

SCALIA'S POKER: PUZZLES AND MYSTERIES IN CONSTITUTIONAL INTERPRETATION

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Howard Hawks had some trouble directing *The Big Sleep*, the 1946 Humphrey Bogart/Lauren Bacall *film noir* based on Raymond Chandler's classic novel. He once convened a story conference with the film's three screenwriters, a group headed by Nobel Prize-winner William Faulkner. The four were having a terrible time trying to make sense of Chandler's labyrinthine tale. Flummoxed by one plot twist, Hawks fired off a telegram to Chandler reading "Who killed chauffeur?" The next day he received Chandler's response: "Damned if I know."¹

Such an answer would have been inconceivable from a writer such as Agatha Christie. Her books are elaborately plotted, with every detail accounted for. There are no loose ends.

Christie and Chandler were both fine writers. But they worked in very different genres: Christie created puzzles, while Chandler created mysteries.

This point was brought home in a completely different context by Gregory Treverton, a Senior Consultant at RAND, in his book *Reshaping National Intelligence for an Age of Information*.²

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1. THE BIG SLEEP (Warner Brothers 1946). Like all good stories, this one has many variations. Compare the account found in GEORGE STEVENS, JR., CONVERSATIONS WITH THE GREAT MOVIEMAKERS OF HOLLYWOOD'S GOLDEN AGE 122 (2006) with the version in Roger Ebert, *The Big Sleep*, CHICAGO SUN-TIMES, June 22, 1997, at 4, available at <http://rogerebert.suntimes.com> (enter *The Big Sleep* in the search field).

2. GREGORY F. TREVERTON, RESHAPING NATIONAL INTELLIGENCE FOR AN AGE OF INFORMATION (2001).

He traces the shift in the roles of the United States intelligence community from the Cold War to the present. During the Cold War, Treverton notes, the most pressing questions facing the intelligence community were “puzzles,” *i.e.*, questions “that could, in principle, have been answered definitively if only the information had been available.”³ He offers examples of Cold War puzzles: How big was the Soviet economy? How many missiles did the Soviet Union have? How much steel did the Soviet Union produce during the previous year?⁴ These were all questions that could be definitively answered if one only had the right information.

Treverton differentiates these Cold War puzzles from what he calls “mysteries.” A mystery is “a question that cannot be answered with certainty even in principle.”⁵ And he contends that today “most of the critical questions facing American foreign policy are mysteries.”⁶ He offers these examples: Will China continue to grow rapidly or will it fragment? Will reform and democracy take hold in the former Soviet Union? Where is South Africa headed?⁷ These are mysteries because no one knows for certain what the answers will be. Unlike puzzles, which cannot be solved because of a lack of information, many mysteries these days ironically suffer from a surfeit of information. The problem is determining which parts of the mountain of available information are truly relevant.

This leads to another distinction: “Mysteries also differ from puzzles in that, by definition, puzzles have already happened.” *i.e.*, the Soviet steel has already been made and the missiles have already been built.⁸ Mysteries are more subtle. Not only are they unknowable at this time, but their eventual answer is intertwined with events which have not yet occurred, such as what U.S. government policy will be next year.

Not everyone is equally adept at solving puzzles and mysteries. Malcolm Gladwell addressed this issue in a recent *New Yorker* article in which he characterized the Enron scandal as a

3. *Id.* at 11.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 12. Treverton is not the first scholar to distinguish puzzles and mysteries. The French existentialist Gabriel Marcel complained that 20th century philosophers had “lost sight of the mysteries by distracting themselves with puzzles.” ROBERT C. SOLOMON, *THE JOY OF PHILOSOPHY* 13 (1999). I am indebted to Professor Jeffrey Lipshaw for this reference.

mystery rather than a puzzle.⁹ Gladwell notes that “Mysteries . . . are a lot murkier [than puzzles] . . . [S]ometimes the question itself cannot be answered. Puzzles come to satisfying conclusions. Mysteries often don’t.”¹⁰ He quotes Yale law professor Jonathan Macey that puzzles are “transmitter-dependent;” that is, their solutions turn on what information we are provided. Mysteries, on the other hand, are “receiver-dependent;” their solutions turn on the skills of the listener.¹¹

What does all of this have to do with law? I would suggest that the distinction between puzzles and mysteries may describe a significant dichotomy in constitutional interpretation. Some justices view interpreting the Constitution as a puzzle—they seek a definite answer from the past by looking at information that will yield an objective answer. They see constitutional interpretation as “transmitter-dependent.” Others see it as a mystery—they are less certain that history will provide a clear answer, and assume that they must use their own skills to process information from many sources to reach an answer. They see constitutional interpretation as “receiver-dependent.” They believe that their answers will often be provisional rather than final.

This Essay contends that whether a justice views constitutional interpretation as a puzzle or a mystery has important ramifications not only with respect to the justice’s own views in an individual case, but also in the way he interacts with other justices on a collegial court.

The Essay is divided into three parts. Part I offers an example of a particular constitutional provision—the Due Process Clause of the Fourteenth Amendment. While some justices view this clause as a puzzle, others see it as a mystery. It examines opinions by Justices John M. Harlan and Felix Frankfurter that champion the view that the content of the clause is not susceptible to definitive, mechanical answers. According to Harlan and Frankfurter, its meaning requires a large amount of information and experienced judgment. In the terminology of this Essay, they viewed the Due Process Clause as an ongoing mystery. The Essay then contrasts this perspective with Justice Hugo Black’s famous dissent in *Adamson v. California*¹² offering the definitive account of the “total incorporation” theory. Justices who fol-

9. Malcolm Gladwell, *Open Secrets: Enron and the Perils of Full Disclosure*, THE NEW YORKER, Jan. 8, 2007, at 44.

10. *Id.* at 46.

11. *Id.* at 52.

12. *Adamson v. California*, 332 U.S. 46, 68 (1947).

lowed this theory saw the Due Process Clause as having a fixed meaning as defined by the Bill of Rights. They saw the meaning of the Due Process Clause as the solution to a puzzle.

Part II turns from examining a specific constitutional provision as either a puzzle or a mystery to considering two current Supreme Court justices who disagree over whether constitutional interpretation as a whole should be considered mystery-solving or puzzle-solving. It looks at two books written by Justices Stephen Breyer and Antonin Scalia. Justice Breyer has set out his philosophy of interpretation in his book *Active Liberty*¹³. In it, he presents a theory similar to what this Essay describes as a “mystery” approach to constitutional interpretation. On the other hand, Justice Antonin Scalia in his book *A Matter of Interpretation*¹⁴ views constitutional interpretation more as an exercise in historical puzzle-solving.

Part III temporarily leaves both the United States and the Supreme Court to describe a famous confrontation between two philosophers that occurred over sixty years ago at Cambridge University. The two men were Karl Popper and Ludwig Wittgenstein. Wittgenstein saw philosophy as a discipline that should confine itself to finding solutions to what he explicitly referred to as linguistic “puzzles.”¹⁵ Popper, on the other hand, advocated a much broader role for philosophy. He wanted philosophy to discuss what he termed “problems”—in many ways similar to what this Essay describes as “mysteries.” The Essay then uses the Popper-Wittgenstein confrontation as a template for comparing and contrasting the puzzle-solving Scalia and the mystery-solving Breyer. It then examines the work of psychologist Philip Tetlock who has discovered personality differences between these two general types of thinkers. It finally suggests how the “puzzle/mystery” dichotomy might affect relations between justices on a collegial court.

13. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

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

15. It is important to note, however, that Wittgenstein's concept of a “puzzle” bears little resemblance to either Treverton's or Gladwell's definition of that term. See *infra* note 80.

I. THE CONSTITUTIONAL CLAUSE AS PUZZLE,
THE CONSTITUTIONAL CLAUSE AS MYSTERY:
THE DUE PROCESS CLAUSE OF THE
FOURTEENTH AMENDMENT

The Due Process Clause of the Fourteenth Amendment mandates that no State shall “deprive any person of life, liberty, or property, without due process of law.”¹⁶ After its ratification in 1868, the meaning of the clause became the focus of intense judicial scrutiny.

The theory the U.S. Supreme Court used to interpret this clause for almost a century after ratification has been referred to as the “fundamental fairness” theory. One of the classic expositions of this theory of due process was written in 1961 by Justice John M. Harlan in his dissent in *Poe v. Ullman*.¹⁷ Responding to Justice Hugo Black’s argument that Fourteenth Amendment due process was exactly equivalent to all the specific guarantees of the Bill of Rights, Harlan argued for a more flexible interpretation:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that . . . it has represented the balance which our Nation . . . has struck between . . . liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a *living thing*.¹⁸

And just how does a justice impute meaning to the Due Process Clause? Harlan states that the meaning of any constitutional provision “must be discerned from [its] larger context.”¹⁹

And inasmuch as this context is *not one of words, but of history and purposes*, the full scope of the liberty guaranteed by [the Clause] cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out. . . . [Rather,] [i]t is a rational continuum which,

16. U.S. CONST. amend. XIV, § 1.

17. *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting from dismissal of appeals).

18. *Id.* at 542 (emphasis added).

19. *Id.* at 542–543.

broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.²⁰

Harlan concludes his discussion by noting that

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited . . . judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."²¹

Compare Justice Harlan's claim that the meaning of the Due Process Clause is not amenable to a "mechanical answer" to Justice Black's famous defense of "total incorporation" in his dissent in *Adamson v California*.²² After extensively relating the details surrounding the ratification of the Fourteenth Amendment, Black concludes that the "purpose of those who framed, advocated, and adopted the Amendment had been to make the Bill of Rights applicable to the States."²³ He rails against the audacity of those justices who believe they are "now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights."²⁴ Those justices who do not accept the Bill of Rights as embodying the entire meaning of due process arrogate to themselves "boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'"²⁵ Not tethering the meaning of due process to the Bill of Rights allows the Court "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."²⁶

Naturally, Justice Frankfurter disagreed.²⁷ Responding directly to Black's "total incorporation" theory, Frankfurter insisted that

20. *Id.* (emphasis added).
 21. *Id.* at 544 (citation omitted).
 22. *Adamson*, 332 U.S. at 68 (Black, J., dissenting).
 23. *Id.* at 74.
 24. *Id.* at 90.
 25. *Id.* at 69.
 26. *Id.* at 90.
 27. *Id.* at 59 (Frankfurter, J., concurring).

A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would . . . tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. . . . Judicial review of [due process] inescapably imposes upon this court an exercise of judgment . . . in order to ascertain whether [the proceedings] offend those canons of decency and fairness which express the notions of justice of English-speaking peoples²⁸

In chiding Justice Black for his total incorporation theory, Frankfurter memorably stated that the standards of due process cannot be reduced to a finite list, "as though they were prescriptions in a pharmacopoeia."²⁹ And he went on to criticize Black's charge that a "fundamental fairness" approach to due process allowed judges to simply apply their own concepts of natural law:

[A judgment construing due process] must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied.³⁰

These opinions elegantly set out the very different perspectives of viewing a constitutional provision as a mystery as opposed to a puzzle. To Justice Black, the meaning of due process is a puzzle to be worked out from historical sources. He concludes that the purpose behind the Due Process Clause of the Fourteenth Amendment was to make the Bill of Rights applicable against the States. The answer is "transmitter-dependent;" the job of the justice is simply to channel the intent and purpose of the ratifiers.

To Harlan and Frankfurter, however, it is not that simple. The meaning of due process cannot be pigeon-holed into merely being defined by the specific guarantees of the Bill of Rights. It is a "living thing" that represents a "balance" that must be continually re-examined and re-defined. It is a "rational continuum"

28. *Id.* at 67.

29. *Id.* at 68.

30. *Id.*

rather than a series of discrete pinpricks. In Frankfurter's blunt words, the meaning of due process "inescapably imposes upon this court an exercise of judgment." By definition, the meaning of due process is "receiver-dependent." Due process is not Sudoku with one specific solution; it is a living thing, an ongoing mystery inviting different solutions at different times.

Thus, from the example of the Due Process Clause, it is clear we can interpret one specific clause of the Constitution as either a puzzle or a mystery. But it is also true that some justices regard constitutional interpretation in general as either a puzzle or a mystery. We now turn to the examples of two such justices.

II. CONSTITUTIONAL INTERPRETATION AS PUZZLE, CONSTITUTIONAL INTERPRETATION AS MYSTERY: THE JUDICIAL PHILOSOPHIES OF ANTONIN SCALIA AND STEPHEN BREYER

What effect does the puzzle/mystery dichotomy have on the overall judicial philosophy of a justice? We can compare two justices, Stephen Breyer and Antonin Scalia, who have both written thoughtful books explaining their views on constitutional interpretation.

Justice Breyer's book *Active Liberty* sets out his theory of both statutory and constitutional interpretation. Ken I. Kersch has reduced Breyer's theory on interpretation to two concepts:

First, a judge should interpret a law in light of both its purposes (or objectives) and the consequences of that judge's interpretation for the achievement of those purposes. Second, an approach that accords due regard to the purposes and consequences of interpreting particular statutory and constitutional provisions will advance the overarching purpose of the Constitution as a whole, which is to promote "the people's will," or "democracy," or "active liberty."³¹

Breyer traces the origin of the concept of "active liberty" back to the nineteenth-century French political philosopher Benjamin Constant.³² Constant referred to the "liberty of the ancients" as consisting of "a sharing of a nation's sovereign authority among that nation's citizens."³³ According to Constant, this is ac-

31. Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 763 (2006).

32. BREYER, *supra* note 13, at 3-4.

33. *Id.* at 4.

complished through recognizing the people's right to "an active and constant participation in collective power."³⁴ Breyer considers this concept to be so crucial to the essence of American government that he flatly states that "[m]y thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."³⁵

Breyer explicitly eschews grand theory in interpreting broad constitutional texts. He warns that judges should "not expect highly general instructions themselves to determine the outcome of difficult concrete cases where language is open-ended and precisely defined purpose is difficult to ascertain."³⁶ To begin a quest for meaning, a judge must first see "texts as driven by *purposes*."³⁷ This is particularly important because the Constitution must constantly be applied to new subjects not envisioned by the Framers. Breyer then quotes Learned Hand's tenet that a judge should "reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision."³⁸

But understanding *purposes* is not enough. The judge must also be cognizant of the *consequences* that might result from a specific decision. This means that the judge must have the ability, in the words of Louis Brandeis, to consider the "contemporary conditions, social, industrial, and political, of the community to be affected."³⁹ And, as Frankfurter wrote, since "the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded."⁴⁰

Breyer again cites a Frankfurter speech for a proposition that could have been part of his concurrence in *Adamson v California*. Frankfurter wrote that certain constitutional language reflects "fundamental aspirations and . . . 'moods,' embodied in provisions like the due process and equal protection clauses,

34. *Id.* at 5 (quoting BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in *POLITICAL WRITINGS* 309, 316 (Biancamaria Fontana trans., Cambridge Univ. Press 1988)).

35. *Id.*

36. *Id.* at 18.

37. *Id.* at 17 (emphasis in original).

38. *Id.* at 18 (quoting LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 172, 174 (Irving Dillard ed., 1952)).

39. *Id.* at 18 (quoting LOUIS D. BRANDEIS, in *THE WORDS OF JUSTICE BRANDEIS* 115 (Solomon Goldman ed., 1953)).

40. *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 541 (1947)).

which were designed not to be precise and positive directions for rules of action."⁴¹

In interpreting these open-ended clauses, a judge may find herself between a legal Scylla and Charybdis. On the one hand, the judge is not free merely to impose her own views of what she thinks is best. On the other hand, a judge must avoid being "wooden, in uncritically resting on formulas" to interpret constitutional text.⁴²

What route should a judge take? Breyer supports a "tradition" that "answers with an *attitude*, an attitude that hesitates to rely upon any single theory or grand view of law, of interpretation, or of the Constitution."⁴³

Breyer's philosophy is a blueprint for approaching the Constitution as a mystery, rather than a puzzle. To solve a puzzle you look only at what has already occurred. But to Breyer, it is not possible to interpret the Constitution in this way. Its language is "open-ended" and its purposes are often difficult to ascertain. His solution is to see constitutional interpretation as receiver-dependent. The judge must look to all sources for help in solving the mystery. Nothing that is "logically relevant" should be excluded. This information is necessary for the judge to be able to "reconstruct" the past "imaginatively" in order to project the purposes which inspired the text upon the actual case now facing the judge.

Compare this with Justice Scalia's theory of constitutional interpretation as expressed in his book *A Matter of Interpretation*.⁴⁴

Scalia begins by distinguishing the English common-law system from the American legal system. The American system is governed by written constitutions and statutes. The English common law system, however, was court-driven. The common law judges performed two functions. The first was to apply the law to the facts of the cases they were deciding. But, according to Scalia, the second function was the more important one: to make the law.⁴⁵

41. *Id.* (quoting FELIX FRANKFURTER, *The Supreme Court in the Mirror of Justices, in OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956-1963*, at 77, 94 (Philip B. Kurland ed., 1967)).

42. *Id.* at 19.

43. *Id.* at 19 (emphasis in original).

44. SCALIA, *supra* note 14.

45. *Id.* at 6.

And how did the common law judge make law? Scalia uses a striking image. Because of the principle of *stare decisis*, “common law grew in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it.”⁴⁶ Thus, law students are presented with a particular image of the great judge—a judge who is able to apply and distinguish precedent on the way to establishing the best possible rule of law.

So what’s wrong with this picture? Nothing, Scalia says, and “All of this would be an unqualified good were it not for a trend in government that has developed in recent centuries, called democracy.”⁴⁷ Now the job of a judge is not to *make* law, but rather to apply the law that has been created by the people of the nation through the democratic process.

Scalia bemoans the fact that “the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory” of statutory interpretation.⁴⁸ One canon holds that the judge’s job is to give effect to “the intent of the legislature.” What this means in reality, Scalia contends, is that the judge seeks not the legislature’s subjective intent, but rather seeks “a sort of ‘objectified’ intent.”⁴⁹ And to make this determination, you as a judge will come “to the conclusion that the law means what you think it *ought* to mean—which is exactly how judges decide things under the common law.”⁵⁰ At this point, you have come full circle.

What is the solution? A judge should avoid asking what the legislature “intended” by the words of a statute. Instead, the judge should ask only what the words mean. Scalia refers to this theory as “textualism.”⁵¹

Interestingly, he applies his textualist theory to language in both the Fifth and Fourteenth Amendment Due Process Clauses, which state that no person shall “be deprived of life, liberty, or property without due process of law.” He disapprovingly notes that the Clause has been interpreted to prevent the government from “taking away certain liberties *beyond* those . . . that are specifically named in the Constitution.”⁵² Scalia disagrees with

46. *Id.* at 8 (emphasis in original).

47. *Id.* at 9.

48. *Id.* at 14.

49. *Id.* at 17.

50. *Id.* at 18 (emphasis in original).

51. *Id.* at 23.

52. *Id.* at 24 (emphasis in original).

this interpretation because “[b]y its inescapable terms, [the Due Process Clause] guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and a fair trial.”⁵³

Turning to constitutional interpretation in general, he contends that the “Great Divide. . . is not that between Framers’ intent and objective meaning, but rather that between *original* meaning (whether derived from Framers’ intent or not) and *current* meaning.”⁵⁴ He ridicules the concept of a “Living Constitution, a body of law that (unlike normal statutes) grows from age to age, in order to meet the needs of a changing society.”⁵⁵ He characterizes the so-called “Living Constitution” as nothing more than “the common law returned, but infinitely more powerful than what the old common law ever pretended to be.”⁵⁶ And, Scalia adds, the common law way of making law is not the way to construe a democratically-adopted text.⁵⁷

What is the proper way to interpret such a text? By seeking the original meaning of the words. Scalia concedes that there is no guarantee that this will yield an answer on which everyone will agree; there can be disagreement on what is the “original meaning” of a specific text as well as disagreement on how that meaning should apply to the situation facing the court. But, Scalia insists, “the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.”⁵⁸

Thus, for Scalia “original meaning” provides a method for determining the proper interpretation of both constitutional and statutory text. In his Supreme Court opinions, it is not uncommon for Scalia to establish the meaning of a word through use of a dictionary.⁵⁹ Meaning is a “puzzle” to be worked out. For Breyer, on the other hand, the meaning of constitutional text is a more open-ended quest, requiring consideration of a broad range of legal materials—in other words, more like approaching a “mystery.”

53. *Id.* at 24–25.

54. *Id.* at 38 (emphasis in original).

55. *Id.*

56. *Id.*

57. *Id.* at 40.

58. *Id.* at 45.

59. *But see* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 317 (1998) (criticizing Scalia’s assumption that dictionaries precisely capture the ordinary meaning of words).

It is interesting to compare the puzzle/mystery dichotomy to Jack Balkin's recent work in constitutional interpretation.⁶⁰ Balkin distinguishes between what he calls a focus on the "original meaning" of a constitutional text as opposed to the "original expected application" of the text.⁶¹ As an example, he cites Justice's Scalia's reading of the Cruel and Unusual Punishment Clause of the Eighth Amendment. Scalia has written that the principle underlying this clause "is not a moral principle of 'cruelty' that philosophers can play with in the future, but rather the existing society's assessment of what [was] cruel [in 1791]. . . . It is, in other words, rooted in the moral perceptions *of the time*."⁶² Scalia would thus answer the question of whether the death penalty violates the Eighth Amendment by asking how people living in 1791 would have answered the question.⁶³ Balkin calls Scalia's version of originalism a search for the "original expected application." In the terminology of this Essay, Scalia sees the meaning of the Eighth Amendment as being a transmitter-dependent puzzle.

Balkin contrasts this with the quest for the "original meaning" of a constitutional clause. Balkin contends that we must look not only to text, but to the principles underlying the text.⁶⁴ What is "cruel and unusual" must be judged by "contemporary application" of this constitutional command.⁶⁵ Each generation "must take responsibility for interpreting and implementing the Constitution in its own era."⁶⁶ Consider how similar this is to Breyer's view that a judge must see "texts as driven by *purposes*."⁶⁷ The judge must "reconstruct" the past "imaginatively" in order to apply the constitutional aspirations to the case at bar.

60. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

61. *Id.* at 294–96.

62. Antonin Scalia, *Response, in A MATTER OF INTERPRETATION*, *supra* note 14, at 145 (emphasis in original).

63. *Id.*

64. Balkin, *supra* note 60, at 304.

65. *Id.* at 295.

66. *Id.* at 306. Note the similarity to Ronald Dworkin's distinction between constitutional "concepts" and "conceptions." Dworkin contends that, in considering for example whether segregated schools are currently unconstitutional, it is irrelevant that the authors of the Equal Protection Clause of the Fourteenth Amendment may have supported them. "Equal protection" is a *concept* that admits of many *conceptions*. The Clause constitutionalizes a concept that can support many different conceptions over the course of decades of societal changes. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, 132–37 (Duckworth, 1977).

67. BREYER, *supra* note 13, at 17 (emphasis in original).

In the terminology of this Essay, Breyer sees constitutional interpretation as a receiver-dependent mystery.

Jan Crawford Greenburg expresses this in yet another way. She refers to Isaiah Berlin's famous division of thinkers into "hedgehogs" and "foxes."⁶⁸ Hedgehogs are those who know "one big thing," while foxes "know many things."⁶⁹ As she applies this dichotomy to the Supreme Court, "[H]edgehogs . . . don't place much value on compromise and consensus. *They think there are right answers in the law.* . . . Scalia is a classic hedgehog who is guided by an overarching theory and assesses cases in light of it . . . Breyer, in contrast, is a fox, a one-case-at-a-time pragmatist without a grand global theory."⁷⁰

Scalia the puzzle-solving hedgehog and Breyer the mystery-loving fox—could different modes of judicial thinking actually affect the way justices interact with their colleagues?

III. SCALIA'S POKER: WHAT A DISPUTE BETWEEN TWO PHILOSOPHERS MAY TEACH US ABOUT RELATIONS BETWEEN SUPREME COURT JUSTICES

What effect does the puzzle/mystery dichotomy have on the way Supreme Court justices do their day-to-day work on and off the bench? Before answering this question, we must first go back to a meeting held in England over sixty years ago.

At 8:30 p.m. on Friday, October 25, 1946, the Moral Science Club of Cambridge University held its weekly meeting in Room H3 of King's College. No one attending that night's meeting could have anticipated that what occurred would become the subject of debate for decades to come. The best account of that night was recently provided by David Edmonds and John Eidinow in their book *Wittgenstein's Poker*.⁷¹

The guiding spirit of the Moral Science Club was the philosopher Ludwig Wittgenstein. It was Wittgenstein himself who dictated the format for the invitation to all guest speakers. The invi-

68. ISAAH BERLIN. *The Hedgehog and the Fox*, in *RUSSIAN THINKERS* 22 (Viking 1978).

69. *Id.* at 22.

70. JAN CRAWFORD GREENBURG. *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 181 (2007) (emphasis added).

71. DAVID EDMONDS & JOHN EIDINOW. *WITTGENSTEIN'S POKER: THE STORY OF A TEN-MINUTE ARGUMENT BETWEEN TWO GREAT PHILOSOPHERS* (2001).

tation specified that the speaker should be prepared to present "short papers, or a few opening remarks, stating some philosophical puzzle."⁷² In response, that evening's guest speaker Karl Popper had titled his paper "Are There Philosophical Problems?"⁷³

The title was not as innocuous as it sounds. Popper's refusal to accede to Wittgenstein's request that he discuss a "philosophical puzzle" illustrated the chasm that existed between these two giants of twentieth-century philosophy. And straddling the chasm was the philosopher both saw as a mentor and who was also present in Room H3 that night—Bertrand Russell.

Starting with Descartes in the seventeenth century, and continuing through the work of the great British empiricists such as Locke and Hume, the basic thrust of Western philosophy centered around epistemology—the study of what we can know.⁷⁴ Russell's work, however, displaced epistemology both with the philosophy of language and with the "premise that our words are the lenses through which we access our thoughts and the world. We cannot see the world without them."⁷⁵

Wittgenstein and Popper each took Russell's insights in different directions. Popper saw Russell's linguistic insights as "no more than an extremely useful device in the examination of what mattered—real problems."⁷⁶ Yet Wittgenstein had come to see linguistic scrutiny not as a means to an end, but rather as the ultimate end of philosophy.

Popper's best known book, *The Open Society and Its Enemies*, had been published in England shortly before he faced Wittgenstein and Russell at Cambridge on that night in 1946. The book was a philosophical response to the growth of fascism throughout the world. Popper contended that there was no guarantee that progress was inevitable. Rather, progress depended on the proper conditions. Popper further argued that the most effective environment for both social and economic advance was "openness." This meant that progress could only come through trial and error. This also meant that we should welcome the fact that "[e]rror was always possible [and] 'truth' was never certain."⁷⁷ Falsification should be embraced, for only when a theory

72. *Id.* at 28.

73. *Id.* at 1.

74. *Id.* at 174.

75. *Id.* at 175.

76. *Id.* at 179.

77. *Id.* at 190.

is shown to be false does there arise the impetus to progress to a new level of progress.

As Edmonds and Eidinow express it:

Popper's insight was to recognize that democracy should not be viewed merely as a luxury, something a country can afford only once it has reached a certain stage of development. Rather, democracy itself is a prerequisite to progress. He believed democracy entails a rational attitude that can be summed up in the lines, "I may be wrong and you may be right, and by an effort, we may get nearer to the truth."⁷⁸

Wittgenstein, on the other hand, believed that understanding the use—and misuse—of language should be the central quest of philosophy. For example, admitting that an object cannot "be red and green all over" was to Wittgenstein not some deep metaphysical truth, but merely a rule of grammar.⁷⁹ Wittgenstein described philosophical questions in terms of "puzzles" of language, rather than "problems" in the broader sense.⁸⁰

Where was Bertrand Russell in the Popper-Wittgenstein conflict? Russell was firmly in the Popper camp on the need for philosophers to address large contemporary political problems. According to Edmonds and Eidinow, Russell believed that Wittgenstein's emphasis on linguistic puzzles was "dragging Cambridge philosophy down a cul-de-sac of tedium and triviality."⁸¹ He agreed with Popper that philosophy needed to deal with the large international issues of the Cold War and the rise of nuclear weapons. If Wittgenstein were right, Russell wrote, then philosophy was "at best, a slight help to lexicographers, and at worst, an ideal tea-table amusement."⁸²

Within this context, it is clear that when Popper answered Wittgenstein's request for a discussion of a "puzzle" with his

78. *Id.*

79. *Id.* at 183.

80. *Id.* at 182-82. It is important to understand that a "puzzle" to Wittgenstein bears little relation to Gregory Treverton's definition of a "puzzle" that is otherwise used in this Essay. A "puzzle" to Treverton is a question "that could, in principle, have been answered if only the information had been available." TREVERTON, *supra* note 2, at 11. Also, a "puzzle" to Treverton concerns something that has already happened. *Id.* at 12. For Wittgenstein, however, a "puzzle" promised no simple solution; it was, rather, a springboard for philosophical discussion. Consider, for example, Wittgenstein's famous "puzzle" concerning music: How is it possible to be surprised by musical events that one knows will happen? Clearly this kind of paradox is different from Treverton's concept of "puzzle."

81. EDMONDS & EIDINOW, *supra* note 71, at 187.

82. *Id.* at 188.

own paper on philosophical “problems,” Popper was throwing down a gauntlet.

So what happened in Room H3? Edmonds and Eidinow concede that studying the accounts of those present is akin to reading a British version of *Rashomon*. What does seem clear is that a loud argument erupted between Popper and Wittgenstein.⁸³ At some point Wittgenstein picked up a fireplace poker and began jabbing it to punctuate his statements.⁸⁴ Was he threatening Popper? Was it hot? Memories differ. What does seem clear is that at some point Wittgenstein dropped the poker, exchanged some angry words with Russell, and left the room.⁸⁵ Popper stayed and finished the lecture.⁸⁶

Much of what happened in the room will remain a mystery. But one point is clear: the philosopher who focused on “puzzles” exploded and left the room while the philosopher who focused on broader “problems” remained.

I do not want to stretch a rough comparison to the point of caricature. But, on the one hand, we have Popper confronting the global “problem” of how a society can prevent the spread of fascism; on the other hand, there is Wittgenstein’s hedgehog-like insistence on discussing philosophy in terms of linguistic “puzzles,” such as why in comic strips a balloon with words denotes “speaking” while a cloud with words represents “thinking.”⁸⁷ Across the ocean, we have Breyer’s style of constitutional interpretation as “mystery” with its talk of “moods” and “attitudes” and its insistence that constitutional language was “designed not to be precise [nor to provide] positive directions for rules of action;”⁸⁸ on the other hand, we have Scalia insisting that “usually [the original meaning of constitutional text] is easy to discern and simple to apply.”⁸⁹

Some see puzzles where others see mysteries. Could the personalities of fox-like thinkers inclined to see the world as open-ended “problems” and “mysteries” perhaps differ from the

83. *Id.* at 212–13.

84. *Id.* at 213–14.

85. *Id.* at 214–15.

86. *Id.* at 215.

87. *Id.* Again, Wittgenstein’s definition of “puzzle” is much different from the definition otherwise used in this Essay. See *supra* text accompanying note 80. But what is significant in terms of this Essay is Wittgenstein’s dogged insistence—again, his hedgehog-like behavior—that the philosophers speaking at the Moral Science Club must conform to his current vision of philosophy as being comprised of “puzzles.”

88. BREYER, *supra* note 13, at 18.

89. SCALIA, *supra* note 14, at 45.

hedgehogs, who are absolutely certain that theirs is the only true path?

Philip Tetlock, a psychologist at the University of California-Berkeley, recently wrote a book analyzing people who make political predictions.⁹⁰ The book is based on a study he conducted of 82,361 forecasts made over a twenty year period by 284 people considered experts on political and economic trends. His short conclusion was that people who make predictions for a living—media “talking heads,” academics, high-level government advisors—were not significantly more reliable in their predictions than non-experts.

In his study, Tetlock discovered something striking. He found that one factor that distinguished good predictors from bad predictors had nothing to do with *what they knew*, but rather with *how they thought*: Berlin’s “foxes” scored higher than Berlin’s “hedgehogs.” As Tetlock expresses it:

Low scorers look like hedgehogs: thinkers who ‘know one big thing,’ aggressively extend the explanatory reach of that one big thing into new domains, *display bristly impatience with those who “do not get it,”* and express considerable confidence that they are already pretty proficient forecasters, at least in the long term. High scorers look like foxes: thinkers who know many small things (tricks of their trade), *are skeptical of grand schemes*, see explanation and prediction not as deductive exercises but rather as exercises in flexible “ad hocery” that require stitching together diverse sources of information, *and are rather diffident about their own forecasting prowess*⁹¹

Look at Tetlock’s descriptions: the hedgehog’s “bristly impatience with those who ‘do not get it,’” as opposed to the fox’s skepticism towards grand schemes and “diffidence” concerning her prowess as a predictor. Could this suggest a lens for examining how foxes and hedgehogs interact with each other in a group setting?

Consider this account of Wittgenstein at a seminar. A participant at another meeting of the Moral Science Club related Wittgenstein’s reaction to a paper with which he disagreed: “This sort of thing has got to be stopped. Bad philosophers are

90. PHILIP TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* (2005).

91. *Id.* at 73, 75 (emphasis added).

like slum landlords. It's my job to put them out of business."⁹² Compare this with what was previously noted to be a maxim frequently cited by Popper: "I may be wrong and you may be right, and by an effort, we may get nearer to the truth."⁹³

Now compare what Justices Scalia and Breyer have said about their respective theories of constitutional interpretation. Breyer has described his approach as "an *attitude*, an attitude that hesitates to rely upon any single theory or grand view of law, of interpretation, or of the Constitution."⁹⁴ On the other hand, Scalia has explained his theory of "original meaning" thusly: "But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply."⁹⁵ To Scalia, law is a puzzle that should yield a definite answer; to Breyer, law is a mystery that is less certain and more open-ended.

One can never be absolutely sure he has solved a true mystery; input from others should always be welcome. On the other hand, once you have solved a puzzle, there is nothing more boring than watching someone else struggle to solve it. And if you truly believe that you have found the one and only solution to the puzzle, you might be inclined to exhibit "bristly impatience" towards those too dull to understand.

Could this affect a justice's courtroom behavior? Here is how Jeffrey Rosen describes Justice Scalia's performance on the bench:

Scalia's tendency to dominate oral argument with aggressive questions and showy put-downs alienated several justices, including Rehnquist, who once shook his finger at Scalia for interrupting Kennedy Scalia's jokes were often at the expense of lawyers and his colleagues He also has the reputation as something of a sore loser who reads his dissenting opinions from the bench in aggrieved tones.⁹⁶

Compare this to Rosen's description of Breyer's courtroom demeanor: "Breyer . . . has a gentler temperament and more intellectual humility: at oral arguments, he often summed up the strongest arguments on both sides of a case, candidly identified

92. EDMONDS & EIDINOW *supra* note 71, at 200.

93. *Id.* at 190.

94. BREYER, *supra* note 13, at 19 (emphasis in original).

95. SCALIA, *supra* note 14, at 45.

96. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 199-200* (2007).

the issues on which he was still undecided, and invited the lawyers to try to persuade him through an energetic conversation."⁹⁷

In a similar vein, compare Wittgenstein's and Scalia's relations with colleagues. Both Noel Annan and Friedrich von Hayek wrote about their experiences at other Moral Science Club meetings where Wittgenstein also waved a poker in anger in reaction to comments with which he disagreed; Hayek even added that he thought Wittgenstein "had gone mad."⁹⁸ At another meeting, Wittgenstein made this remark in the presence of Alfred Ewing, a Cambridge colleague for whom Wittgenstein had intellectual contempt: "Let us make the purely hypothetical assumption that Ewing has a mind."⁹⁹

Compare this to Scalia's relations with his colleagues. Rosen notes that "Scalia, by his own account, is unconcerned about his relative failure to win many converts on the Court."¹⁰⁰ Rosen writes that Scalia's dissents have had the tendency to treat every colleague who disagreed with him "as a politician or a fool."¹⁰¹ Jan Crawford Greenburg flatly states that "[Scalia] is regarded as the Court's preeminent master at the art of burning bridges."¹⁰² She recounts how Scalia publicly mocked Justice O'Connor's concurring opinion in an abortion case, declaring that it "cannot be taken seriously."¹⁰³ It was a slight O'Connor would never forget.¹⁰⁴ Greenburg also describes similar run-ins with Justices Souter¹⁰⁵ and Kennedy.¹⁰⁶ Because of such tactics, Rosen declares that Scalia has "managed to alienate even his ideological sympathizers."¹⁰⁷ In fact, Christopher E. Smith¹⁰⁸ has

97. *Id.*

98. EDMONDS & EIDINOW, *supra* note 71, at 161.

99. *Id.* at 53.

100. ROSEN, *supra* note 96, at 200.

101. *Id.* at 182.

102. GREENBURG, *supra* note 70, at 160.

103. *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

104. GREENBURG, *supra* note 70, at 83.

105. *Id.* at 130.

106. *Id.* at 157.

107. ROSEN *supra* note 96, at 199. Even the Court's newest members are not immune. Consider Justice Scalia's recent opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (Scalia, J., concurring in part and concurring in the judgment). Scalia first criticized Chief Justice Roberts' opinion in the case for distinguishing, rather than overruling, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). *FEC v. Wisconsin Right to Life*, 127 S. Ct. at 2684 n.7 (Scalia, J., concurring in part and concurring in the judgment). Claiming that Roberts' reasoning had effectively overturned *McConnell* "without saying so," Scalia charged that "This faux judicial restraint is judicial obfuscation." *Id.* Scalia then went on to criticize Justice Alito's concurring opinion in the same case, accusing Alito of having contradicted himself in another

argued that Scalia's continual personal attacks on O'Connor and Kennedy may have contributed to their decision not to join Scalia in trying to overturn *Roe v. Wade*.¹⁰⁹

Perhaps most telling is Rosen's observation that "[Scalia] had a powerful need to bind himself in advance to rigid rules, but was so convinced of his own virtue that he demonized all who fell short of the standards he imposed on himself."¹¹⁰ Clearly, Tetlock would characterize this as classic "hedgehog" behavior.

It is always dangerous to generalize. Perhaps other aspects of Justice Scalia's personality have more to do with his judicial behavior than does his "puzzle" theory of constitutional interpretation. Perhaps, as George Kannar has argued, the rigidity of the question-and-answer church catechism experienced by Justice Scalia as a Roman Catholic coming of age in the 1950's is more responsible for Scalia's demeanor than his "law as a puzzle" beliefs.¹¹¹

In fact, compare Scalia with two "total incorporation" justices who each believed that the meaning of Fourteenth Amendment Due Process was nothing more than the collected provisions of the Bill of Rights—Hugo Black and William Douglas. Their views on the "puzzle" quality of Fourteenth Amend-

recent opinion: "Justice Alito seemed to recognize [the validity of the opposing argument] as recently as, well, today." *Id.* at 2682 n.5 (referring to Justice Alito's concurring opinion in *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007)). In another case, Scalia criticized yet another opinion written by Alito and joined by Roberts for its "meaningless and disingenuous distinctions" under the guise of "judicial minimalism." *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553, 2573 (2007) (Scalia, J., concurring in the judgment). In fact, the exceptionally acerbic tone of Scalia's comments even merited front-page coverage in *The New York Times*. Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, N.Y. TIMES, June 28, 2007, at 1 col.2.

108. CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 99–101 (1993).

109. *Roe v. Wade*, 410 U.S. 113 (1973). In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 843 (1992) Justices O'Connor and Kennedy joined Justice Souter in an opinion refusing to overturn *Roe*.

110. ROSEN *supra* note 96, at 182–83. Indeed, Judge Alex Kozinski has even written that Justice Scalia's rigidity extends to where to eat pizza. Alex Kozinski, *My Pizza With Nino*, 12 CARDOZO L. REV. 1583 (1991) (humorously describing Scalia's insistence that AV's restaurant in Washington was the only place he would go for pizza).

111. George Kannar, Comment, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1313–15 (1990) (describing Scalia's "'catholic' constitutional vision" arising from learning the faith through the Baltimore Catechism, a text that provided a "written, though extra-Scriptural tradition serving much like [legal] precedent"). Cf. Donald L. Beschle, *Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329, 1333 (1992) (disputing the concept that Scalia provides "the most likely model of a Catholic judicial style").

ment Due Process were identical—Douglas joined completely in Black’s dissent in *Adamson v California*, discussed above.¹¹²

Douglas, like Scalia, had no doubts about his own constitutional theory. And he was also similar to Scalia in that, according to Rosen, “He made no effort to persuade colleagues of his own position”¹¹³ He could also be as acerbic with colleagues as Scalia. A well-known story tells of Douglas completing a dissent in a case before the majority opinion was written. As time wore on and no majority opinion was forthcoming, Douglas became so impatient he also drafted a majority opinion and sarcastically sent it to the justice who was assigned to write it.¹¹⁴ Not surprisingly, Justice Blackmun said that Douglas “never had a close friend [on the Court].”¹¹⁵

Compare Douglas to Black, who also believed that the meaning of the Fourteenth Amendment Due Process Clause was a clearly solvable puzzle. In contradistinction to Douglas, Black cared deeply about building coalitions on the Court. Justice Blackmun described Black as a “canny, lovable manipulator.”¹¹⁶ Rosen characterized Black as a “pragmatic” justice, one who was “willing to compromise or to add language to an opinion if he thought it would win him additional votes.”¹¹⁷ True, Black could be personally difficult at times; his legendary feud with Justice Robert Jackson in the 1940’s exposed the Court to public embarrassment.¹¹⁸ Yet, Justice Harlan—Black’s polar opposite in his interpretation of the Fourteenth Amendment Due Process Clause—had this to say about the state of the Supreme Court in 1963: “Things are very troublesome . . . [but] Justice Black has been a rock. He is saving the Court. Some men are institutional men, who care about the institution, and Black is one of them.”¹¹⁹ Black returned the compliment: “John Harlan is one of the few

112. Of course, there was much that Black and Douglas did not agree on. Compare Douglas’s very un-puzzle-like discussion of penumbral rights in *Griswold v Connecticut*, 381 U.S. 479, 484–85 (1965) with Black’s dissent in that case. *Id.* at 509–10 (Black, J., dissenting) (“I get nowhere in this case by talk about a constitutional ‘right of privacy’ as an emanation from one or more constitutional provisions.”).

113. ROSEN, *supra* note 96, at 152.

114. *Id.* at 153.

115. HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA’S CONSTITUTIONAL REVOLUTION 78 (1992).

116. *Id.*

117. ROSEN, *supra* note 96, at 153.

118. *Id.* at 147–48.

119. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 543–44 (Pantheon 1994).

people who convince me that there is such a thing as a good Republican."¹²⁰

And that political jibe may offer a clue to why Black was different from his fellow "puzzle" justices, Douglas and Scalia. Black entered the Court from the world of electoral politics; he came directly from representing Alabama in the U.S. Senate. In Blackmun's affectionate words, Black was "ever the politician, ever the U.S. Senator still."¹²¹ Black knew how to leaven his bedrock constitutional principles with the skills of a candidate working the Talladega County Fair. Interestingly, Black admired the affable personality and political savvy of another member of the Court—William Brennan, who learned his lessons through years of New Jersey labor disputes. Brennan's "people skills" led Black to declare "Bill is my heir."¹²² And not surprisingly, Black's political acumen was recognized and relied upon by a three-term Governor of California—Chief Justice Earl Warren. Warren's biographer Jim Newton unequivocally states that "Black was Warren's most important mentor" on the Court.¹²³

Unlike Black, neither Scalia nor Douglas ever held elective office. Perhaps a justice with a "puzzle" proclivity harnessed to political skills can escape ideological isolation on the Court. But ideological isolation appears to be the situation shared by Antonin Scalia and William Douglas—two justices absolutely convinced they have solved the constitutional puzzle, but each lacking the skills to convince their colleagues of this fact.

CONCLUSION

Adherents of either side of the puzzle/mystery dichotomy could be said to be cursed.

Fox-like thinkers such as Breyer and Popper face a world that lacks intellectual certainty. The recognition that they are dealing with "mysteries" or "problems" means that they are aware that the concept of a final answer can be no more than a chimera. Breyer speaks of a judge starting with an "attitude" to approach imprecise texts that embody merely "aspirations" or "moods." Popper falls back on his frequently cited maxim "I may be wrong and you may be right." Like Moses, they face a

120. *Id.* at 588.

121. BALL & COOPER, *supra* note 115, at 78.

122. NEWMAN, *supra* note 119, at 508.

123. JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 348 (Riverhead 2006).

lifetime of wandering in the desert. But unlike Moses, there is no guarantee of even seeing the Promised Land from afar.

But the hedgehogs who see the world in “puzzles” may be doubly cursed. First, many will deny that their solutions are correct. Second, many will deny that the problems were even “puzzles” to begin with. How much of Wittgenstein’s frustration with Popper may have resulted from a Cassandra-like certainty that he was right and that Popper—and Russell and others—stubbornly refused to listen? Should it really surprise us that at Cambridge in 1946 it was the hedgehog who waved the poker rather than the fox?¹²⁴ Impatience with those who simply “do not get it” is a heavy burden.

As for Scalia, it appears that early in his Supreme Court career he must have despaired of ever being a justice like Black or Brennan who could use charm as well as brains to put together majorities on the Court. A death wish is the only rational explanation for a full-page memo Scalia directed to O’Connor but circulated to the entire court in 1992.¹²⁵ Scalia complained about O’Connor’s use of the word “implausible” instead of “improbable” in one of her draft opinions. He supported his argument with references to Webster’s Dictionary and Roget’s Thesaurus. He went on to ask her to use the phrase “irrational or incredible” instead of merely the word “irrational.” In solving these “puzzles,” Scalia uses the kind of “geometric logic” Captain Queeg used to determine who stole the strawberries on the U.S.S. Caine.¹²⁶ If his goal was to forever alienate Justice O’Connor, he undoubtedly succeeded.

What Harry Blackmun penned in the margin of his copy of the memo could serve as a kind of judicial epitaph for Justice Scalia, the paradigmatic hedgehog puzzle-solver bedeviled by dull-witted foxes.

Scalia had concluded his memo with the following: “I apologize if these suggestions seem rather picky.”

In response, Blackmun simply wrote two words: “They do.”¹²⁷

124. Again, I am referring to Wittgenstein as a hedgehog only in the limited sense that, at the time of his confrontation with Popper in 1946, he was so adamant about philosophy needing to be approached through “puzzles” that he showed no patience with philosophers who used alternative approaches. *See supra* note 87.

125. GREENBURG, *supra* note 70, at 130.

126. THE CAINE MUTINY (Columbia Pictures 1954).

127. GREENBURG, *supra* note 70, at 130.