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SCOTUS Review: Supreme Court adheres to the doctrine of stare decisis and to prior precedent, even while criticizing that same precedent

By Michael Summerhill

While the nation deals with the COVID-19 pandemic, the civil judicial system nonetheless continues to resolve disputes. On March 23, 2020, the United States Supreme Court released its decision in *Comcast Corp. v. National Association of African American-Owned Media*, 589 U.S. ___ (2020). In the 9–0 decision, with Justice Ginsburg concurring, the Court resolved a split between the Seventh and Ninth Circuits regarding what level of causation a plaintiff must plead and prove under Section 1 of the Civil Rights Act of 1866—Section 1981 claims (42 U.S.C. § 1981). The Court agreed with the Seventh Circuit's traditional "but-for" causation analysis and rejected the Ninth Circuit's "motivating factor" test. While the result should be viewed as somewhat unsurprising; indeed, the first sentence of the opinion notes the long-standing acceptance of "but-for" causation, the Court's unanimous reliance on strict constructionism and its criticism of prior court's willingness to assume a more active decision-making posture further signals the more conservative-leaning philosophy of the current Court.

Case background

Comcast Corp. involved § 1981 claims brought by Entertainment Studios Network (ESN), an African American-owned television network operator. ESN sought to have Comcast carry its channels. After years of discussions, Comcast refused, citing a lack of demand for ESN's programming, bandwidth constraints, and Comcast's preference for news and sports programming that ESN did not carry. In response to Comcast's refusal to carry ESN's programming, ESN sued and alleged that "Comcast systematically disfavored 100% African American-owned media companies," and that Comcast's stated reasons for not contracting with ESN were merely pretextual. ESN, therefore, contended that Comcast violated the guarantees in § 1981 that "all persons [have] the same right … to make and enforce contracts … as is enjoyed by white citizens."

Comcast moved to dismiss the complaint arguing that ESN could not show "that, but for racial animus, Comcast would have contracted with ESN." While the trial court agreed with Comcast, the Ninth Circuit did not. It concluded that the trial court "used the wrong causation standard" when it dismissed ESN's complaint. According to the Ninth Circuit, a § 1981 plaintiff does not have to plead facts showing that "racial animus was a but-for cause of the defendant's conduct." Rather, relying

on the motivating factor test associated with claims under Title VII of the Civil Rights Act of 1966, the Ninth Circuit held that "a plaintiff must only plead facts plausibly showing that race played some role in the defendant's decision-making process." In so holding, the Ninth Circuit created a circuit-split because the Seventh Circuit previously held that to be actionable under section 1981, "racial prejudice must be a but-for cause … of the refusal to transact."

Supreme Court proceedings

The Court's ultimate holding that section 1981 claims are subject to a but-for causation analysis is not surprising—9–0 decisions are rarely dramatic. The Court's reasoning and rationale, however, shed light on the Court's legal philosophy. As an initial matter, the Court rejected ESN's efforts to craft onto section 1981 claims brought under the Civil Rights Act of 1866 the motivating factor test for causation found in claims brought under Title VII of the Civil Rights Act of 1966. While Justice Gorsuch's opinion provided a detailed summary of the origins of the motivating factor test, the end result was that the Court determined the Civil Rights Act of 1966 shed no light on the question of the proximate causation requirements for a statute passed one hundred years earlier.

Instead, the Court determined that the "simple and ancient 'but-for' common law causation test…supplies the default or background against which Congress is normally presumed to have legislated when creating its own new causes of action." The Court determined that the "statute's text, its history, and our precedent persuade us that § 1981 follows the general rule."

With respect to the text of the statute, the Court stressed it was suggestive of but-for causation because "[i]f the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of the English language would say that the plaintiff received the same legally protected right." When discussing the history of the Civil Rights Act of 1866, however, the Court obliquely criticized earlier Supreme Courts and their willingness to imply the existence of private rights of action. The Court noted that a private right of action under section 1981 did not exist until 1975 when the Supreme Court created it, and further noted that the current Court would no longer be in the business of creating causes of action where Congress did not:

> [1975] was during a period when the Court often assumed it to be the proper judicial function to provide such remedies as are necessary to make effective a statute's purpose. With the passage of time, of course, we have come to appreciate that, like substantive federal law itself, private rights of action to enforce federal law must be created by Congress and raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals. Yet, even in the era when this Court routinely implied causes of action, it usually insisted on legal elements at least as demanding as those Congress specified for analogous causes of action actually found in the statutory text.

The Court refused to decide whether section 1981 guaranteed "the right to equivalent contractual outcomes (a contract with the same final terms), but also the right to an equivalent contracting process (no extra hurdles on the road to securing the contract)." The Court reasoned that whether the right to equivalent contracts included the contracting process was not sufficiently addressed in the courts below and was otherwise unrelated to the central question on which the proximate causation standard should be applied.

On this point, Justice Ginsburg offered her concurring opinion. According to Justice Ginsburg, "[a]n equal right to make contracts is an empty promise without equal opportunities to present or receive offers and negotiate over terms." Thus, on remand, Justice Ginsburg stressed that "if race indeed account[ed] for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract-formation process."

Conclusion

While the Court's ultimate holding that but-for causation applies to section 1981 claims is uncontroversial, the Court's willingness to criticize earlier courts so openly is surprising. Normally, such criticisms are reserved for those decisions where the Court actually overrules prior precedent. Here, however, the Court criticized prior decisions and then relied on those decisions to reach its conclusion. Thus, the Court's preference for a strict textual statutory interpretation and its unwillingness to enforce statutory rights judicially may be worrisome for some observers. The Court's adherence to *stare decisis* by following controlling precedent—even precedent with which it disagrees—will reassure even the most ardent critics of the current, more conservative Court.

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