

# Ex Ante

## DE-PRECEDENTING ROE

“MY MOTIVATION for writing,” explains Michael Stokes Paulsen of the University of Minnesota, is not unique: “a desire that *Roe* [*v. Wade*] be overturned.” But his plan, outlined in the May issue of the *Yale Law Journal*, is unprecedented. Paulsen begins with the proposition – again, not unique – that reliance on stare decisis was “[c]entral to the opinion and decision in [*Planned Parenthood v. Casey*]” upholding *Roe*, drafted jointly by Justices O’Connor, Kennedy, and Souter. Then – and here is where Paulsen moves off the beaten path – he argues that Congress’s authority under the Necessary and Proper Clause to regulate federal judicial procedures and jurisdiction includes the power to abrogate stare decisis, either generally or selectively. From this flows Paulsen’s “counterintuitive” conclusion:

If it lies within the power of Congress to remove from the Court the perceived burden of being “tested by following” – that is, of feeling compelled to adhere to decisions of the Court rendered years or decades ago, even if a majority of the Court today believes those decisions wrong – and if the Court consequently can point to *Congress* as the body responsible for striking a different policy balance concerning considerations of reliance and stability (on which *Casey* rests so heavily), the result could well be different in the next abortion case.

Paulsen recognizes that broad statutory abrogation of stare decisis could gore a few of his own favored oxen as well, but he favors a general statute over one targeted exclusively at *Roe*, both because it would be consistent with his critiques of stare decisis in the *Yale Law Journal* and elsewhere and because it would be less susceptible to challenge as an attempt to circumvent the constitutional amendment process. In any event, Paulsen is turning to Congress in the hope that the legislative branch will facilitate what it cannot direct – a change of heart on the part of the judicial branch.

Paulsen’s article does not, however, contain a specific prescription for congressional action, a model statute. The *Green Bag* invited him to fill in that blank, and here is the result:

H.R. \_\_\_\_, S. \_\_\_\_ (200\_\_)

(An Act to Abrogate the Doctrine of Stare Decisis in Federal Question Cases)

(To be Codified at 28 U.S.C. §1652a)

*Section One.* If a court of the United States, in a case or controversy where the Constitution, statutes, or treaties of the United States supplies a rule of decision, determines that a prior judicial interpretation of a provision of the Constitution of the United States, or of a statute or treaty of the United States, is not consistent with said provision, the relevant provision of the Constitution, statute, or treaty of the United States shall supply the rule of decision,

not the prior judicial interpretation that is not consistent with such provision.

*Section Two.* This Act shall not be construed to repeal or alter any statute prescribing the jurisdiction of any court of the United States; to invalidate or reopen any final judgment or decree rendered in any case or controversy by any court; to authorize denial of full faith and credit to final judgments validly rendered by a court of competent jurisdiction; or to alter any lawful obligation of inferior federal courts to follow the prior judicial interpretations of the law rendered by the United States Supreme Court and, where applicable, by the U.S. Court of Appeals that possesses authority to review on appeal the decisions of such inferior court.

*Section Three.* If any part of this Act or application of this Act is held unconstitutional, all remaining parts and valid applications shall be considered severable. Any judicial decision holding any part of this Act or application of this Act unconstitutional shall be subject to the requirements of this Act in any subsequent case or controversy in which the constitutionality of any part of this Act or application of this Act is drawn in question.

Or for those who prefer plain English:

The judicial policy of stare decisis, to the extent not constitutionally mandated, is hereby abrogated in federal cases as to issues of federal constitutional, statutory, or treaty interpretation.

Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 Yale L.J. 1535 (2000).

## EARLY DISABILITY PROTECTION

**T**HE AMERICANS WITH Disabilities Act often is cited as an indicator of our nation's new-found concern for the disabled. But the United States Code contains some evidence that the special needs of the disabled have concerned Congress since the 1950s, at least. Consider Title 15, Chapter 29 – Manufacture, Transportation,

or Distribution of Switchblade Knives:

Section 1243: Whoever within any Territory or possession of the United States ... manufactures, sells or possesses any switchblade knife, shall be fined not more than \$2000 or imprisoned not more than five years.

Section 1244: Section ... 1243 of this title shall not apply to - ... (4) the possession and transportation upon his person, of any switchblade knife with a blade three inches or less by any individual who has only one arm.

Perhaps the idea was to give one-armed combatants a fighting chance, or more plausibly if prosaically, to enable someone with one arm to do most of the things with a pocketknife that are possible for someone with two arms. There are no clues in the legislative history.

Pub. L. 85-623, §§ 3, 4, Aug. 12, 1958, 72 Stat. 562.

## A CONVENIENT POCKET SIZE

**T**HIS IS A BIG YEAR for the useful and much-maligned *Bluebook*. It marks the appearance of the seventeenth edition, and of *The Bluebook: A Sixty-Five Year Retrospective*, W.S. Hein's compilation of the first through fifteenth editions. The Hein compilation also includes material that casts some doubt on the conventional wisdom that the *Harvard Law Review* is the birthplace of the *Bluebook*. In its February 1955 promotional blurb for the ninth edition of the *Bluebook*, the *Law Review* offered the fullest public expression of its own views on the subject:

A reader with an eye for the minute and a technical turn of mind may spot a few citations in this issue whose forms are a trifle irregular. They will, we trust, soon lose their novelty. For it is with this issue that the *Review* adopts the citation forms prescribed by the ninth edition of *A Uniform System of Citation*, which has just been published.

Colloquially known as the "Blue Book," from its cover which in recent years has ranged from calamine to ultra-marine, the publication dates