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COMMENT

THE IMPORTANCE OF SECTION 1981

Theodore Eisenberg†
& Stewart Schwab††

Section 1981,1 an important but obscure Reconstruction statute, is suddenly at the cutting edge of civil rights doctrine. On April 25, 1988, the Supreme Court ordered reargument in Patterson v. McLean Credit Union2 to reconsider Runyon v. McCrary,3 a twelve-year-old case applying section 1981 to private conduct. In Runyon, black children sued a segregated private school, claiming that the refusal to admit blacks denied them the "same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," as guaranteed by section 1981.4 The Supreme Court agreed, holding that section 1981 prohibits private persons, as well as the government, from racially discriminating in contractual relations.

In Patterson the section 1981 claim is for employment discrimination. Brenda Patterson, a black bank teller, claimed that her supervisor harassed her because of her race.5 Although title VII of the

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4 Section 1981 provides:
All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.


Civil Rights Act of 1964\(^6\) prohibits employers from racially harassing employees,\(^7\) it requires the plaintiff to follow an elaborate procedure before filing suit.\(^8\) Apparently Patterson filed too late to bring a title VII claim,\(^9\) so instead brought her racial harassment claim under section 1981. The Fourth Circuit, following prior authority, recognized that section 1981 supports a claim against private employers of racially discriminatory hiring, firing, or promotion because those acts "go to the very existence and nature of the employment contract."\(^10\) Nevertheless, the court of appeals refused to hold that racial harassment, standing alone, abridges the section 1981 right to "make" and "enforce" contracts.\(^11\) The Supreme Court granted certiorari to review this refusal.\(^12\) After oral argument, the Court ordered reargument on the broader question of whether Runyon itself should be reconsidered, that is, whether section 1981 applies to private parties at all.\(^13\)

In deciding whether to overturn Runyon, the Court will attempt to divine the intent of the Reconstruction Congresses. Some scholars believe the enacting Congresses never intended section 1981 to cover private discrimination.\(^14\) Even if the Court agrees, that would not end the issue, for it must also decide whether to overturn Runyon. The principle of stare decisis suggests that the Court should not overturn a statutory decision simply because it thinks the earlier Court holding was wrong. After all, if Congress disagrees with Runyon, it can pass a new statute limiting section 1981 to government conduct.\(^15\) Congress has shown no inclination to do so.

The question posed by the reargument in Patterson, then, involves conflicting considerations. How wrong (if at all) was Runyon, and how disruptive would it be for the Court to overrule it? The

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\(^9\) 805 F.2d at 1144 n.* ("Presumably for statute of limitations reasons, Patterson did not assert a claim under title VII of the Civil Rights Act of 1964 . . . ").
\(^10\) Id. at 1145.
\(^11\) Id. at 1145-46.
\(^12\) Patterson v. McLean Credit Union, 108 S. Ct. 65 (1987).
Justices dissenting from the order to reargue Patterson warn that the Court should be reluctant to overturn Runyon and other cases applying section 1981 to private discrimination because they have become "an important part of the fabric of our law."\(^{16}\)

This Comment neither examines the intent of the Reconstruction Congresses nor assesses the strength of the stare decisis argument. It instead examines the quantitative importance of section 1981 litigation in the "fabric of our law." As part of a larger empirical study of civil rights cases,\(^{17}\) we have examined the courthouse record in every section 1981 case filed in fiscal 1980-81 in the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia. Together, these three districts accounted for 7.9% of all nonprisoner civil rights claims filed in fiscal 1980-81,\(^{18}\) and they include the major cities of Los Angeles, Philadelphia, and Atlanta.\(^{19}\) Based on these data, we describe the number and type of claims brought under section 1981, and how these claims relate to claims brought under other civil rights statutes.

To our knowledge, this is the only existing data set on filed section 1981 cases.\(^{20}\) Actual operation of section 1981 is relevant both to assessing how embedded in the fabric of our laws the section has become and to any legislative initiatives that may precede or follow the Patterson decision on the merits.

We first examine the nature and number of section 1981 cases and compare their quantity and characteristics to cases under other civil rights statutes. Because much of the debate about section 1981 stems from its overlap with title VII, we then examine the extent of that overlap.

I

GENERAL CHARACTERISTICS OF LITIGATION UNDER SECTION 1981

Before the Court reassesses its prior interpretation of section

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\(^{17}\) Our initial findings from the study, largely on § 1983 cases from the Central District of California, are reported in Eisenberg & Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641 (1987) [hereinafter Eisenberg & Schwab, Reality]. The study's methodology is explained id. at 652-58. We expand our study of § 1983 cases in Schwab & Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 CORNELL L. REV. — (forthcoming 1988) [hereinafter Schwab & Eisenberg, Explaining].

\(^{18}\) Schwab & Eisenberg, Explaining, supra note 17.

\(^{19}\) On the representativeness of the case sample, see id.

\(^{20}\) The Administrative Office of the U.S. Courts, which keeps data on federal court cases, does not have a separate category for § 1981 cases, only for the broader categories of "Civil Rights—Jobs" and "Other Civil Rights." See Eisenberg & Schwab, Reality, supra note 17 at 660-61, 668-69.
1981, it is helpful to know what role section 1981 actions play in the federal civil rights program. Table I lists the number of non-prisoner cases filed that invoked each of several federal civil rights statutes in a one-year period in the three districts. It shows, not surprisingly, that the two dominant federal civil rights statutes are title VII, relied on in 433 cases, and section 1983, relied on in 506 cases. The Table also shows that, based on the number of filed cases invoking it, section 1981 is the third most important federal civil rights statute. Its invocation in 252 cases places it well behind section 1983 and title VII, but well ahead of all other federal civil rights statutes. Crude extrapolation from the three districts to a national figure yields an estimate of 3,190 section 1981 claims filed in one year. If, as some believe, a flood of section 1983 cases threatens our courts and cities, then civil rights litigation under section 1981, roughly half as great as litigation under section 1983, is also a major legal phenomenon.

### TABLE I

<table>
<thead>
<tr>
<th>Civil Rights Statutes</th>
<th>Number of Cases Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>42 U.S.C. § 1982</td>
<td>39</td>
</tr>
<tr>
<td>42 U.S.C. § 1983</td>
<td>506</td>
</tr>
<tr>
<td>42 U.S.C. § 1985 or 1986</td>
<td>171</td>
</tr>
<tr>
<td>Title VIII (housing) (42 U.S.C. § 3604)</td>
<td>15</td>
</tr>
<tr>
<td>Title VI (federally assisted programs) (42 U.S.C. § 2000d)</td>
<td>10</td>
</tr>
<tr>
<td>Title IX (sex discrimination in education) (20 U.S.C. § 1681)</td>
<td>2</td>
</tr>
<tr>
<td>Title II (public accommodations) (42 U.S.C. § 2000a)</td>
<td>1</td>
</tr>
<tr>
<td>Equal Pay Act (29 U.S.C. § 206(d))</td>
<td>27</td>
</tr>
<tr>
<td>Rehabilitation Act (29 U.S.C. § 791)</td>
<td>17</td>
</tr>
<tr>
<td>Age Discrimination Act (42 U.S.C. § 6101)</td>
<td>1</td>
</tr>
<tr>
<td>Age Discrimination in Employment Act (29 U.S.C. § 621)</td>
<td>43</td>
</tr>
</tbody>
</table>

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22 Arrived at by treating 252 filings under § 1981 as 7.9% of the number of national filings. *See supra* note 18 and accompanying text.
24 There is a noteworthy relationship between § 1981 and 42 U.S.C. § 1982 (1982), the other surviving remnant of § 1 of the Civil Rights Act of 1866. The Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), interpreted § 1982 to reach a private racially discriminatory refusal to sell a house. It thus opened the way for interpretation of section 1981 in *Runyon*. According to Table I, filings under § 1981 dwarf those under § 1982. This is because § 1982 establishes rights only with respect to inheriting, purchasing, leasing, selling, holding, and conveying property. Section 1981 reaches contracts without the limitation to property. Indeed, our data show that 21 of the 99 § 1982 cases also have a § 1981 count.
25 More than one statute may be relied on in a case.
Examining the outcome and procedural progress of section 1981 litigation reveals no distinctive pattern differentiating it from litigation under section 1983 and title VII. Table II compares the important characteristics of cases filed under the major civil rights statutes. Section 1981 plaintiffs are successful about as often as other civil rights plaintiffs. Moreover, the burden of section 1981 litigation as measured by discovery and trial activity is similar to the other two provisions. For example, Table II shows that section 1981 cases generated interrogatories in 46.5% of cases, while section 1983 cases produced interrogatories in 39.1% of the cases. Rates of trial are slightly higher in section 1981 cases but the rate at which court records reflect money settlements is lower than for the other two categories.

**TABLE II**

**Characteristics of Cases Filed Under Major Civil Rights Statutes, 1980-81, Three Districts**

<table>
<thead>
<tr>
<th>Case Characteristics</th>
<th>§ 1981</th>
<th>§ 1982</th>
<th>§ 1983</th>
<th>or 1986</th>
<th>Title VII</th>
</tr>
</thead>
<tbody>
<tr>
<td>Success</td>
<td>46.1%</td>
<td>55.3%</td>
<td>51.3%</td>
<td>46.7%</td>
<td>50.2%</td>
</tr>
<tr>
<td>Answer</td>
<td>83.0%</td>
<td>84.2%</td>
<td>73.9%</td>
<td>76.4%</td>
<td>80.5%</td>
</tr>
<tr>
<td>Interrogatories</td>
<td>46.5%</td>
<td>34.2%</td>
<td>39.1%</td>
<td>47.3%</td>
<td>42.6%</td>
</tr>
<tr>
<td>Hearing</td>
<td>36.9%</td>
<td>26.3%</td>
<td>37.7%</td>
<td>33.3%</td>
<td>32.1%</td>
</tr>
<tr>
<td>Prettrial conference</td>
<td>40.2%</td>
<td>31.6%</td>
<td>32.1%</td>
<td>38.8%</td>
<td>36.2%</td>
</tr>
<tr>
<td>Depositions</td>
<td>57.3%</td>
<td>44.7%</td>
<td>43.7%</td>
<td>55.2%</td>
<td>50.2%</td>
</tr>
<tr>
<td>Trial commenced</td>
<td>23.2%</td>
<td>15.8%</td>
<td>15.9%</td>
<td>18.2%</td>
<td>20.0%</td>
</tr>
<tr>
<td>Production of documents</td>
<td>29.5%</td>
<td>23.7%</td>
<td>23.0%</td>
<td>32.7%</td>
<td>24.8%</td>
</tr>
<tr>
<td>Money judgment</td>
<td>2.5%</td>
<td>2.6%</td>
<td>2.7%</td>
<td>1.2%</td>
<td>2.6%</td>
</tr>
<tr>
<td>TOTAL CASES</td>
<td>241</td>
<td>38</td>
<td>483</td>
<td>165</td>
<td>420</td>
</tr>
</tbody>
</table>

Our data also reveal the type of claims being brought under section 1981. On its face section 1981 reaches discrimination in all contractual relations, and published decisions recount a wide variety of claims. Overall, however, employment cases dominate. Ta-

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26 To account for plaintiffs' successes not reflected in court records, we adopt a broad, somewhat artificial measure of success. A case is successful if (1) the plaintiff wins after trial or on a motion for summary judgment; (2) the parties settle; (3) the court grants a stipulated dismissal; or (4) the plaintiff dismisses the case voluntarily. The broadness of the measure should not greatly distort the comparisons of success rates between groups of cases. For a discussion of the definition of success and problems in measuring it, see Eisenberg & Schwab, *Reality*, supra note 17, at 676-77, 681-83.

27 In Table II, we screen out transferred and pending cases, as well as cases suspended for statistical purposes. Its totals therefore differ from Table I's totals. The success rates for all categories are well below those for non-civil-rights litigation. *Id.* at 674, 677-83; Schwab & Eisenberg, *Explaining*, supra note 17.

28 *See* supra note 4.

29 *E.g.*, Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975) (dealings with
Table III breaks down the types of cases filed under section 1981 in the
three districts. Employment claims comprise 77% of all filings
under the statute. The only other cases with substantial filings in-
volve "police misconduct," which arise not from the contracts
clause but the equal benefit and like punishment clauses of section
1981. The dominance of employment claims suggests examining
the relationship between section 1981 and title VII.

### Table III

<table>
<thead>
<tr>
<th>Kind of § 1981 Case</th>
<th>No.</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment</td>
<td>195</td>
<td>77.4</td>
</tr>
<tr>
<td>Police misconduct</td>
<td>29</td>
<td>11.5</td>
</tr>
<tr>
<td>Housing or zoning</td>
<td>9</td>
<td>3.6</td>
</tr>
<tr>
<td>Job related speech</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Other</td>
<td>9</td>
<td>3.6</td>
</tr>
<tr>
<td>Schools</td>
<td>2</td>
<td>.8</td>
</tr>
<tr>
<td>Other contract</td>
<td>2</td>
<td>.8</td>
</tr>
<tr>
<td>Missing</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>252</td>
<td>100</td>
</tr>
</tbody>
</table>

II

**Relationship to Title VII**

There is some feeling that an employment race discrimination
claim under section 1981 is less compelling than other section 1981
claims because title VII, a comprehensive statute specifically
designed by Congress to remedy workplace discrimination, may
supply an alternate remedy. For example, Brenda Patterson could
have brought her case under title VII, had she met the procedural
prerequisites Justice Blackmun, dissenting from the order to
reargue Patterson, conceded somewhat defensively that "it is prob-
ably true that most racial discrimination in the employment context
will continue to be redressable under other statutes." Justice Stevens
likewise noted the substantial overlap between section 1981 and
Title VII in workplace discrimination claims. Both Justices em-

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30 For a case relying on the "equal benefits" and "like punishments" clauses of
§ 1981 as a remedy for police misconduct, see Mahone v. Waddle, 564 F.2d 1018 (3d
31 See supra note 9 and accompanying text.
32 Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1422 (1988) (Blackmun, J.,
dissenting).
33 Id. (Stevens, J., dissenting).
phasized the importance of section 1981 claims outside of employment.34

One might question this feeling that title VII renders section 1981 largely superfluous in employment cases. The Court itself has held, in Johnson v. Railway Express Agency, Inc.,35 that the remedies under title VII and section 1981 are "separate, distinct, and independent."36 Not only do title VII and section 1981 differ in substance37 and procedure,38 but there are important differences in the scope of coverage.39 Title VII only applies to employers with 15 or more employees,40 whereas section 1981 has no minimum size requirement.41 The Equal Employment Opportunity Commission estimates that this size limitation excludes about 10.7 million workers (14.4% of the workforce) and 86.3 percent of all establishments from title VII's coverage.42

Our data reveal considerable but not complete overlap between

34 Id. at 1422-23.
36 Id. at 461.
41 Section 1981 may not apply to minor and personal private employment relationships such as babysitters and live-in caretakers. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 n.11 (2d ed. 1983). Other employers subject to § 1981 but exempt from title VII may include bona fide private membership clubs, see id. at 1007, and the uniformed military services, see Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981).
42 These are unpublished estimates made by the Equal Employment Opportunity Commission (EEOC), applicable for the "early 1980s." Telephone interview by Bruce Kennedy, Public Services Librarian, Cornell Law School, of John Allmaier, Mathematical Statistician, EEOC (June 3, 1988). Published census data report "establishments" and subdivide establishments into those with fewer than 10 employees and those with 10 to 19 employees. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1984, at 3 (1986). Taking half of the number of employees and establishments in the 10-19 category and adding them to the number of employees and establishments in the fewer-than-10 category suggests that some 16 million workers (22% of the
title VII and section 1981. In 1980-81 in the three districts, plaintiffs filed 321 complaints of racial discrimination in employment. Two hundred seventy (84%) filed a title VII claim. Of the title VII claims, almost one-half (133) also had a section 1981 claim.

More intriguing are the 41 cases brought under section 1981 and not under title VII. Eleven of these cases were brought against government defendants and also relied on section 1983. These cases would not be affected by a reversal of Runyon. The 30 remaining cases would be affected by a Runyon reversal, however, particularly if they could not also be brought under title VII. We have no way of knowing whether plaintiffs in these cases were not covered by title VII or were simply avoiding title VII. If the former, reversal of Runyon would destroy almost 9 percent (30/321) of all racial employment discrimination claims. This is more claims than are brought under most civil rights statutes.

CONCLUSION

Has section 1981 become an important part of the fabric of American law? We think it has. If our data reflect the national experience, section 1981 is the third most frequently relied on civil rights statute. Even ignoring section 1981 cases with an overlapping title VII claim, section 1981 remains one of the most important civil rights statutes. In the employment area, it furnishes a remedy to the large class of workers not covered by title VII. We find that 9 percent of all race discrimination employment complaints have a section 1981 claim without a title VII or section 1983 count. Over 14 percent of the workforce and 86 percent of all employers are covered by section 1981 but not title VII.

A statute's impact cannot be measured solely by the cases filed under it. Its influence on primary behavior and its symbolic value also count. Although plaintiffs file relatively few nonemployment cases under section 1981 against private defendants, it does reach beyond the employment sphere to important matters such as in-workforce) work in establishments with fewer than 15 employees (82% of all establishments).

\[^{43}\] This differs from the 420 title VII cases in Table II because many title VII cases are not race cases.

\[^{44}\] Ten race discrimination employment cases relied on neither statute.

\[^{45}\] See supra Table I. Of cases that rely on both title VII and § 1981, we do not know the number of cases in which, due to procedural or substantive limitations, plaintiffs erroneously relied on title VII. Treating such spurious title VII claims as bona fide overstates the overlap between the two employment discrimination provisions.

\[^{46}\] Our data revealed six § 1981 private nonemployment race cases filed in 1980-81 in the three districts.
dependent contracting\textsuperscript{47} and private school segregation. Section 1981, as interpreted in \textit{Runyon}, makes it more difficult to run a segregation academy or any other segregated activity. Section 1981 has become an important symbol supporting the generalization that racial discrimination in this country is unlawful. Reinterpretation of section 1981 would open huge gaps in the federal antidiscrimination legislative program, presenting the specter of "whites only" signs for a broad range of activities.

Nevertheless, it is difficult to fault an institution for admitting its mistakes and seeking to correct them. In the field of race relations, the Supreme Court bears a particularly heavy responsibility to do so. For as surely as it helped launch the modern race relations revolution with \textit{Brown v. Board of Education},\textsuperscript{48} it contributed to our racially polarized society with its early restrictive interpretations of post-Civil War constitutional amendments and legislation.\textsuperscript{49} If the Court, sua sponte, reviews its interpretations of Reconstruction era statutory and constitutional enactments, one hopes that it will re-think controversial decisions unfavorable to civil rights litigants as well as favorable ones such as \textit{Runyon}.

\textsuperscript{47} Cf. \textit{Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980)} (title VII does not reach independent contractors).
\textsuperscript{48} 347 U.S. 483 (1954).
\textsuperscript{49} \textit{See James v. Bowman, 190 U.S. 127 (1903)} (invalidating portions of 1870 Act); \textit{Baldwin v. Franks, 120 U.S. 678 (1887)} (invalidating part of 1871 Act); \textit{Civil Rights Cases, 109 U.S. 3 (1883)} (invalidating Civil Rights Act of 1875); \textit{United States v. Harris, 106 U.S. 629 (1883)} (invalidating part of 1871 Act); \textit{United States v. Cruikshank, 92 U.S. 542 (1876)} (narrowly construing Enforcement Act of 1870); \textit{United States v. Reese, 92 U.S. 214 (1876)} (invalidating portion of 1870 Act); \textit{Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)} (narrowly construing privileges or immunities clause); \textit{Blyew v. United States, 80 U.S. (13 Wall.) 581 (1872)} (narrowly construing Civil Rights Act of 1866).