VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

How *Allen v. Cooper* Breaks Important New (if Dubious) Ground on Stare Decisis

10 APR 2020 | VIKRAM DAVID AMAR

POSTED IN: CONSTITUTIONAL LAW

Allen v Cooper, decided a few weeks ago by the Supreme Court, is significant for both its substance and its methodology. In my column today, I focus on the brief but potentially very important passage in Justice Elena Kagan's majority opinion concerning constitutional *stare decisis*—the respect the Court pays to its past interpretations of the Constitution. But before I turn in earnest to that, I offer a bit of background on the case and the substantive(ly flawed) result it reaches.

Problems with the Court's Jurisprudence on

State Sovereign Immunity and Congress's Section 5 Power

The case concerns state sovereign immunity under the Constitution—that is, the immunity states enjoy from being sued without their consent. *Allen* is the second major case in less than a year by the Court extending state sovereign immunity. *Franchise Tax Board v. Hyatt* in May 2019 expanded sovereign immunity to protect states from being sued in the state courts of other states. And in *Allen*, the Court blocked a damage lawsuit filed against North Carolina in federal court, invalidating a congressional statute that sought to subject states to federal-court damage liability for breaches of copyright.

As my *Verdict* colleague Professor Mike Dorf ably explained last week, "the result in *Allen* is hardly surprising. In the 1998 case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court ruled that Congress could not authorize private damages lawsuits against states for patent infringement, and as Justice Elena Kagan's majority opinion in *Allen [observed]*, the copyright and patent statutes are 'basically identical.'" So the *Allen* Court was acting consistently with the most relevant judicial precedent.

But consistent and correct are different things, and the whole line of cases in which *Allen* and *Florida Prepaid* lie is seriously flawed. Although this column is not the place to undertake a full-throated critique of the Court's state sovereign immunity jurisprudence, let me suggest just a few thoughts on the merits. First, the Court's entire interpretation of the Eleventh Amendment, and state sovereign immunity first principles, is open to serious question as a matter of originalism, which is supposed to take most seriously text and historical understandings.

Second, the requirement, fashioned in *City of Boerne v. Flores* in 1997, that

Congress, in exercising it powers under Section 5 of the Fourteenth Amendment to remedy state constitutional violations, pass only those laws that are "congruent and proportional" to unconstitutional action by states, is also unjustified by classic originalist sources. Indeed, Section 5's language, giving Congress "power to enforce" the provisions of the Fourteenth Amendment by "appropriate" legislation, tracks the language of the so-called Necessary and Proper Clause of Article I of the Constitution, which confers on Congress the "power" to make "all laws which shall be necessary and proper" to "carry[] into execution" other provisions of the Constitution. That key language from Article I had already been prominently understood at the time of the Fourteenth Amendment, in the seminal case of *McCulloch v. Maryland* fifty years prior, to include authority to make all laws that were rationally related, not just those that were "congruent and proportional," to legitimate federal objectives.

And third, even if "congruence and proportionality" were part of what the Fourteenth Amendment requires, *Allen* repeats the analytic mistake of *Florida Prepaid* of looking generally at evidence of how frequently states violate intellectual property rights. In *Florida Prepaid*, the Court said evidence of states infringing patents as a general matter was "thin," and in *Allen* the Court found that the evidence of the frequency of state violations of copyright was "scarcely more impressive." But in assessing federal statutes that subject states to damages for intellectual property rights violations, the question isn't how frequently states violate IP entitlements, but how often they are acting unconstitutionally when they do so. Even if congruence and proportionality were mandatory, Congress can solve a problem with a surgical cure regardless of widespread the problem may be. If all (or nearly all) of the instances reached by a federal statute involve actions by states that violate Fourteenth Amendment rights to due process, it shouldn't matter how often those instances occur. So a low overall frequency of state IP violations is relevant only in the limited sense (to which the Court never even puts it) that a small

sample size can make a high rate of constitutional-violations-per-IP-violation seem less statistically significant.

The "Special" Character of *Stare Decisis*

Given these weaknesses of *Florida Prepaid* and the cases that preceded it, why did the Court unanimously follow it, much less in a majority opinion written by Justice Elena Kagan and joined by Justice Sonia Sotomayor, jurists not known for their aggressive embrace of states' rights? Here is what Justice Kagan said by way of explanation:

> [W]e would have to overrule *Florida Prepaid* if we were to decide this case Allen's way. But stare decisis, this Court has understood, is a "foundation stone of the rule of law.". . . To reverse a decision, we demand a "special justification," *over and above the belief "that the precedent was wrongly decided."* *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). But Allen offers us nothing special at all; he contends only that if the Court were to use [his reasoning of constitutional interpretation], it would discover that *Florida Prepaid* was wrong. . . . (emphasis added)

This one little passage is big, because it represents the first time a majority of the Court has invoked this *stare decisis* requirement of a "special justification" – above and beyond the wrongness of a prior decision – in a constitutional setting since *Planned Parenthood v. Casey* in 1992. *Casey*, it will be recalled, was a famous abortion case in which a coalition of justices preserved a watered-down version of *Roe v. Wade* and its recognition two decades earlier of a woman's right to terminate an unwanted pregnancy.

In *Casey*, a majority of the Supreme Court explained why it was retaining the "essential holding" of *Roe* notwithstanding substantial "reservations" that (at

least some of) the justices in the majority had about the correctness of the *Roe* decision itself. The Court observed that while the rule of *stare decisis* is not an "inexorable command," a decision to overrule an earlier case "should rest on some special reason over and above the belief that [the] prior case was wrongly decided" since changes in the law based on changes in the Court's membership invite distrust.

In other words, for the *Casey* majority, it was unclear that even a belief that an egregious error occurred in interpreting the Constitution in a prior case (here, *Roe*) would by itself constitute "special" justification for failing to follow precedent. (Of course I am not suggesting here that *Roe* does represent an egregious error, only that members of the *Casey* majority indicated that egregious error would not be enough to justify overturning past precedent.)

Notwithstanding some discussions in recent times of the importance of *stare decisis*, prior to *Allen* no Court majority in the thirty years since *Casey* had doubled down on this special-justification-over-and-above-wrongness approach to *stare decisis* in a constitutional case, and until *Allen* it was not remotely clear whether *Casey*'s articulated approach commanded a majority of the current Court.

In 2018, when the Court overruled major constitutional precedents in two blockbuster cases—*Janus v. American Federation of State, County and Municipal Employees* and *South Dakota v. Wayfair, Inc.*—the Court did not use the word "special" at all in describing the permissible justifications for overturning past rulings. The closest either majority came was the admonition in *Janus* to the effect that "[w]e will not overturn a past decision unless there are strong grounds for doing so." But "strong" is an ambiguous term, and the *Janus* majority itself relied primarily on the wrongness of the decision it overruled (*Abood v. Detroit Board of Education*) as the basis for overruling.

As for the dissents in the two big *stare decisis* cases from 2018, while none of them quoted the language in *Casey* noted above, the two principal dissents (which together spoke for five of the nine justices) did use words that *might* have connoted the same idea. In *Janus*, Justice Kagan's dissent for herself and three others, quoting from the 1984 *Arizona v. Rumsey* case, said: "Departures from *stare decisis* are supposed to be 'exceptional action[s]' demanding 'special justification.'" And Chief Justice Roberts's opinion for all the dissenters in *Wayfair* made similar noises (quoting from the same case): "Departing from the doctrine of *stare decisis* is an 'exceptional action' demanding 'special justification.'"

But it is not clear that "exceptional" and "special," as used in these instances, meant something beyond the firm belief that the prior case was wrongly decided. (Recall that *Casey*, and now *Allen*, didn't just say a "special" reason was needed; it said that what was required to justify overruling was a "special reason *over and above the belief that [the] prior case was wrongly decided*." (emphasis added)). "Special" as it is used in the *Janus* and *Wayfair* dissents, without the additional language from *Casey*, might have meant simply a clear conviction of past mistake. (And since most of the time the Court thinks it got things right in its earlier cases, fixing errors is something that is certainly "special" or "exceptional" in the sense of being unusual.)

In my view, it was a wise thing the Court hadn't doubled down on *Casey*'s formulation over the last few decades, because, as I have explained in detail in several columns, including one here and here, *Casey*'s formulation is problematic if applied to constitutional cases as a general matter. In short, the *Casey* approach, taken seriously, would mean that so long as the older, wrong case identifies an easy-to-administer rule, no matter how bad the mistake was and how much harm it does to society, and *even if there was no reliance on the mistaken ruling* (as there often is not, say, in situations where

the Court has wrongly upheld legislative power to victimize certain out-groups, as in the 1986 *Bowers v. Hardwick* case that was rightly overruled by *Lawrence v. Texas* in 2003), there should be no fixing it. This makes little sense. It is one thing to say we need to live with judicial mistakes because we value other things, like ease of administration and protecting reliance interests; oftentimes there *are* reliance interests to protect, as the Court said there were in *Casey*, which made the disinclination to overrule *Roe* in that case sensible even if the *Casey* formulation was not. But it is another to say we should live with mistakes as a matter of course, whether or not fixing the mistakes would be unfair to those who have relied on them or would cause other collateral problems. Proponents of *Casey*'s approach have never explained precisely why we should leave intact past mistakes as to which there has been no reliance. Perhaps someone could argue that a supercharged vision of *stare decisis* is grounded on a notion of judicial infallibility, but none of the justices appears to believe that prior volumes of the U.S. Reports (the official reporter of the Court's decisions) are completely free from interpretive error. Indeed, all the justices reject the notion of judicial infallibility, and argue strenuously that some past rulings (and the rulings in which they dissent today) are wrong. In this regard, it bears noting that some of the Supreme Court's most celebrated (and legally correct) decisions (such as *Brown v. Board of Education*) involve overruling past cases that were wrongly decided.

What about the case Justice Kagan's *Allen* opinion itself cites for support in the *stare decisis* passage—*Halliburton did* invoke the full-throated special-justification-over-and-above-wrongness idea. But *Halliburton* (and other cases prior to *Allen* in which the full *Casey* formulation had been repeated) is a statutory case, and it is well understood that statutory *stare decisis* is qualitatively different from constitutional *stare decisis*. Indeed, *Halliburton* itself made clear its analysis was applicable because of the statutory context. Why are the two kinds of *stare decisis* so distinct?

As the *Janus* majority observed, that the doctrine of *stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." And the *Janus* dissent did not take issue with this. Indeed, there has always been broad agreement on the Court for the commonsense idea that mistakes that Congress cannot remedy relatively easily are entitled to lesser precedential weight. But agreement on this principle simply reminds us that mistake correction is an important value—fixing mistakes is a factor on one side of the balance and something that, other things being equal, we should facilitate. But this acknowledgement itself undermines the *Casey* formulation. If fixing mistakes is important, then why would we need a special justification beyond a strong belief an error was made in the prior case if the other side of the balance were zero (e.g., there is no reliance and no collateral damage done by overruling)? It bears repeating that although reliance can outweigh the need for error correction in particular cases, the *Casey/Allen* approach, taken seriously, would mean that even in the absence of reliance, something beyond a clear conviction of error is needed.

Casey Itself

An attentive reader might observe: Ok, the *Casey* formulation hasn't been followed in other constitutional cases until now, but *Casey* itself was a constitutional case, so why is *Allen* so noteworthy? The answer to that is that, as observed above, in *Casey* one could argue (and a majority of the Court actually concluded) that there *had* been a great deal of reliance (on *Roe*), such that *Casey*'s discussion about the need for a special justification even in the absence of reliance was really beside the point and could be considered dicta. Put differently, *Casey*'s result is defensible on *stare decisis* grounds – because of reliance – with or without the "special justification" approach. But legitimate reliance by state governments on *Florida Prepaid* is much harder to

assert. Can states say they relied on their ability to violate intellectual property rights, to be "pirates," as Justice Kagan described such behavior? Perhaps states take as a given their protection from damage actions in allocating state funds come budget time, but the dollars at issue in copyright cases are trivial in the big picture for states even though they matter a great deal for victimized plaintiffs. Moreover, even if these kinds of expectations by states were cognizable, the Court could have created a glidepath away from such budget-planning reliance in a way that is much harder to imagine in contexts like *Casey*'s. Indeed, in *Janus* itself, in overruling *Abood*, the Court made much of the way the Court had been trying to reduce the economic-planning reliance by labor unions on fair share fees in cases over the six years leading up to *Janus* itself. The *Janus* Court appreciated that the Justices can over time blunt or minimize certain kinds of reliance costs when they want to correct a past mistake; in particular, they can telegraph that an overruling may be coming in the not-too-distant future so that people should and will rely less in their economic planning on the prior, mistaken ruling.

All of this brings up the question: Why would Justices Kagan and Sotomayor be willing to stick with *Florida Prepaid* on *stare decisis* grounds? Perhaps they thought that getting Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh to sign onto a twenty-first-century opinion embracing the *Casey* special-justification-over-and-above-wrongness formulation will make abortion rights more likely to be preserved. (Justice Thomas did not join the majority opinion in *Allen*, and wrote a solo concurrence agreeing with *Florida Prepaid* on the merits but expressing extremely minimal support for *stare decisis*, even, apparently, when substantial reliance can be shown. And Justices Ginsburg and Breyer also declined to join the majority opinion and concurred only in the result in *Allen*. They wanted to be on record they thought *Florida Prepaid* was wrong though binding, whereas Justice Kagan's majority opinion did not address *Florida Prepaid*'s correctness—only its importance as binding

precedent.)

Perhaps it *will* be difficult for the conservative justices who joined the majority opinion in *Allen* to say in future cases that *Casey*'s substantive "undue burden" doctrinal test (which provides some protection for abortion rights) has proven unworkable, or that (medical and societal) facts underlying *Casey*'s merits framework have been found to be mistaken, such that there is a special justification beyond wrongness to overrule it. We may get an answer to that soon enough, when the Court later this Term decides *June Medical Services LLC v. Russo*, an abortion case from Louisiana whose basic facts seem pretty similar to those in *Whole Woman's Health v. Hellerstedt*, in which five justices (including now-retired Justice Anthony Kennedy) used the *Casey* undue burden abortion-rights framework in 2016 to strike down Texas's abortion-clinic regulation. If the Court preserves *Hellerstedt* and uses it to invalidate the Louisiana law, perhaps *Allen*'s embrace of otherwise dubious *stare decisis* reasoning will pay some dividend for the liberals (even as it hurts progressive causes in other constitutional contexts.) But if all *Allen*'s *stare decisis* passage ends up doing is giving Justices Kagan and Sotomayor fodder for a dissent in *Russo* to make a conservative majority look bad, that doesn't seem like much of a payoff.

POSTED IN: CONSTITUTIONAL LAW
TAGS: SCOTUS, STARE DECISIS

VIKRAM DAVID AMAR

Vikram David Amar is the Dean and Iwan Foundation Professor of Law at the University of Illinois College of Law on the Urbana-Champaign campus. Immediately prior to taking the position at Illinois in 2015, Amar served as the Senior Associate Dean for Academic Affairs and a Professor of Law at the UC Davis School of Law. He has also had teaching stints at three other law schools affiliated with the University of California: the UC Berkeley School of Law; the UCLA School of Law; and UC Hastings College of

the Law.

Comments are closed.
