MEDITATIONS ON THE ORIGINAL: JAMES MADISON, FRAMER WITH COMMON LAW INTENTIONS — RAMIFICATIONS IN THE CONTEMPORARY SUPREME COURT

William D. Bader*

To Lord Denning[1]

> The deep waters of time will flow over us: only a few men of genius will lift a head above the surface, and though doomed eventually to pass into the same silence, will fight against oblivion and for a long time hold their own.[2]

James Madison is, "by common consent," the Father of the United States Constitution.[3] If a contemporary Justice of the United States Supreme Court wishes to determine original intent with respect to the Constitution, it is essential that he or she discerns the relevant intentions of this primary Framer. In fact, an examination of the evidence reveals that Madison thought in terms of the prevailing legal method of his day, the common law method.[4] This approach, characterized by narrow case-by-case adjudications and high respect for precedent, including constitutional precedent, permeated our early legal culture through the writings of Sir Edward Coke and his intellectual heir Sir William Blackstone.[5] Robert Ferguson, a legal and literary scholar, observed of

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* Member of the Connecticut Bar; J.D. 1979, Hofstra University School of Law; A.B. 1974, Vassar College. Visiting lecturer at Louisiana State University at Shreveport.

1. Alfred Thompson Denning, born in 1899 during the reign of Queen Victoria, has served the British judiciary as a Lord of Appeal in Ordinary and as the Master of the Rolls. He can be found in his library, early each morning, studying the law.

2. LANNAEUS SENECA, LETTERS TO LUCILIUS 68-69 (E. Phillips Barker trans., 1932).

3. A. E. Dick Howard, *James Madison and the Founding of the Republic*, *in* JAMES MADISON ON RELIGIOUS LIBERTY 21, 21 (Robert S. Alley ed., 1985). Bruce Ackerman accurately notes that Madison is "our greatest constitutionalist" in his essay *Liberating Abstraction*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 317, 323 (Geoffrey R. Stone et al. eds., 1992).

4. Overwhelmingly, the Framers and their generation thought in terms of common law methodology. Even a so-called radical, such as Jefferson, wrote that precedents "should therefore be sacred, and not wantonly set aside when ingenuity can persuade us to believe they are unfit . . . . This deference to adjudged cases is enjoined by our laws." EDWARD DUMBAULD, THOMAS JEFFERSON AND THE LAW 102 (1978).

5. ROBERT E. SHALHOPE, THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760-1800 40 (1990); RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 150 (1990); *see also* William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 6-7 (1994).

Blackstone, author of the culturally ubiquitous *Commentaries on the Laws of England*:

> All of our formative documents — the Declaration of Independence, the Constitution, the Federalist Papers . . . were drafted by attorneys steeped in Sir William Blackstone's *Commentaries on the Laws of England (1765-1769)*. So much was this the case that the *Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions.[6]

Blackstone clearly considered respect for precedent, embodied in case-by-case judicial determinations, to be the cornerstone of the common law method and the major bulwark against usurpation of the rule of law by tyrannical judges. In his *Commentaries*, he wrote:

> And therefore, even so early as the conquest, we find the "*praeteritorum memoria eventorum*" [the remembrance of past events] reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriae optime instituti*" [best instructed in the laws of the country]. For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments . . . .[7]

Blackstone concluded, "the doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust."[8]

In *The Federalist* No. 37, Madison demonstrated an inherent Blackstonian common law perspective in his understanding of law and meaning. He wrote: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, *until their meaning be liquidated and ascertained by a series of particular discussions and*

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6. ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984) (footnote omitted).

7. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (Richard Burns et al. eds., 11th ed. 1788) (citation omitted).

8. *Id.* at 70.

adjudications."[9] Thus all law, according to Madison, acquires its meaning through many discrete adjudications and particular cases in classic common law tradition.

In 1811, Jeremy Bentham wrote Madison offering his services to codify the law of the United States in its entirety.[10] Bentham bitterly opposed Blackstone and the common law method that he propounded.[11] He viewed the case-by-case adjudicatory approach of the common law, with its cornerstone of precedent, as too fragmented, flexible, and uncertain.[12] Using his a priori rationalism grounded in "utility," Bentham proposed to codify all law; judges would then have a clear, ironclad legislative code to defer to in every decision.[13] Madison displayed his dedication to the common law method by refusing Bentham's incredible offer. In a remark to John Quincy Adams, who delivered Madison's reply to Bentham, the Framer essentially referred to the real inevitability of the common law method: "[Either] I greatly overrate or [Bentham] greatly underrates the task . . . not only [of digesting] our Statutes into a concise and clear system, but [of reducing] our unwritten to a text law."[14] For all Bentham's utopian good intentions, Madison felt that we had no choice but to struggle, one hard case at a time, as common lawyers had done for centuries.

Similarly, Madison rejected federal use of the code developed by the American Benthamite Edward Livingston.[15] Madison made clear that the complexities of the common law, developed and developing through case-by-case adjudications, could not be reduced to a simple code and imposed on litigants. He wrote to Livingston:

> I have been accustomed to doubt the practicability of giving all the desired simplicity to so complex a subject . . . . But where the technical terms [and] phrases have a complex import, not otherwise to be reduced to clearness [and] certainty, than by practical applications of them, it might be unsafe to introduce new terms [and] phrases, tho' aided by brief explanations. The whole law expressed by single terms,

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9. THE FEDERALIST NO. 37, at 229 (James Madison) (Edward Mead Earle ed., 1937) (emphasis added).

10. JOHN DINWIDDY, BENTHAM 60 (1989).

11. *Id.* at 55.

12. *Id.* at 55-58.

13. *Id.* at 58-61.

14. KETCHAM, *supra* note 5, at 632 (alterations in original).

15. JAMES MADISON, THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 338-39 (Marvin Meyers ed., 1981).

> such as "trial by jury, evidence, &c, &c." fill volumes, when unfolded into the details which enter into their meaning.[16]

McCulloch v. Maryland provided an excellent opportunity for Madison to criticize Chief Justice John Marshall's interpretation and to display his adherence to the common law method in the constitutional context.[17] In *McCulloch*, Chief Justice Marshall utilized a loose constitutional interpretation to justify Congress' power to incorporate the Second Bank of the United States.[18] In so doing, Marshall construed the Necessary and Proper Clause of the Constitution in the broadest possible manner.[19] Underlying his decision, and providing the justification, he declared a nationalist theory of the Union, whereby federal power emanated "directly from the people," as opposed to a compact of states.[20] In a September 2, 1819 letter to Judge Spencer Roane, Madison honed in on the Chief Justice's flawed methodology, if not his holding:

> It appears to me as it does to you that the occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case. I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject. The example in this instance tends to reverse the rule and to forego the illustration to be derived from a series of cases actually occurring for adjudication.[21]

Thus, Madison strenuously objected to the imposition of a priori abstractions upon judicial reasoning in constitutional cases. Constitutional doctrine, he believed, must accrue inductively, on the facts of each case, over time, consistent with Anglo-American common law tradition.

Madison's adherence to the classical Blackstonian common law method was particularly demonstrated by his respect for the binding force of judicial precedent, including constitutional precedent. Regarding judicial precedent generally, Madison wrote:

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16. MADISON, *supra* note 15, at 339.

17. McCulloch v. Maryland, 4 U.S. (1 Wheat.) 316 (1819).

18. *Id.* at 324.

19. *Id.* at 324-25.

20. *Id.* at 403.

21. MADISON, *supra* note 15, at 359. Madison felt obligated to change his position on the constitutionality of a national bank out of respect for constitutional precedent. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939-40 (1985).

> And why are judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regarded as of binding influence, or, rather, of authoritative force in settling the meaning of a law? It must be answered; 1st. Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decision of his predecessors, should vary the rule of law according to his individual interpretation of it . . . . 2. Because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those who, having made the law through their legislative organ, appear, under such circumstances, to have determined its meaning through their judiciary organ.[22]

Then Madison proceeded to endorse the same respect for judicial precedent in constitutional cases. He asked in rhetorical fashion: "Can it be of less consequence that the meaning of a Constitution should be fixed and known, than that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation unless the Constitution be so?"[23] A judge, Madison maintained, must follow established precedents, including constitutional precedents, rather than "his solitary opinions as to the meaning of the law or Constitution."[24]

In fact, Madison's classical Blackstonian view of precedent became the established judicial approach in both constitutional and non-constitutional cases. Washington Van Hamm clearly reflected this in an 1844 Western Law Journal article when he wrote, "An honest judge can only be governed by precedent, whether that precedent arise [sic] under a written or unwritten law, so long as it is consistent with reason and justice, and applicable to our condition."[25] Roscoe Pound reiterated this approach particularly well in a 1941 Fordham Law Review article:

> [I]t had become established that nothing less than an overriding conviction that a precept fixed by a prior decision was contrary to the principles of the law so that it had an ill effect upon the process of determining new questions by analogical reasoning and was, as Blackstone puts it, "flatly" unjust in its results, could justify judicial rejection of it.[26]

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22. MADISON, *supra* note 15, at 391.

23. *Id.*

24. *Id.* at 392.

25. Washington Van Hamm, *In Answer to Judge Walker's Report in* LAW, IN ANTEBELLUM SOCIETY: LEGAL CHANGE AND ECNOMIC EXPANSION 96, 100 (Jamil Zainaldin ed., 1983).

26. Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 6 (1941).

The compellingly impressive jurisprudence of Justice David H. Souter best exemplifies the classical Blackstonian common law method as intended by Madison and his generation. This approach to constitutional and non-constitutional cases is brilliantly elucidated in Justice Souter's joint opinion for the Court in *Planned Parenthood of Southeastern Pa. v. Casey*,[27] and his concurring opinion in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.[28]

Planned Parenthood involved a highly unusual joint opinion by Justices Souter, Kennedy and O'Connor. At issue was the question of overruling *Roe v. Wade*.[29] The Justices in fact upheld *Roe* on *stare decisis* grounds. Justice Souter essentially wrote Part III, the holding's *stare decisis* rationale, and read much of it from the bench.[30]

First, Justice Souter emphasizes the necessity, indeed the indispensability, of high respect for precedent.[31] Without the obligation to follow precedent, he maintains, the judicial system could not survive.[32] He writes: "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[33]

Justice Souter goes on to state that the decision to overrule a prior holding involves a prudential and pragmatic balancing of criteria embodied in the ideal of the rule of law.[34] Specifically, the Court would inquire whether the rule has defied practical workability.[35] The Court would also ask whether the rule has caused so much reliance that an overruling would lead to special inequity.[36] Furthermore, the Court would have to determine whether related principles of law have developed in such a way as to leave the old rule as a vestige of an abandoned doctrine.[37] Finally, the Court must ascertain whether facts have changed so dramatically that

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27. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992).

28. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring).

29. Roe v. Wade, 410 U.S. 113 (1973).

30. David J. Garrow, *Justice Souter Emerges*, THE NEW YORK TIMES MAGAZINE, Sept. 25, 1994, at 38-39; *see also* JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 164 (1995).

31. *Planned Parenthood*, 1125 S. Ct. at 2808.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 2808-09.

the old rule cannot really be applied or justified.[38] Justice Souter then applies these criteria to the holding in *Roe*. He writes that although *Roe* has proved controversial, it has not proved unworkable or unenforceable.[39]

Justice Souter next addresses the issue of reliance. He points out that for twenty years women and couples have relied on *Roe* in both an economic and social context: "An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . ."[40]

Examining the case law, Justice Souter then maintains that the holding in *Roe* is not doctrinally obsolete.[41] On the contrary, he illustrates the fact that no Court precedent since *Roe*'s 1973 holding has significantly eroded the central doctrines of due process, liberty or personal autonomy, which underlie its holding.[42]

Finally, Justice Souter writes that advances in medicine, including maternal health care and neonatal care, have ramifications for the scheme of time limits in *Roe*.[43] The former change in facts would allow for safe abortions earlier in pregnancy; the latter would make for a somewhat earlier point of fetal viability.[44] However, Justice Souter asserts that these factual changes do not affect *Roe*'s holding that viability marks the earliest point when the state may assert its interest in criminalizing non-therapeutic abortions.[45] On this point, he concludes:

> Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.[46]

Because of the controversy surrounding *Roe*, Justice Souter, in an exceptional effort to meet the circumstances, examines the two controversial lines of cases which have been overruled in this century: *Lochner v. New York*[47] and *Plessy v. Ferguson*.[48] *Lochner* put substantive

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38. *Id.* at 2809.
39. *Id.*
40. *Id.* at 2812.
41. *Id.* at 2810.
42. *Id.* at 2810-11.
43. *Id.* at 2811.
44. *Id.*
45. *Id.* at 2811-12.
46. *Id.*
47. Lochner v. New York, 198 U.S. 45 (1905).

due process limitations on social welfare legislation which limited economic liberty.[49] In 1937, *West Coast Hotel Co. v. Parrish* initiated the demise of *Lochner*.[50] *Plessy* and its progeny established the "separate but equal" rule for applying the Equal Protection Clause of the Fourteenth Amendment.[51] *Plessy* was overruled by *Brown v. Board of Educ.*, where the Court found that legally sanctioned segregation in public schools inhered with inequality under the Equal Protection Clause of the Fourteenth Amendment.[52] Justice Souter concludes that "*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."[53] Specifically, the Depression clearly revealed that the interpretation of economic liberty which supported the *Lochner* line rested on the false factual assumptions of radical laissez-faire theory.[54] Similarly, by 1954, society's understanding of the facts regarding legally sanctioned segregation had changed from the claimed understanding which supported the *Plessy* line of cases.[55] As explained above, Justice Souter maintained that the understanding of the facts central to the holding in *Roe* had not significantly changed since 1973.[56]

Justice Souter then addresses the issue of *stare decisis* as it relates to legitimacy. He writes that frequent overruling of the Court's own precedent would undermine its legitimacy by providing evidence that the Justices had discarded principle in favor of particular short-term results.[57] With respect to precedent such as *Roe*, which calls on the nation to accept a constitutional interpretation in the midst of controversy, Justice Souter endorses a *higher standard* of precedential force requiring "most compelling reason[s]" to overrule.[58] He writes: "But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation."[59] Addressing those who advocate a lower threshold for overruling constitutional cases, Justice Souter writes:

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48. Plessy v. Ferguson, 163 U.S. 537 (1896).
49. *Lochner*, 193 U.S. at 52-53.
50. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).
51. *Plessy*, 163 U.S. at 544.
52. Brown v. Board of Educ., 347 U.S. 483 (1954).
53. *Planned Parenthood*, 112 S. Ct. at 2813.
54. *Id.* at 2812.
55. *Id.* at 2813.
56. *Id.* at 2813-14.
57. *Id.* at 2814-15.
58. *Id.* at 2815.
59. *Id.*

> The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. *From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution.* A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.[60]

Finally, *Planned Parenthood* is precursive of Justice Souter's concurrence in *Lukumi,* in which he discusses refined criteria for the rare overruling of precedent.[61] One such criterion elucidated in *Lukumi* is the need to reduce doctrinal tension when a precedent is at odds with the whole body of other precedents on a subject.[62] Thus, those parts of *City of Akron v. Akron Ctr. for Reprod. Health Inc.*,[63] which struck down a local twenty-four hour waiting period and compulsory dissemination of certain information to the abortion patient, and those parts of *Thornburgh v. Am. College of Obstetricians and Gynecologists*,[64] which struck down a state law requiring dissemination of specific information to the abortion patient, are disturbingly at odds with *Roe* and its progeny. These particular aspects of the holdings in *Akron I* and *Thornburgh* are therefore overruled in *Planned Parenthood*, where similar requirements had been prescribed by state law. In *Planned Parenthood*, Justice Souter states that:

> Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, *are inconsistent with Roe's statement that the State has a legitimate interest in promoting the life or potential life of the unborn*, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today.[65]

In his concurring opinion in *Lukumi*, Justice Souter elucidates certain criteria for overruling precedents.[66] In *Lukumi*, he maintains that the rule

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60. *Id.* at 2815-16 (emphasis added).

61. *See infra* notes 69-76 and accompanying text.

62. *Lukumi*, 113 S. Ct. at 2248.

63. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 442, 449-450 (1982).

64. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 764 (1985) (hereinafter *Akron I*).

65. *Planned Parenthood*, 112 S. Ct. at 2816-17 (citation omitted) (emphasis added).

66. *Lukumi*, 113 S. Ct. at 2217.

in *Employment Div., Dep't of Human Resources of Ore. v. Smith*,[67] unnecessarily cited in Justice Scalia's majority dicta, should not be followed in future cases.[68] His reasons reveal a common law methodologist in the tradition of Madison the Framer as opposed to a judicial legislator.

In *Smith*, the Court rules that the Free Exercise Clause of the First Amendment was not implicated when a neutral, generally applicable law incidentally prohibits the exercise of religion.[69] Justice Souter, having a high respect for constitutional precedent, writes that the *Smith* rule is at odds with other free-exercise precedents.[70] Unlike the rule in *Smith*, the other decisions clearly require a substantive free exercise as well as a formal one. If the law prohibits the free exercise of religion *in fact*, the Free Exercise Clause is implicated regardless of the law's facial neutrality and generality.[71] Furthermore, the rogue *Smith* did not overrule these other precedents in announcing its peculiar rule.[72] Thus, Justice Souter maintains, the doctrinal tension among the cases must be resolved; *Smith* should be critically re-examined with an eye to overruling.[73]

Additionally, Justice Souter examines other classic common law criteria which together form an argument for overruling *Smith*. The *Smith* rule's value as precedent is limited because the parties did not brief the proposition which the Court embraced.[74] Furthermore, he maintains that the novel *Smith* rule is almost like dicta, because it was not needed to resolve the question presented in the case.[75] He points out that Justice O'Connor reached the same conclusion as the majority by applying the established precedents.[76] Like Madison, as demonstrated in his critique of *McCulloch*'s reasoning, Justice Souter opposes the imposition of a priori abstractions on the inductive case-by-case methodology of the common law.

As an exemplary common lawyer, Justice Souter also looks to the words of the Free Exercise Clause and evidence of the Framers' intended

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67. Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990).
68. *Lukumi*, 113 S. Ct. at 2240.
69. *Smith*, 494 U.S. at 882.
70. *Lukumi*, 113 S. Ct. at 2243.
71. *Id.* at 2240-42.
72. *Id.* at 2243.
73. *Id.*
74. *Id.* at 2247.
75. *Id.*
76. *Id.*

meaning.[77] He concludes that the pre-*Smith* precedents are more consistent with the language of the Free Exercise Clause than the *Smith* rule: "The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both."[78] Likewise, a look at history tends to support the pre-*Smith* precedents protecting religious observance from the incidental burden of generally applicable, neutral statutes.[79]

Chief Justice William H. Rehnquist is the most articulate expounder of the so-called "originalist" theory of precedent. Writing for the Court in *Payne v. Tennessee*,[80] and dissenting and concurring in *Planned Parenthood*,[81] he supports the doctrine of *stare decisis* when property or contractual rights are implicated, but discounts the importance of *stare decisis* in most constitutional cases.[82] The Chief Justice writes in *Planned Parenthood*: "Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that 'depar[t] from a proper understanding' of the Constitution."[83] This "originalist" theory of *stare decisis* does not in fact trace back to the Framers, but rather to that paragon of activism, Chief Justice Roger B. Taney. In the *Passenger Cases*,[84] Taney wrote:

> I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.[85]

Unfortunately, Chief Justice Rehnquist has never squarely addressed the related issue of legitimacy raised by Justice Souter in *Planned Parenthood*. As Justice Souter has indicated, the Court's legitimacy is seriously called into question when constitutional interpretation varies

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77. *Id.* at 2248-49.

78. *Id.* at 2248.

79. *Id.* at 2249.

80. Payne v. Tennessee, 501 U.S. 808 (1991).

81. *Planned Parenthood*, 112 S. Ct. at 2855.

82. *Id.* at 2860-61.

83. *Id.* at 2861 (emphasis in original).

84. Smith v. Turner; Norris v. City of Boston, 48 U.S. (7 How.) 283 (1849) (collectively referred to as the *Passenger Cases*).

85. *Id.* at 470.

according to the changing personnel of the Court and their constitutional values du jour.[86] The Chief Justice does latch on to Justice Souter's discussion of "divisive" decisions, and badly misinterprets it to mean that the Court must follow public opinion to remain legitimate.[87] Sir Francis Bacon best described this particular forensic technique of the Chief Justice: "[M]akes me think of the phrase of the Psalm, *starting aside like a broken bow*: so when they find their reasons broken, they start aside to things not in question."[88]

When original intent is genuinely sought in the resolution of today's legal problems, we, like Justice Souter, inevitably rediscover the classical common law methodological approach to constitutional and non-constitutional adjudications, as advocated by James Madison. Unfortunately, Madison would find no kinship with some of our self-proclaimed "originalists."[89] They reject careful case-by-case adjudications for the imposition of a priori thinking and results, from their menu of substantive theories labelled "original." When necessary to reach these results, they reject proper respect for precedent in constitutional cases. And while disparaging precedent, they ultimately elevate the importance of a judge's "solitary opinions as to the meaning of the law or Constitution," in Madison's words of warning.[90]

Roscoe Pound, writing on the eve of the Second World War, observed a curious irony among the contemporary critics of the common law method, which surprisingly applies to today's "originalists." Specifically, these critics repeat Bentham's argument that courts should not have any discretion in making law, but rather, should strictly apply it.[91] In obvious contradiction, however, these same critics go on to advocate the wholesale overruling of established precedents when such action comports with their agenda.[92] Pound characterized this methodology as "administrative rather than in the judic[i]al manner," and saw it as part of an absolutist revival.[93] He wrote: "The demand for overruling decisions today comes in large part from those whose ideal plan involves free

86. *Planned Parenthood*, 112 S. Ct. at 2815.

87. *Id.* at 2862-63.

88. 7 THE WORKS OF FRANCIS BACON 602 (James Spedding ed., 1892) (emphasis in original).

89. *See supra* notes 21-24 and accompanying text.

90. MADISON, *supra* note 15, at 392.

91. POUND, *supra* note 26, at 3.

92. *Id.* at 5.

93. *Id.*

decision of each case to the ideas of the moment according to personal discretion."[94]

No wonder some present day discussion of overruling precedent is often couched in terms of personal discretion, with reference to "changing one's mind."[95] No wonder the nomination and confirmation process for Supreme Court Justices has degenerated into a crass political battle among special interests who view the process as an effort to tip the judicial outcomes their way by one vote.[96] If true originalism prevailed, and *stare decisis* was therefore given the respect traditionally accorded it from the days of Madison the Framer, a potential Justice's personal views of policy, along with his one vote, would not be so singularly important.[97]

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94. *Id.*

95. *See, e.g.*, Antonin Scalia, The Dissenting Opinion, Address Before the Supreme Court Historical Society (June 13, 1994) *in* JOURNAL OF SUPREME COURT HISTORY, 1994, at 43; *see also* Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting).

96. *See, e.g.*, DAVID BROCK, THE REAL ANITA HILL (1993); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (7781989).

97. When the common law method, with its high respect for constitutional and non-consitutional precedent, is properly utilized, there still remains the potential for disagreement as to what exactly constitutes the *ratio decidendi* in a particular case. Although this issue is beyond the scope of the present essay, the common law method does offer firm guidance to judicial discretion in the determination of a case's holding. In fact, the occasional wide disagreement over the content and meaning of a precedent usually does not reflect methodological limitations as much as it reveals a lack of intellectual candor by a few judges who have political agendas and who crave particular outcomes at any cost to principle. *See* Arthur L. Goodhart, *Determining The Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).