those you bother to print. Just ask Elena Kagan. In a 1995 book review, she famously skewered the Senate Judiciary Committee hearings for Supreme Court nominees as “a vapid and hollow charade, in which repetition of platitudes have replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.” Those are strong words, the kind that young professors truck in when the favor of a tenure committee is foremost in their minds and the courage of their convictions comes cheap.

Things change. Fifteen years after defending “the essential rightfulness—the legitimacy and the desirability—of exploring a Supreme Court nominee’s set of constitutional views and commitments,” Kagan was the nominee and found herself on the receiving end of her own taunts.² Would she challenge the central conceits of originalism? Thumb her nose at Justice Scalia? Provide a progressive view?

She would not. And honestly, who can blame her, especially after President Obama’s experience, just a year before? He had challenged conventional wisdom 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 Supreme Court nominees.³ It was not the first time the President had used

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2. Id. at 942.
the word “empathy” to describe his views on constitutional interpretation and the complicated work of a judge. It may, however, have been the last.

To the Right, empathy was nothing less than a code word for judicial activism, a dog whistle to the Democratic base that the President would choose judges who would put the counsel of a bleeding heart above the demands of impartial justice. To the Left, a scholastic debate over the merits of empathy was not very inviting, particularly if winning minor points might come at the expense of the President’s first nominee. Seeing Sonia Sotomayor safely to the Court was far more important than arguing over how she, or any other Justice for that matter, should make her decisions on the bench.

No doubt this was a shrewd tactical decision. The Democrats on the Senate Judiciary Committee, charged with shepherding Sotomayor through the mountain pass of the Senate confirmation process, were not about to let the first Supreme Court nominee by a Democratic President in nearly a generation slip into some philosophical crevasse. They would steer clear of it. They would steer Sotomayor clear of it. And when Senate Republicans called to them from the edge, jumping up and down and pointing excitedly below, the Democrats were quick to discount the danger they saw. So quick, in fact, that over the course of the confirmation hearings empathy was made to seem uncomplicated and largely irrelevant to the work of a judge.

This is how the Senate Democrats wanted it. What they wanted more was not to have to talk about empathy at all. The President seems to have gotten the message. No mention of empathy was made this year when Justice John Paul Stevens retired, nor again when Elena Kagan was nominated to take his place. The “essential ingredient” went unspoken. One imagines that we will not be hearing about it again.

Not that the President doesn’t think about it. Empathy isn’t just a word for him, it’s a passion, and his silence now says more about the realities of partisan politics than it does about a loss of faith. Barack Obama’s faith in empathy is abiding. At times it seems nearly boundless.

1. A POOR FIRST IMPRESSION

In hindsight, the excitement over one small word seems a bit ridiculous. Two days after the announcement of Justice Souter’s retirement and the introduction of what would come to be called the “empathy standard,” Republican Senator Orrin Hatch appeared on ABC’s This Week to help translate the President’s words. Empathy, the Utah senator warned, was
actually “a code word for an activist judge.” The President said he favored judges who have an appreciation for “how our laws affect the daily realities of people’s lives,” but what he really meant was that he would select judges based not on merit but “on the basis of their personal politics, their personal feelings, their personal preferences.” When he said that he was looking for a nominee capable of “understanding and identifying with people’s hopes and struggles,” the President was signaling that he intends “to pick people who will take sides.”

This formulation—that empathy is synonymous with taking sides—became a rallying cry for the Right. Columnist Charles Krauthammer declared, “[I]f nothing else, [conservatism] stands unequivocally against justice as empathy—and unequivocally for the principle of blind justice.” John Yoo wondered whether Judge Sotomayor’s vote in the Ricci case, where she sided with the City of New Haven over a group of mostly white firefighters in a decision to invalidate a promotional test on allegedly discriminatory grounds, was “the product of her ‘empathy’ rather than the correct reading of the Constitution.” And Wendy Long, a former clerk to Justice Clarence Thomas, accused Mr. Obama of aiming to “become the first president in American history to make lawlessness an explicit standard for Supreme Court justices.” At the time, Long was general counsel for the Judicial Confirmation Network, a conservative group formed in 2004 to lobby on behalf of President Bush’s judicial appointments. This past spring, the group rechristened itself the “Judicial Crisis Network,” a nod to changing political realities and, no doubt,

4. This Week (ABC television broadcast May 3, 2009) (remarks by Senator Orrin Hatch) [hereinafter Hatch, This Week].
5. Obama, Remarks on Souter, supra note 3.
6. Hatch, This Week, supra note 4.
7. Obama, Remarks on Souter, supra note 3.
8. Hatch, This Week, supra note 4.
to the grave threat posed to the country of having too much empathy on the bench.

By the time the Sotomayor hearings began, Republicans were united in their aim to put empathy on trial. In their opening statements, every Republican member of the Senate Judiciary Committee singled out the term for abuse. The ranking Republican member, Alabama Senator Jeff Sessions, said the empathy standard “empowered” a judge to “favor” some plaintiffs over others. Iowa Senator Chuck Grassley voiced his concern “that judging based on empathy is really just legislating from the bench.” And South Carolina Senator Lindsay Graham said that choosing a nominee based on her capacity for empathy is “an absurd, dangerous standard.”

Senate Democrats showed no interest in joining this debate. Only two of them mentioned empathy in their opening statements, and in subsequent colloquies they rarely referred to empathy except to make clear, in the words of Wisconsin Senator Russ Feingold, that “a judge’s ability to feel empathy does not mean the judge should rule one way or another.” New York Senator Chuck Schumer even went so far as to reassure the Committee that Judge Sotomayor’s capacity for empathy was actually not all that it was cracked up to be: “[I]n the courtroom of a judge who ruled based on empathy, not law, one would expect that the most sympathetic plaintiffs would always win.” However, he helpfully noted, “that is clearly not the case in your courtroom.”

For her part, Judge Sotomayor, who spent much of the hearings nodding her head graciously and wearing a benign grin, was more than happy to comply. “[M]any senators have asked me about my judicial philosophy,” she said when the hearings opened. “Simple: fidelity to the law.”

Yet, for all the efforts to affix and evade the Scarlet E, nobody on the Judiciary Committee seemed to know exactly what the President meant when he called empathy an “essential ingredient” in judicial decisionmaking. Senator Grassley opined that the “empathy standard appears to encourage judges to

15. Id. at 17 (statement of Sen. Chuck Grassley).
16. Id. at 27 (statement of Sen. Lindsey Graham).
17. Id. at 116 (statement of Sen. Russ Feingold).
18. Id. at 127 (Statement of Sen. Chuck Schumer).
19. Id.
20. Id. at 59 (statement of Judge Sonia Sotomayor).
make use of their personal politics,” while Rhode Island Senator Sheldon Whitehouse said that empathy helped a judge understand that the “courtroom can be the only sanctuary for the little guy when the forces of society are arrayed against him.” Senator Schumer offered that empathy is the opposite of “having ice water in your veins.” And Senator Sessions simply admitted, “I don’t know what empathy means.”

II. A LEGAL SHOWDOWN

The senators can be forgiven for their confusion. Empathy is hardly a familiar term in popular debates over constitutional interpretation, and the President has never bothered to defend at length, much less define in depth, why it might be an essential tool for a Supreme Court Justice.

Not that he is required to. Coherent legal opinions, much less a complex theory of jurisprudence, are not requirements for the presidency, and Obama differs from his predecessors not because he has articulated a nuanced theory of Supreme Court jurisprudence, but only because he seems so qualified to do so. His legal résumé—president of the Harvard Law Review, civil rights attorney, constitutional law lecturer—was a star attraction of his 2008 campaign, and no less a law 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.”

Yet while President Obama is no doubt among the most sophisticated legal minds to inhabit the Oval Office since Woodrow Wilson, another law lecturer turned Commander-in-Chief, he has left few written clues as to his own thoughts on judicial review. During his decade-long tenure at the University of Chicago, he published no law journal articles, and his only known piece of legal scholarship is an unsigned Case Note in the Harvard Law Review assessing a ruling by the Illinois Supreme Court that a fetus could not sue its mother for

22. Id. at 37 (statement of Sen. Sheldon Whitehouse).
23. Id. at 127 (statement of Sen. Chuck Schumer).
prenatal injuries. The six-page piece, which conservative law professor Eugene Volokh describes as “calm and fairly uncontroversial,” is hardly the Rosetta Stone for decoding the President’s views.

For this, one must turn to his brief career in the Senate and, in particular, to his showdown with the man who has become a legal foil to the President’s progressive agenda. That man is John Roberts, who met then–Senator Obama in the summer of 2005 when he was first nominated to fill the vacancy left by retiring Justice Sandra Day O’Connor before being renominated to replace Chief Justice William Rehnquist following his death that fall. On the surface, the two men have much in common. Neither was a product of the northeastern prep schools that are the farm teams for the Ivy League: Roberts made his way to Harvard from a small boarding school in northern Indiana, Obama from Chicago, Hawaii, and seemingly all points West. Both men rose to become editors of the Harvard Law Review, the executive suite of Harvard Law School, and graduated in the top ten percent of their classes. Both men served in high levels of government, spent their adult lives in the law, and were destined for greatness—or so they were told, time and time again.

Beyond their political differences, each man could appreciate in the other a formidable intellect and an astute legal mind. Obama said as much when he announced that he would vote against Roberts’s confirmation. Recalling his days at the University of Chicago Law School, he observed that what engendered respect among the faculty was not the political stripe of one’s argument, but “the intellectual rigor and honesty” with which it was pursued. Obama liked this approach. It appealed to his cool scholarly temperament, and he believed that it helped to “maintain a sense of collegiality between those people who hold different views.” Still, he could not vote for Roberts, and the reason had much to do with the way the two men understand the law, its purpose, and perhaps most of all its clarity.

During the hearings, Roberts framed his understanding of the law in terms that might charitably be called user-friendly. “Judges are like umpires,” he told the members of the Senate Judiciary Committee. “Umpires don’t make the


29. Id.
rules, they apply them.” Their role—whether in a ball game or a democracy—is essential but limited. “They make sure everybody plays by the rules.” To this end, the work of umpires and judges alike was unobtrusive and mechanical—unobtrusive because it was mechanical. “Nobody ever went to a ball game to see the umpire,” Roberts assured the senators, and nobody would ever have reason to watch a Roberts Court closely.

Listening to John Roberts, one might have wondered how the Supreme Court ever came to be so highly regarded. He made it sound as if the work of a Justice were no more complicated than assembling a futon from Ikea, a task that most any person could do who had an aptitude for following directions and the patience of Job.

It isn’t surprising, then, that the Chief Justice’s baseball analogy, however pleasing it might have been to members of the Senate Judiciary Committee, failed to convince close observers of the Court, perhaps least of all Judge Richard Posner, a Reagan appointee and the conservative high priest of the law and economics movement. In his 2008 book How Judges Think, he said that 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.” Indeed, a judge does not merely apply the laws; he has to interpret them, and the weight of these responsibilities shifts the higher one climbs in the judicial branch. Trial court judges may fairly be said to spend most of their time applying the law, but the very purpose of the appellate courts is to resolve disputes over how


31. Id.

32. Id.

33. Shortly after I finished the first draft of this essay, Dahlia Lithwick made an eerily similar remark in her Slate column:

   The question I would ask is why it’s so fashionable for nominees to suggest that the hard work of judging is simple; that the Constitution is no more complicated than the instructions for assembling an Ikea end table; and that the reason they are perfectly qualified for the job is that, well, they can read.

   Dahlia Lithwick, It’s Complicated: David Souter Finally Tells Americans To Grow Up, SLATE.COM, June 9, 2010, http://www.slate.com/id/2256458/pagenum/all/#p2. That Ms. Lithwick and I should come to nearly the same conclusion is as much a tribute to the misleading simplicity of the “umpire analogy” as it is to the surprising ease with which one may assemble an end table, or a futon, from Ikea.

laws ought to be applied when their terms are contradictory, uncertain, or potentially unconstitutional. Thus the Chief Justice’s baseball analogy, which portrayed the work of a judge as no more complex than the application of simple, straightforward rules, was incomplete at best and specious at worst, an opinion Judge Posner seems to hold. If Justices are going to be profitably compared to baseball umpires, he said, “in addition to calling balls and strikes,” we must suppose that umpires also “made the rules of baseball and changed them at will.”35 Which is another way of saying that Supreme Court Justices and baseball umpires really aren’t that much alike after all.36

During the confirmation, then-Senator Obama was willing to grant John Roberts his baseball analogy to a greater extent than Judge Posner—ninety-five percent of the time, in fact. This was the proportion of cases that could be disposed of by merely adhering to what he called the “basic precepts” of judicial decisionmaking, the protocols of good behavior that nearly all judges follow. These included “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.”37 In such cases, the President would later say, “Justice Ginsburg, Justice Thomas, Justice Scalia—they’re all gonna agree on the outcome.”38 The reason is simple: “[T]he law is pretty clear.”39

However, as debates over cases like Roe v. Wade40 and Citizens United41 suggest, sometimes the law is not very clear. And in the Roberts confirmation, Obama acknowledged this. There were “truly difficult” cases where “the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of

35. Id. at 78-79.
36. For a novel reinterpretation of Roberts’s analogy, see Aaron S.J. Zelinsky, The Justice as Commissioner: Benching the Judge-Umpire Analogy, 119 YALE L.J. ONLINE 113, 114 (2010), http://yalelawjournal.org/2010/03/03/zelinsky.html, arguing that “the appropriate analog for a Justice of the Supreme Court is not an umpire, but the Commissioner of Major League Baseball.”
39. Id.
40. 410 U.S. 113 (1973).
decision." True, by his own account, these were only five percent of cases that came before the appellate bench, but they tended to be the ones that made their way to the Supreme Court. Once there, the questions they presented did not merely have the cerebral appeal of academic debates hashed out in the faculty lounge. They had actual stakes. The answers the nine Justices gave them could change people’s lives and shape the destiny of a nation.

Thus the power of the Supreme Court was immense, and, given that legal uncertainty characterized the cases that came before it, being a super lawyer was not enough to qualify one for membership. John Roberts was one such lawyer, a fact Senator Obama readily conceded, and if his task as a Supreme Court Justice were really no different from calling legal balls and strikes, he would not be just as good as any other lawyer—he would be among the very best.

But something more was needed for such work. At the time, Senator Obama compared it to running a marathon. The “basic precepts” of judicial decisionmaking would get a Justice through the twenty-fifth mile, but that last mile was different. Here the law stopped short, the thread of certainty was broken. A Justice would have to rely on other resources to cross the finish line and reach his decision.

So what were these resources? Back then, the junior senator from Illinois did not hesitate to describe them: “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.”

III. NO NEED TO READ BETWEEN THE LINES

The confirmation of John Roberts was the first time Barack Obama described empathy as an essential tool for breaking the logjam of legal uncertainty, but it certainly was not the last. He raised it two years later during his presidential campaign and again when he became President. Admittedly, it was sometimes hard to hear him for all the Republicans who were busy grinding their teeth. This was partly a reaction to the very word itself—empathy? whatever that means—and to the idea that a judge (a judge!)

42. Obama, Floor Speech, supra note 28.
43. Livingston & Murray, supra note 38 (quoting remarks made by President Obama to Planned Parenthood).
44. Id.
45. See id.
46. See Obama, Remarks on Souter, supra note 3.
should call upon it in a court of law. Indeed, for Republicans, it seemed all too predictable that a President they regarded as effete, overeducated, and generally out of touch should use a word that seemed chosen to speak directly over their heads.

Yet there was also a deeper, visceral reaction to the very idea of legal uncertainty. For decades, Republicans had crusaded against what they darkly termed “judicial activism.” Federal judges, they said, were ignoring the clear language of the law in furtherance of a progressive agenda they could not implement through democratic channels. These judges saw the courts as a shortcut to a liberal utopia, and the only thing stopping them were judges like Robert Bork, Antonin Scalia, and Clarence Thomas, honest brokers of the law who did nothing more than read the relevant statutes or constitutional clauses and rule according to their plain meaning. These men had no agenda. A judge should have no agenda. Whatever the lawmakers said, whatever the Founders intended, this was how they ruled.

The critique was not without force. The Warren Court bent over backward to support civil rights, and the Burger Court’s majority decision in Roe was so creative that liberal constitutional scholars tend to pinch their noses whenever they read it. “[I]t is not constitutional law,” John Hart Ely, one of the most distinguished, has said, “and gives almost no sense of an obligation to try to be.”

Still, there is a significant difference between saying that judges should be obliged to follow the plain meaning of the law and asserting that the law’s meaning is always plain. This is a distinction that conservatives have rarely highlighted. If anything, they have tried to obscure it. Separating the two would complicate the picture of liberal judges as rogue jurists who make up the law as they go along and conservative judges who act as humble clerks to the Founders and the legislative wisdom of the day. These are forces of light and darkness; who needs competing shades of gray?

The generally warm reception to Roberts’s baseball analogy underscores the degree to which this vision of legal certainty has passed from conservative conceit to conventional wisdom—so much so that, last spring, the temperamentally taciturn David Souter felt the need to address it. As a speaker for Harvard’s commencement, the retired Justice delivered an uncharacteristic broadside against what he called “the fair reading model” of constitutional interpretation, an approach, he said, that presumes that “deciding

constitutional cases should be a straightforward exercise of reading fairly and viewing facts objectively.”48 This sounds like a fine approach to constitutional interpretation, Souter noted, except for the fact that different clauses of the Constitution, as well as its twenty-seven amendments, “can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises.”49 Taken as a whole, the Constitution is not a tidy document of dead-end rules but “a pantheon of values”—and it is precisely for this reason that “a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another.”50

It is too soon to say whether Justice Souter’s plea will represent a turning of the tide in the way the public views constitutional interpretation and the work of a Supreme Court Justice. In the meantime, however, beyond familiar objections from liberal members of the legal academy and contrarians like Judge Posner, almost no member of the Washington establishment, Democrat or Republican, would ever publicly admit that the law is rife with uncertainty. Otherwise, they would have to own up to the fact that, to apply a law, one must interpret it, and while that work may be fairly straightforward at the trial level, moving up the appeals chain, the question of what the law actually is becomes increasingly opaque and, thus, open to dispute. Judges have to make the call—indeed, that’s their constitutional responsibility—but Judge Posner is right when he says that deciding the ambit of the Commerce Clause or applying an ambiguous term in a civil rights statute is not like calling balls and strikes. It is more like making up the rules of baseball, except that the rules are federal laws, leading another famous judge to observe that the “court of appeals is where policy is made.”51

That judge was Sonia Sotomayor, who made the rather freewheeling remark to a student audience in 2005. Acknowledging the nervous laughter of the crowd, she immediately added, “I know, I know this is on tape and I should never say that.”52 She wouldn’t four years later when she appeared before the Senate Judiciary Committee. There she stared unflinchingly at the

49. Id.
50. Id.
52. Id.
panel and said: “The task of the judge is not to make law, it is to apply the law.”

She could only have hewn more closely to John Roberts’s playbook if she had appeared in eye-black and cleats.

IV. BIG SHOES TO FILL

That Barack Obama has been so candid about the uncertainty of the law sets him apart from most every elected official. His suggestion that empathy is a tool for overcoming it makes him indisputably unique.

Obama’s only sustained discussion of empathy comes not in his speeches or in remarks he made during his presidential campaign, but in his 2006 book, *The Audacity of Hope*. There he describes empathy with reference to Paul Simon, the late senator from Illinois who was a supporter of Obama during his Senate campaign. Simon was an unapologetic liberal known for his bow ties and bookish mien, but people across the political spectrum came to admire him, Obama says, because they could sense “he cared about them and what they were going through.”

He goes on:

That last aspect of Paul’s character—a sense of empathy—is one that I find myself appreciating more and more as I get older. It is at 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.

The distinction between “sympathy or charity” and the “call to stand in somebody else’s shoes and see through their eyes” is important. The second exercise is what we traditionally call empathy. In cases of suffering, it may lead to the first, but the act is characterized not by the pity we feel for others but by our attempt to understand their reality. We do this by trying to imagine the emotional topography of their world, their setbacks and triumphs, their blessings as well as their burdens. If we are black, we imagine what it would mean to be white. If rich, poor. If lonely, beloved. We doff our own experience and try on another. For a moment, we live someone else’s life.

55. Id.
This is empathy, a practice Obama deems necessary for “understanding and identifying with people’s hopes and struggles.”\(^{56}\) Saying further, as he does, that it is “an essential ingredient for arriving at just decisions and outcomes”\(^{57}\) is novel, but not because it calls for a judge to rely on the counsel of experience. Justices as different as James Wilson, Oliver Wendell Holmes, Benjamin Cardozo, and Sandra Day O’Connor have all said as much. In fact, when Obama nominated Kagan to fill the seat left vacant by John Paul Stevens, he cited Holmes’s observation that experience “can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live.”\(^{58}\) He also cited Kagan’s account of the most important lesson that she learned while clerking for Thurgood Marshall, another Justice who saw experience as an indispensable tool for deciding the law. Marshall, said Kagan, thought that “all lawyers (and certainly all judges) should be reminded, that behind the law there are stories—stories of people’s lives as shaped by law, stories of people’s lives as might be changed by law.”\(^{59}\) The civil rights icon “had little use for law as abstraction, divorced from social reality,” and he shared his own stories with his clerks of a life spent in pursuit of justice, often at considerable risk to himself and his loved ones, in order to keep them “focused on law as a source of human well-being.”\(^{60}\)

No, insofar as empathy is a particular variety of experience, indeed, a gateway to the experience of others and so a means for taking an impartial view of our own, Obama’s praise of empathy as an “essential ingredient” in judicial decisionmaking is not novel or particularly bold given his candor about the law’s uncertainty. What is bold is the faith he places in empathy. Believing that we can see the world through the eyes of others and actually seeing the world they see are two very different things. To gain access to your experience, I not only have to check my own experience at the door, I must part with the accessories of my identity—the habits, tendencies, inclinations, and, yes, prejudices that give my experience its gravitational pull. At the same time, I have to array myself with yours, or at least make that attempt, for only by doing so can I truly be said to share in your experience. Otherwise, we are like two strangers standing silently before a portrait. We may see the same woman

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56. Obama, Remarks on Souter, supra note 3.
57. Id.
60. Id.
staring back at us, but if that woman once broke your heart, we are really seeing two different things.

Obama has this faith, a very democratic faith and one that is peculiarly American. “In all people I see myself,” Walt Whitman said, “none more and not one a barleycorn less.” Whitman remains America’s great poet-evangelist of empathy, and Song of Myself is a national hymn to its power and possibility, especially to reach the desperate and despised in a nation of great difference:

The mother condemned for a witch and burnt with dry wood, and her children gazing on;
The hounded slave that flags in the race and leans by the fence, blowing and covered with sweat,
The twinges that sting like needles his legs and neck,
The murderous buckshot and the bullets,
All these I feel or am.62

Echoes of Whitman can be heard in voices as diverse as Harriet Beecher Stowe, John Dewey, Harper Lee, and Richard Rorty. The President stands at the end of this line. He seems to believe that we can empathize with others, no matter how different they may be. Moreover, he thinks that this practice changes us—radically changes us. It resets our moral compass such that we come to view the concerns of justice not from our own perspective, but from the perspective of others, an exercise that yields the wisdom of a community rather than the insight of an individual. “That’s what empathy does,” Obama says, “it calls us all to task, the conservative and the liberal, the powerful and the powerless, the oppressed and the oppressor. We are all shaken out of our complacency. We are all forced beyond our limited vision. No one is exempt from the call to find common ground.”63

Obama’s belief that empathy leads us to common ground is important for his vision of jurisprudence, as it provides a judge a sense of moral assurance when the law strays into uncertainty. Obama never discusses this faith in strictly legal terms, but he illustrates it in The Audacity of Hope when he describes what he calls an “empathy deficit.”64 The social consequences of this deficit, and the actions we would take if it were overcome, point to Obama’s

62. Id. at 64–65.
63. Obama, The Audacity of Hope, supra note 54, at 68.
64. Id. at 67.
faith in the power of empathy to provide common moral purpose. “[A]s a country,” he says,

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.  

As the passage attests, for Obama, empathy does not reveal moral quandaries so much as make them irresistible, focusing the mind and giving one the courage and purpose to resolve them. At the same time, it universalizes the problems as well as their solutions. If we were all accustomed to standing in the shoes of others and seeing the world through their eyes, we would not only face up to the moral shortcomings of our society—we would find common cause in resolving them.

Sounds good, doesn’t it? Not everyone is so convinced, perhaps most surprisingly Justice Sonia Sotomayor. Understanding others, she has cautioned, “takes time and effort, something that not all people are willing to give,” and the experiences of some people “limit their ability to understand the experiences of others. Others simply do not care.” For Sotomayor, the walls of personal experience appear much higher than they do to the man who made her name synonymous with judicial empathy. So high, in fact, that some people cannot scale them. We are left then not with the aim of shared experience and common wisdom, but with the hope that our personal experience yields a private wisdom that can make us more just and humane. Or, as Sotomayor famously distilled her hope, “that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white man who hasn’t lived that life.”

This is a second challenge to the President’s jurisprudence, one far more formidable than the central conceit of the “umpire analogy.” Indeed, even if you can convince people that the law in general, and constitutional law in particular, is not nearly as clear as people like John Roberts make it out to be, it

65. Id.
67. Id.
does not necessarily follow that a judge should rely on the wisdom of personal experience instead. You have to further make the claim that, in the absence of legal certainty, the experience of trying to empathize with others can provide a judge—or, for that matter, a collection of Justices—a sense of moral clarity and common cause in deciding disputes. Otherwise, skepticism like Sotomayor’s only serves to reinforce the broader conservative critique that the “empathy standard” is not an enlightened tool for adjudication in the breach, but a proxy for partiality on the bench.

V. SECOND THOUGHTS

So the President has his work cut out for him. In addition to a controversial belief about the relative clarity of constitutional law, he seems to have far more faith than his own nominee in the ability of judges to see beyond their personal differences and in the capacity of empathy to steer us toward common ground.

But his idealism—for that is what it is—is neither shallow nor unreflective. It is the voice of his own experience, one heard in Dreams from My Father, Obama’s account of his struggle for self-understanding growing up a citizen of so many worlds while the son of no single one. That experience, aching and so often lonely, made Obama a shrewd student of human differences, as if, by staring hard enough at them, they might simply melt away. “I learned to slip back and forth between my black and white worlds,” he says of his youth, “understanding that each possessed its own language and customs and structures of meaning, convinced that with a bit of translation on my part the two worlds would eventually cohere.”

They do not, at least not immediately, such that when Obama travels to Kenya for the first time as a young man, he calls himself “a Westerner not entirely at home in the West, an African on his way to a land full of strangers.” The brief visit changes him, however. He sees his own struggle reflected in those of his father and grandfather, men left essentially homeless by their inability to integrate the Kenya they knew with the Western world they longed to join. They grew resentful and distrusting, a bared fist ready to strike at the broader world. Their failure, Obama realizes, was ultimately a failure of faith, “faith in other people.”

69. Id. at 301.
70. Id. at 429.
did, “to embrace our teeming, colliding, irksome diversity, while still insisting on a set of values that binds us together.”

Empathy is at the heart of that faith. By it, Obama was able to resolve the contradictions of his own identity without abandoning them altogether. By it, he believes that a diverse people can find common cause to address the pressing problems of the day. By it, he thinks a judge can break the impasse of legal uncertainty and make decisions that are characterized by shared wisdom and moral clarity.

This is idealism, no doubt, but is it dangerous politics, too? The President seems to have concluded as much, for the E-word never passed his lips last spring when he nominated Elena Kagan to replace Justice Stevens. If so, it is a shame. By challenging the “umpire analogy,” Senator Obama called attention to the poverty of popular constitutional discourse, a sorry state of affairs in which people on both sides of the aisle are too eager to doubt what should be taken for granted—the personal integrity of the Justices they disagree with—and to take for granted what should be doubted—the pellucid clarity of constitutional law. Make no mistake, these are the unavoidable consequences of the “umpire analogy,” for if an umpire calls out a batter on what looks to you like a wild pitch, he’s either a dirty liar, or blind as a bat.

But Senator Obama didn’t merely try to redeem the Court from the mischievous simplicity of John Roberts’s analogy; he went further by suggesting that empathy might supply a judge moral certainty when legal certainty was simply not available. In so doing, he was not only invoking a tradition of constitutional interpretation that calls on the wisdom of personal experience to supplement the shortcomings of written law, he was trying to provide his own unique addition, a jurisprudence of empathy that drew inspiration from his experience and seemed tailor-made for the times. That, as President, he has proven unwilling to engage those who have distorted his views, relying instead on carefully coded homilies that praise the benefits of empathy without ever identifying the practice by name, is a great loss to legal

71. Id. at x.

72. Noting that the President never used the word “empathy” in his speech nominating Elena Kagan to the Supreme Court, Arizona Senator Jon Kyl said during the Senate Judiciary hearings that Obama had merely “repackaged” his views. Said Kyl:

Perhaps because his first nominee failed to defend the judicial philosophy that he was promoting, the President has repackaged it. Now, he says that judges should have “a keen understanding of how the law affects the daily lives of the American people... [and] know that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens.”
discourse, which could use an eloquent spokesman in the Oval Office for a sophisticated alternative to the “fair reading model” of constitutional interpretation.

It is an even greater loss to the public, however, which would benefit from a candid discussion about the place of empathy in modern American life. Indeed, people can disagree about the role of empathy on the bench—and this is a debate very much worth having—but no one can deny that it is a powerful virtue in a large and diverse democracy, particularly one that now finds itself teeming with the intensity of its differences.

Barack Obama’s debut on the national stage at the 2004 Democratic National Convention captivated the country because he spoke to the stubborn quality of those differences and of a politics by which they might be embraced and overcome. “[A]longside our famous individualism,” he said,

there’s another ingredient in the American saga: a belief that we’re all connected as one people.

If there is a child on the South Side of Chicago who can’t read, that matters to me, even if it’s not my child. If there’s a senior citizen somewhere who can’t pay for their prescription drugs and has to choose between medicine and the rent, that makes my life poorer, even if it’s not my grandparent. If there’s an Arab American family being rounded up without benefit of an attorney or due process, that threatens my civil liberties.

It is that fundamental belief—that I am my brother’s keeper, I am my sister’s keeper—that makes this country work. It’s what allows us to pursue our individual dreams and yet still come together as one American family.

E pluribus unum. Out of many, one.73

It is a stirring vision, one that saw an anonymous state senator rise all the way to the White House in only four years. An abiding faith in the power of empathy underpins it. Nobody understands that power better than President Obama—even if, for now, he’s lost the audacity to say it.

John Paul Rollert is a doctoral student at the Committee on Social Thought at the University of Chicago and will soon graduate from Yale Law School. He would like to thank Scott Anderson and Aaron Zelinsky for taking a red pen to the first draft of this essay, his lead editor Sophia Brill for holding to the highest standards the last, and the staff of The Yale Law Journal for patiently bringing the work to print. Finally, he is especially grateful to Linda Greenhouse, who showed no small amount of empathy in helping him to get this work off the ground. Thank you, Linda.

The uncertain future of democracy. Trump has support for banning immigration from certain Muslim-majority countries, for example. And last year, the UK government was able to pass the most sweeping internet-surveillance legislation of any democracy. In the US and most of Western Europe, the checks and balances are very likely to be strong enough to prevent severe damage to democratic freedoms and constitutional safeguards, says Diamond. But 'very likely' is not 'certain'. United States President Barack Obama discussed his plan for health care reform in a speech delivered to a joint session of the 111th United States Congress on September 9, 2009 at 8:00 PM (EDT). The speech was delivered to Congress on the floor of the chamber of the United States House of Representatives in the United States Capitol. House Speaker Nancy Pelosi presided over the joint session and was accompanied by the President of the United States Senate, Joe Biden, the Vice President of the United States. It was not the first time the President had used the word to describe his views on constitutional interpretation and the complicated work of a judge. It may, however, have been the last. Is that what the law should be? If I can beat a case by appealing to empathy, you can bet I will, but appeals to empathy are a two-way street. My experience, Justice Holmes, is that such appeals are not merely inherently inconsistent, but are more likely to bite my client in the butt then serve his cause.