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## The Counter-Revolutionary Nature of Justice Scalia's "Traditionalism"

Allen R. Kamp\*

### I. INTRODUCTION

This essay is an investigation of Justice Scalia's "traditional" jurisprudence in the area of personal jurisdiction. After a discussion of his opinion in *Burnham v. Superior Court*,<sup>1</sup> this essay will compare his notion of "traditionalism" with the history of the doctrines of personal jurisdiction in the American legal system. The key difference between Justice Scalia's jurisprudence and the historical jurisprudence of American personal jurisdiction is that his "tradition" is one of fixed practices, not an ideological system based on values.

This essay then seeks to clarify Justice Scalia's "traditionalism" by comparing his approach to that of two rival religious traditions: those of Roman and Anglican Catholicism. There is a current intellectual debate on whether Justice Scalia's thought can be characterized as Roman Catholic. Professor George Kannar argues that Justice Scalia's thought can be traced to the rigid "Baltimore" catechism of the American Roman Catholic Church of the early 1900s,<sup>2</sup> while Professor Donald Beschle states that such a view misconceives the social principles held by the majority of American Roman Catholics.<sup>3</sup>

Justice Scalia's approach is comparable to the Anglican traditionalism, which rejected the evolved traditions of the Roman Catholic Church in favor of a return to the practices of a past era. In his traditional jurisprudence, Justice Scalia's thought functions in a similar fashion to that of the counter-revolutionary French in rejecting the revolutionary ideals of the immediately prior era. Justice Scalia's traditionalism functions as a strategic device that enables him to reject the jurisprudence of rationalism.<sup>4</sup> The essay concludes with a critique of Justice Scalia's jurisprudence.

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1. 495 U.S. 604 (1990).

2. George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1316-17 (1990).

3. Donald Beschle, *Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329, 1353-54 (1992).

4. See *infra* note 80 and accompanying text (discussing "rationalism"). In comparing Anglican traditionalism with Roman Catholicism, I am only discussing how the two churches have dealt with tradition historically; I am not criticizing any contemporary religious views of these two churches or their members.

## II. TRADITIONALISM DEFINED

"Traditionalism," to Justice Scalia, is uncomplicated—it is an interpretive device to determine the meaning of "due process." To him, "due process" refers exclusively to the legal processes that were in existence at the times of the adoption of the Fifth and Fourteenth Amendments. Thus, any procedures existing at that time, such as jurisdiction based on presence within a sovereign's territory and the regulation of punitive damages, are presumptively constitutional. This presumption can only be rebutted by wide-spread changes in social attitudes. Judges cannot declare such practices invalid on their own. In fact, the policy behind Justice Scalia's adoption of "traditionalism" is to protect against such an exercise of judicial power.

Justice Scalia explains and justifies his views in his article, *Originalism: The Lesser Evil*.<sup>5</sup> Originalism, he argues, is theoretically expedient in that it preserves permanent rather than evolving values.<sup>6</sup> It is a coherent method of interpretation, while there cannot be "any consensus on what, precisely, is to replace original meaning, once that is abandoned."<sup>7</sup> Moreover, it guards against subjectivism: the "main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that judges will mistake their own predilections for the law."<sup>8</sup> Justice Scalia sees no middle ground between objective historicism and subjectivism. Thus, Scalia seems to believe that the only alternative to the use of rigid black-letter law is some wholly subjective form of case-by-case conceptual chaos.<sup>9</sup>

Basing constitutional interpretation on anything but originalism is a mistake for Scalia: "Because opinions differ widely about predictable social effects and, for that matter, about their desirability, policy analysis is a jurisprudential foundation of shifting sand."<sup>10</sup> He does, however, qualify his view. He may be a "faint-hearted originalist." He states: "I cannot imagine myself, anymore than any other federal judge, upholding a statute that imposes the punishment of flogging."<sup>11</sup>

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5. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). The article is an adoption of an address delivered at the University of Cincinnati's William Howard Taft Constitutional Law Lecture.

6. *Id.* at 862.

7. *Id.* at 862-63.

8. *Id.* at 863.

9. Lea Brilmayer, *Introduction: Three Perennial Themes in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 561, 686 (1991). Justice Scalia's "aversion to uncertainty in due process analysis is dramatically out of step with the Court's most important jurisdictional precedents." *Id.*

10. Jay W. Schlosser, Note, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 385 n.42 (1988); see *id.* (quoting Scalia's testimony at his confirmation hearings); Antonin Scalia, *The Judges are Coming*, reprinted in 126 CONG. REC. 18920-22 (1980).

11. Scalia, *supra* note 5, at 864.

### III. SCALIA'S *BURNHAM* DECISION

Justice Scalia applied this "traditional" philosophy in deciding issues of personal jurisdiction in *Burnham v. Superior Court*.<sup>12</sup> The *Burnham* Court upheld transitory jurisdiction where a separated wife obtained service, in a suit for divorce, over her husband who was in California both to conduct business and to visit his children. The subject of the suit did not relate to his activities in California, and Burnham challenged the court's jurisdiction based on the lack of "minimum contacts."

All of the Justices held that the California court had jurisdiction over Burnham, but they were divided on the reasoning leading to that conclusion. Justice Scalia advocated upholding jurisdiction based on his "traditional" due process jurisdiction; Justice Brennan upheld it on the basis of minimum contacts. Both had to deal with the language of *Shaffer v. Heitner*,<sup>13</sup> which stated that "all assertions of state-court jurisdiction must be evaluated according to the standards of set forth in *International Shoe*<sup>14</sup> and its progeny."<sup>15</sup> Justice Scalia, in his plurality opinion, rejected any broad reading of *Shaffer* and based his opinion on pre-*International Shoe* practice. Scalia concludes that jurisdiction based on "physical presence alone" does not violate due process, and therefore need not be subjected to the *International Shoe* "minimum contacts" analysis.<sup>16</sup>

Scalia writes: "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."<sup>17</sup> The view that courts could exercise such jurisdiction "was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted."<sup>18</sup> Furthermore, the practice continues today. Scalia stated in *Burnham*:

This American jurisdictional practice is, moreover, not merely old; it is continuing. It remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government—if one disregards (as one must for this purpose) the few opinions since 1978 that have erroneously said, on grounds similar to

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12. 495 U.S. 604 (1990). Justice Scalia's plurality opinion was joined by Chief Justice Rehnquist, Justice Kennedy, and in part by Justice White. Justice Brennan, joined by Justices Marshall, Blackmun, and O'Connor concurred. Justice Stevens concurred in a third opinion.

13. 433 U.S. 186 (1977).

14. *International Shoe Co. v. Washington Office of Unemp. Comp. & Placement.*, 326 U.S. 310 (1945).

15. *Shaffer*, 433 U.S. at 212.

16. *Burnham*, 495 U.S. at 619.

17. *Id.* at 610.

18. *Id.* at 611.

those that petitioner presses here, that this Court's due process decisions render the practice unconstitutional.<sup>19</sup>

Thus, jurisdiction based on physical presence alone constitutes due process for Scalia because it represents one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice."<sup>20</sup>

Justice Scalia reads *Shaffer v. Heitner*<sup>21</sup> as limited to quasi-in-rem jurisdiction, although he concedes that his approach to the due process question differs from that of the *Shaffer* Court, in that "[w]e have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislature[s] that are free to amend it; for our purposes, its validation is its pedigree, as the phrase 'traditional notions of fair play and substantial justice' makes clear."<sup>22</sup> In Part III of his opinion, he criticizes the concurring opinion of Justice Brennan, which he sees as:

[a]n outright break with the test of 'traditional notions of fair play and substantial justice,' which would have to be reformulated 'our notions of fair play and substantial justice.' The subjectivity, and hence inadequacy, of this approach becomes apparent when the concurrence tries to explain *why* the assertion of jurisdiction in the present case meets its standard of continuing-American-tradition-plus-innate-fairness.<sup>23</sup>

The judicial system can progress, but the question is "whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court. . . . The question is whether, armed with no authority other than individual Justices' perceptions of fairness that conflict with both past and current practice, this Court can compel the States to make such a change on the ground that 'due process' requires it. We hold that it cannot."<sup>24</sup>

Justice Scalia's law of personal jurisdiction is thus a collection of rules based on historical practices. It is not a system based on an intellectually coherent set of principles.<sup>25</sup> To Justice Scalia, any constitutional theory must give way to what

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19. *Id.* at 615.

20. *See id.* at 619.

21. 433 U.S. 186 (1977).

22. *Burnham*, 495 U.S. at 621 (emphasis in original).

23. *Id.* at 623 (emphasis in original).

24. *Id.* at 627.

25. This lack of coherency shows up in other areas. For example, compare George Kannar's description of the Court's present criminal procedure doctrine: "[T]hrough some have characterized the recent era in criminal procedure as representing a triumph of the vision of criminal procedure as a system of rules, . . . it would be more accurate to say that what we have is all rules and no system." George Kannar, *supra* note 2, at 1301 n.11. The same may be said of personal jurisdiction.

he calls tradition.<sup>26</sup> Furthermore, the Justice's doctrine lacks any dimension of substantive fairness. Historical practices constitute due process because they are historical practices, not because they make sense on any theoretical level. Scalia appears to tie the due process clause to its historical role, and thereby rejects any substantial component of substantive fairness to the due process clause.<sup>27</sup>

#### IV. TRADITIONS OF PRACTICE VERSUS TRADITIONS OF SYSTEMS

By focusing on the specific "practices" of the past as the "traditions" to be followed, Justice Scalia ignores the fact that specific practices may be a part of coherent intellectual systems. Generally, Scalia's assertion that his is a traditional approach has been accepted acritically—with a few notable exceptions.<sup>28</sup> Some scholars have noted that Justice Scalia's "traditionalism" actually counters the traditions of due process analysis. Professor Wendy Collins Perdue points out that the Court began expanding jurisdiction beyond its "traditional" limits in 1868, a fact acknowledged by Justice Scalia in *Burnham*.<sup>29</sup> Paradoxically, then, it seems that in the area of personal jurisdiction it is *not* traditional to limit personal jurisdiction to its traditional limits.<sup>30</sup>

An investigation of the meaning and the history of various "traditions" will help us understand Justice Scalia's own "traditionalism" and why it may actually be considered counter-traditional. The word "tradition" has more than one meaning and there are different approaches to the past that are equally traditional. Placing Justice Scalia's traditionalism in context will help us understand it.

"Tradition" can be understood as specific historic practices and as an evolving process. Because the word "tradition" has various meanings, it can be

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26. *Rutan v. Republican Party*, 497 U.S. 62, 97 (1990) (Scalia, J., dissenting). For Scalia, "[a] constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory." *Id.* at 97 n.2; see L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581, 607 (1992) (analyzing the parallels between *Burnham* and *Rutan* with regard to Scalia's criticism of Brennan's logic in *Burnham*, and Stevens' logic in *Rutan*).

27. Patrick J. Borchers, *The Death of Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 24 (1990); see *id.* (contrasting Scalia's and Brennan's *Burnham* opinions, characterizing them as "giant leaps down different roads in the same direction").

28. See, e.g., Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After Burnham v. Superior Court*, 22 RUTGERS L.J. 675, 676 (1991) (criticizing Scalia's methods). But see Timothy L. Raschke Shattuck, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743, 2745-50 (1992) (assuming that Scalia's jurisprudence is "traditional").

29. *Burnham*, 495 U.S. at 616-19; see Wendy Collins Perdue, *Personal Jurisdiction and The Beetle in the Box*, 32 B.C. L. REV. 529, 531 (1991) (discussing the Court's expansion beyond "traditional limits"). "Thus, according to Justice Scalia's own opinion, it seems that in the area of personal jurisdiction it is not traditional to limit personal jurisdiction to its traditional limits." *Id.* at 532.

30. Perdue, *supra* note 29, at 532.

treacherous—for example, an original meaning of “tradition” was “treason.”<sup>31</sup> Raymond Williams, in his book *Keywords*,<sup>32</sup> describes how “tradition” comes from the Old French *tradition* derived from the Latin *traditionem*, the ultimate traceable word being the Latin *trader*, to hand over or deliver. According to Williams, the Latin noun had the senses of (i) delivery, (ii) handing down knowledge, (iii) passing on a doctrine, and (iv) surrender or betrayal. “Tradition” can be used to indicate the *process* of transmitting culture from one generation to the next (“the expressing or transferring our knowledge to others. . . . I will tearme by the general name of Tradition or Deliverie” (Bacon, 1605)); or the practice passed down itself, with a connotation that this practice requires respect and duty (“Will you mocke at an ancient Tradition began uppon an honourable respect” (Henry V, v, I.)).<sup>33</sup>

Williams points out how “tradition,” a word describing a process of transmission, becomes a word that ratifies a practice, requiring a respect and duty:

It is easy to see how a general word for matters handed down from father to son could become specialized, within one form of thought, to the idea of necessary respect and duty. Tradition survives in English as a description of a general process of handing down, but there is a very strong and often predominant sense of this entailing respect and duty. When we look at the detailed processes of any of these traditions, indeed when we realize that there are traditions, and that only some of them or parts of them have been selected for our respect and duty, we can see how difficult Tradition really is, in an abstract or exhortatory or, as often, ratifying use.<sup>34</sup>

A tradition, thus, can either mean a process of transmission of culture from one generation to another, or a specific practice or set of practices. To Justice Scalia, it means a set of specific practices. An investigation of legal history reveals that our jurisprudence of personal jurisdiction has always been based on a systematic legal way of solving conflicts within American society, rather than focusing on any particular procedural practices.<sup>35</sup> We will see that the way courts dealt with territorial jurisdiction before the Civil War formed a part of the full-faith and credit jurisprudence of that era, that *Pennoyer*<sup>36</sup> was an instance of the

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31. RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* (rev. ed. 1983) 319; see *OXFORD ENGLISH DICTIONARY* (2d ed. 1989).

32. WILLIAMS, *supra* note 31.

33. *Id.* at 318-19.

34. *Id.* at 319.

35. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 265-67 (1990).

36. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

substantive due process paradigm of Justice Field, while *International Shoe*<sup>37</sup> and *Shaffer*<sup>38</sup> deal with territorial jurisdiction in the context of modernistic jurisprudence.

## V. TRADITION IN THE LAW OF PERSONAL JURISDICTION

Our traditional law of personal jurisdiction has always been based on general principles, often including a rejection of past practices. Professor Kogan points this out in his *A Neo-Federalist Tale of Personal Jurisdiction*,<sup>39</sup> in which he states that there have been three systems or paradigms of personal jurisdiction in our legal history.<sup>40</sup> Each paradigm is tied closely to one of three foundational moments in our country's history: the Founding, the Civil War, and the New Deal.<sup>41</sup> A brief description of each of the three systems will illustrate the systemic nature of personal jurisdiction jurisprudence and the difficulty in labeling a specific "tradition."

### A. *The Founding*

Professor Kogan characterizes the personal jurisdiction cases prior to the Civil War as a debate between Federalists and anti-Federalists over the fundamental character of our nation, and the role of the separate states. Developed as common law in this country prior to the Constitution's ratification, the personal jurisdiction doctrine was utilized as a means to mediate between the two extreme views of interstate federalism. The doctrine created ambiguity with regard to the constitutional relationship among the states—which served the important function of easing the tensions between Federalist and anti-Federalists in the early years of our nation.<sup>42</sup> In this era, the Supreme Court sought to balance two visions of America: the vision of a strong, sovereign, federal government, versus leaving sovereignty with the states, where it had resided with the Articles of Confederation.<sup>43</sup>

The first era is exemplified in *Picquet v. Swan*,<sup>44</sup> in which Justice Story, sitting as a circuit court judge, speaks of a state's jurisdiction as being limited to its boundaries: "[T]his results from the general principle, that a court created within and for a particular territory is bounded in the exercise of its power by the

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37. *International Shoe Co. v. Washington Office of Unemp. Comp. & Placement*, 326 U.S. 310 (1945).

38. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

39. Kogan, *supra* note 35.

40. *Id.* at 259-61.

41. *Id.*

42. *Id.* at 260-61.

43. *Id.* at 274.

44. 19 F. Cas. 609 (Mass. 1828) (No. 11,134)



limits of such territory.”<sup>45</sup> Story saw the territorial restrictions on jurisdiction as a way to prevent states from overstepping their bounds in a federal union. The traditional units of territorial boundaries founded in international law served this function well.<sup>46</sup>

## *B. The Civil War*

*Pennoyer v. Neff* represents the second personal jurisdiction system, one characterized by a substantive due process interpretation of the Fourteenth Amendment. *Pennoyer* transformed the international law principle which governs foreign sovereigns into “a principle of constitutional federalism protecting the private rights of individuals under the Fourteenth Amendment.”<sup>47</sup> Justice Field instituted the doctrine of “substantive due process”—the Reconstruction Amendments “set federal limits to the power of a state to interfere with the civil rights of American citizens.”<sup>48</sup> Unsuccessful in the *Slaughterhouse Cases*<sup>49</sup> in which he dissented, Justice Field prevailed in *Pennoyer*, using personal jurisdiction and the Fourteenth Amendment to create individual rights against State actions.<sup>50</sup>

Justice Field likened a state court’s exercise of personal jurisdiction to a citizen’s property right of ownership and control over one’s physical self, a natural right protected by the Thirteenth and Fourteenth Amendments. In Field’s conceptual scheme, the only state that could exercise jurisdiction over a person was the state in which the individual was actually located. “This followed from Lockean notions of consent, a notion central to the laissez faire ideology of late nineteenth-century classical legal thought. All other states were forbidden to exercise jurisdiction over that person—thus followed the constitutional requirement of strict in-state service of process.”<sup>51</sup>

Field’s opinion in *Pennoyer*, then, was not based on current practices, but rather on a principled, intellectual scheme that protected natural rights rather than tradition. *Pennoyer* actually worked against tradition. At the time it was decided,

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45. *Id.* at 611.

46. Kogan, *supra* note 35, at 297.

47. *Id.* at 261.

48. *Id.* at 300.

49. 83 U.S. 36 (1873).

50. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). In the *Slaughterhouse Cases*, the Court rejected an attack on a Louisiana Statute that granted to a single company the right to engage in the Slaughterhouse business in New Orleans and surrounding areas. It represented the Court’s first opportunity to assess the impact of the Reconstruction amendments. The majority held that the Privileges and Immunities Clause of the Fourteenth amendment distinguishes between U.S. and state citizenship—fundamental civil rights were the domain of the states. *Id.* at 78. The minority rejected this limited reading of the Fourteenth Amendment. 83 U.S. at 83.

51. Kogan, *supra* note 35, at 300; see JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 15-16 (Liberal Arts Reprint, Thomas P. Pearson ed. 1956) (discussing the “liberty of man in society” and its relation to consent).

a number of states permitted quasi-in-rem jurisdiction without an initial seizure, but *Pennoyer* ruled this practice unconstitutional.<sup>52</sup> The main point of Justice Hunt's dissent was that under contemporary state practice there was nothing wrong with attaching the land after judgment in a quasi-in-rem proceeding.<sup>53</sup> Moreover, it was not universally accepted that a State could not serve process outside its borders—the statutes of New York and California seemingly having authorized personal jurisdiction without requiring in-state service.<sup>54</sup>

Field was *not* using the Due Process Clause to enforce traditional State practices, but rather sought to limit State power. There are limitations on state power inherent in the nature of our constitutionally created government. Having described these limitations, Field invokes the Due Process Clause as the mechanism by which federal courts may ensure that the states do not exceed those limitations on their power.<sup>55</sup> Individual rights, which are protected by due process, exist independently of the Due Process Clause. For Justice Field, the Fourteenth Amendment is not the *source* of the rights in question, but is rather a device for recognizing and enforcing preexisting and inalienable rights.<sup>56</sup>

### C. *The New Deal*

Professor Kogan describes how the world-view of *Pennoyer* ultimately broke down given the sweeping effect of social change:

[T]he conceptual structure of the world of classical legal thought began to crumble with the acceleration of developments in technology and communications at the end of the nineteenth and beginning of the twentieth centuries. By the early twentieth century, a legal consciousness that attempted to understand interstate relations in purely physicalized, boundary-drawing terms no longer proved adequate to make sense of an increasingly mobile society. A new conceptual structure for rights in society, one which was no longer tied to physicality but was increasingly relational, was now needed.<sup>57</sup>

*International Shoe* incorporates modern jurisprudence into personal jurisdiction doctrine; under its system of minimum contacts, the court entered the

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52. *Pennoyer*, 95 U.S. at 728; see Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 498 (1987) (discussing Field's opinion and his lack of authority for the notion that property must be attached at the beginning of the suit to secure quasi-in-rem jurisdiction).

53. *Pennoyer*, 95 U.S. at 741-48 (Hunt, J., dissenting).

54. Perdue, *supra* note 52, at 499.

55. *Id.* at 502.

56. *Id.* at 505.

57. Kogan, *supra* note 35, at 343.

world of the activist state. The purpose of this post-New Deal doctrine for personal jurisdiction was largely administrative. After *International Shoe*, a litigant's contacts with a locale are not relevant simply because they establish physical or other relations with a state. The litigant's activity and its impact on jurisdiction is judged "in relation to the fair and orderly administration of the laws."<sup>58</sup>

The Court was speaking of both federal and state law. The opinion departs from the realm of sovereignty and enters the domain of fair administration. System-wide solutions to personal jurisdiction are required, addressing a national, rather than a local picture.<sup>59</sup>

The minimum contacts system, then, is a *system* reflecting modern jurisprudence, modern legal administration, and modern society. *International Shoe* represents a theoretical and practical departure from the past based on standards better suited to our mobile society. A defendant no longer had to be present within the territory of the forum if sufficient "minimum contacts" existed.<sup>60</sup>

## VI. THE ROAD TO *BURNHAM*

With *Shaffer v. Heitner*, the Court re-assessed the entire intellectual basis of *Pennoyer*. *Shaffer* in invalidating plaintiff Heitner's stock seizure, and thus was much more than a case about how Delaware law fixed the locus of Delaware corporations' stock in that state. Justice Scalia's footnote,<sup>61</sup> which states that Delaware's procedure was unique in its rule of locating corporate securities, in the state of incorporation, misses the point of *Shaffer*—that there was no logical justification for distinguishing between *in personam* and *in rem* jurisdiction:

The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971). . . . This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due

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58. *International Shoe*, 326 U.S. at 319.

59. Kogan, *supra* note 35, at 355.

60. *International Shoe*, 326 U.S. at 316.

61. *Burnham v. Superior Court*, 495 U.S. 604, 622 n.4 (1990).

Process Clause is the minimum-contacts standard elucidated in *International Shoe*.<sup>62</sup>

This key paragraph strikes at the heart of the conceptual scheme of *Pennoyer*. *Pennoyer's* jurisdictional scheme was based on the view that *all* jurisdiction was in rem. Personal rights were transformed into *things*. Professor Kogan points out that under the classical legal thought which informed *Pennoyer*, rights and state power were reified. "[T]he concretization of the world and the use of actual physical boundaries and physicalized metaphors to delimit the spheres of dominion of legal actors were viewed as entirely natural."<sup>63</sup> Under Cooley's thought as adopted by Justice Field, state borders became a natural law boundary.<sup>64</sup> *Pennoyer's* either/or system of inside-the-border/jurisdiction, outside-the-border/no jurisdiction was based on this classical presence-based jurisprudence.

*Shaffer's* recognition that under modern jurisprudence property itself is dephysicalized meant that quasi-in-rem jurisdiction had to be rejected—it simply no longer made any sense.<sup>65</sup>

In *Burnham*, Justice Scalia ignores the intellectual structure and message of *Shaffer* and attempts to narrow it to the abolishment of quasi-in-rem jurisdiction. Indeed, he seeks to limit it to only dealing with Delaware's unique rule locating Delaware stock in Delaware, where other states locate securities as being where the stock certificates are physically present. This narrow view of *Shaffer*, of course, ignores the jurisprudential system on which *International Shoe* was built.

## VII. ROMAN CATHOLIC AND ANGLICAN TRADITION

In focusing on the specific practice of transitory jurisdiction rather than the three systems of personal jurisdiction, Justice Scalia adopts a tradition of specific practices and rejects as untraditional the most recent tradition of personal jurisdiction, that of *International Shoe* and *Shaffer*. In doing so, his thought parallels another conflict between two traditions, that of the Roman and Anglican Catholic Churches. In rejecting the tradition of fairness based on an underlying political and philosophical view that shapes American personal jurisdiction doctrine, Justice Scalia aligns himself with an Anglican traditionalism rather than a Roman Catholic one. A comparison of Scalia's traditionalism with two types of religious tradition can help us better understand his jurisprudence.

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62. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (citations omitted).

63. Kogan, *supra* note 35, at 319.

64. *Id.* at 338.

65. *See id.* at 344; Kannar, *supra* note 2, at 1300.

My conclusion that Justice Scalia's traditionalism is *not* Roman Catholic contradicts the approach of Professor Kannar who, in his *The Constitutional Catechism of Antonin Scalia*,<sup>66</sup> links Scalia's jurisprudence to the approach of the pre-Vatican II Catholics: "[T]he hypothesis will be that, as a pre-Vatican II Roman Catholic, Scalia absorbed very early a particular formalistic vision of how one perceives and evaluates the world, as well as a particular literalistic view of what one does with texts."<sup>67</sup> At first glance, Justice Scalia's use of tradition seems to parallel the Catholic use of tradition as a spiritual authority. One could see the division between Justice Scalia's use of tradition and those who use constitutional text as paralleling the division between Catholics and Protestants. For one of the key elements of Protestant thought is its rejection of tradition in favor of Scripture: In the words of Martin Luther, "[t]hose things which have been delivered to us by God in the Sacred Scriptures must be sharply distinguished from those that have been invented by men in the Church, it matters not how eminent they be for saintliness or scholarship."<sup>68</sup> "Necessity compels us to run to the Bible with all the writings of the Doctors, and there to get our verdict and judgement upon them; for Scripture alone is the true overlord and master of all writings and doctrines on earth."<sup>69</sup> Thus, "in the person of Martin Luther the cleavage between Scripture and tradition became irreconcilable."<sup>70</sup>

Looking at Catholic tradition more closely, however, reveals that Justice Scalia's view of tradition is not that of Catholicism. George Tavard, a noted Catholic theologian, points out that Catholic tradition concentrates on the church's guardianship over the process of the transmission of the gospel: "Tradition is the art of passing on the Gospel,"<sup>71</sup> characterizing the Church as a keeper of traditions that guard against heresy.<sup>72</sup> In focusing on the practices of an ideal earlier age and denying the possibility of evolving traditions, at least one made by the courts, Justice Scalia's approach is more Protestant than Roman Catholic. Catholic traditionalism is evolving, based on the principle of a continuing revelation:

Fathers and successors of the Apostles do not only hand on the apostolic doctrine. At the Spirit's bidding a tradition may start at any point in history. "For that Spirit was not only in the Apostles. He has also spoken in their successors. Continuously he had remained in the Church to this day and he remains in her forever and ever. In her therefore he still

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66. Kannar, *supra* note 2.

67. *Id.* at 1300.

68. GEORGE H. TAVARD, *HOLY WRIT OR HOLY CHURCH: THE CRISIS OF THE PROTESTANT REFORMATION* 83 (quoting Martin Luther, *Babylonian Captivity* 261) (1959).

69. *Id.* (quoting Martin Luther, *3 Argument in Defense of the Articles* 16).

70. *Id.* at 80.

71. *Id.* at 3.

72. *Id.* at 10-11.

speaks today as though in the seat and basis of truth, and he teaches all the very truth."<sup>73</sup>

Justice Scalia's view is more analogous with that of the Anglican Church, which rejects an evolving traditional model for one which locates the ideal era in the past. To the Anglicans, the church should model itself at that time, not on more recent eras:

The early Anglicans were convinced that they had restored the pattern of the primitive Church. Their conception of the Church of England stands or falls with the accuracy of their judgement on the first centuries of the Church. There must have been at the beginning of Christianity an ideal period, an apostolic time, set as a pattern for all subsequent centuries. This apostolic period was more or less long. What matters is not its precise length. It is simply the fact that the apostolic faith and order persisted in the Church for several centuries. It was afterwards lost through the misguidance of the Bishops of Rome. It is being restored in the Churches of the Reformation, and especially in Elizabethan England.<sup>74</sup>

Justice Scalia, like the Anglicans, rejects current doctrine and seeks to return to the practices of a prior time, seen as an ideal.

#### VIII. SCALIA AS COUNTER-REVOLUTIONARY

In his rejection of modern thinking and desire to return to the past, Scalia is functioning not so much as a revolutionary, but as a counter-revolutionary.

His social and political program is to roll back jurisprudence to the era of Justice Taft, before the modernistic jurisprudence of the New Deal. If he can make illegitimate the policy-based jurisprudence of New Deal Realists, he can reject the precedents of the liberal, rights-expanding courts and the traditions of the immediately prior era, to return to those of an earlier one.

Stylistically, his thought resembles that of the Restoration society which replaced the Revolutionaries in France. This resemblance explains why Justice Scalia, who is most frequently characterized as a witty and intelligent man, is so against a jurisprudence based on judicial creativity, thought, or policy. Why, out of all the possible traditions, does he choose the narrow, rule-oriented one that he does? The answer is suggested by Stendhal in his novel *The Red and The Black*,<sup>75</sup> which gives the classic description of this type of counter-revolutionary intel-

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73. *Id.* at 129.

74. TAVARD, *supra* note 68, at 237-38.

75. STENDHAL, *THE RED AND THE BLACK* (Robert M. Adams ed., trans. 1969).

lectual milieu. In it, the protagonist Julian Sorel is faced with making his way in counter-revolutionary France, in which the church, the aristocracy, and society as a whole is reacting to the Revolutionary and Napoleonic eras. A romantic and an intellectual, and an admirer of Napoleon, Julian attempts to succeed by hypocrisy, but his intelligence and emotions keep betraying him to a world that regards free thought as anathema. His career in a seminary, for example, met with disaster after he answered an exam by discussing pagan authors, earning him last place. Later, in his position as a secretary to the Marquis de La Mole, Julian again displays his nonconformity and complains of the boredom of the counter-revolutionary milieu:

-Sir, said Julian abruptly, is dining every day with the marquise one of my duties, or are they doing me a favor? - It's a great honor! said the abbē, scandalized. Why, M. N., the academician, who's been paying them court for fifteen years, has never been able to obtain such a favor for his nephew M. Tanbeau.

-For me, Sir, it's the most painful part of my job. I was less bored in the seminary.<sup>76</sup>

The boredom and the lack of any critical discourse complained of by Julian did not come about by coincidence. The critic Erich Auerbach explains why the social context rejected any discussion of important issues:

Even the boredom which reigns in the dining room and salon of this noble house is no ordinary boredom. It does not arise from the fortuitous personal dullness of the people who are brought together there; among them there are highly educated, witty, and sometimes important people, and the master of the house is intelligent and amiable. Rather, we are confronted, in their boredom, by a phenomenon politically and ideologically characteristic of the Restoration period. In the seventeenth century, and even more in the eighteenth, the corresponding salons were anything but boring. But the inadequately implemented attempt which the Bourbon regime made to restore conditions long since made obsolete by events, creates, among its adherents in the official and ruling classes, an atmosphere of pure convention, of limitation, of constraint and lack of freedom, against which the intelligence and good will of the persons involved are powerless. In these salons the things which interest everyone—the political and religious problems of the present, and

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76. Erich Auerbach, *In The Hotel de La Mole* (quoting *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* (1953)), quoted in STENDHAL, *supra* note 75, at 437.

consequently most of the subjects of its literature or of that of the very recent past—could not be discussed, or at best could be discussed only in official phrases so mendacious that a man of taste and tact would rather avoid them. How different from the intellectual daring of the famous eighteenth-century salons, which, to be sure, did not dream of the dangers to their own existence which they were unleashing!<sup>77</sup>

Likewise, for Scalia, a jurisprudence of policy and creativity could give rise again to New Deal jurisprudence. Thought is dangerous and should be avoided. Justice Scalia views his judicial opponents as the seminarians did Julian:

Actually, the important actions in his life had been skillfully managed; but he was not clever at the details, and in the seminary clever fellows pay attention only to the details. Thus, he was already considered by his fellows a free thinker. He had been betrayed by a host of little actions.

In their eyes he was already guilty of one enormous vice: he thought, he judged for himself, instead of following blindly authority and precedent.<sup>78</sup>

Such a jurisprudence preserves the status of the political forces that placed the Justice on the bench. Eric Hobsbawm writes that valuing of tradition is characteristic of a group that fears a decline in prestige.<sup>79</sup> A group that has achieved status does not want change, it wants to preserve things as they are, and will adopt an ideology to support that position.

## IX. AGAINST RATIONALISM

Like Stendhal's aristocrats and priests who attacked the rational modernism of the French Revolution, Justice Scalia's traditionalism operates as a strategic weapon to attack the rationalism<sup>80</sup> which has underlined American jurisprudence

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77. STENDHAL, *supra* note 75, at 437.

78. *Id.* at 143.

79. ERIC HOBSBAWM & TERENCE RANGER, *THE INVENTION OF TRADITION* (eds., 1992).

80. See Anthony Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1043-47 (1990) (explaining that rationalism rejects authority, religion, and precedent for reason and pragmatism). Rationalism as an ideology underlay the French Revolution:

As a revolutionary crisis, rationalism last appeared—and in some ways irreversibly—in the 17th and 18th centuries. It was the answer to the physical and moral catastrophes of the Christian Churches in the Thirty Years War. It was the answer to the helplessness of orthodoxy in face of the dimensions of the world discovered by the modern sciences. It was the explicit liquidation of an age in which Christianity took itself for granted, being philosophically integrated in scholasticism and perfectly established socially.

SACRAMENTUM MUNDI, *AN ENCYCLOPEDIA OF THEOLOGY* 184, 185 (1970).



since The New Deal. Justice Scalia attacks this jurisprudence as being a substitution of individualism for the rule of law. In his *Originalism: The Lesser Evil*, Justice Scalia writes: “Now, the main danger in judicial interpretation of the Constitution—or for that matter in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.”<sup>81</sup> To him the rule of law can only be following tradition.

Justice Scalia comments on “the subjectivity, and hence inadequacy” of the concurring opinion by Justice Brennan in *Burnham*. He sees an inquiry into the “fairness” of exercising jurisdiction as a logical quicksand, an “imperious” exercise of “individual Justices perceptions of fairness.”<sup>82</sup> He writes in *Pacific Mutual Life Insurance v. Haslip*,<sup>83</sup> which upheld the constitutionality of punitive damages:

[N]othing but the conclusiveness of history can explain why jurisdiction based upon mere service of process within a State—either generally or on the precise facts of that case—is “fundamentally fair.” Nor to my mind can anything else explain today’s decision that a punishment [punitive damages] whose assessment and extent are committed entirely to the discretion of the jury is “fundamentally fair.”<sup>84</sup>

Judicial decisions cannot be based on policies. As he testified in his confirmation hearings, “because opinions differ widely about predictable social effects and, for that matter about their desirability, policy analysis is a jurisprudential foundation of shifting sand.”<sup>85</sup>

Compare here the program of the Legal Realists who explicitly wished to replace formalism with a jurisprudence based on policy. Karl Llewellyn in the 1930s called for a jurisprudence based on policy and a monitoring of the effects of legislation to determine if policy goals were being realized. In his 1931 Legal Realistic manifesto, *Some Realism about Realism—Responding to Dean Pound*,<sup>86</sup> Llewellyn describes the “common points of departure” of the modernistic jurisprudence of Legal Realism to include seeing the law as a means to a social end, not as being valued in itself:

(2) The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose,

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81. Scalia, *supra* note 5, at 863.

82. *Burnham*, 495 U.S. at 627.

83. 499 U.S. 1 (1991).

84. *Id.* at 37.

85. Schlosser, *supra* note 10, at 380.

86. Karl Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

and for its effect, and to be judged in light of both and their relation to each other.

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(8) An insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects.<sup>87</sup>

Far from valuing social experiments as did the Realists, Justice Scalia sees changes from past practices to be deviations from the norm: "[w]e have held such deviations permissible, but only with respect to suits arising out of the absent defendant's contacts with the State."<sup>88</sup> Perhaps even using "deviations" in a sexual sense where he describes nonoriginalists in terms of "outing:" "It is only in relatively recent years, however, that nonoriginalist exegesis has, so to speak, come *out of the closet*, and put itself forward overtly as an intellectually legitimate device."<sup>89</sup>

Justice Scalia here operates as an opponent of modernism, a view of life in which nothing is fixed, and everything "melts into thin air."<sup>90</sup> He positions himself against the modernist whose key attribute is the rejection of tradition: "the self-conscious rejection of all traditionalist thinking being, in fact, one of the principal badges by which the champions of modernity have, from the beginning of their battle against unenlightened superstition, sought to distinguish themselves from their opponents."<sup>91</sup>

Justice Scalia sees policy analysis as a "jurisprudential foundation of shifting sand."<sup>92</sup> His extended critique of Brennan's concurrence in *Burnham* shows his contempt for the type of "balancing" done by realistic jurisprudence:

Thus, despite the fact that he manages to work the word "rule" into his formulation, Justice Brennan's approach does not establish a rule of law at all, but only a "totality of the circumstances" test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum competence.<sup>93</sup>

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87. *Id.* at 1235-37.

88. *Burnham*, 495 U.S. at 610 (footnote omitted).

89. Scalia, *supra* note 5, at 852 (emphasis added).

90. For a general discussion of modernism, see MARSHALL BERMAN, *ALL THAT IS SOLID SELTS INTO AIR* (1988).

91. Kronman, *supra* note 80, at 1044.

92. Schlosser, *supra* note 10.

93. *Burnham*, 495 U.S. at 626.

Karl Llewellyn, the arch realist, would reply that “shifting sand” is the only foundation material we have. His poetic discourse at the start of *Some Realism About Realism* describes a world in which there are no firm foundations:

Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men; as men they have human backgrounds. Beyond rules, again, lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch. The field of Law reaches both forward and back from the Substantive Law of school and doctrine. The sphere of interest is widening; so, too, is the scope of doubt. *Beyond rules lie effects*—but do they? Are some rules mere paper? And if effects, what effects? Hearsay, unbuttressed guess, assumption or assertion unchecked by test—can such be trusted on this matter of what law is *doing*?

The ferment is proper to the time. The law of schools threatened at the close of the century to turn into words—placid, clear-seeming, lifeless, like some old canal. Practice rolled on, muddy, turbulent, vigorous. It is now spilling, flooding, into the canal of stagnant words. It brings ferment and trouble. So other fields of thought have spilled their waters in: The stress on behavior in the social sciences; their drive toward integration; the physicists’ reexamination of final-seeming premises; the challenge of war and revolution. These stir. They stir the law. Interests of practice claim attention. Methods of work unfamiliar to lawyers make their way in, beside traditional techniques. Traditional techniques themselves are reexamined, checked against fact, stripped somewhat of confusion. And always there is this restless questing: what *difference* does statute, or rule, or court-decision make?<sup>94</sup>

In contrast, Justice Scalia hates modernity. We see his nostalgia in a speech about William Howard Taft, where responding to criticisms of Taft for running “counter to the ultimate sweep of history,” he states:

[T]his is presumably the school of history that assesses the greatness of a leader by his success in predicting where the men he is leading want to go. That is perhaps the way the world ultimately evaluates things—but one may think that Taft, in having (as I have described) a more celestial view of the judge’s function, had a quite accurate “vision of things to

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94. Llewellyn, *supra* note 86, at 1222.

come," did not like them, and did his best, with consummate skill but ultimate lack of success, to alter the outcome. To demean him for not being Brandeis is to demean Lee for not being Grant.<sup>95</sup>

Thus, a return to a status quo ante, is the point. In this, Justice Scalia differs from the modern legal scholars who argue for the adoption of a new system of law to replace an outmoded one. Today, a typical synopsis of a law review article is a review of the existing law, a critique of that law, and a proposal of a new legal paradigm to solve the problems generated by existing law with an attempt to balance the competing concerns.

Professor Hazard's classic article on personal jurisdiction, *A General Theory of State-Court Jurisdiction*,<sup>96</sup> is an example. After reviewing a history of personal jurisdiction, Hazard concludes that the *Pennoyer* system is no longer workable and proposes a "minimum contacts paradigm" as providing "an adequate general theory of state court jurisdiction."<sup>97</sup> More recently, Professor Brilmayer, after reviewing the present theories of personal jurisdiction concludes that we may choose our own system of personal jurisdiction: "[H]aving had a clear look, we may decide to retain the assumptions or to reject them—at least we will make a free and informed choice."<sup>98</sup>

Justice Scalia would see Professors Brilmayer and Hazard's proposals as anathema. We cannot create a "general theory" of state court jurisdiction, nor can we make a "free and informed" choice. That would be substituting our own thoughts, predictions, values, and practices for that of the Constitution.

In fact, Justice Scalia's traditionalism functions to protect us from finding new ways of structuring the law. Professor Kisthardt explains the results of his methods:

A judging paradigm based on the "historical analysis" method of identifying constitutionally protected interests acts only to confirm those interests that are already considered important. The historical analysis method will almost always lead to nonrecognition of the asserted interest, particularly when the issue is framed as narrowly as possible. It is a process that is destined to result in the maintenance of the status quo. Under this theory, the Fourteenth Amendment offers shelter only to those interests that were previously historically protected. If this were accurate,

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95. Scalia, *supra* note 5, at 849-50. Justice Scalia may be indulging in what the Portuguese call "saudades"—a nostalgia for something that never existed. See Stephen Holden, *Longing for a Time Imagined*, N.Y. TIMES, Nov. 30, 1991, at 13.

96. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241 (1965).

97. *Id.* at 281-88.

98. Lea Brilmayer, *The William Blockhart Lecture: Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 35 (1989).

there would be little need for constitutional adjudication. The Court's function in interpreting the Constitution would be obsolete. Furthermore, this mode of analysis makes the Constitution a stagnant document, unresponsive to the plurastic society in which we live.<sup>99</sup>

Justice Scalia may well intend everything of which Professor Kisthardt complains.

#### X. CRITIQUE

We may characterize Justice Scalia's approach as being that of one who looks at part of a pattern through a microscope—one focusing on a single item but seeing the larger context. The larger context indeed has no meaning. This restrictive focus has further consequences: since the practice, not the process, is the focus, there can be no evolution. One is stuck with the unchanging practice. But keeping a particular practice which is part of a system will necessarily produce different results over time as the other parts of the system change. In any changing complex system, the repetition of any particular input will yield different results. The same dosage of aspirin, for example, will have a different result on an eight-month old than it will on an eighty-year old body. Similarly, a procedural practice such as transitory jurisdiction has a different effect today than it did in the past.

At the time *Pennoyer* was decided, there was no railroad into Oregon and traveling there was dangerous, difficult, time-consuming, and expensive. Contrast the airplane trip of Mr. Burnham, where a safe, short, and cheap trip by jet plane gave rise to jurisdiction over him because of his weekend visit to see his children.<sup>100</sup> *Burnham* gives the spouse who left the state with the children a legal advantage over the visiting spouse. But in what way does this legal advantage reflect "traditional notions of fair play and justice?" The practice of transitory jurisdiction is unchanged, but the context of its application has. The social phenomena of divorce and interstate migration have grown from a rarity to a commonplace occurrence. Transitory jurisdiction then can be used in a traditional manner to produce a new result.

The fact that the results change even if we do things the same way puts the traditionalist in a quandary. Traditional practices will produce non-traditional results and favor non-traditional parties (e.g., the wife who leaves with the kids to California). This quandary is produced, however, by focusing on the practice, not the principle. The question is what is the tradition—the particular practices

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99. Mary Kay Kisthardt, *Of Fatherhood and Families*, 65 TUL. L. REV. 585, 640 (1991).

100. *Burnham*, 495 U.S. at 608.

or the endeavor to apply principles? Seeing tradition as the practice leaves one with an irrational system—although that might be the point.

Many legal scholars have characterized Justice Scalia's opinion in *Burnham* as illogical. Professor Hay in *Transient Jurisdiction After Burnham* criticizes Scalia's opinion as being "intellectually unconvincing."<sup>101</sup> Professor Stein in his *Burnham and the Death of Theory in Personal Jurisdiction*, points out that "[i]mplicit in this approach [Scalia's] is an absence of a normative concept of jurisdiction; jurisdiction is permitted to the extent that it conforms to historical practice—not because it conforms to a concept of legitimate judicial power."<sup>102</sup>

But Justice Scalia explicitly rejects "concepts of legitimacy" because such thinking leads to individual thought and the "shifting sands" of subjectivity. Thus, such criticisms as Professor Redish's, that it defies rationality to distinguish, as did *Burnham*, between jurisdiction based on presence of property and that based on presence of a person, miss the point—Justice Scalia wants to substitute rules for norms and rationality.

Contemplating Justice Scalia's position, I was reminded of my grandfather's response to my questions as to why we always did things the same way, e.g., "Grandpa, why do we always eat in this restaurant?" He answered: "Because that's the way we do it, goddamn it!" Don't ask questions, don't argue, just shut up, get to work, and don't make a fuss about it. Such an approach has its virtues—it is certain and it does not require any intellectual effort in disputing it. And this is why the many critiques of *Burnham* on an intellectual level are all immaterial. One must first determine who has the power; he who has the power does it his way. Those unhappy about not having power must then obtain it for themselves. Arguing about it is a waste of time.

In his tradition of practices, Justice Scalia resembles a group of legal scholars who maintain the irrationality of modern legal doctrine—the critical legal scholars. Compare: "nothing but the conclusiveness of history can explain why jurisdiction based on mere service of process within a state—either generally or on the precise facts of that case—is 'fundamentally fair.' Nor to my mind can anything else explain today's decision that a punishment whose assessment and extent are committed entirely to the discretion of the jury is 'fundamentally fair. I can conceive of no test relating to 'fairness' in the abstract that would approve this procedure, unless it is whether something even more unfair could be imagined"<sup>103</sup> with: "much of current law, instead of making sense, is contradictory and incoherent; some of it [current scholarship] claims that current law

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101. Peter Hay, *Transient Jurisdiction After Burnham*, 1990 U. ILL. L. REV. 593 (1990); *see id.* at 598 (arguing that Justice Scalia draws in his distinction between traditional and new basis of jurisdiction as precluding or permitting judicial inquiry).

102. Allan R. Stein, *Burnham and the Death of Theory in Personal Jurisdiction*, 22 RUTGERS L.J. 597, 598-99 (1991).

103. *Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1, 37 (1991) (Scalia, J., concurring).

in operation is ineffectual or harmful; and that from none of it could anyone extract an immediately useful policy proposal.”<sup>104</sup>

That Justice Scalia’s critique of prevailing legal ideology should parallel that of the “best” critical legal historian, Robert Gordon, perhaps should not come as a surprise.<sup>105</sup> Both the left-and right-wing critics cannot accept the prevailing opinion that our present legal system is based on rationality.

The problem, especially for a conservative, is that Justice Scalia is acting to destroy one of the pillars of our legal system. If the law is not based on policy, reason, or logic, but rather on an irrational adherence to past practices—where is its legitimacy?

## XI. CONCLUSION

This essay has attempted to place Justice Scalia’s traditionalism in the context of various traditions. His traditionalism cannot be taken as the only possible traditional jurisprudence; in fact, it is in the tradition of only a counter-revolutionary traditionalism. A traditional procedural due process based on development and creativity is also possible.

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104. Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1056 (1981).

105. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 213 (1987).