THE COLLISION OF EMPLOYMENT-AT-WILL, SECTION 1981 & *GONZALEZ*: DISCHARGE, CONSENT AND CONTRACT SUFFICIENCY

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> [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employes [sic] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employe [sic] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.[1]

> The simple characterisation [sic] of employment as a contract fails to grasp the nature of the social relations involved. In the first place, the ordinary nexus between manager and employee cannot be described as a contractual relation, for they have never actually made a contract together.[2]

I. INTRODUCTION

Since the beginning of the twentieth century, "the majority of employment relationships in the United States have been governed by the common law employment-at-will presumption."[3] Commentators both in

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1. Payne v. W. & Atl. R.R., 81 Tenn. 507, 518-19 (1884), *overruled on other grounds by* Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915).

2. Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L.J. 1, 3 (1986) [hereinafter Collins, *Market Power, Bureaucratic Power*].

3. John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 HARV. J.L.

the United States and abroad argue that employment-at-will constitutes an exercise of arbitrary power by individuals in dominant economic and/or bureaucratic positions against workers, whose mobility may be limited.[4] While a majority of jurisdictions recognize the common law doctrine of employment-at-will[5] as a default rule[6] that has evolved from a transnational conception of the common law,[7] it has arguably undergone substantial erosion over the past three decades,[8] consistent with the Anglo-American

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& PUB. POL'Y 555, 556 (1997); *see also* Andrew P. Morriss, *Developing A Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-at-Will*, 45 CASE W. RES. L. REV. 999, 1060 (1995) [hereinafter Morriss, *Developing A Framework*] (stating that "[s]ince the end of the nineteenth century, the default rule for the interpretation of indefinite employment contracts in the United States has been employment-at-will"); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 688 (1994) [hereinafter Morriss, *Exploding Myths*] (noting that employment-at-will became the default rule for interpreting individual contracts in the United States in the early part of the twentieth century). For an excellent and penetrating discussion of at-will employment, see DOUGLAS E. RAY, ET AL., UNDERSTANDING LABOR LAW 43-69 (1999).

4. *See, e.g.*, Collins, *Market Power, Bureaucratic Power*, *supra* note 2, at 2 (arguing that an employee's subordination stems from "inequality of bargaining power and the exercise of bureaucratic power").

5. Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048, 1049 n.11 (5th Cir. 1998) (noting that the "overwhelming majority of states recognize the traditional common law doctrine of employment-at-will").

6. Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 107 n.9 (1997) (noting that "[e]mployment at will is the default rule in every American jurisdiction except Montana, Puerto Rico, and the Virgin Islands").

7. For an excellent survey of the development of the at-will doctrine, see Gail L. Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167, 167-93 (1993). *See also* Morriss, *Exploding Myths*, *supra* note 3, at 683-745 (tracing and analyzing the rise of employment-at-will in various states). For a discussion of the employment contract and in particular the doctrine of employment-at-will from a law and economics perspective, see Ian Ayres & Stewart Schwab, *The Employment Contract*, 8 KAN. J.L. & PUB. POL'Y 71 (1999).

8. *See* REBECCA HANNER WHITE, EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION: ESSENTIAL TERMS AND CONCEPTS 7-50 (1998) (discussing the contract and tort erosion the at-will doctrine has faced in the past three decades). Increasingly, courts have developed the following exceptions to the at-will rule: public policy exceptions, employer liability for breaking either express or implied promises concerning discharge policies, and an implied covenant of good faith and fair dealing which requires employment contracts be interpreted in light of community standards of fair treatment. *Id.* at 13-50; *see also* RAY ET AL., *supra* note 3, at 45-67 (discussing common law and legislative erosion of the at-will doctrine); Cynthia L. Estlund, *Wrongful Discharge Protections In An At-Will World*, 74 TEX. L. REV. 1655, 1655 (1996) (noting that the at-will employment rule "has been drastically cut back in the last sixty years"); Frantz, *supra* note 3, at 558 n.9 (noting that the courts have developed three exceptions to the at-will employment rule); Morriss, *Exploding Myths*, *supra* note 3, at 682 (noting that "all but two states courts had limited employment at-will in a significant fashion by 1993"). For a discussion of an emerging challenge to the at-will presumption in the form of the evolution of a communitarian

conclusion[9] that the balance of power has shifted "heavily in favor of direct public regulation."[10] For some, this hauntingly appealing erosion confirms a growing consensus among legislatures and judges that restrictions should be placed on an employer's right to terminate the employment relationship.[11] Similarly, others suggest that given that contracts of employment, like most contracts, "engender relations of power,"[12] and given that the assent required to produce such contracts arises out of an inequality of bargaining power[13] (both bureaucratic and economic), at-will employment should be placed under review. For several observers then, employment-at-will continues to be "premised on antiquated notions of economic individualism and contractual freedom"[14] and remains contrary to the emerging consensus among major industrial countries.[15] Accordingly, the persistence of at-will employment in the United States reflects the fact that workers are mistaken about the law and misled by their employers at the time of hiring as to the risks of discharge.[16] This leads to the

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perspective in the context of the United Kingdom, see Harry Hutchison, *Evolution, Consistency and Community: The Political, Social and Economic Assumptions That Govern the Incorporation of Terms in British Employment Contracts*, 25 N.C. J. INT'L L. & COM. REG. 335 (2000) [hereinafter Hutchison, *Evolution, Consistency and Community*].

9. *See, e.g.*, Collins, *Market Power, Bureaucratic Power*, *supra* note 2, at 1-14 (discussing the unequal bargaining power of employers and employees).

10. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947 (1984); *see also* Heriot, *supra* note 7, at 193-94 (discussing the trend toward government regulation of the employment relationship).

11. *See* HANNER WHITE, *supra* note 8, at 7.

12. Collins, *Market Power, Bureaucratic Power*, *supra* note 2, at 1. For an examination and analysis of these and other views, see Harry Hutchison, *Subordinate or Independent, Status or Contract, Clarity or Circularity: British Employment Law, American Implications* 28 GA. J. INT'L & COMP. L. 55 (1999) [hereinafter Hutchison, *Subordinate or Independent, Status or Contract*]; Hutchison, *Evolution, Consistency and Community*, *supra* note 8, at 335-58.

13. Collins, *Market Power, Bureaucratic Power*, *supra* note 2, at 1-3.

14. Frantz, *supra* note 3, at 556; *see also* Janice R. Bellace, *A Right of Fair Dismissal: Enforcing A Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207, 207 (1983) (arguing that the United States should adopt statutory guarantees of fair dismissal as other highly industrialized nations have already done and proposing a system that would conform to world standards of unfair dismissal); Lawrence Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967) (arguing that the ancient notion of an employer's dominion over his employees is "incompatible with these days of large, impersonal, corporate employers"); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 491 (1976) (arguing that there is inadequate statutory protection against unjust dismissal of employees).

15. Summers, *supra* note 14, at 509-19 (surveying the protection against unjust dismissal in various European nations).

16. *See* Kim, *supra* note 6, at 110 (noting that critics of at-will employment believe that employees often have inadequate information and are likely misled by their employers). *But see* Morriss, *Developing A Framework*, *supra* note 3, at 1060 n.225 (stating that some commentators argue that employees tend to misunderstand their employer's obligations with

conclusion that inflated expectations prevent employees from recognizing the value of job security guarantees.[17] While these claims may be questionable, the underlying premise is widely accepted by critics of the at-will rule.[18]

On the other hand, if one accepts the view that "any employment relationship is a contractual one, based on mutual consent,"[19] then freedom of contract for employers and employees both advances individual autonomy and promotes the efficient operation of labor markets.[20] The wisdom of this view may or may not be confirmed by the fact that alternatives to at-will employment have not yet infiltrated this form of employment; employment-at-will still remains the predominant form of labor contracts in the United States.[21] Under this model the worker can quit when he or she wants to and subject to some exceptions, the employer can terminate him or her for any or no reason. While there may be reason to doubt the value of this type of employment relationship,[22] it is equally

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respect to discharge). It is possible that historically:

> the employment relation was conceived as generally having three dominant characteristics. First, it was a personal relationship between a dominant master or employer and a servient worker. Second, it was full-time, meaning that it was for the full normal work week. Third, it was generally assumed to continue for a substantial period.

Clyde W. Summers, *Contingent Employment in the United States,* 18 COMP. LAB. L.J. 503, 503 (1997). *See also* Hutchison, *Subordinate or Independent, Status or Contract, supra* note 12, at 56-57 (discussing the distinction between a "contract for service" and a "contract of service" and its importance for determining whether an employment relationship exists under British law).

17. Kim, *supra* note 6, at 110 (stating that some commentators believe that the various discharge restrictions that the law places on employers engenders a false sense of job security in employees).

18. *See, e.g.,* Kim, *supra* note 6, at 107-08 (discussing the perceived unfairness of the at-will rule, the lack of support for this rule among other industrialized countries, and its incompatibility with modern, contemporary and humane values); *see also* Blades, *supra* note 14, at 1405-10 (arguing that the employment relationship is unbalanced and destroys the freedom of the employees).

19. Heriot, *supra* note 7, at 167. In addition to a consent-based theory of contract, other variations include the notion that a contract reflects a promise. *See, e.g.,* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 7-27 (1981) (arguing that the promise principle is the moral basis of a contract).

20. *See* Epstein, *supra* note 10, at 951 (arguing that the widely held view that employment-at-will has outlived its usefulness is mistaken).

21. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, 358 (1998) (stating that "employment at will is the usual form of labor contract in the United States").

22. *See, e.g.,* John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment-at-Will,* 17 AM. BUS. L.J. 467, 491 (1980) (examining recent trends in at-will employment and noting a growing unrest with the prevalent common law tradition of employment-at-will); Gary Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine,* 36 SYRACUSE L. REV. 939, 989 (1985) (criticizing the New York rule known as "Wood's Rule" which preserves employment-at-

doubtful that such workers are without any protection at all.[23] Posner has argued that "[i]f the employer gets a reputation for arbitrarily discharging employees, he will have to pay new employees a premium. Since the employer thus cannot gain in the long run from a policy of arbitrary discharges—it is not effective predatory behavior—he might as well treat the employee fairly."[24] Moreover, limits on employee dismissal by management may add "a degree of rigidity to a relationship that had previously been very flexible."[25]

Much ink has been spilt both attacking and defending the employment-at-will doctrine. Frequently, the debate centers on direct threats in the form of statutory control over employer termination authority, or on judicial decisions which seek to overturn adherence to this doctrine on the ground that it represents an antiquated concept, or on arguments for intervention grounded in the notion of unequal bargaining power.[26] While the validity of these assaults may be doubtful,[27] alternative ways have been found to constrain the employment-at-will doctrine. Among them are various statutory enactments which govern employment terms (i.e., minimum wages and fair labor standards) and grounds for discharge (i.e., anti-discrimination statutes and public policy exceptions). It has been asserted that while "discrimination law makes only a limited formal incursion on employment at will, it arguably does impinge more significantly in an informal way. Employers who are sued under a federal discrimination statute have their best chance of winning if they can offer a good reason for their adverse employment actions."[28]

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will absent any statutory protection against dismissal); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1, 7-8 (1979) (arguing that the current at-will employment system in the United States is not consistent with a civilized society). *But see, e.g.,* Morriss, *Exploding Myths, supra* note 3, at 762-63 (defending the at-will rule as "a solution to an institutional problem which remains important today").

23. *See* POSNER, *supra* note 21, at 358-59 (arguing that employees have some job security as they develop firm-specific skills that make them more productive).

24. *Id.* at 358.

25. Heriot, *supra* note 7, at 194.

26. Two leading commentators have discussed, from an economic perspective, and dismissed the inequality of bargaining power argument as a basis for government intervention. *See* Ayres & Schwab, *supra* note 7, at 74-76 (discussing the issue of unequal bargaining power as a context for legal intervention in the employment market).

27. For a recent assessment of some of the arguments for and against employment at-will from a law and economics perspective, see Ayres & Schwab, *supra* note 7, at 71-83 (arguing that at-will employment lessens opportunism by employers and employees and the inequality of bargaining power argument fails to explain the fact that most employment relationships are at-will).

28. William R. Corbett, *The "Fall" of Summers, The Rise of "Pretext Plus," and The Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks,* 30 GA. L. REV. 305, 330 (1996). Courts might be

One observer provides this assessment of the contours of this dispute: "On one side are power, property, and prerogative—the ultimate manifestation of which is the legal doctrine known as employment at will. On the other side are the federal statutes and policies prohibiting discrimination in employment based on specified invidious characteristics."[29] While it is far from crystalline that such commentary amounts to a balanced appraisal,[30] it is unmistakable that employment-at-will is often referred to as a "feudal concept."[31] And yet, "it is difficult to imagine a more inapt comparison than that between feudal vassalage and employment at will."[32] Whatever it is, simple or complex, right or wrong,[33] employment-at-will can be perceived as a particular type of transaction:

> [T]he employee trades labor for wages; the employee allows an employer to control his or her activities during working hours in return for cold, hard cash. In that respect, the relationship is indistinguishable from any other market transaction-an exchange of goods or services freely entered into by the parties and nothing else.[34]

Given its rather maligned reputation, however, one might have predicted that employment-at-will would be overmatched when arrayed against positive statutory law enacted by Congress.[35] While that might be a

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suspicious of an employer's claim that it did not discriminate when it offers no reason for its action. Additionally, in cases where employers offer bad but not discriminatory reasons, they may not be believed. *Id.* at 330 (citing RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 148 (1992)).

29. Corbett, *supra* note 28, at 307.

30. While management prerogative may be an explanatory factor for discrimination, it is possible that Corbett's hegemonic concern for managerial prerogative is misplaced given the persistent attempts of some unions to exclude racial minorities from the workplace and the willingness of some union leaders to ignore the concerns of minorities. For an examination of the evidence drawn from the United States and South Africa, see Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 128-29 (1997). For a discussion of the capability of some union leaders and majorities to ignore the concerns of racial minorities in the postmodern world, see Harry Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 U. MICH. J.L. REFORM (forthcoming October 2000). For a discussion of the common law tradition which recognizes that employers possess managerial prerogative powers beyond the scope of the express term of the contract, see Harry Hutchison, *Evolution, Consistency, and Community*, *supra* note 8, at 340.

31. Heriot, *supra* note 7, at 167 (citing Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (stating that the common-law rule of employment-at-will is based on the ancient feudal system)).

32. *Id.*

33. *See generally* Estlund, *supra* note 8, at 1691 (arguing that employment-at-will undermines the effectiveness of important public policies).

34. Heriot, *supra* note 7, at 168.

35. Corbett, *supra* note 28, at 308 ("In the beginning, one might have predicted that

hasty conclusion, and while there may be elegant arguments for the economic efficiency of at-will employment,[36] the focus of this article is not whether at-will employment deserves to be assailed or safeguarded in some normative sense or whether the cacophonous voices illuminate or dissemble, but whether § 1981 applies or should apply to at-will relationships grounded in the notion of contract. A related question is whether employment-at-will, if considered a contract, embodies satisfactory contractual sufficiency to sustain a § 1981 claim. This issue is most poignantly illustrated in the context of a contested discharge. For example, can termination be characterized as a term of the contract (assuming one exists) or is it merely a default rule, which cannot logically be sustained as a term of the employment agreement by individuals and courts that are committed to the notion of a contract premised on grounds of consent? More specifically, do workers possess adequate knowledge about this asserted default rule and, if not, will the absence of knowledge negate the assertion that the term of employment is within the contract, and thus, alterable by § 1981? Answers to these questions raise ineffably ornery and potentially irresolvable doctrinal issues that may paralyze the application of § 1981 in some at-will situations.

Recently, the Seventh Circuit entered this doctrinal fray with dicta that confronts, but does not decide, these related questions.[37] While an incipient dispute has arguably developed regarding the reach and application of § 1981 to at-will employment, the operation of § 1981 should conceptually turn on state law.[38] Accordingly, federal courts will have to decide whether § 1981 applies, or should apply, within the context of a given state's jurisdiction. Significantly, *Gonzalez v. Ingersoll Milling Machine Co.* held that in order to bring a § 1981 claim "there must at least be a contract."[39]

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employment at will . . . would be overmatched when opposing the employment discrimination statutes, which are positive law enacted by Congress.").

36. *See, e.g.*, Epstein, *supra* note 10, at 955-76 (arguing that employment-at-will is economically efficient).

37. Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1034-35 (7th Cir. 1998) (indicating that an employment-at-will relationship will not sustain a § 1981 claim, but deciding the case on other grounds under Illinois law).

38. For example, in *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048 (5th Cir. 1998), the federal appeals court relied on decisions derived from *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). *Sabine* suggests that while an at-will employee can be fired for good, bad, or no cause, he or she cannot be fired for an illicit cause. Perforce, the *Fadeyi* court held that discrimination on the basis of race is not only illegal but against public policy, and therefore, an employee states a cause of action under § 1981 even if he or she is an at-will employee. *See Fadeyi*, 160 F.3d at 1051-52. *But see* Mungin v. Macklowe, No. 97 Civ. 6058, 2000 U.S. Dist. LEXIS 3811, at *6-*7 (S.D.N.Y. Mar. 24, 2000) (finding that an at-will employee cannot maintain a cause of action under § 1981).

39. *Gonzalez*, 133 F.3d at 1034.

And yet, even if an at-will relationship can be considered a contract under pertinent state law,[40] it may nonetheless provide an insufficient contractual relationship to support a § 1981 claim.[41] Since *Gonzalez*, several other circuits have taken up the mantle.[42] Three federal circuits have issued decisions which confirm that at-will employment provides an adequate basis to sustain a § 1981 action. On the other hand, a distinct split of opinion has emerged within the Second Circuit. A majority of courts in the Southern District of New York have held that employment-at-will is not a contract pursuant to New York state law.[43] By contrast, a minority of courts in the Southern District have held that, "while an at-will employee may not have a per se contract with his employer, he may have a contractual relationship with the employer for purposes of Section 1981."[44] The Second Circuit is in the process of settling a dispute among the district courts premised on whether, under state law, at-will employment is a contract at all within the meaning of § 1981.[45] Although an earlier Second Circuit case confirmed that a § 1981 plaintiff "must show both that he was subjected to intentional discrimination . . . and that this discrimination interfered with a contractual relationship,"[46] the meaning of a contract for the purpose of § 1981 has been placed squarely in issue by the surging dispute within this and other jurisdictions.

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40. McKnight v. Gen. Motors, Inc., 908 F.2d 104, 109 (7th Cir. 1990) (holding that while a contract at-will may end abruptly, it is a real and continuing contract, not a series of contracts).

41. *Gonzalez*, 133 F.3d at 1034. Confusingly, other courts assert that while employment-at-will is not a per se contract, it does possess satisfactory contractual sufficiency for a § 1981 claim. *See, e.g.*, *Mungin*, 2000 U.S. Dist. LEXIS 3811, at *3-*4.

42. *See, e.g*, Perry v. Woodward, 199 F.3d 1126, 1133 (10th Cir. 1999) (holding that an at-will employment relationship is a contract under New Mexico law); Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1018 (4th Cir. 1999) (holding that employment-at-will is considered a contractual relationship and may, therefore, serve as a predicate for § 1981 claims); *Fadeyi*, 160 F.3d at 1050 (stating that an at-will employment relationship is a contract under Texas law).

43. *See, e.g.*, *Mungin*, 2000 U.S. Dist. LEXIS 3811, at *6 (holding that an at-will employee cannot maintain a cause of action under § 1981); Lauture v. IBM, No. 98 Civ. 4882, 1999 U.S. Dist. LEXIS 20637, at *1-*2 (S.D.N.Y. May 25, 1999) (holding that an employee at-will cannot sue for wrongful discharge under § 1981(a), as amended); Bascomb v. Smith Barney, Inc., No. 96 Civ. 8747, 1999 U.S. Dist. LEXIS 353, at *11 (S.D.N.Y. Jan. 15, 1999) (holding that employment-at-will is noncontractual and therefore an at-will employee cannot state a claim under § 1981); Brown v. Sara Lee Corp., No. 98 Civ. 1593, 1998 U.S. Dist. LEXIS 18325, at *9 (S.D.N.Y. Nov. 19, 1998) (stating that the contract clause of § 1981 does not apply to at-will employees).

44. *Mungin*, 2000 U.S. Dist. LEXIS 3811, at *3-*5.

45. *Lauture*, 1999 U.S. Dist. LEXIS 20637, at *2-*3.

46. Krulik v. Bd. of Educ. of N.Y., 781 F.2d 15, 23 (2d Cir. 1986); *see also* Murray v. Nat'l Broad. Co., 844 F.2d 988, 995 (2d Cir. 1988) (holding that to maintain a cause of action under § 1981, a plaintiff must show intentional discrimination that interfered with the contractual relationship).

While most other circuits have yet to confront this question directly, the *Gonzalez* opinion, and other federal court decisions, are of considerable importance because they occur against a background that includes the highly criticized decision of the United States Supreme Court in *Patterson v. McLean Credit Union*,[47] as well as Congressional efforts to overturn that decision. Section 1981, part of a series of post-civil war statutes,[48] "prohibits racial discrimination in the making and enforcement of private contracts."[49] *Patterson* restricted the application of § 1981 to contract formation and enforcement issues and thus prohibits its application to terms and conditions. For some observers, this decision contributes to a long lineage that is rooted in the Court's "powerlessness to control employment at will."[50] On the other hand, the 1991 Civil Rights Act evinces a Congressional desire to substantiate and expand the application of § 1981 beyond the constraints imposed by the Supreme Court. Today, § 1981's proscriptions include "discrimination in the performance, modification, and termination of the contract, as well as in the benefits, privileges, terms and conditions of the contractual relationship."[51] Significantly, it applies both to "public and private discrimination."[52] Section 1981 can be a powerful tool for fighting intentional racial discrimination in employment,[53] especially when Title VII is inapplicable.[54] However powerful, § 1981, like the law generally, may be a rather weak instrument that is incapable of permanently resolving racial problems in society.[55]

I hope to illustrate that while the 1991 Civil Rights Act broadens the reach of § 1981, an important predicate remains: there must be both a contract and a sufficient contractual relationship to sustain a claim. Without an underlying contract or a sufficient contractual relationship, § 1981 remains impotent in the face of alleged discriminatory misconduct.

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47. 491 U.S. 164 (1989).

48. *See generally* 42 U.S.C. § 1981 (1991) (originally enacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144) (securing equal rights to make and enforce contracts).

49. *Patterson*, 491 U.S. at 171.

50. Corbett, *supra* note 28, at 353.

51. HANNER WHITE, *supra* note 8, at 115.

52. *Id.*

53. *Id.* at 116. Section 1981 only embraces claims of intentional discrimination and accordingly, the disparate impact theory remains unavailable. *Id.* It also extends to all contracts, not simply employment contracts. *Id.* at 115. In contradistinction with Title VII of the Civil Rights Act of 1964, an action under 42 U.S.C. § 1981 entitles the plaintiff to plenary compensatory damages as well as punitive damages in an appropriate case.

54. Title VII only applies to employers with fifteen or more employees. 42 U.S.C. § 2000-e(b) (1991).

55. Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 967 (1993) (arguing that the failure of civil rights statutes to address the "race question" hinders reform through judicial channels).

Employers thus have one pertinent and potentially devastating defense to employee claims: the absence of a contract or a contract term that can be altered by § 1981. Indeed, the significance of this issue may extend beyond the parameters of § 1981 and may implicate Title VII claims as well.[56]

Before considering the current state of the debate among the several circuits, Part II examines the *Patterson* decision, the statutory amendments to § 1981 derived from the 1991 Civil Rights Act, and a relatively early Seventh Circuit opinion. Part III examines the *Gonzalez* decision, a number of recent federal appellate cases, and a few cases from New York that have shaped the debate in the Second Circuit. Part IV analyzes selected arguments generated by both supporters and opponents of employment-at-will. I intend to demonstrate that the analyses used by freedom of contract advocates and employment-at-will critics may converge to exacerbate difficult doctrinal issues connected with the presumed application of the at-will canon as a default rule.

Relying primarily on the teaching of case law and doctrinal concerns, I reach the tentative conclusion that § 1981 does apply, and should apply, to at-will relationships despite potentially vigorous arguments to the contrary spawned by the notion of consent. In reaching this conclusion, I assert that while employment-at-will is an indefinite form of employment, it should nonetheless be seen as a contract. Throughout this discussion, I will largely concentrate on the identification of the law through conventional criteria as opposed to delving into a moral evaluation directed at normative concerns.[57]

II. *PATTERSON V. MCLEAN CREDIT UNION* AND THE 1991 CIVIL RIGHTS ACT

A. *Patterson v. McLean Credit Union*

Prior to the enactment of Congressional amendments, *Patterson v. McLean Credit Union*[58] restricted the scope of 42 U.S.C. § 1981. While the plaintiff proffered a number of allegations, the most pertinent issues

56. It might be possible for employers to argue that Title VII's protection of the terms and conditions of employment fail to apply to at-will employment relationships. *See* Letter from Lawyers' Committee for Civil Rights Under Law 4 (Dec. 16, 1999) (on file at 1401 New York Avenue, NW, Suite 400, Washington DC 20005-0400) (citing Hishon v. King & Spalding, Inc., 467 U.S. 69 (1984)).

57. This approach has been described as part of H.L.A. Hart's rule of recognition. *See, e.g.*, BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 36-37 (2d ed. 1999) (stating that Hart's rule of recognition is premised on determining which rules are part of our legal system).

58. 491 U.S. 164 (1989).

involved the application of § 1981 to her lawsuit. The employer laid off the petitioner, Brenda Patterson, a black woman.[59] After termination, she commenced an action in federal court and alleged a violation of 42 U.S.C. § 1981 because her employer had: (1) harassed her; (2) failed to promote her to an intermediate accounting clerk position; and (3) then discharged her because of her race.[60] The petitioner also claimed that this conduct amounted to an intentional infliction of emotional distress and, therefore, was actionable under North Carolina tort law.[61]

According to the Supreme Court, § 1981 includes two pertinent elements. The "most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief."[62] Thus, "[s]ection 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts."[63] Hence, by its terms, the statute does not extend to post-formation problems arising out of continuing employment, including the conduct of the employer in breaching contract terms, the imposition of discriminatory working conditions, or discharge. Such behavior does not implicate the "right to make" a contract but the performance of established contractual obligations.[64] Second, the guarantee that blacks enjoy "the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizens" encompasses "protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race."[65] This provision protects access to courts and prevents discrimination which would infect the legal process and preclude an employee from enforcing a contract right because of her race.[66] While this proscription applies to both public and wholly private efforts to impede access to courts,[67] it does not extend beyond conduct by an employer which impairs an employee's ability to enforce established contract rights through the legal process.[68]

Since the plaintiff's complaint attacked the conditions of her employment (racial harassment) she could not succeed unless: (1) the court

59. *Id.* at 169.
60. *Id.*
61. *Id.* at 169.
62. *Id.* at 176.
63. *Id.*
64. *Id.*
65. *Id.* at 177.
66. *Id.*
67. *Id.*
68. *Id.* at 177-78.

could be persuaded that the language of § 1981 compels the court "to look outside section 1981 to the terms of particular contracts and to state law for the obligations and covenants to be protected by the federal statute"[69] or (2) "the acts constituting harassment are sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner."[70] The Court declined to accept either broadened interpretation.[71] Therefore, the only questions that remained were whether the employer refused to enter into an employment contract because of racial animus or whether the victim was denied her contract rights because of race. While racial harassment, like other post-formation conduct, is actionable under Title VII's proscriptions against discrimination in the terms, conditions or privileges of employment, "racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."[72] The Court thus rejected the opportunity to construe § 1981 "as a general proscription of racial discrimination in all aspects of contract relations."[73]

On the other hand, the United States Supreme Court conceded the possibility that discrimination with respect to a promotion may give rise to an actionable claim if the nature of the promotion involves the opportunity to enter into a new contract with the employer.[74] Thus, § 1981 provides a basis for an actionable claim when there is an alleged discriminatory promotion and the promotion creates a new and distinct relationship between the employer and the employee.[75] Accordingly, Brenda Patterson

69. *Id.* at 182. In arguing that the Supreme Court should look outside the language of § 1981, the Solicitor General implied that the statute has no actual substantive content, but instead mirrored only the specific protections that were afforded under the law of contracts of each state. If this view was accepted, racial harassment in the conditions of employment becomes actionable only when it amounts to a breach of contract under state law. The Court declined such a construction because racial harassment amounting to a breach, like racial harassment alone, impairs neither the right to make nor the right to enforce a contract. *Id.* at 182-83.

70. *Id.* at 184. The Supreme Court declined Justice Brennan's proffered standard. *Id.*

71. *See id.* at 182-85.

72. *Id.* at 171.

73. *Id.* at 176.

74. *Id.* at 185.

75. *See id.* at 185-86. One issue considered was the soundness of the district court's jury instruction. In cases of alleged disparate treatment, the ultimate issue is whether the defendant intentionally discriminated against the plaintiff. The district court erred in its formulation requiring the plaintiff to prove that she was more qualified than the white employee who received the promotion. The correct order is that the plaintiff need only prove, by a preponderance of the evidence, that she applied for and was qualified for an available position for which she was rejected, and that after she was rejected the defendant either continued to seek applicants for the position, or filled the position with a white

may have an actionable claim premised on her failure to be promoted.

While even the *Patterson* Court "implicitly conceded that an at-will employee may maintain a cause of action under § 1981,"[76] it has been forcefully maintained that the Supreme Court engaged in a "needlessly cramped interpretation" of the statute.[77] This decision is, therefore, seen as a parsimonious reading of a civil rights statute which fails "to further our Nation's commitment to the eradication of racial discrimination."[78] The dissent would accordingly allow the racial harassment claim[79] and would decline to constrain the statute solely to a formation/enforcement posture.[80] The dissent deplored the *Patterson* Court's willingness to engage in a formalistic hermeneutical approach "antithetical to Congress' vision of a society in which contractual opportunities are equal."[81] Justice Stevens, writing separately, added: "An at-will employee . . . is not merely performing an existing contract; she is constantly remaking that contract."[82] In response to these and other contentions, Congress amended § 1981 in 1991 to reaffirm "that the right 'to make and enforce contracts' free from race discrimination includes . . . 'the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.'"[83] As we shall see, those amendments did not categorically settle all issues. New issues arise that must be sifted through. They include: contractual sufficiency, the meaning of the word "terms," and a determination of whether discharge is now subject to the amended statute.

While the focus of this article is *Gonzalez* and post-*Gonzalez* decisions, it is instructive to consider the Seventh Circuit's opinion in *McKnight v. General Motors, Inc.*,[84] which attempts to apply the *Patterson* decision. This opinion was issued after *Patterson*, but prior to the passage of the 1991 Civil Rights Act, by a federal circuit that is arguably disinclined to give statutes an expansive reading. In this case, a black male, McKnight, alleged that General Motors fired him both because of his race and in retaliation for his decision to file claims of racial discrimination against the company.[85] The plaintiff, an at-will employee, prevailed at trial

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employee. *Id.* at 186-87.

76. Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048, 1050 (5th Cir. 1998).

77. Patterson v. McLean Credit Union, 491 U.S. 164, 189 (1989) (Brennan, J., dissenting).

78. *Id.* (Brennan, J., dissenting).

79. *See id.* at 205-07(Brennan, J., dissenting).

80. *See id.* at 207-12 (Brennan, J., dissenting).

81. *Id.* at 189 (Brennan, J., dissenting).

82. *Id.* at 221 (Stevens, J., dissenting).

83. H.R. REP. NO. 102-40(II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 730-31.

84. 908 F.2d 104 (7th Cir. 1990), *reh'g denied*, 908 F.2d 104 (7th Cir. 1990).

85. *Id.* at 107.

but the judge declined to reinstate him.[86] While the case was before the Seventh Circuit, the Supreme Court resolved *Patterson*. Hence, the appellate court concentrated on whether termination because of race and retaliation for filing anti-discrimination complaints constituted actionable misconduct in light of the constraints *Patterson* imposed on § 1981 lawsuits that implicate post-formation conduct. Despite the possibility that dicta in *McKnight* "suggests that an employment at-will situation might support § 1981 claims,"[87] the Seventh Circuit held that § 1981 does not extend to conduct by the employer after the contractual relationship has been established.[88] Thus, McKnight's discriminatory discharge failed to infringe his right to make a contract. In so deciding, the court sides with the Fifth[89] and Ninth[90] Circuits and against the Eighth Circuit.[91] Notwithstanding that determination, it is important to note that Chief Judge Posner's opinion undeniably states that "[e]mployment at-will is not a state of nature but a continuing contractual relation."[92] Yet, even that conclusion seems to implicate only certain terms and conditions of the contract such as "'wages, benefits, duties, working conditions' and all other terms but one, the term of the employment."[93] If this constrained approach is found to be persuasive, an argument exists which suggests that § 1981 pertains to employment at-will with the exception of certain terms of employment.

B. Section 12 of the 1991 Civil Rights Act—the Current Status of Employment-At-Will and § 1981

While a comprehensive examination of the legislative record transcends the scope of this enterprise, the legislative history that accompanied the 1991 Civil Rights Act states that one of its purposes was to respond "to a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of . . . important federal laws [that ban discrimination in employment]."[94] While that statement is neither richly elegant nor suffused with meaning, "the existing text of section 1981 was redesignated as section 1981(a) and subsections

86. *Id.* at 117.

87. Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998) (questioning the viability of that conclusion in light of *Patterson*).

88. *McKnight*, 908 F.2d at 109.

89. *See* Carroll v. Gen. Accident Ins. Co., 891 F.2d 1174, 1177 (5th Cir. 1990); Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805, 807 (5th Cir. 1990).

90. *See* Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990).

91. *See* Hicks v. Brown Group, Inc., 902 F.2d 630, 638 (8th Cir. 1990).

92. *McKnight*, 908 F.2d at 109.

93. Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998) (citing *McKnight*, 908 F.2d at 109).

94. H.R. REP. NO. 102-40(II), at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 730-31.

(b) and (c) were added."[95]

Section 12 of the Civil Rights Act of 1991 adds subsection (b) to § 1981 and states: "For the purposes of this section, the term, 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[96] Perforce, "[s]ection 1981 now clearly prohibits discriminatory conduct that occurs both before and after the establishment of the contractual relationship."[97] Significantly, § 1981 as amended "continues to center on the protection of contractual rights."[98] Whilst "an employee can now seek redress for discriminatory conduct engaged in by her employer either before or after the formation of the employment relationship, any claim brought pursuant to section 1981 must still be supported by an underlying right of the employee to 'make and enforce contracts.'"[99] This of course raises two questions concerning the content of the relationship. First, is there really a contract or is the relationship something else? Second, if the employee enters into an agreement at-will, does such a relationship meet the contractual sufficiency[100] requirement of § 1981?

Significantly, in applying *Patterson* to conduct that occurred before the enactment of the 1991 Civil Rights Act, the Tenth Circuit stated unequivocally that § 1981 does not apply to conduct that can be distinguished from the plaintiff's right to form a contract.[101] The court declined to apply the 1991 Civil Rights Act retroactively to plaintiff's discharge claim because § 1981, without the amendments, does not extend to "breach of the terms of the contract or imposition of discriminatory working conditions."[102] In contrast, this court concluded that discharge decisions are included in the amended version of the statute.[103] Since one

95. Perry v. Woodward, 199 F.3d 1126, 1132 (10th Cir. 1999); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (1991) (explaining what the term "make and enforce contracts" refers to).

96. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (1991).

97. *Perry*, 199 F.3d at 1132.

98. *Id.*

99. *Id.*

100. For example, if the employment relationship simply conforms to the default rule of employment-at-will, is termination a contract term that is capable of being altered by the statute? More generally, what are the implications for employment-at-will agreements which fail to possess a term or condition which the plaintiff seeks to alter by enforcing § 1981? *See infra* pp. 240-241.

101. Hopkins v. Seagate, 30 F.3d 104, 106 (10th Cir. 1994).

102. *Id.* at 106 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989)). While the facts suggest that the plaintiff held an indefinite form of employment, employment-at-will was not explicitly litigated in this case.

103. *Id.* at 105.

purpose of the 1991 Civil Rights Act was to respond to *Patterson*, it may be useful to examine the state and application of the law prior to the issuance of the *Patterson* decision.

C. Federal Appellate Decisions Before Patterson

The following chart recaps relevant federal appellate case law as applied to employer conduct occurring before *Patterson* and the 1991 Civil Rights Act.

FEDERAL APPELLATE CASES IMPLICATING THE INTERSECTION OF EMPLOYMENT-AT-WILL AND SECTION 1981[104]

Citation	**Issue**	**Termination**	**Other Post-Formation Conduct**	**Holding Re: Viability Of § 1981 Claim**
Davis v. United States Steel Supply, 581 F2d 335 (3d Cir. 1978)	Statute of Limitations Period re: § 1981	Discharged for "won safety" after complaining about racial slurs	Racial Harassment	Complaint was timely with respect to § 1981 action
Guillory v. St. Landry Parish Police Jury, 802 F.2d 822 (5th Cir. 1986)	Did the district court (1) apply an improper legal standard to the § 1981 claim and	Discharged and was not rehired		For the employer on the merits of the § 1981 claim

104 This table is largely based on a LEXIS search conducted on March 24, 2000 in the Federal Courts File. The search terms included "employment-at-will" and "section 1981". Other appellate cases found in the search process include: Yatvin v. Madison Metro. Sch. Dist., 840 F.2d 412, 414 (7th Cir. 1988) (dealing primarily with claims brought under Title VII and § 1983); Siu v. Johnson, 748 F.2d 238, 239 (4th Cir. 1984) (dealing with a tenure dispute); Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982) (involving a Title VII claim); Cal. Brewers Ass'n v. Bryant, 444 U.S. 598, 601 (1980) (litigating a § 1981 claim, but the case was litigated primarily under Title VII); Muscare v. Quinn, 614 F.2d 577, 577 (7th Cir. 1980) (involving § 1983 and § 1988 claim); Pearson v. Furnco Constr. Co., 563 F.2d 815, 818 (7th Cir. 1977) (focusing on a Title VII claim); King v. Greenblatt, 560 F.2d 1024, 1025 (1st Cir. 1977) (dealing with the issue of reasonable attorney fees).

	(2) did the district court make a "clearly erroneous" factual finding?			
Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974)	Did Ford's failure to train adequately amount to a violation and was race therefore a factor in termination?	Discharged	Dissimilar treatment may violate § 1981 by showing that employment terms vary from those enforced against whites	Remanded to allow the plaintiff to present prima facie case of dissimilar treatment due to race within the meaning of § 1981
Archie v. Chi. Truck Drivers, 585 F.2d 210 (7th Cir. 1978)	Did his first amended compliant state a § 1981 claim?	Discharged allegedly for an error in loading freight	Error in loading freight	On remand, Archie could seek leave to amend and include his § 1981 claim
Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985)	Was there a pattern and practice of discrimination with respect to Coates and a class of workers which gives rise to a Title VII and § 1981 claim?	Individual plaintiff discharged for sleeping on the job	Alleged that blacks were treated less favorably than whites with respect to discipline; Alleged that the employer engaged in a plan to reduce black employment; In reality, failed to engage the § 1981 employment	For the defendant on the class and individual discrimination claim (little analysis of § 1981 claim, but § 1981 claim seems tenable)

Citation	Issue	Termination	Other Post-Formation Conduct	Holding re: viability of § 1981 Claim
			at-will intersection	
Poolaw v. City of Anadarko, 660 F.2d 459 (10th Cir. 1981)	Must the claimant claim a property interest in employment in order to bring a § 1981 claim?	Discharged and was not reinstated	Alleged discriminat-ory (1) job classification (2) promoti-onal practices and (3) rates of pay	Plaintiff stated a § 1981 claim and there was no need to state a property interest in job
McMillian v. Svetanoff, 878 F.2d 186 (7th Cir. 1989)	Has the claimant proved her § 1981 claim, consistent with *McDonnell Douglas* rule?	Discharged by new judge who terminated all at-will staff		Defendant provided legitimate non-discrimina-tory reason for the discharge and prevailed on viable § 1981 claim
Walker v. Consumers Power Co., 824 F.2d 499 (6th Cir. 1987)	Question of whether the employer violated § 1981 by discharging the plaintiff was tried at the trial level and the employer prevailed; No appeal on that issue	Discharged		Since plaintiff did not appeal § 1981 claim, the judgment of trial court in favor of employer stands

Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96 (3d Cir. 1987)	Did the defendant's general post-contract formation conduct, including the expulsion of the plaintiff, give rise to a § 1981 claim?	Dr. Nanavati was expelled from the hospital staff	Dr. Nanavati was referred to as a "nigger"	While the plaintiff can state a claim under § 1981, the verdict for the defendant was upheld pursuant to res judicata
Waters v. Six. Steel Workers of Int'l Harverster Co., 502 F.2d 1309 (7th Cir. 1974)	Were the backpay and attorney fees awarded for violation of Title VII and § 1981 appropriate?		Discriminat-ion in hiring, seniority, layoffs, and recall rights	Facts sufficient to ground § 1981 liability
Krulik v. Bd. of Educ. of N.Y., 831 F.2d 1184 (2d Cir. 1986)	Was the judgment n.o.v. issued against plaintiff's § 1981 claim correct? Was any evidence of intentional discrimina-tion adduced?	Plaintiff alleged a cause of action for constructive discharge	Not promoted, failure to transfer plaintiff along with staff, post-heart attack working conditions at issue	Because the appellate court found that there was no evidence of intentional discrimina-tion, it did not reach the question of whether he could establish a viable § 1981 claim

Citation	Issue	Termination	Other Post-Formation Conduct	Holding re: viability of § 1981 Claim
Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987)	Employment-at-will issue was not raised but discriminatory discharge was alleged	Construction discharge claim arose out of asserted hostile environment	Separate hostile work environment claim	Plaintiff can establish a § 1981 claim for constructive discharge
Adams v. McDougal, 695 F.2d 104 (5th Cir. 1983)	Can an indefinite term employee/ appointee state a claim regarding terms and conditions under § 1981?	Did not allege discharge	Alleged discrimination in the terms and conditions of his employment and in his employer's failure to rehire.	Plaintiff can establish a § 1981 claim regarding terms and conditions for indefinite term employment.

This summary indicates that both contracts at-will and post-formation conduct apparently furnished a basis for § 1981 relief for workers prior to *Patterson*. Discharge, racial harassment, rates of pay and other forms of allegedly dissimilar treatment, independent of contract formation and enforcement, have also supplied a basis for § 1981 claims for at-will employees. While these issues were not always directly decided by the courts, it is difficult to refute the conclusion that post-contract formation claims were sufficient to sustain a § 1981 claim prior to the date of the *Patterson* decision. After the *Patterson* opinion, and before the enactment of the statutory amendment to § 1981, a number of federal appellate cases applied *Patterson* retroactively to sustain the dismissal of lawsuits which sought to apply § 1981 to post-formation conduct including harassment or discharge.[105] If the goal of the 1991 Civil Rights Act was to restore the law

105. *See, e.g.*, Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1386-87 (10th Cir. 1991) (stating that discriminatory discharge is not actionable under § 1981 given the *Patterson* decision); Dabor v. Dayton Power & Light Co., No. 90-3307, 1991 U.S. App. LEXIS 2402, at *7 (6th Cir. Feb. 12, 1991) (per curiam) (finding that discharge remains outside of § 1981's protective umbrella); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990) (stating that "refusal to hire an employee on

to its previous state, and if the congressional purpose was actually enacted into law, then one can conclude that the statute encompasses at-will relationships and post-formation issues, including terms and conditions.[106] Still, the possibility exists that the federal courts may constrain that conclusion through certain interpretations of employment-at-will.

D. The Intersection of Employment-At-Will and the Amended Version of § 1981

As the next section demonstrates, the statutory amendments to § 1981 effectively preclude *Patterson* from being used as a dispositive employer defense to terms and conditions, and other post-formation claims with respect to all employment situations. Still, the statute must confront the question of whether or not employment-at-will and its default provisions fall within the amplified parameters of § 1981. *Gonzalez* asserted that when an at-will plaintiff claims that an employer interfered with the right to enter into an employment contract by not recalling her from a layoff, "there was no employment contract to interfere with" within the meaning of § 1981.[107] On the other hand, one judge, arguing for a broader interpretation of the statute, stated that § 1981 includes "the right to continue to work, in the face of racially discriminatory termination."[108] The next section attempts to clarify these disparate views.

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the basis of race is actionable under section 1981, whereas subsequent harassment or maltreatment of an employee on account of race is not."); Carroll v. Gen. Accident Ins. Co. of Am., 891 F.2d 1174, 1177 (5th Cir. 1990) (stating that retroactive application of *Patterson* precludes relief based on post-formation conduct including constructive discharge under § 1981); Lavender v. V & B Transmissions & Auto. Repair, 897 F.2d 805, 807-08 (5th Cir. 1990) (holding consistent with *Patterson* that since termination neither involves the formation of contracts, nor an opportunity to enter into a new contract, the plaintiff's discriminatory discharge claim is not allowed); Wilmer v. Tenn. Eastman Co., 919 F.2d 1160, 1163 (6th Cir. 1990) (finding that an employee at-will failed to state a § 1981 claim for discriminatory discharge after *Patterson*); *id.* at 1164-68 (Jones, J., dissenting) (stating that *Patterson* does not apply to a § 1981 claim for discriminatory discharge). *But see* Hicks v. Brown Group, Inc., 902 F.2d 630, 635 (8th Cir. 1990) (concluding that racially discriminatory discharge is actionable under § 1981 because discriminatory discharge was not at issue in *Patterson*).

106. It remains possible that the legislative purpose is incomplete or imprecise since the legislators have not considered all possible situations and therefore, "legislative intent, even if clearly known, will not answer all possible problems in applying rules." BIX, *supra* note 57, at 41 (discussing H.L.A. Hart's theories relating to legal positivism). A full discussion of the pertinent legislative history exceeds the scope of this article.

107. Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1034 (7th Cir. 1998).

108. McKnight v. Gen. Motors, Corp., 908 F.2d 104, 117 (7th Cir. 1990) (Fairchild, J., concurring in part, dissenting in part).

III. FEDERAL APPELLATE DECISIONS: THE SEVENTH CIRCUIT IN THE MIRROR OF THE OTHER CIRCUITS

The primary questions which confront federal appellate courts are: (1) whether employment-at-will is a contract or a contractual relationship and (2) whether employment-at-will retains satisfactory contract sufficiency so that plaintiffs can challenge otherwise valid terminations, or other post-contract formation conduct, within the meaning of § 1981. These two questions are different but related. Unhelpfully, they may at times be conflated. In any case, one might ask, for example, whether they can challenge their termination given that at-will employees do not have contractual rights to a specific duration of employment? In order to answer that question, it may be necessary to determine whether: (1) there is a contract within the meaning of § 1981 available to protect the worker and (2) there is a duration term of the agreement which is capable of being altered by the statute?

A. *Gonzalez v. Ingersoll Milling Machine Co. (7th Cir. 1998)*

In *Gonzalez v. Ingersoll Milling Machine Co.*, Juana Gonzalez, a Hispanic worker, claimed that: (1) she had an employment contract with her employer and (2) she was discriminated against with regard to a term or condition of that contract in violation of § 1981 by virtue of the fact that she was laid off while other similarly situated white employees were not.[109] She appealed from a district court opinion which granted the employer's motion for summary judgment. Since she "never challenged Ingersoll's . . . layoff and/or termination policies as discriminatory in and of themselves below . . . [she was] barred from raising them for the first time [at the appellate level]."[110] Consequently, this case failed to squarely address the viability of a § 1981 claim premised on at-will employment.

While agreeing that the district had improperly limited the scope of § 1981 by holding it inapplicable to any post-formation conduct, the Seventh Circuit affirmed the grant of summary judgment based on the dicta that no contractual relationship existed and that even if there was one, Gonzalez neglected to comply with her burden under *McDonnell Douglas Corp. v. Green.*[111] In order to reach that conclusion, one must first ascertain whether, under Illinois law, Gonzalez had an employment contract. The initial answer seemed to be no, but limits on that conclusion

109. *Gonzalez*, 133 F.3d at 1033. This case also included claims brought under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (1991), and for retaliation under 42 U.S.C. § 2000e-3 (1991).

110. *Gonzalez*, 133 F.3d at 1033.

111. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

remain.[112] Subsequently, the court stated that employment-at-will could be a contract, but § 1981 enforcement may require greater contract sufficiency than Gonzalez demonstrated.[113] The court insinuates that even if a contract exists, there must be a term which is capable of being modified.[114]

Illinois, like most American jurisdictions, accepts that "an employer-employee relationship without an explicit durational term is presumed to be an at-will relationship."[115] Unless the facts give rise to a clearly mandated public policy exception,[116] Illinois employers are allowed to discharge at-will employees "for any reason or for no reasons."[117] The court summarized it's position as follows:

> By its terms, section 1981 governs contractual relationships. Gonzalez's section 1981 claim lacks merit because there is no evidence to show that she had ever been employed under a contract with Ingersoll or that she was after her return in October, 1994. Section 1981 bars all racial discrimination with respect to making and enforcing contracts. 42 U.S.C. § 1981(a). In order to bring a section 1981 claim there must at least be a contract.[118]

Since Ms. Gonzalez "did not have any contractual rights regarding the term of her employment, she cannot claim that she was discriminated against with respect to [her] layoff."[119] Thus the Seventh Circuit, while not squarely deciding the issue,[120] and conceding that employment-at-will at least conceptually implicates § 1981, engaged in speculation which

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112. The court stated that there was no contract to interfere with and that Gonzalez failed to establish a contractual relationship. *Id.* at 1034. Additionally, the *Spriggs* opinion cites *Gonzalez* for the proposition that at-will employees have no contractual rights to specific terms of employment. Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1019 (4th Cir. 1999).

113. *Gonzalez*, 133 F.3d at 1034.

114. The Tenth Circuit in *Perry v. Woodward* concentrates on this aspect of the *Gonzalez* reasoning. *See* Perry v. Woodard, 199 F.3d 1126, 1133 (10th Cir. 1999).

115. *Gonzalez*, 133 F.3d at 1034 (citing Evans v. Gurnee Inns, Inc., 645 N.E.2d 556 (Ill. App. Ct. 1994)).

116. *Id.* (citing Talley v. Wash. Inventory Serv., 37 F.3d 310, 311 (7th Cir. 1994)).

117. *Id.*

118. *Id.*

119. *Id.* at 1035. In reaching this conclusion, the court cites several district court opinions that find no underlying contractual relationship, *see* Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 676 (E.D.N.Y. 1997) (stating that an at-will employee's § 1981 claim for layoff, due to company reduction in force, should be dismissed); Moscovitz v. Brown, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994) (stating that an at-will employee's § 1981 claim, arising out of his termination from positions with both police department and board of education, should be dismissed); Askew v. May Merch. Corp., No. 87-CIV-7835, 1991 U.S. Dist. LEXIS 1919, at *13 (S.D.N.Y. Feb. 20, 1991) (holding that the absence of a contractual relationship is fatal to an at-will employee's § 1981 claim).

120. The court stated that it need not determine whether the plaintiff's at-will status provided adequate support for her § 1981 claim because the claim would fail for other reasons. *Gonzalez*, 133 F.3d at 1035.

implicitly found that employment-at-will provides spongy, yet insufficient footing on which to base a § 1981 claim because her employment lacks adequate contractual sufficiency. This contention is apparently based on the view that since the parties failed to agree explicitly on the *length of the contract*, the default rule (the at-will presumption) is not a term of the contract. If it is not a term of the contract, then it cannot be altered by § 1981. On the other hand, as Restatement (Second) of Contracts, indicates, "[m]uch contract law consists of rules which may be varied by agreement of the parties. Such rules are sometimes stated in terms of presumed intention, and they may be thought of as implied terms of an agreement."[121] Since Illinois presumes and arguably supplies *a durational length*, then one can argue that there is in fact a term which is capable of being altered by § 1981. This possibility was effectively adopted in subsequent federal appellate cases.

B. Fadeyi v. Planned Parenthood Association of Lubbock (5th Cir. 1998)

The *Fadeyi* court reached its decision approximately ten months after *Gonzalez*. In *Fadeyi,* a black female employed by Planned Parenthood for seven years, alleged that her employer engaged in various acts of racial discrimination during the course of her employment.[122] Since neither the EEOC nor the Texas Commission on Human Rights had jurisdiction, her complaints were dismissed.[123] Planned Parenthood fired her two days after receiving notification of this decision.[124] In its defense to Fadeyi's § 1981 claim, Planned Parenthood asserted that her claim must fail because she could not show the existence of a contract, which is an

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121. RESTATEMENT (SECOND) OF CONTRACTS, section 5 cmt. b (1981). If the term is implied-in-law, it is sometimes referred to as a gap-filler. Such terms "are said to be imposed by the legal system for reasons of principle or policy rather than consented to by the parties." Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 822-23 (1992) [hereinafter Barnett, *The Sound of Silence: Default Rules and Contractual Consent*]. Barnett avers:

> That such implied-in-law terms are based on the parties' consent has long been thought to be pure fiction. If the publicly provided rules of contract law almost always operate where there is a gap in the manifestation of assent, then consequently a gap-filling provision must be coercively imposed on parties who have not, by assumption, consented to its imposition.

Id. at 823.

122. Among other things Fadeyi alleged that her employer engaged in discriminatory scheduling and distribution of office resources, giving her and another black employee an application for membership to the Klu Klux Klan. Ultimately, she was terminated from employment. Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048, 1048 (5th Cir. 1998).

123. *Id.*

124. *Id.*

essential element in a § 1981 action.[125] The district court accordingly granted summary judgment to Fadeyi's employer on the ground, that as an at-will employee she did not have a "contract" on which to base a claim under § 1981.[126] The sole issue on appeal was whether "a Texas employment-at-will relationship is a contract for the purposes of 42 U.S.C. § 1981 (1994)."[127]

Despite the widespread acceptance of the validity of employment-at-will in the United States, "[c]ase law addressing whether an at-will employee may bring an action under § 1981 is surprisingly sparse."[128] Until this decision no circuit court had squarely resolved this issue in the wake of *Patterson.*[129] In reviewing *Patterson* and the 1991 Civil Rights Act, the Fifth Circuit ultimately accepted the conclusion that a number of courts have found persuasive: "[t]o hold that at-will employees have no right of action under § 1981 would effectively eviscerate the very protection that Congress expressly intended to install for minority employees, especially those who, by virtue of working for small businesses, are not protected by Title VII."[130] Moreover, "Texas law firmly supports the contractual nature of an at-will employment relationship as well."[131] Citing the Texas Supreme Court with approval, the Fifth Circuit accepted that a "promise may be a valid and subsisting contract even though it is voidable . . . . A similar situation exists with regard to contracts terminable at will."[132] Perforce, "an employment-at-will relationship is a contractual, one even though either party can terminate it without cause at any time."[133] While this relationship is contractual that conclusion only answers part of the question. Beyond the contractual nature of the agreement, the question remained whether the contract was imbued with satisfactory contractual sufficiency to sustain a § 1981 action.

Additionally, the court referred to both the Texas Supreme Court and the Texas Legislature's emphasis on the importance of public policy when considering the breadth of the employment-at-will doctrine.[134] Given that

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1049.
129. *Id.* at 1048.
130. *Id.* at 1050. Numerous courts have accepted this view. *See, e.g.*, Mogdhadam v. Morris, 87 F. Supp. 2d 1255, 1262 (N.D. Fla. 2000); Pettis v. Alexander Graphics, 52 F. Supp. 2d 950, 953 (1999); Watson v. Lucent, 92 F. Supp. 2d 1129 (D. Kan. 1999). On the other hand, a significant number of courts within the Second Circuit have disagreed. *See, e.g.*, Mungin v. Macklowe, No. 97 CIV. 6058, 2000 U.S. Dist. LEXIS 3811, at *6 (S.D.N.Y. Mar. 24, 2000).
131. *Fadeyi*, 160 F.3d at 1050.
132. *Id.* at 1050-51.
133. *Id.* at 1051.
134. *Id.*

the Texas Supreme Court invalidated the termination of employees for refusing to perform illegal acts ordered by their employers, and that the Texas Legislature enacted exceptions to the at-will doctrine in order to protect such employees from discharge on the basis of race, sex, color, disability, religion and national origin, the Fifth Circuit concluded that while an at-will employee can be fired for good, bad, or no cause at all, they cannot be fired for an illicit cause.[135] Discriminating against an employee on the basis of race is illegal and against public policy because Congress, in amending § 1981, advanced such public policy concerns by creating a vehicle for "every employee to remedy racial discrimination in the workplace. Congress could not have meant to exclude at-will workers from the reach of § 1981, as to do so would be to allow use of the ubiquitous at-will doctrine 'as leverage to incite violations of our state and federal laws.'"[136] This conclusion departs, at least marginally, from the conclusion of one observer that employment-at-will is an employment relationship with no "legally enforceable safeguards against termination."[137]

The Fifth Circuit's conclusions warrant analysis. Discharging an at-will employee for racial reasons contravenes § 1981 only if it is illegal to terminate an at-will employee for such reasons. By its terms, the 1991 Civil Rights Act only precludes discrimination with respect to the making and enforcement of contracts. This includes the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[138] While § 1981 applies to discriminatory conduct that occurs both before and after the establishment of a contractual relationship, it does not explicitly add to the contract itself. Therefore, the pertinent question is whether § 1981 extends to something that, according to the *Gonzalez* court, may not be within the contract, namely the discharge of the employee. While Illinois law supplies a presumptive term of the contract, the pertinent issue becomes, how does Texas decide this question? Rather than directly confronting this doctrinal issue raised by *Gonzalez*, the *Fadeyi* court merely concluded that since employment-at-will is a contract, it is modifiable by § 1981, because a public policy exception exists in Texas,

135. *Id.* at 1051-52.

136. *Id.* at 1052. This conclusion is potentially problematic. For instance, surely it is the public policy of the United States to discourage discrimination on the basis of age. However, in the skillful hands of a lawyer it might be possible for an employee-at-will plaintiff, who is discharged at age thirty-eight and replaced by someone who is twenty-four years old, to argue that the language of the Fifth Circuit creates a public policy exception to at-will employment despite the fact that her age is less than the statutory age of protection. It is doubtful that this court wished to create an exception which devours the rule.

137. POSNER, *supra* note 21, at 693.

138. 42 U.S.C. § 1981(b) (1994).

regarding the discharge of employees at-will.[139]

C. *Spriggs v. Diamond Auto Glass (4th Cir. 1999)*

The *Spriggs* case was decided more than a year after the decision in *Gonzalez* was handed down. This case directly confronts two related doctrinal issues. First, is employment-at-will a contractual relationship?[140] Second, does at-will employment retain adequate contract sufficiency so that plaintiffs can challenge their otherwise contractually-permissible terminations under § 1981?[141] James Spriggs brought suit alleging racial harassment and retaliation in connection with his at-will employment relationship with Diamond Auto Glass.[142] Spriggs alleged that severe racial harassment amounted to his forced employment termination.[143] The district court determined that because at-will contracts "confer no rights that are enforceable in an action *ex contractu* . . . [they] cannot serve as the predicate for a Section 1981 action."[144]

The Fourth Circuit reversed the district court based on the notion that an at-will employment relationship can support a § 1981 action where the employer engaged in racial harassment that was sufficiently severe to compel the victim to end the employment relationship.[145] The court found the Congressional amendments to § 1981 persuasive:

> The 1991 Act amended § 1981 by adding, *inter alia*, a new, broad definition of "make and enforce contracts": For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.[146]

A § 1981 action must be therefore grounded "on purposeful, racially discriminatory actions that affect at least one of the contractual aspects listed in § 1981(b)."[147] Because at-will employment "is contractual, . . . such relationships may therefore serve as predicate contracts for § 1981 claims."[148] In reaching this conclusion, the Fourth Circuit found itself in disagreement not only with the lower court but a number of other district

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139. *Fadeyi*, 160 F.3d at 1050-52.

140. Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1018 (4th Cir. 1999).

141. *Id.* at 1019-20.

142. *Id.* at 1016.

143. Spriggs alleged that his supervisor, Stickell, repeatedly used racial slurs in the plaintiff's presence and at times they were directed toward him. *Id.* at 1017.

144. *Id.* at 1017.

145. *Id.*

146. *Id.* at 1017-1018; *see also*, 42 U.S.C. § 1981(b) (1994).

147. *Id.* at 1018.

148. *Id.* at 1018-19.

courts as well.[149] Helpfully, the court divided the contrasting cases into two distinct groups. The court stated that "[c]ases in the first group simply assume without extensive analysis that at-will employment relationships are not 'contracts' within the meaning of § 1981."[150] In the second group, the cases "acknowledge that the at-will employment relationship is a type of a contract, but conclude that because at-will employees have no contractual rights to specific terms of employment, they cannot challenge their contractually-permissible terminations under § 1981."[151] In other words, within the second group, the cases "presume that in addition to proving purposeful racial discrimination, a § 1981 plaintiff must prove that the discriminatory act *violated* a specific contract right."[152] This court disagreed with both groups of cases and their attendant doctrinal conclusions. Citing *Fadeyi* with approval, it stated that "[p]roving breach of the underlying contract is neither necessary to a successful § 1981 claim, nor, standing alone, sufficient to make out such a claim. An employer may breach a contract for non-discriminatory reasons; this, of course, would not give rise to a § 1981 claim."[153] On the other hand, "an employer may act in perfect accord with its contractual rights-for example, when it terminates an at-will employee-but it may still violate § 1981 if that action is racially discriminatory and affects one of the contractual aspects listed in § 1981(b)."[154] Since § 1981(b) specifically includes "termination of contracts" as an aspect of making and enforcing contracts protected in § 1981(a), and since the plaintiff alleged that purposeful, racially discriminatory actions by his employer were so severe that they caused a "discriminatory and retaliatory forced termination of employment," *Spriggs* stated a claim within the meaning of 42 U.S.C. § 1981.[155] Thus, at-will employment is a contract and the default provision is capable of being altered by § 1981.

D. Perry v. Woodward (10th Cir. 1999)

In the most recent case, decided almost two years after *Gonzalez*, the Tenth Circuit directly addressed, for the first time, the question of whether

149. *See, e.g.*, Hawkins v. Pepsico Inc., 10 F. Supp. 2d 548 (M.D.N.C. 1998); Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665 (E.D.N.Y. 1997); Moscowitz v. Brown, 850 F. Supp. 1185 (S.D.N.Y. 1994); Askew v. May Merch. Corp., No. 87 Civ. 7835, 1991 U.S. Dist. LEXIS 1919, at *3 (S.D.N.Y. Feb. 20, 1991).

150. *Spriggs*, 165 F.3d at 1019. *See, e.g., Moscowitz*, 850 F. Supp. at 1192.

151. *Spriggs*, 165 F.3d at 1019. *See, e.g.*, Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998).

152. *Spriggs*, 165 F.3d at 1019-20 (emphasis added).

153. *Id.* at 1020.

154. *Id.*

155. *Id.*

an at-will employee could bring a § 1981 lawsuit.[156] The court of appeals reversed the district court's grant of summary judgment on Elizabeth Perry's § 1981 claim[157] because the district court misapplied the substantive law when it concluded that an at-will employee cannot maintain a cause of action under § 1981.[158] Pursuant to New Mexico's default rules,[159] "she was an at-will employee."[160] Perry, a Hispanic women, alleged that she had been discriminated against on the basis of her race and retaliated against because she opposed unlawful employment practices under state and federal law. Perry was hired as Deputy County Clerk, and at the time of her hiring she understood the position to be at-will.[161] Her supervisor, Judy Woodward, "[b]egan making racist remarks to employees shortly after taking office as County Clerk."[162] Among other things, Ms. Woodward referred to Hispanics as "dirty Mexicans," indicated that "Mexicans smell bad," and stated that she did not like Hispanics because her ex-husband left her for a "hot blooded Mexican."[163] Moreover, she forbade Perry, who held hiring authority, to hire "any more Hispanics."[164]

The district court dismissed Perry's action for two reasons: (1) she failed to provide proof of intentional discrimination and (2) she was an at-will employee and was therefore, unable to establish a violation of § 1981.[165] The latter is most germane for our purposes. The defendants contended that § 1981 requires "the existence of a contractual relationship between an employee and her employer and . . . that this contractual relationship can only arise if an employee and her employer have entered into a written employment contract."[166] Therefore, the defendants "argue[d] that the absence of a written employment contract [was] fatal to [Perry's] section 1981 claim."[167] Consequently, "Perry [could not] maintain a cause of action under section 1981."[168]

The Tenth Circuit disagreed. It held that "Perry's relationship with her employer consisted of Perry's rendition of services in exchange for her

156. *See* Perry v. Woodward, 199 F.3d 1126, 1133 (10th Cir. 1999).

157. The court also reversed the district court's grant of summary judgment on Elizabeth Perry's state racial discrimination claim. *Id.* at 1142.

158. *Id.* at 1134.

159. Consistent with New Mexico law, employment is terminable "at will," unless there is an explicit contract of employment stating otherwise. *Id.* at 1132.

160. *Id.* at 1130.

161. *Id.*

162. *Id.*

163. *Id.* at 1130-31.

164. *Id.* at 1131.

165. *Id.* at 1132.

166. *Id.*

167. *Id.*

168. *Id.*

employer's payment of wages."[169] Perforce, "[u]nder New Mexico law, this is a contractual relationship."[170] Despite the fact that Perry could be terminated for a good or bad reason, this court declined to conclude that termination predicated on racial considerations is beyond judicial review.[171] Having reached that conclusion, the issue remained whether "the contractual relationship between Perry and her employer embodied sufficient contractual rights to support a cause of action for wrongful termination under section 1981."[172] The resolution of this question turned on the meaning of the word "terms." As previously considered in *Spriggs*, it can be argued that since "an at-will employment contract does not encompass termination terms, an at-will employee cannot bring an action for wrongful termination against her employer under section 1981."[173] Despite the fact that the statute governs the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship,"[174] the defendant effectively argued that "because an at-will employee may be discharged at any time, the terms of an at-will employment contract extend only to wages, benefits, duties, and working conditions, but do not encompass the time or manner of termination."[175] If this view is persuasive, "terminations for any reason or no reason are permissible under the terms of an at-will employment contract [and] employees cannot bring claims under section 1981 alleging wrongful termination."[176] On the contrary, the Tenth Circuit concluded that the "amendment of section 1981 to include a prohibition against racially discriminatory conduct in the termination of contracts has effectively altered the at-will employment relationship."[177] While an employer may "discharge an at-will employee for any reason or no reason . . . an employer can no longer terminate an at-will employment relationship for a racially discriminatory reason."[178] Citing a number of cases, the court had no difficulty with the conclusion that "the employment-at-will relationship encompasses sufficient contractual rights to support section 1981 claims for wrongful

169. *Id.* at 1133.
170. *Id.*
171. Among other things, the court cited *Hopkins v. Seagate*, 30 F.3d 104, 105 (10th Cir. 1994) for the proposition that the termination of contracts is included in the protections afforded by § 1981, as amended by the Civil Rights Act of 1991. *Perry*, 199 F.3d at 1132.
172. *Id.* at 1133.
173. *Id.*
174. Pub. L. No. 102-166(II), § 101(b), 105 Stat. 1071, 1071-72 (1991); *see also Perry*, 199 F.3d at 1132.
175. *Perry*, 199 F.3d at 1133.
176. *Id.*
177. *Id.*
178. *Id.*

termination."[179] Hence, the Tenth Circuit failed to find the contrary dicta in *Gonzalez* convincing.

E. The Second Circuit

Importantly, the Second Circuit is currently considering whether an at-will employee may bring suit under § 1981.[180] Significantly, several district courts within the Second Circuit have decided that "while an at-will employee may not have a *per se* contract with his employer, he may have a contractual relationship with the employer for purposes of Section 1981."[181] These courts largely rely on the opinion in *Fadeyi.*[182] However, a "vast majority of judges"[183] in the Southern District of New York, and others both inside and outside of this circuit, have declined to adopt the *Fadeyi* position[184] because they "hold that a contract is a prerequisite for a Section 1981 suit."[185] These judges have held that: (1) under New York law, "absent an agreement establishing a fixed duration, an employment relationship is presumed to be hiring at will, terminable at any time"[186] and (2) absent a clear Congressional mandate, § 1981 does not alter the termination "term" of the plaintiff's employment.[187] *Mungin* illustrates that state law jurisdictions which refuse to classify at-will employment as a contractual relationship constitute a barrier to anti-discrimination law under § 1981.[188] Importantly, both the *Spriggs* case and a number of New York cases, including *Mungin,* cite the *Moscowitz* case as a decision that concludes that at-will employment is not a contract.[189] *Moscowitz,*

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179. *Id. See, e.g.*, LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 774-77 (D. Neb. 1999); O'Neal v. Ferguson Constr. Co., 35 F. Supp. 2d 832, 837-38 (D.N.M. 1999); Williams v. United Dairy Farmers, 20 F. Supp. 2d 1193, 1201-02 (S.D. Ohio 1998).

180. *See* Lauture v. IBM, No. 98 Civ. 4882, 1999 U.S. Dist. LEXIS 20637, at *1-*2 (S.D.N.Y. May 25, 1999).

181. Mungin v. Macklowe, No. 97 Civ. 6058, 2000 U.S. Dist. LEXIS 3811, at *3-4 (S.D.N.Y. Mar. 24, 2000) (emphasis added).

182. *See id.* at *4. (citing Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048 (5th Cir. 1998)).

183. *See Lauture*, 1999 U.S. Dist. LEXIS 20637, at *2.

184. *See Mungin*, 2000 U.S. Dist. LEXIS 3811, at *5.

185. *Id.*

186. *Id.* at *6 (quoting Depetris v. Union Settlement Ass'n, Inc., 657 N.E.2d 269, 271 (1995)).

187. *See id.*

188. A number of New York cases accept this possibility. *See, e.g.,* Sutherland v. N.Y. State Dep't of Law, No. 96 Civ. 6935, 1999 WL 314186, at *11 (S.D.N.Y. May 19, 1999); Bascomb v. Smith Barney Inc., No. 96 Civ. 8747, 1999 WL 20853, at *4 (S.D.N.Y. Jan. 15, 1999); Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 675-76 (E.D.N.Y. 1997); Moscowitz v. Brown, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994).

189. *Moscowitz* has apparently been followed by *Mungin. See Mungin*, 2000 U.S. Dist. LEXIS 3811, at *6. In addition, *Moscowitz* has been cited by a number of courts for the

therefore, warrants analysis.

1. Moscowitz v. Brown (S.D.N.Y. 1994)

This lawsuit arose, at least partially, out of facts that occurred after *Patterson* but before the effective date of the 1991 Civil Rights Act.[190] The plaintiff, an Orthodox Jew, brought a § 1981 claim presumably based on his dismissal from two entities: the New York Police Department (NYPD) and the Board of Education.[191] His alleged termination from the NYPD occurred on January 14, 1991, well before the effective date of the 1991 Civil Rights Act. That statute took effect on November 21, 1991, and according to the United States Supreme Court does not apply retroactively.[192] However, under "the amended Civil Rights Act, 'make and enforce contracts' includes the termination of contracts, and therefore a claim of discriminatory discharge could arise under Section 1981 . . . based on his termination by the Board of Education, which occurred after November 1991."[193] On the other hand, this court found that "according to the plain language of Section 1981, plaintiff's claim would have to be based on a contractual relationship with the Board of Education . . . ."[194] Since his employment is governed by N.Y. Civ. Ser. Law § 65, which defines him as an employee at-will, a contractual relationship could not be found.[195] But that conclusion may simply amount to dicta as the court went on to state that the plaintiff "fails to specifically allege that his termination by the Board of Education was discriminatory"[196] as required by § 1981. Arguably, his claim merits dismissal on grounds that it fails to state a cause of action, even if § 1981 could plausibly apply to a discharge of an employee at-will after the effective date of the 1991 Civil Rights Act. If this criticism is persuasive, it becomes dubious that *Moscowitz* reliably states the law. On the other hand, another avenue of attack also exists in a leading New York case regarding employment-at-will. That is the topic of

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proposition that at-will employment fails to support a § 1981 claim. *See, e.g.*, Bishop v. Avera, 177 F.3d 1233, 1235 n.5 (11th Cir. 1999); Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998). *But see* Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1019 (4th Cir. 1999); EEOC v. Die Fliedermaus L.L.C., 77 F. Supp. 2d 460, 469 n.4 (S.D.N.Y. 1999). According to a search of the LEXIS on-line database conducted on April 27, 2000, *Moscowitz* appeared in 63 citing decisions.

190. The *Moscowitz* court relies on the United States Supreme Court's decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 300 (1994). That case held that the 1991 Civil Rights Act does not apply retroactively. *See Moscowitz*, 850 F. Supp. at 1192.

191. *Id.* at 1189.

192. *Id.* at 1192.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1193.

the next subsection.

2. Sabetay v. Sterling Drug (N.Y. 1982)

One of New York's leading cases on employment-at-will suggests that in the absence of an express agreement limiting its duration, an employment relationship is generally presumed to be terminable at-will.[197] The Court avered that the etymology of the employment-at-will doctrine in New York arose out of a perceived need "to afford employees the freedom to contract to suit their needs and to allow employers to exercise their best judgement with regard to employment matters."[198] While this gives the employer unfettered power to dismiss employees without cause,[199] it is far from clear that it means a contract does not exist. In fact, as the concurring opinion ably points out, "in every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part."[200] If this perspective is legitimate, a contract, albeit a limited one, exists. Thus, the *Moscowitz* conclusion that a contractual relationship does not exist becomes doubtful. Assuming the incoherence of the conclusion that New York employment-at-will fails to give rise to a contractual relationship, a question still remains as to the content and the contractual sufficiency of the employment agreement for purposes of § 1981. While the judgment that employment-at-will constitutes a contract may or may not be vindicated by the Second Circuit in pending litigation, it is possible to reach some tentative conclusions about the overall status of the debate concerning the collision of § 1981 and employment-at-will.

F. Analysis

It may be plausible to maintain that § 1981 should not apply to at-will employment where the pertinent state jurisdiction *declines* to accept that employment-at-will is a contract or where a contractual relationship is absent. However, if the jurisdiction accepts that employment-at-will is a contract, it is difficult to conclude that the employment relationship

197. Sabetay v. Sterling Drug, 506 N.E.2d 919, 920 (N.Y. 1987). According to a Shepard's search conducted on April 27, 2000, *Sabetay* has apparently been cited in 316 citing decisions. *See, e.g.,* Hanchard v. Facilities Dev. Corp., 651 N.E.2d 872, 874 (N.Y. 1995).

198. *Sabetay*, 506 N.E.2d at 920; *see also* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441 (N.Y. 1982) (observing that the employment-at-will rule originated in English law regarding master and servant relationships, but received its greatest boost from the *laissez-faire* attitudes of the nineteenth century).

199. *Sabetay*, 506 N.E.2d at 920.

200. *Id.* at 924.

remains unmodifiable by § 1981. If the federal circuit's prevailing understanding of the law prior to *Patterson* was accurate, if the 1991 Civil Rights Act successfully restored the law to its prior position, and if the federal circuit courts that have confronted this issue since *Gonzalez* are correct, then: (1) employment-at-will is arguably a contract within the meaning of § 1981; (2) contract sufficiency exists; and (3) post-contract formation conduct is alterable by the statute. Moreover, most recent federal district court opinions disagree with the implications of *Gonzalez*.[201] That is equally true for recent federal district opinions in the Seventh Circuit that have interpreted Illinois law.[202] While a substantial number of district court decisions in the Second Circuit may disagree, employment-at-will is arguably an adequate predicate to a § 1981 action. This conclusion finds widespread support from conventional sources which restate the holding in *Fadeyi* and conclude that "[t]o hold that at-will employees have no right of action under § 1981 would effectively eviscerate the very protection that Congress expressly intended to install for minority employees . . . who . . . are not protected by Title VII."[203]

A direct confrontation to this emerging consensus, derived from freedom of contract advocates, is the contention that the duration of an at-will employment relationship may not be a contract term that is compatible with the notion of contracts predicated on consent. Therefore, such an arrangement lacks adequate contractual sufficiency. An indirect confrontation is the notion that the at-will relationship may not be a contract because it is a form of status, in service to an oppressive ideology, or because workers are insufficiently aware of the default rule and it would be unfair to enforce the termination term. The next section analyzes these

201. *See, e.g.*, Price v. Wis. Serv., 55 F. Supp. 2d 952, 955 (E.D. Wis. 1999); Farrior v. H.J. Russell & Co., 45 F. Supp. 2d 1358, 1364 (N.D. Ga. 1999); Lane v. Ogden Entm't, Inc., 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998); Williams v. United Dairy Farmers, 20 F. Supp. 2d 1193, 1202 (S.D. Ohio 1998); Baker v. Am. Juice, Inc., 870 F. Supp. 878, 883 (N.D. Ind. 1994); Harris v. N.Y. Times, No. 90-C5235, 1993 U.S. Dist. LEXIS 1534, at *12 (S.D.N.Y. Feb. 9, 1993).

202. *See, e.g.*, Allen v. Chi. Transit Auth., No. 99-C7614, 2000 U.S. Dist. LEXIS 937, at *10 (N.D. Ill. Jan. 27, 2000); Riad v. 520 S. Mich. Ave. Assoc. Ltd., 78 F. Supp. 2d 748, 754-55 (N.D. Ill. 1999); Robinson v. SABIS Educ. Sys., No. 98-C4251, 1999 U.S. Dist. LEXIS 9065, at *32 (N.D. Ill. June 3, 1999); Jones v. SABIS Educ. Sys., 52 F. Supp. 2d 868, 875-76 (N.D. Ill. 1999). *But see* Saez v. Chi. Hous. Auth., No. 98-C7970, 1999 U.S. Dist. LEXIS 4109, at *6 (N.D. Ill. June 14, 1999) (mem.) (dismissing a § 1981 claim which failed to allege a violation of contractual rights); Payne v. Abbott Lab., No. 97-C3882, 1999 U.S. Dist. LEXIS 2443, at *7 (N.D. Ill. Mar. 2, 1999) (mem.) (citing as persuasive authority Gonzalez v. Ingersoll Milling Machine Co., 133 F. 3d 1025 (7th Cir. 1998)).

203. Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048, 1050 (5th Cir. 1998). Numerous courts rely on *Fadeyi*. *See, e.g.*, *Price*, 55 F. Supp. 2d at 955-56; Knight v. Palm City Millworks, 78 F. Supp. 2d 1345, 1346 (S.D. Fla. 1999); Lazoro v. Good Samaritan Hosp., 54 F. Supp. 2d 180, 185 (S.D.N.Y. 1999); Watson v. Lucent Tech., No. 98-2494-GTV, 1999 U.S. Dist. LEXIS 14118, at *5 (Kan. Aug. 20, 1999).

claims. It is possible that whether direct or indirect, these diverse claims generated by commentators may ultimately converge with the judgment of courts, which remain skeptical about the intersection of § 1981 and employment-at-will.

IV. CONSENT, STATUS AND CONTRACT SUFFICIENCY--LESSONS FROM THE COMMENTATORS

A. Analysis

It has been argued that "[b]ecause employment at will often is referred to by one of its many aliases, such as management prerogatives, it has not always been recognized."[204] And yet, it is asserted that whatever it is called, it "trumps employment discrimination law."[205] Consistent with this perspective, the notion of worker assent, express or implied, becomes doubtful as "inequality of bargaining power leads to the creation of forms of oppressive subordination under the disguise of freely chosen agreements."[206] Admittedly, the at-will doctrine appears to be:

> beset on every side with both its lineage and pedigree being challenged and 'exceptions' to the doctrine being recognized in all jurisdictions with increasing frequency. Among the recognized exceptions are wrongful discharge in violation of public policy, intentional infliction of emotional distress, invasion of privacy, breach of the covenant of good faith and fair dealing, detrimental reliance or promissory estoppel, and implied-in-fact contracts.[207]

Despite these exceptions, the vitality of the default rule endures. One argument against the elimination of the at-will doctrine is judicial reluctance to become "involved in evaluating employers' discharge decisions."[208] One observer contends that employment-at-will originated in judicial incompetence to assess the performance of discharged employees.[209] The resilience of this perspective provides a basis for the

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204. Corbett, *supra* note 28, at 308.

205. *Id.* at 311.

206. Collins, *supra* note 2, at 1.

207. Corbett, *supra* note 28, at 313-14 (footnotes omitted). Another possible exception is the imposition on employers of an extracontractual duty to investigate before discharging. *See* Michael D. Moberly, *Negligent Investigation: Arizona's Fourth Exception to the Employment-At-Will Rule,* 27 ARIZ. ST. L.J. 993, 998 (1995); *see also* Kim Sheehan, Comment, *Has Employment-at-Will Outlived its Usefulness? A Comparison of U.S. and New Zealand Employment Law,* 28 CAL. W. INT'L L.J. 323 (1997) (comparing employment-at-will to "affirmative rights" granted by New Zealand's labor laws).

208. Corbett, *supra* note 28, at 317.

209. Morriss, *Exploding Myths, supra* note 3, at 713, 752–53.

allegation that the at-will doctrine stands as an impregnable barrier to the adequate enforcement of anti-discrimination law.[210] From that perspective, one may be excused for concluding that employment-at-will, unless displaced, precludes anti-discrimination law in general,[211] and § 1981 in particular, from having any significance. This article's inspection of federal appellate cases suggests otherwise. It seems clear that most federal appellate cases, both before *Patterson* and after the 1991 Civil Rights Act, unmistakably accept the application of § 1981 to the employment-at-will relationship. This application extends beyond a simple concern for the litigant's capability to "make and enforce" a contract. This determination is driven by, among other things, an unwillingness to vitiate the congressional purpose which seeks to extend protection to employees who may not be covered by Title VII. Indeed, the precise language of the statute explicitly extends to post-formation conduct, including termination.

Furthermore, if Richard Epstein's eloquent defense of freedom of contract and contract at-will is to be taken seriously, it needs to be grounded in the notion that the employment relationship is, rather emphatically, a contract entered into freely by private parties. First, if "any employment relationship is a contractual one,"[212] the parties "should be permitted as of right to adopt this form of contract if they so desire."[213] Second, Epstein treads on shakier ground in asserting that the at-will canon "should be respected as a rule of construction in response to the perennial question of gaps in contract language: what term should be implied in the absence of explicit agreement on the question of duration or grounds for termination?"[214] While defenders of at-will employment oppose statutory interference with such a relationship on numerous grounds, their principled defense is not based on the view that there is no contract. On the contrary, they argue that it is simply a limited contract.

Still, as we have seen, the implication of the default rule raises its own complications. If the parties have not explicitly agreed to a termination term, a court is allowed to engage in an interpretation of indefinite employment grounded in the presumed applicability of the default rule. At least two possibilities present themselves.[215] As alluded to earlier, it might be possible to contend that the default rule is not a term of the contract,

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210. Corbett, *supra* note 28, at 314 n.34 and accompanying text.

211. *See* Corbett, *supra* note 28, at 330 ("[I]f the laws are to have any practical significance, they must displace employment at will to the extent necessary to effectuate the goals of the laws.").

212. Heriot, *supra* note 7, at 167.

213. Epstein, *supra* note 10, at 951.

214. *Id.*

215. A third possibility is that indefinite employment fails to constitute a contract at all. *See* Gonzalez v. Ingersoll Milling Mach. Co., 133 F. 3d 1025, 1033 (7th Cir. 1998) (dismissing a § 1981 claim because, among other things, there was never a contract).

because: (a) it may not have been consented to, or (b) the implied rule is simply a rule that fails to become part of the contract. If either possibility is persuasive, it is conceivable that § 1981 remains inapplicable to discharge because there is no term[216] of the contract to modify. On the other hand, if employment-at-will is a contract, it is precisely because of its indefinite nature that the default rule enters into the putative agreement. If so implicated, one can robustly argue that it is a specific term, and if it is, the explicit parameters of § 1981 render the contract terms (including termination) modifiable.

Parenthetically, the parties could, through mutual assent, create a contract which allows for termination-at-will. In such a case discharge is a term of the contract and uncontroversially becomes alterable by statutory provisions. Therefore, § 1981 can modify the termination term of the contract so that employees may sue for wrongful discharge within the meaning of the statute.

Assuming that this examination of the foregoing possibilities is completely sound, those who claim that § 1981 remains, and should remain, inapplicable to *all* employment-at-will situations must confront the possibility that such arguments amount to an ideological commitment to at-will relationships as opposed to a claim that is premised on logic. Paradoxically, commentators, both in the United States and abroad, who oppose employment-at-will on the grounds that it "leads to the creation of forms of oppressive subordination under the disguise of freely chosen agreements,"[217] and that it fails to constitute a contract at all, must confront the possibility that arguments premised on the illegitimacy of employment-at-will as a form of contract[218] inescapably establish grounds for the

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216. "A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations." RESTATEMENT (SECOND) OF CONTRACTS, Section 5(2) (1981). Comment (a) states that agreed terms are the "terms of a promise or agreement . . . expressed in the language of the parties or implied in fact from other conduct. Both language and conduct are to be understood in the light of the circumstances . . . ." *Id.* Comment (b) states that:

> [m]uch contract law consists of rules which may be varied by agreement of the parties. Such rules are sometimes stated in terms of presumed intention, and they may be thought of as implied terms of an agreement. They often rest, however, on considerations of public policy rather than on manifestation of the intention of the parties . . . . [S]uch rules are stated in terms of the operative facts which make them applicable."

Id.

217. Collins, *Market Power, Bureaucratic Power, supra* note 2, at 1.

218. *See, e.g.*, PAUL DAVIES & MARK FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 18 (1983)(stating that employment is "an act of submission, in its operation it is a condition of subordination . . . however much . . . concealed by that indispensable figment of the legal mind known as the 'contract of employment'"), *as cited in* Hutchison,

inapplicability of § 1981 to all "employment-at-will" relationships posited on the default presumption.[219] If there is no contract at all, then § 1981 seems clearly inapplicable. If there is an inadequate contractual relationship it may be difficult to find a term for § 1981 to alter. In reality, the desire of some observers to respect the freedom of contract "rights" of individuals predicated on consent, and the inclination of others to question whether informed consent actually exists in at-will relationships, converge in a doctrinal morass which calls this form of employment into question, despite it clear acceptance by post-*Gonzalez* courts. Contract sufficiency, grounded in adherence to doctrinal rigor, is thus placed at issue.

In the next subsection I examine this possibility by an example driven by the intersection of the analysis of one leading proponent of the freedom of contract, Professor Barnett, and the empirical insight of one leading critic of employment-at-will, Professor Kim. This example illustrates the possible doctrinal impediments to clarity regarding the meaning of contractual sufficiency in at-will relationships that have previously been alluded to in more general terms.

B. Doctrinal Concerns Grounded in Default Rule Presumption: Professor Barnett's Consent-based Contract Regime in the Mirror of Professor Kim's Empirical Research

If employment-at-will is the default rule, and if the "presence of consent to be legally bound is essential to justify the legal enforcement of any default rules,"[220] doctrinal issues, generated by the possible absence of informed consent, may emerge. Specifically, if a contract consists of enforceable promises, as Professor Barnett lucidly suggests, and if we seek to "distinguish between enforceable and unenforceable promises by looking to see if the parties to an agreement manifested their intention to create or alter their legal relations,"[221] then it is possible to argue that an at-will relationship fails to meet the contract sufficiency requirement. In order to understand why this might be so, one must examine Professor Kim's analysis of worker perceptions and knowledge of legal protection against termination in an at-will world. If workers fail to have satisfactory knowledge about the absence of legal protection that they possess, as Professor Kim contends,[222] they cannot give the informed consent

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Subordinate or Independent, Status or Contract, supra note 12, at 58 n.15.

219. Even when employment-at-will arises out of the explicit consent of the parties, some might argue its illegitimacy because of the presumed inequality of bargaining power.

220. Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 827 (1992) [hereinafter Barnett, *The Sound of Silence*].

221. Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1027 (1992) [hereinafter Barnett, *Some Problems with Contract as Promise*].

222. Professor Kim focuses most of her criticism toward efficiency arguments, which

necessary to apply the default rule of employment-at-will.[223] It may be difficult to assert that workers have, in general, manifested an intention to be legally bound by a rule of which they may be unaware.[224] Thus, there may not be a contract term with respect to duration. If that is true, it is difficult to conceive how § 1981 alters what is arguably absent from the agreement. Furthermore, Professor Barnett affirms that a consent-based contract law regime may be incompatible with gap-filling terms that are often implied-in-law. Such terms may be implied on grounds of principle

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allegedly favor the at-will rule. She argues that "the at-will rule draws force from the prevalence of at-will contracts in the real world and the faith that the observed market outcome reflects an efficient bargaining process." Kim, *supra* note 6, at 147. She asserts that this faith, "rests on a number of assumptions, including the assumption that workers have full information, or at least sufficient information to protect their own best interests in the contracting process." *Id.* If her study is verifiable and replicable, it may cast doubt on that assumption. Her study indicates that workers overestimate their legal rights and thus, believe that the law provides greater protection against unjust discharge than it does. *Id.* Professor Kim then states that:

> [r]ather than assuming that both employer and employee act "in full possession of their faculties and their own interests," the model of the labor market – at least as to job security terms – must take into account that at least one of the parties is likely seriously misinformed about the background rules against which bargaining takes place.

Id. (quoting Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1098 (1989)).

If this analysis is persuasive, then one could question whether there was any intent by employees to be bound. Without such intent, and consistent with consent theory of contract law, then one might question whether there is adequate contractual sufficiency to sustain a § 1981 claim of discriminatory discharge. For a more complete discussion of the consent theory of contract law, see Barnett, *Some Problems with Contract as a Promise*, *supra* note 221, at 1027-30; *see also* Randy Barnett, *The Sound of Silence*, *supra* note 220, at 821 (discussing how contracts are often incomplete due to lack of knowledge and interest of the parties). For an expanded discussion, see *infra* note 207.

There may be reason to doubt Professor Kim's conclusions. First, her empirical data is based on a survey of 330 unemployed workers. It is possible that such a group fails to typify a representative cross section of workers who are currently employed. Second, worker perceptions may reflect the actual practice of most employers as opposed to the legal rights of employers. On the latter point see POSNER, *supra* note 21, at 358 and accompanying text (discussing the market forces that cause employers to treat employees fairly).

223. For an argument in favor of employment-at-will, premised at least in part on efficiency, see, e.g., Epstein, *supra* note 10, at 951-76. In addition to the efficiency test, he offers two additional arguments in support of at-will arrangements: intrinsic fairness and distributional consequences. *Id.*

224. This might be seen as a special variant of the notion that all contracts are, by necessity, incomplete to some degree. The inevitability of incompleteness reflects . . . both out "relative ignorance of fact" and "our relative indeterminancy of aim. These two causes of contractual incompleteness reflect in turn two fundamental problems addressed by liberal principles of justice: the problems of knowledge and of interest. Barnett, *The Sound of Silence*, *supra* note 220, at 823.

or policy, rather than consent, and amount to coercive imposition on a party or parties "who have not . . . consented to its imposition."[225] If this view is persuasive, once again, it may be doubtful that there is a term of the contract to modify. Professor Barnett concedes that under a contract regime, which operates functionally on grounds of consent, default rules may be compatible with consent, only when subjected to imperative caveats. He avers: (a) that under certain circumstances a decision to remain silent is sufficient to permit the default rules to operate as an expression of consent[226] and (b) that "even when parties cannot be said to have consented by their silence to the enforcement of particular default rules, enforcement may still be justified on grounds of consent when default rules are chosen to reflect the commonsense or conventional understanding of most parties."[227]

Whatever the value of this approach, it seems dependent, among other things: on the presence of low information costs in learning the content of default rules, on low costs in contracting around them, and on the notion that default rules reflect the parties' shared tacit assumptions.[228] While this summary fails to capture the complete elegance of Barnett's theory, if his overall analysis remains sound and if at-will employment as a default rule is implicated by his contentions,[229] it leads to problematic conclusions when compared with Professor Kim's empirical research. Workers apparently lack sufficient knowledge about the default rule, and their commonsense

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225. *Id.* at 822-23 and accompanying text.

226. *Id.* at 827. According to Barnett:

> [t]he institution of contract is invoked by the manifestation of intention to be legally bound. Without this threshold manifestation of consent, there is no justification for enforcing contractual obligations. So long as the costs of learning the content of default rules and of contracting around them are sufficiently low, silence by the parties in the face of a default rule can constitute consent to its imposition.

Id. at 897.

227. *Id.* at 827. Barnett avers that:

> [c]onventionalist default rules bring objective manifestations and subjective assent closer together in two ways: (a) they capture the meaning of the parties' shared tacit assumptions so that enforcement is more likely to reflect the subjective agreement of the parties, and (b) they act as penalty defaults by reducing the instance of subjective disagreements that may arise between rational parties with asymmetric knowledge of the legal background rules.

Id. at 897.

228. *Id.*

229. Barnett, among others things, asserts that: (1) the existence of consent to be legally bound is essential in order to justify the legal enforcement of default rule; and (2) nested within this overall consent to be legally bound, consent also operates to justify the selection of particular default rules. *Id.* at 827. If this contention is valid, one wonders if a worker's consent in accepting indefinite-term employment acts in any way to confirm the selection of the default rule.

understanding supports the belief that other rules which constrain the employer's powers of discharge are in play. Her research suggests that the costs of learning the default rule may be high, that the price of contracting around a rule they are unaware of also may be high, and that the at-will default rule fails to reflect their tacit assumptions. Since consent to be legally bound is essential to the legal enforcement of default rules, the absence of such consent suggests that there is in fact no justifiable default rule to enforce.[230] Without a default rule, there is no employment duration term available for § 1981 to alter. More controversially, one could also argue that since the default rule is no longer available to impute the duration of the putative agreement, then the employee is without a contract at all because duration is an essential term. Without a contract, §1981 is clearly inapplicable. While there may be an answer, the complete resolution of this debate exceeds the scope of this enterprise. Ironically, the research and analysis of an employment-at-will critic may potentially converge with the analysis of a freedom of contract advocate and they may jointly undermine the viability of a § 1981 claim and thus revitalize the skepticism exhibited by *Gonzalez* and the Second Circuit district courts concerning the viability of § 1981 claims within the employment-at-will context.

While many, and perhaps most, courts may be disinclined to engage in a transparently elegant concern for the metaphysical state of default rules, they may be inclined to accept that employment-at-will constitutes a contract with modifiable terms. Given the seeming acceptance and expansion of public policy exceptions to employment-at-will, and given the federal appellate court's acceptance of the public policy purpose of § 1981, employment-at-will may plausibly be varied by the statute. When courts reach this conclusion, they are unlikely to find that the parties to the agreement are startled by that determination. Very likely, such a position mirrors the expectations of the parties, if of course, they have any expectations concerning the applicability of § 1981. Moreover, as one judge eloquently avers,[231] when courts interpret § 1981, they should be aware that they are not acting in a vacuum; history is also present. It is possible that the original purpose, and the subsequent amendments to § 1981, were aimed at remedying the effects of post-Civil War discrimination and include, at least implicitly, the congressional intent to eradicate

230. One can, perhaps incompletely, analogize this situation to standard form contracts as discussed in RESTATEMENT (SECOND) OF CONTRACTS Section 211 cmt. f (1979), which indicates that parties are not bound to unknown terms within a contract if they are beyond the reasonable expectation of the parties.

231. Wilmer v. Tenn. Eastman Co., 919 F.2d 1160, 1164 (6th Cir. 1990) (Jones, J., dissenting).

discrimination in employment.[232] On the other hand, clarity would be enhanced by yet another congressional amendment, which would explicitly state that employment-at-will is a contract within the meaning of § 1981 and all of its terms including default terms, such as discharge, are alterable by § 1981. If Congress fails to act, then it is possible that the United States Supreme Court will refuse to accept, or will otherwise limit, the application of § 1981 to at-will employment. That possibility may breathe life into Corbett's pessimistic, and perhaps overblown, assertion that anti-discrimination law is persistently subject to subordination by the at-will ideology of the federal courts.[233]

V. CONCLUSION

The notion of default rules as gap-filling may constitute a distraction from the notion of "consent as the basis of contractual obligation."[234] This implication of employment-at-will means that the default rule must interact with anti-discrimination law generally and 42 U.S.C. § 1981 in particular. While *Patterson* strove to cabin § 1981 within the "make and enforce contracts" framework, that view was effectively muted by Congress. The efficacy of the congressional effort to broaden the section has been placed in issue by both the Seventh Circuit's dicta that an employee at-will fails to have any contractual rights regarding the term of her employment and, accordingly, cannot be discriminated against with respect to either layoff or termination, and by the district court opinions in the Second Circuit which expressly hold that employment-at-will fails to constitute a contract or a contractual relationship for purposes of § 1981. While this skepticism has not been accepted by any of the federal appeals courts which have squarely determined this issue since the passage of the Civil Rights Act of 1991, knotty doctrinal issues still remain. While the majority of federal appellate courts that have confronted § 1981 and employment-at-will prior to *Patterson* seemed to accept the application of §1981 to employment-at-will, including discharge, there is no Second Circuit opinion which conclusively concurs.[235] In addition, the United States Supreme Court has not yet reconsidered this issue since *Patterson*. Indeed, most federal

232. *See id.* (stating that *Patterson* does not apply to a § 1981 claim for discriminatory discharge).

233. Corbett, *supra* note 28, at 332-58. Corbett directs most of his criticism at the United States Supreme Court.

234. Barnett, *The Sound of Silence*, *supra* note 220, at 822.

235. A Second Circuit opinion issued in 1987 held a discriminatory discharge action subject to § 1981. *See Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188-89 (2d Cir. 1987) (stating that a former employee established a prima facie case for racially discriminatory discharge under § 1981). However, no definite period of employment was adduced and employment-at-will, as a presumptive default rule, was not discussed.

circuits have not had the opportunity to consider the implications of *Gonzalez*. Accordingly, the assertion that federal court jurisprudence constitutes an impregnable bulwark against anti-discrimination law in general, has, in the context of recent § 1981 litigation, thus far been eviscerated. Rightly or wrongly, employment-at-will has proved sufficiently elastic to accommodate the verve of the default rule and the aim of anti-discrimination law. On the other hand, as the brief and preliminary exegesis of the doctrine of informed consent indicates, and as the discussion of the incipient debate among the federal appellate courts and specifically within the Second Circuit implies, complex doctrinal issues endure which may provide a "core of certainty" but give rise to a "penumbra of doubt."[236]

While doctrinal issues may linger, given both pre-*Patterson* and post-1991 Civil Rights Act jurisprudence, and the expanding number of exceptions to employment at-will, I conclude, independently of whether such developments can be justified or assailed and principally on the basis of conventional analyses, that the terms and conditions of the employment-at-will relationship, including discharge, are alterable, and should be alterable by § 1981. Whether this conclusion is sustainable on largely normative grounds, is a question best left for others.

236. H.L.A. HART, THE CONCEPT OF LAW, 119 (1st ed. 1972), *cited in* BIX, supra note 57, at 41 n.43.