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TEXTUALISM AT WORK

*George H. Taylor**

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

— Justice Holmes¹

A contract is not just a piece of paper. Just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings. An at-will employee . . . is not merely performing an existing contract; she is constantly remaking that contract.

— Justice Stevens²

INTRODUCTION

Much of the debate about textualism³ as a method of statutory interpretation centers on its propriety. Is it appropriate to reject recourse to legislative history?⁴ Does a textualist methodology lead to determinate judgments?⁵ Less attended, however, are the implications of textualism for subsequent judicial interpretations of the same statute. Once the Supreme Court has issued its interpretation of a statute, it would seem that the basic task of textualism has been accomplished. According to this view, interpretations of the statute in later cases should proceed without difficulty, because they are

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1. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

2. *Patterson v. McLean Credit Union*, 491 U.S. 164, 221 (1989) (Stevens, J., concurring in part & dissenting in part).

3. Textualism endorses constrained judicial decision based on an interpretation of the language and structure of the text and basically rejects reference to extra-textual evidence such as legislative history. See generally William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

4. See, e.g., *id.* at 625 (arguing that legislative history is “at best, secondary and supporting evidence of statutory meaning”).

5. This set of issues is explored in a separate article. See George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. (forthcoming 1995, on file with *Boston University Law Review*).

merely applying in more precise fashion principles already enunciated. The Court's textualist decision in *Patterson v. McLean Credit Union*,⁶ a case interpreting § 1981,⁷ exemplifies this line of thinking. In *Patterson*, all that the Court required of the lower courts was that they give "a fair and natural reading" to the statute, "not strain in an undue manner the statute's language,"⁸ and accord the statutory terms "their plain and common sense meaning."⁹ The Court confidently declared its belief "that the lower courts will have little difficulty applying the straightforward principles that we announce today."¹⁰

Through an analysis of the nearly 600 post-*Patterson* cases,¹¹ this Article evaluates whether the Court's confidence was warranted and concludes that it was not. A textualist approach must confront more directly the difficult *correlation between the meaning and application* of a statute. The post-*Patterson* cases provide an unusually rich constellation of cases with which to examine whether the relationship between the meaning and application of a statutory text is more accurately characterized as one of *subsumption*, as textualism would seem to imply, or one of *interrelation*. To the extent that, as the post-*Patterson* cases evidence, the meaning of a text is in fact tested and potentially transformed during the process of application, this transformation poses a significant challenge to the textualist project.¹² If applying statutory language in new cases extends and changes the statute's meaning, then the meaning is not provided conclusively by the statutory language, and a court's role cannot be restricted to mere explication of previously ascertained meaning.¹³

6. 491 U.S. 164 (1989).

7. 42 U.S.C. § 1981 (1994).

8. *Patterson*, 491 U.S. at 185. Although the specific context of the Court's discussion was the interpretation of one aspect of § 1981, the Court seemed to treat these claims as an illustration of a generalizable interpretive model. *Id.*

9. *Id.* at 185 n.6.

10. *Id.*

11. See *infra* Appendix (listing the post-*Patterson* cases and a coded summary of their holdings).

12. Although the Civil Rights Act of 1991 overrode the *Patterson* decision, that does not diminish the analysis. See Pub.L. 101-166 § 101(b), 105 Stat. 1071, 1071-72 (1991). The *Patterson* holding may not remain, but the textualist methodology employed there endures.

13. This Article focuses on the practical evidence of the correlation between meaning and application. Elsewhere I evaluate the more theoretical dimensions of this interrelation. See George H. Taylor, *Meaning and Application* (unpublished manuscript, on file with author). Post-*Patterson* cases do not necessarily represent the only model of application at work in statutory interpretation to maintain that the model challenges textualism.

I. THE PATTERSON DECISION

The *Patterson* decision was primarily directed¹⁴ toward determining the amplitude of rights protected under § 1981's prohibition against racial discrimination in the making and enforcement of contracts.¹⁵ In a ruling which surprised many,¹⁶ the Court narrowly interpreted these rights and held that Brenda Patterson's charge of racial harassment was not actionable under § 1981.¹⁷ The Court ruled that § 1981's protection of the right to *make* a contract "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment."¹⁸ The right to *enforce* a contract, in turn, is restricted to protection against racial discrimination only of an individual's "ability to enforce through *legal process* his or her established contract rights."¹⁹

The judicial repercussions of the Court's interpretation of § 1981

14. Two other substantive issues faced the *Patterson* Court. First, the Court discussed the applicability of § 1981 to private contracts. *Patterson*, 491 U.S. at 171-75. Second, the Court discussed the burdens of proof applicable to § 1981 claims. *Id.* at 186-88. Neither of these issues is directly pertinent to the themes of this Article and, therefore, does not receive attention.

15. Section 1981 provides:

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

42 U.S.C. § 1981 (1994).

16. Prior to the Court's ruling, over twenty decisions in the courts of appeals had discussed the availability of racial harassment actions under § 1981. See George M. Sullivan, *Countervailing Activism? Employment Cases Evokes Supreme Court Crisis*, 24 GONZ. L. REV. 31, 31-32 & 31 n.4 (1988-89) (presenting these statistics and listing the decisions). Only the Fourth Circuit decision from which Brenda Patterson appealed held racial harassment not actionable under that statute. *Id.*; see *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *aff'd in part & vacated in part, remanded*, 491 U.S. 164 (1989).

17. *Patterson*, 491 U.S. at 178. I return later to the Court's discussion of Patterson's § 1981 promotion claim. See *infra* text accompanying note 135.

18. *Patterson*, 491 U.S. at 176. The Court continued:

The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make a contract does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

Id. at 176-77. The quotations contain the Court's entire discussion in this section of the right to make contracts.

19. *Id.* at 178 (emphasis added).

have been dramatic and extensive. As already mentioned, the *Patterson* decision has affected the viability of claims in nearly 600 subsequent cases.²⁰ Complaints initiating these cases contained over 960 § 1981 claims;²¹ approximately 825 of these claims were dismissed on the basis of *Patterson*.²² In some striking individual cases, the retroactive application of *Patterson* required the reversal of prior jury verdicts which resulted in the loss of plaintiffs' damages awards ranging from hundreds of thousands to a million dollars.²³ The post-*Patterson* decisions forcefully point out that inquiries into interpretive methods are neither remote nor merely academic exercises.

No one has previously undertaken a systematic assessment of the post-*Patterson* cases, but the view that *Patterson* failed to sweep away interpretive confusion and enunciate easily applied rules is endorsed by other commentators. For instance, in one post-*Patterson* opinion, Judge Richard Posner stated:

We show no disrespect for the Supreme Court by suggesting that the scope of *Patterson* is uncertain. The glory of the Anglo-American system of adjudication is that general principles are tested in the crucible of concrete controversies. A court cannot be assumed to address and resolve in the case in which it first lays down a rule every controversy within the semantic reach of the rule.²⁴

20. See *infra* Appendix.

21. Some cases presented more than one § 1981 claim, for example, both failure to promote and discriminatory discharge claims. See *infra* Appendix.

22. See *infra* Appendix.

23. See, e.g., *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993) (reversing jury verdict awarding \$1,000,000 in damages); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515 (11th Cir. 1991) (reversing trial verdict awarding nearly \$465,000); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990) (reversing jury verdict awarding \$610,000), *cert. denied*, 499 U.S. 919 (1991). The vagaries of retroactivity rules are particularly telling in the *McKnight* case. The Seventh Circuit held that McKnight's trial verdict had to be reversed because the Supreme Court's *Patterson* decision was retroactive. *McKnight*, 908 F.2d at 108. McKnight's case remained alive after passage of the Civil Rights Act of 1991, which again made General Motors' actions against McKnight unlawful, but a lower court, following recent Seventh Circuit precedent, held that this statute, unlike a court decision, should *not* be applied retroactively. *McKnight v. General Motors Corp.*, No. 87-C-248, 1992 U.S. Dist. LEXIS 6803, at *8-10 (E.D. Wis. Apr. 22, 1992) *aff'd*, 973 F.2d 1366 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1270 (1993). Subsequently, in *Rivers v. Roadway Express Inc.*, 114 S. Ct. 1510 (1994), the Supreme Court settled that the Civil Rights Act of 1991 should not be applied retroactively to § 1981 claims. *Id.* at 1518.

24. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989), *on remand*, No. 86 C 9460, 1990 U.S. Dist. LEXIS 16653 (N.D. Ill. Dec. 4, 1990), *aff'd*, 963 F.2d 375 (7th Cir. 1992). Judge Posner's statement has been cited with approval by a number of courts. See, e.g., *Daniels v. Pipefitters' Ass'n. Local Union No. 5971*, 945 F.2d 906, 913 n.3 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992); *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 638 n.19 (8th Cir. 1990); *Crader v. Concordia College*, 724 F. Supp. 558, 563 n.7 (N.D. Ill. 1989).

Other courts and judges have independently confirmed the confusions generated by the *Patterson* opinion.²⁵ Commentators have echoed these observations as well.²⁶

25. See, e.g., *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990) (Boggs, J., dissenting) ("The Supreme Court decisions interpreting 42 U.S.C. § 1981 and its reach are not a model of clarity."); *Mayhue v. St. Francis Hosp.*, 748 F. Supp. 1484, 1485 (D. Kan. 1990) (noting that despite *Patterson's* anticipation, "[t]he lower courts . . . have reached differing conclusions on what specific acts of discrimination may be remedied under section 1981 in light of *Patterson*"), *aff'd*, 969 F.2d 919 (10th Cir. 1992); *Jackson v. McCleod*, 748 F. Supp. 831, 834 (S.D. Ala. 1990) ("[E]specially when applied outside of the specific factual context there presented, [*Patterson*] does not provide a bright line rule leading to easy answers to all questions concerning the scope of § 1981."); *Ward v. Sisters of Charity of the Incarnate Word*, No. B-86-0606-CA, 1990 U.S. Dist. LEXIS 7991, at *2 n.1 (E.D. Tex. Feb. 2, 1990) ("It does not appear from the cases this court has pled that Justice Kennedy's hopeful prophecy has been fulfilled . . .").

26. Julius Chambers, Director-Counsel of the NAACP Legal Defense and Education Fund, was particularly forceful in stating that:

Although *Patterson* has resulted in the dismissal of hundreds of claims and has caused the lower courts to question the validity of almost every claim under § 1981, the decision also left many unresolved questions which have created chaos and uncertainty in the lower courts and further obstacles for victims pursuing relief for discrimination . . . *Patterson* . . . has spawned a host of novel and unprecedented issues about the meaning of § 1981 which has led to conflict and confusion among the lower courts The impact of *Patterson* is complicated considerably by the fact that the majority opinion raises far more questions than it resolves.

1 *The Civil Rights Act of 1990, Joint Hearings on H.R. 4000 Before the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 101st Cong., 2d Sess., 143, 156, 157, 181 (1990) [hereinafter *Joint House Hearings*] (prepared statement of Julius Chambers). Statements of other commentators are to a like effect. Before the same Joint House Hearings, for example, then president-elect of the American Bar Association John J. Curtin noted the need for statutory amendments to "eliminate [the] considerable confusion and conflict among the lower courts over the scope of [§ 1981] after *Patterson*." *Id.* at 522, 534-35 (prepared statement of John J. Curtin); see also Mack A. Player, *What Hath Patterson Wrought? A Study in the Failure to Understand the Employment Contract*, 6 LAB. LAW. 183, 190 (1990) (noting that "the lower courts have reached different constructions of *Patterson*"); Harvey L. Cohen, Note, *In the Wake of Patterson v. McLean Credit Union: The Treacherous and Shifting Shoals of Employment Discrimination*, 67 DENV. U. L. REV. 557, 557 (1990) (observing "the current chaos that reigns among the lower federal courts in the interpretation of *Patterson*"); Woody L. Lay, Note, *Patterson v. McLean Credit Union: A Narrowing of Remedies for the Employment Discrimination Plaintiff*, 47 WASH. & LEE L. REV. 995, 1009 (1990) ("Clearly the *Patterson* Court was less than prophetic when the Court stated that the lower courts would have little trouble applying the straightforward principles in the opinion.").

In case it might be thought that the views of someone like Julius Chambers were skewed, as he was acting not only on the behalf of the NAACP Legal Defense and Education Fund but also argued Brenda Patterson's case before the Supreme Court, it is instructive to note that one of the amici briefs on the opposite side of the case likewise thought that after *Patterson* "[t]here is chaos out there." Symposium, *The Supreme Court and Local Government Law*, 6 TOURO L. REV. 55, 69 (1989) (quoting Paul Kamenar). In *Patterson*, Kamenar was on the amicus brief for the Washington Legal Foundation. *Id.* at 65. Whereas for Chambers the solution to *Patterson* was a statutory amendment reviving the pre-*Patterson* construction of § 1981, for Kamenar the only solution was a reversal of the *Patterson* Court's upholding of *Runyon v. McCrary*, 427 U.S. 160 (1976), which extended § 1981's coverage to private acts of discrimination. Symposium, *supra*, at

The inquiry into the various ways the meaning of § 1981 as revealed by *Patterson* has been applied in subsequent cases is predicated upon the *Patterson* Court's ruling that § 1981 protects two separate rights:²⁷ the right to make contracts and the right to enforce contracts.²⁸ The post-*Patterson* cases track this division. Because of their particular significance to a textualist methodology, I restrict attention to post-*Patterson* claims arising under an alleged right to *make* a contract and set aside claims of a right to *enforce* a contract.²⁹ Post-*Patterson* cases examining the possible repercus-

69.

If, as these comments reveal, one difficulty in the post-*Patterson* cases was application of the meaning of § 1981 established by the *Patterson* Court, another danger was that the lower courts would read the implications of *Patterson* too broadly. Here the problem rests not so much with the Supreme Court's textualism as with the failure of the lower courts to pay sufficient attention to the confines of the Court's holding. Again to quote Julius Chambers:

[A] number of lower court decisions read as though the central purpose of *Patterson* was simply to throw out as many § 1981 race discrimination claims as possible. Although some courts have allowed plaintiffs to amend their complaints to include allegations that may now be required by *Patterson*, other courts have dismissed § 1981 claims with an alacrity bordering on enthusiasm.

1 *Joint House Hearings*, *supra*, at 156 n.20 (prepared statement of Julius Chambers); *see also* Player, *supra*, at 190 ("The weight of authority appears to construe *Patterson* broadly, far beyond its holding or its language, to the point that many courts seem to view section 1981 as protecting nothing more than discriminatory hiring."). *But see* Kriegel v. Home Ins. Co., 739 F. Supp. 1538, 1540 (N.D. Ga. 1990) ("The Supreme Court reaffirmed in *Patterson* 'our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin.' Given the strength and importance of that commitment, the Court will not infer a more restrictive construction of 42 U.S.C. § 1981 than the Supreme Court has adopted.").

27. This separation is not an ineluctable interpretation of the statutory language. *See infra* note 74 (discussing Steven Burton's contention that the right to make and enforce contracts "is a singular reference to the legal power of contract").

28. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989).

29. Claims under the right to enforce a contract generally involve alleged employer obstructions of employees' attempts to enforce their contracts, including employer retaliation or retaliatory discharge. Of the approximately 960 total § 1981 claims brought post-*Patterson*, approximately 125 alleged a right to enforce a contract, and of these, over 100 have been dismissed. *See infra* Appendix. Just as with the *Patterson* Court's definition of the making of a contract, no one doubts that *Patterson* "suggest[ed] a considerably narrower interpretation of section 1981's term 'enforce' than might previously have been understood." *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1053 (7th Cir. 1991), *reh'g denied*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 644 (1993). Critical is that the enforcement clause does not protect against any kind of racial discrimination or retaliation after the contract is formed but at best only protects those impediments preventing enforcement of contract rights protected under § 1981. *See, e.g.*, *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906, 913 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992); *McKnight v. General Motors Corp.*, 908 F.2d 104, 111-12 (7th Cir. 1990) (Posner, J.), *cert. denied*, 499 U.S. 919 (1991). Under this logic, a retaliation claim would not be viable if it protested conduct not otherwise protected under § 1981. *But see* Charles A. Shanor & Samuel A. Marcossou, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 LAB. LAW. 145, 173 (1990) (presenting the authors', EEOC General Counsel and EEOC attorney, arguments that these cases should be protected under

sions of that decision on other clauses of § 1981 ("same right . . . to sue, be parties, give evidence . . . and shall be subject to like punishment . . .," etc.), are not examined.³⁰

The Supreme Court appeared to hold that the application of § 1981's "right . . . to make . . . contracts" would pose little difficulty³¹ because that phrase bears a clear, easily ascertainable meaning.³² Section 1981 protects against discriminatory action only dur-

§ 1981).

Remaining interpretive issues include whether a right of enforcement survives if the employer's obstruction of legal access is less than complete. *Compare* Valdez v. Mercy Hosp., 961 F.2d 1401, 1404 (8th Cir. 1992) (holding that since the employee was present in court, legal access was not impaired) and Carter v. South Cent. Bell, 912 F.2d 832, 840 (5th Cir. 1990) (holding that when an employer discourages an employee from legal action, he has not "impaired" or "impeded" the employee's ability to enforce the contract), *cert. denied*, 501 U.S. 1260 (1991) with Harvis v. Roadway Exp. Inc., 973 F.2d 490, 494 (6th Cir. 1992) (noting that "[the] fact that [the employer] allowed formal 'access' to legal process does not imply that it could never be impairing the employee's 'ability to enforce through legal process'"), *aff'd on other grounds sub nom.* Rivers v. Roadway Exp. Inc., 114 S. Ct. 1510 (1994).

Another contested issue is whether retaliation, especially retaliatory discharge, survives after *Patterson*. For example, in *Harvis*, Judge Siler dissented from the majority holding that a claim of retaliatory discharge does survive, quoting the following reasoning of the Fifth Circuit:

"Were we to hold that section 1981 still encompasses retaliatory discharge, we would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or 'merely' to discriminate? This would be pointless. Both motives are equally invidious, and the employee suffers the same harm. Because section 1981 no longer covers retaliatory termination, all suits for discrimination must be brought under Title VII."

Harvis, 973 F.2d at 497 (Siler, J., concurring in part & dissenting in part) (quoting *Carter*, 912 F.2d at 840-41). The *Harvis* majority holding creates a circumstance where *retaliatory discharge* remains viable under § 1981's enforcement clause, whereas most courts have held that *discriminatory discharge*, an issue under the contract clause, does not survive. See *infra* notes 199-201 and accompanying text. For reasons of emphasis, my argument in the text follows the *Patterson* Court in separating the right to make and the right to enforce a contract, but the *Harvis* holding suggests that the Court's separation itself presents complicated problems in application.

For more general discussion of § 1981 enforcement cases through 1990, see Caroline R. Frederickson, Note, *The Misreading of Patterson v. McLean Credit Union: The Diminishing Scope of Section 1981*, 91 COLUM. L. REV. 891, 908-13, 914-16 (1991).

30. 42 U.S.C. § 1981(a) (1994). For the full text of § 1981, see *supra* note 15. The amplitude of these clauses has received little attention. For post-*Patterson* discussions, see Spencer v. Casavilla, 839 F. Supp. 1014, 1017-18 (S.D.N.Y. 1993); Franceschi v. Hyatt Corp., 782 F. Supp. 712 (D. Puerto Rico 1992); Ford v. City of Rockford, No. 88 C 20323, 1992 U.S. Dist. LEXIS 15825, at *8-9 (N.D. Ill. Oct. 15, 1992); Watley v. Mooney, No. 91-1115-B, 1992 U.S. Dist. LEXIS 8503 (D. Kan. May 22, 1992); Fowler v. McCrory Corp., 727 F. Supp. 228 (D. Md. 1989); Pressley v. Haeger, No. 83 C 3974, 1989 U.S. Dist. LEXIS 1031 (N.D. Ill. Nov. 15, 1989); Barry L. Refsin, Comment, *The Lost Clauses of Section 1981: A Source of Greater Protection After Patterson v. McLean Credit Union*, 138 U. PA. L. REV. 1209, 1230-46 (1990).

31. *Patterson*, 491 U.S. at 185 n.6.

32. Several courts have described the Court's demarcation as a "bright-line" rule. See, e.g., Coleman v. Domino's Pizza, Inc., 728 F. Supp. 1528, 1530 (S.D. Ala. 1990) (asserting that "this Court finds clear support for a 'bright line' rule which confines the actionable case under § 1981

ing the formation of a contract. Once the contractual relationship is established, the issue is no longer one of the right to make a contract but of "the performance of established contract obligations and the conditions of continuing employment."³³ The dividing line, then, is between conduct during contract formation and "postformation conduct."³⁴ Because the racial harassment Brenda Patterson alleged she experienced involved her employer's contract performance, this postformation conduct although "reprehensible though it be if true, is not actionable under § 1981."³⁵ As we shall see, in numerous subsequent cases the lower courts found it requires little reflection to extend the Court's holding and dismiss such claims as discriminatory discharge because "[t]he Court was clear in stating that § 1981 'does not apply to conduct which occurs after the formation of a contract'"³⁶

The question is whether the dividing line between formation conduct and postformation conduct is so easily drawn. Is it sufficient, for example, to say that discriminatory discharge claims are *not* ac-

to those involving the actual making or enforcement of a contract"); *Carter v. O'Hare Hotel Investors*, No. 88 C 10713, 1990 U.S. Dist. LEXIS 2439, at *14 (N.D. Ill. May 14, 1990) (stating that "*Patterson* draws a bright-line between §1981 coverage of conduct that occurs before a contract is formed and conduct that occurs thereafter."); *Crader v. Concordia College*, 724 F. Supp. 558, 562 (N.D. Ill. 1989) (stating that claims stemming from "race-based harassment, discipline and discharge . . . are expressly barred by *Patterson* . . . [but] [a]s to . . . discriminatory failure to promote . . . , however, *Patterson* does not state the rule in such bright-line terms.").

33. *Patterson*, 491 U.S. at 177. The Court stated that the terms and conditions of continuing employment are "more naturally governed by state contract law and Title VII." *Id.* This case arose from the following facts. Ms. Patterson had worked as a teller at the McLean Credit Union for ten years. *Id.* at 169. She alleged that her employer harassed her, did not promote her, and had terminated her all because she was black. *Id.*

34. *Id.* at 177, 179-80.

35. *Id.* at 179.

36. *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1571 (D.C. Cir. 1991) (quoting *Patterson*, 491 U.S. at 171), *vacated*, 112 S. Ct. 960 (1992), *aff'd*, 975 F.2d 886 (D.C. Cir. 1992); *accord* *Trujillo v. Grand Junction Regional Ctr.*, 928 F.2d 973, 975 (10th Cir. 1991); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1257 (6th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); *Hull v. Case Corp.*, No. 93-1209-CIV, 1993 WL 603554 at *4 (S.D. Fla. Dec. 13, 1993) ("It is well-settled that prior to the amendments made by the Civil Rights Act of 1991, section 1981 did not provide a cause of action for any conduct that occurred after the initial hiring of an individual."); *Hall v. County of Cook*, 719 F. Supp. 721, 723 (N.D. Ill. 1989) (involving an action for discriminatory discharge) ("[U]nder *Patterson*, once an individual has secured employment, the statute's protection of the right to make a contract is at an end."); *Sofferin v. American Airlines*, 717 F. Supp. 597, 599 (N.D. Ill. 1989) ("[T]he *Patterson* Court refused to extend the protections afforded the right to make a contract to reach 'conduct by the employer after the contract relation has been established. . . .'" (quoting *Patterson*, 491 U.S. at 177), *aff'd, rev'd, and remanded in part*, 923 F.2d 552 (7th Cir. 1991), *on remand*, 785 F. Supp. 780 (N.D. Ill. 1992).

tionable because they arise after a contractual relationship has been formed, when at least some promotion claims *are* actionable despite the fact that they too obviously arise after the employment relationship is established?³⁷ Perhaps one must inquire further and examine whether at the time of discharge or promotion a “new” relationship is formed and is, therefore, actionable. How simple is it to distinguish at what points a contract is made or remade and so brought under the protections of the right to make a contract? In attempting to apply *Patterson’s* interpretation of the meaning of § 1981, the post-*Patterson* cases demonstrate the continuing degree to which application of this meaning has required its reassessment and reformulation. At the same time that these cases raise the *substantive* question of when a *contract* is re-made, they also raise the *interpretive* question of when, in the process of application, a statute’s *meaning* is re-made.³⁸

Promotion claims have caused the most problems for courts trying to apply the contract formation test,³⁹ and transfer and demotion claims have created difficulties as well.⁴⁰ While courts have uniformly held discriminatory discharge claims not to be viable under § 1981, the reasoning behind these conclusions is troubling.⁴¹ But application of the Court’s test presents enigmas even at the moment when a contractual relationship is first formed.

II. REFUSAL TO CONTRACT CLAIMS

After *Patterson*, § 1981 clearly continued to cover situations where a defendant refused to contract because of discriminatory animus or attempted to contract on explicitly discriminatory terms.⁴²

37. See *infra* notes 80-82 and accompanying text.

38. I would argue that the two approaches are related. See *infra* note 250 and accompanying text.

39. See *infra* notes 106-54 and accompanying text (discussing post-*Patterson* promotion).

40. See *infra* notes 155-65 and accompanying text (discussing transfer claims) & 166-178 (discussing demotion claims).

41. See *infra* notes 199-249 and accompanying text (discussing post-*Patterson* discharge cases).

42. See, e.g., *Duane v. GEICO*, 37 F.3d 1036 (4th Cir. 1994) (holding that refusal of insurance company to extend homeowners’ insurance to Australian citizen constituted a refusal to contract, extending § 1981 to discrimination based on alienage); *Howard v. BP Oil Co.*, 32 F.3d 520, 527-28 (11th Cir. 1994) (holding that discrimination by petroleum distributor in awarding gas station dealership would constitute discriminatory refusal to contract under § 1981); *Daniels v. Pipefitters’ Ass’n Local Union No. 597*, 945 F.2d 906, 914 (7th Cir. 1991) (holding that a union hiring hall’s discriminatory referral practice constituted discriminatory refusal to hire), *cert. denied*, 112 S. Ct. 1514 (1992); *Walker v. Suburban Hosp. Ass’n*, 885 F.2d 867 (4th Cir. 1989) (holding that if black pharmacist received lower starting salary and lower night-shift differential than compara-

But other cases involving initial contract formation present greater difficulties. Assume, for example, that a court is presented with a case where a controversy does not arise over distinguishing the moments of an employer's contract formation conduct from his or her postformation conduct. Can the latter behavior be used to implicate the discriminatory nature of the former? In his *Patterson* dissent, Justice Brennan argued that postformation conduct, if "sufficiently severe or pervasive," could properly be cited "to belie any claim that the contract was entered into in a racially neutral manner."⁴³ The Court majority resisted in order to prevent a plaintiff from "bootstrap[ing] a challenge to the conditions of employment (actionable, if at all, under Title VII) into a claim under § 1981" ⁴⁴ While the Court did accept that postformation conduct could be "used as evidence that a divergence in the *explicit* terms of particular contracts is explained by racial animus,"⁴⁵ it is unclear whether attention to postformation conduct as evidence of *covert* discriminatory intent to contract would satisfy the Court's interpretation of § 1981.⁴⁶

Note the potential dangers if evidence of postformation conduct is

bly situated whites, this would constitute discriminatory making of a contract) (dismissed on merits), *upon further consideration*, 981 F.2d 1253 (4th Cir. 1992); *Mitchell v. Associated Bldg. Contractors, Inc.*, 884 F.2d 1392 (6th Cir. 1989) (holding that an employer's maintenance of a strict maximum hiring quota of minorities was discriminatory).

43. *Patterson*, 491 U.S. at 207-08 (Brennan, J., concurring in part & dissenting in part).

44. *Id.* at 184. While generalizing too broadly, the court in *Dangerfield v. Mission Press*, 50 Fair Empl. Prac. Cas. (BNA) 1171 (N.D. Ill. July 27, 1989), elucidated the objection here:

If a plaintiff can rely on postformation conduct to show the employer's state of mind at the time of contracting, and thereby sue under § 1981, then *Patterson* is essentially a nullity. In every suit, a plaintiff could allege that the employer intended all along to discriminate based on race, and that the postformation conduct is proof of the unspoken intent. Section 1981 would in that case be used to expose the exact same conduct as *Patterson* disallows, except that the question would be whether the subsequent conduct established a discriminatory state of mind at the time of contracting. Plaintiff, in other words, could accomplish indirectly what *Patterson* directly prohibits. The result in *Patterson* cannot be so easily avoided.

Id. at 1172-73.

45. *Patterson*, 491 U.S. at 184 (emphasis added).

46. Compare *Patterson v. Intercoast Management of Hartford, Inc.*, 918 F.2d 12, 14 (2d Cir. 1990) (holding that postformation conduct could not be used as evidence of § 1981 violation where alleged discriminatory contract terms were covert rather than overt) and *West v. First Pa. Bank*, No. 89-4730, 1990 U.S. Dist. LEXIS 9339, at *7-9 (E.D. Pa. July 25, 1990) (refusing to use discriminatory postformation conduct as evidence of discrimination at the time of contract formation to black employees absent explicitly different contract terms) with *English v. General Dev. Corp.*, 717 F. Supp. 628, 631-32 (N.D. Ill. 1989) (holding that *Patterson* reference to overt discriminatory term was illustrative rather than exhaustive) and *Montgomery v. Atlanta Family Restaurants, Inc.*, 752 F. Supp. 1575, 1584 (N.D. Ga. 1990) (citing *English*).

barred from being used to prove discriminatory intent at contract formation. An unscrupulous employer could simply hire a minority applicant on facially neutral terms, disguise their original discriminatory intentions until sometime — a day, week, month? — later, and then overtly discriminate against or terminate the employee. “The right to make contracts created by § 1981 would be rendered illusory if, by an arcane and semantic distinction, an employer is required to respect a prospective employee’s right to make contracts, yet is permitted to terminate a contract a few moments after the contract has been in existence.”⁴⁷ If the *Patterson* Court was concerned that recourse to postformation conduct would negate § 1981’s limitation to protecting only the right to make a contract, lower courts are worried about the reverse: that attention only to the moment of contract may “effectively annihilate the right to make contracts.”⁴⁸ For many, *Patterson*’s formalistic distinction between contract formation and postformation conduct leads to troublesome and contentious applications.

These worries about the logical coherence and constancy of the *Patterson* differentiation between contract formation and postformation conduct are not merely hypothetical. A number of post-*Patterson* cases have hinged on the determination of whether discriminatory conduct that occurred after the point of contract formation in fact provided evidence of discrimination at the time the contract

47. *Ginwright v. United Sch. Dist.* No. 457, 756 F. Supp. 1458, 1472 (D. Kan. 1991). *Accord Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1530-31 (11th Cir. 1991) (Clark, J., concurring) (arguing that common sense dictates that if a discriminatory refusal to hire claim can be brought under § 1981, then so can a discriminatory discharge claim); *Gersman v. Group Health Ass’n*, 931 F.2d 1565, 1578 (D.C. Cir. 1991) (Wald, J., dissenting) (“[I]f § 1981 prohibits an employer from refusing to hire an applicant because of her race, yet allows the employer to fire that person the next day because of her race, then the law’s promise . . . is empty.”), *vacated*, 112 S. Ct. 960 (1992), *aff’d*, 975 F.2d 886 (D.C. Cir. 1992); *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 639 (8th Cir. 1990) (arguing that this interpretation is “absurd . . . [and] would annihilate the right to make contracts”), *vacated and remanded*, 499 U.S. 914 (1991), *rev’d and remanded*, 946 F.2d 1344 (8th Cir. 1991), *motion to vacate denied*, 952 F.2d 991 (8th Cir. 1991), *vacated*, 112 S. Ct. 1255 (1992), *rev’d*, 982 F.2d 295 (8th Cir. 1992) (en banc), *cert. denied*, 114 S. Ct. 1642 (1994); *English v. General Dev. Corp.*, 717 F. Supp. 628, 632 (N.D. Ill. 1989) (“[E]mployers would be free to disguise discrimination at the time of contract formation until after the employer has hired the employee. Through such machinations, the employer would be able to escape damages liability for acts prohibited by § 1981, even post-*Patterson*.”). *But see Gersman*, 931 F.2d at 1572 (ruling that if an employee is terminated quickly, then there is viable § 1981 claim since discrimination was implicit in the making of the contract); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258 (6th Cir. 1990) (holding that even if immediate discharge, Title VII and state civil rights actions remain available), *cert. denied*, 501 U.S. 1250 (1991).

48. *Hicks*, 902 F.2d at 639.

was formed.⁴⁹ Even more complex have been cases resting on assessment of when, exactly, the time of contract formation transpired. Consider the following. An African-American woman had a scheduled appointment at a hair salon.⁵⁰ Upon arrival she found her scheduled beautician was not able to perform (because of illness), and a substitute operator refused to perform because of the woman's race.⁵¹ Did the refusal to serve constitute a refusal to contract or was it postformation conduct?⁵² Or consider the situation where

49. Was a hospital's alleged failure to assist a minority doctor in developing his private practice after joining the staff a breach of contract or an implied contract term? *See, e.g., Snowden v. Millinocket Regional Hosp.*, 727 F. Supp. 701, 706-08 (D. Me. 1990) (holding employer's inaction in assisting an employee to establish his private practice involved discriminatory performance of a contract and so not a viable claim under § 1981). After servicing a city contract for approximately two months, a Hispanic plaintiff was told that her contract, part of a minority set-aside program, was going to be canceled because she was not black. *Torres v. City of Chicago*, 730 F. Supp. 106, 107 (N.D. Ill. 1989). Was this termination postformation conduct or a covert contract term? The *Torres* court held that the city's cancellation of the contract because Torres was Hispanic and not black was postformation conduct and therefore not actionable under § 1981. *Id.* at 108.

50. *Perry v. Command Performance*, 913 F.2d 99, 100 (3d Cir. 1990).

51. *Id.*

52. The court noted:

[T]he record is inadequate to determine if the refusal to serve plaintiff occurred after the contract was made or was concurrent with the making of the contract. Arguably, an appointment for hair salon services is merely an invitation to negotiate, and that acceptance of the offer occurs simultaneously to the performance of the contract [On remand] [t]he court may wish to consider such factors as industry practice and the expectations of the parties to the instant case. . . . [T]he court must [also] give the parties an opportunity to present evidence as to whether th[e] contract was grounded on discriminatory terms, *i.e.*, to provide services only if a hairdresser were available who would be willing to wash and set a black patron's hair.

Id. at 101-02.

On remand the district court dismissed the § 1981 claim because it classified the offensive conduct as occurring postformation. It held:

An enforceable contract exists where parties intend to conclude a binding agreement, and the essential terms are certain enough to provide basis for an appropriate remedy. . . . Upon Plaintiff's arrival at Defendant salon for her pre-arranged 12:00 p.m. appointment . . . , Defendant's assistant manager confirmed that the "wash and set" services scheduled to be performed for Plaintiff by the assistant manager would be rendered to the Plaintiff, although by another hairstylist, and Plaintiff agreed. The services to be rendered were clearly defined and Plaintiff had impliedly agreed to pay the standard fee for that basic service. At that point, a race-neutral contract was established between Plaintiff and Defendant for hairstyling services. The discriminatory conduct on the part of [the substitute beautician] occurred after Plaintiff and Defendant had established a contract relation.

Perry v. Command Performance, No. 89-2284, 1991 U.S. Dist. LEXIS 4019, at *4-5 (E.D. Pa. Mar. 27, 1991) *aff'd*, 945 F.2d 395 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1166 (1992). The court apparently did not contemplate whether the parties had established a contract at the time of the phone call establishing the hair appointment.

A comparable effect is in the following case. A woman called a rental car company to reserve a

black plaintiffs purchased several items at a store, presented the cashier with a check, and the cashier recorded their race on the check.⁵³ Again, did the alleged discrimination occur at the time of or after contract formation?⁵⁴ Or contemplate the circumstance of an employee who continues her job several weeks after a new employer takes over the business, but then faces an alleged discriminatory "discharge" when the employer has the opportunity to examine the operation of her specific department. Should this be treated as a discriminatory discharge or rather as a discriminatory failure by the new employer to hire her?⁵⁵

Certainly, as the decisions in these cases reveal, recourse to even the rudimentary principles of contract law offers analytical tools with which to parse the facts presented in circumstances such as these and so help a court to assess whether the alleged discriminatory behavior was a matter of contract formation conduct. For in-

luxury car to transport her daughter on the daughter's wedding day. *Harvey v. NYRAC, Inc.*, 813 F. Supp. 206, 206-07 (E.D.N.Y. 1993). However, the reservation was refused on the day of the wedding. *Id.* at 208. The court held that no contract had been entered and, therefore, the § 1981 claim centered on a refusal to contract. *Id.* at 209 n.4.

53. *Roberts v. Walmart Stores, Inc.*, 736 F. Supp. 1527, 1528 (E.D. Mo. 1990).

54. The court noted:

After *Patterson* the resolution of this civil rights claim turns on an interpretation of the Missouri Commercial Code to determine whether the contract was formed at the time the alleged violation occurred. The Court does not possess enough information about the retail transaction to ascertain whether a contract was already formed at the time defendant recorded the race of plaintiffs on the check.

Id. at 1529.

On subsequent consideration, the court dismissed on the merits, finding that the store's cashiers were required to record the race of all customers paying by check and that the plaintiffs' race had no impact on the transaction. *Roberts v. Walmart Stores, Inc.*, 769 F. Supp. 1086, 1089 (E.D. Mo. 1991).

55. As one court noted:

Negotiations between a new employer and existing employees of an acquired business may occur before or after the closing date of sale. Although an employment relationship existed between Carter and defendants immediately after the Sheraton [Hotel] was sold, defendants had no opportunity to negotiate a contract with Carter until they gained control over her [reservations] department. . . . Had defendants terminated Carter due to poor performance, the six-week transition might be analogous to a probationary period, which is not actionable under § 1981. . . . [However,] Carter presents sufficient evidence to raise a genuine issue of material fact that the entire six-week period she worked for defendants was part of the process for formation of a new employment relationship.

Carter v. O'Hare Hotel Investors, No. 88 C 10713, 1990 U.S. Dist. LEXIS 2439 (N.D. Ill. May 14, 1990) (citations omitted), *on further consideration*, 736 F. Supp. 158 (N.D. Ill. 1989); *see also* *Brown v. City of New York*, 66 Fair Empl. Prac. Cas. (BNA) 636, 643 n.12 (S.D.N.Y. Oct. 25, 1994) (finding that an employer's decision to disqualify plaintiff from provisional employment of eight months duration, upon completion of standard investigations of plaintiff's qualifications, was based on a refusal to contract rather than a discharge).

stance, according to the familiar terms of the *Restatement (Second) of Contracts*,⁵⁶ if an offeror is indifferent to the manner or mode of acceptance, the offeree can accept either by promise or performance.⁵⁷ Where an offeror admits acceptance by performance, "the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance."⁵⁸ Thus, in the example favored by treatise writers, where a customer is injured by a bottle that explodes after the customer has taken it off the grocery store shelf, a contract between store and customer had already been formed at the time of injury — the merchant had made an offer through the stocking of the goods, and the customer had accepted the offer through the performance of taking the item from the shelf.⁵⁹ Under this logic, where a cashier records the race of a purchaser at the time of payment, this occurs subsequent to the formation of a contract and so does not present a viable § 1981 claim.⁶⁰ Similarly, the refusal of a hairdresser to serve a black customer also appears to arise as a matter of postformation behavior, where a manager of the store had previously greeted the customer and con-

56. RESTATEMENT (SECOND) OF CONTRACTS (1979).

57. See *id.* § 32; cf. U.C.C. § 2-206(1) ("Unless otherwise unambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as invited acceptance in any manner and by any medium reasonable in the circumstances . . .").

Of course, the Restatement's analysis is based on modern contract law, rather than on contract law in 1866, at the time of passage of § 1981. Oddly, the *Patterson* Court did not address whether the statute should be interpreted according to contemporary contract standards. Because this Article proceeds on the basis of an analysis of the internal sufficiency of the interpretive approach adopted by the *Patterson* Court, it does not evaluate the propriety of the Court's neglect of this issue. It should be noted, however, that contrary to the *Patterson* Court's disregard of the issue, textualism typically argues that a Court must maintain fidelity to the *original* meaning of a legal text. See, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59 (1988) (discussing original intent in the context of two case examples). It would be interesting to speculate whether the differences between a historical and contemporary understanding of contract law might in a number of cases change the dividing line between contract formation and post-contract formation behavior. This is another potential complexity in the interpretation of the statute that the *Patterson* Court does not confront.

58. RESTATEMENT (SECOND) OF CONTRACTS § 62(1) (1979); see also *id.* § 45(1) (stating that where acceptance is invited by performance only, "an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it").

59. See, e.g., JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 36, at 80 & 80 n.24 (3d ed. 1990) (citing *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979); *Sheeskin v. Giant Food, Inc.*, 318 A.2d 874 (Md.App. 1974)); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.10, at 210 n.5 (2d ed. 1990) (citing *Barker*). Murray claims that in the self-service context, the customer has an option contract to purchase the item: the store's offer of the good is irrevocable, but the customer retains the ability to return the good to its shelf and so not exercise the power of acceptance. MURRAY, *supra*, § 36, at 81.

60. For a discussion of the case which presents this factual scenario, see *supra* notes 53-54 and accompanying text.

firmed the appointment for services.⁶¹

It is notable, however, that the courts in both of these cases did not find the facts to divide so cleanly against coverage by § 1981.⁶² This raises a larger point: despite the assistance of contract law's definition of the point of contract formation, judgments about whether a particular event falls under the protection of § 1981 may depend on a rather precise and minute factual inquiry, with situations of rather close factual proximity falling on either side of the line of coverage. Consider, for example, the facts raised in recent litigation against the Denny's chain of restaurants.⁶³ To reduce the number of African-American clientele, a number of Denny's nationwide undertook the various following strategies: they would seat any white customers first, stall on serving any black customers seated, ask black customers (and only black customers) to pay before eating, and even lock them out. In the latter, which was termed a "blackout," employees would lock the store doors before potential African-American customers could enter; the employees would tell these putative customers that the store was closed, only to reopen the doors after they had left.⁶⁴ Most notoriously, one Denny's refused to serve six African-American secret service agents because of their race.⁶⁵ This past August, Denny's settled the litigation arising from all these cases at a cost of \$54.4 million.⁶⁶ How would these disputes have been treated under § 1981? While it seems apparent that the "blackouts" were discriminatory refusals to contract and so unlawful under § 1981, it is difficult to determine where the line should be drawn in the other factual circumstances presented. Has a contract between a restaurant and customer been formed once the customer walks through the restaurant doors, or is the contract formed later — when the customer is seated? If the former, then a

61. For a discussion of the case which presents this factual scenario, see *supra* notes 50-52 and accompanying text.

62. See *supra* notes 52-53 and accompanying text.

63. See, e.g., Howard Kohn, *Service With a Sneer*, N.Y. TIMES MAG., Nov. 6, 1994, at 43. The facts of the Denny's cases is meant to be suggestive; the litigation apparently did not directly present § 1981 claims. See *id.* at 44 (observing that the cases were brought under the public accommodations provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a(1)-a(6)).

64. See *id.*

65. Some twenty-one secret service agents went to the restaurant for breakfast and only the black agents were not served after placing their orders. See *Black Agents Sue Denny's*, N.Y. TIMES, May 25, 1993, at A10. The white agents received breakfasts within ten minutes of their order, and only one breakfast appeared for a black agent, and that after a wait of one hour. *Id.*

66. See Kohn, *supra* note 63, at 48.

refusal to seat African-Americans⁶⁷ or a requirement that they pay before ordering would entail postformation conduct and so fall outside the coverage of § 1981.

The difficulty of these factual complexities in turn raises an even more significant question: can it make sense that the protections provided by § 1981 should be available depending on such slight factual distinctions? Notice one court's response to a case where an African-American woman receives a verbal contract on a Friday that she can start as a part-time waitress the following Monday, but arrives on Monday to discover that she will be employed in the kitchen only.⁶⁸ The court concluded that the employer's actions were not postformation conduct and expanded upon the vagaries of attention simply to the moment of contract formation:

While technically a contract may have been formed on Friday, June 2, and strictly speaking any conduct engaged in thereafter was post-formation conduct, the particular facts of this case show why the availability of a remedy under § 1981 should not, in every case, turn on a strict application of a state law regarding contract formation. While it may be appropriate for the law of contract formation to play a major, if not decisive, role in the resolution of § 1981 claims alleging racial harassment or discriminatory discharge, in cases such as here presented, where the alleged discriminatory conduct occurred prior to or contemporaneously with *the commencement of the employment relationship*, the subtleties of contract law with respect to formation should assume less importance. Surely, it is not within the spirit of § 1981 or even *Patterson* that the technicalities of contract formation law be determinative of the availability of relief under § 1981 in every case.⁶⁹

The point is not whether the court's judgment was correct, or whether it was an accurate reflection of the Supreme Court's judgment in *Patterson*. Rather, the lesson is the unwieldiness of the Supreme Court's distinction between contract formation and postformation conduct and "the extremely strained construction that can arise from an absolutely fixed gaze on the moment of contract formation."⁷⁰ In *Jackson*, was the employer's behavior on Monday

67. This factual circumstance has been alleged in at least two § 1981 cases. See *Jackson v. Tyler's Dad's Place, Inc.*, 850 F. Supp. 53 (D.D.C. 1994) (presenting claim of denial of seating, decided on the merits for defendant); *Brooks v. Pizza Hut, Inc.*, No. 92-1333, 1992 U.S. Dist. LEXIS 14046 (E.D. La. Sept. 14, 1992) (presenting claim of denial of seating and holding that African American patrons failed to state a claim under § 1981 by making only "conclusory allegations" of discrimination). Because both courts ruled on the merits, they did not determine whether the facts presented a discriminatory refusal to contract or a breach of contract.

68. *Jackson v. McCleod*, 748 F. Supp. 831, 832-33 (S.D. Ala. 1990).

69. *Id.* at 835.

70. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1261 (6th Cir. 1990) (Boggs, J.,

evidence of discriminatory animus the previous Friday, the time of the original hire, or did the employer change her mind, for discriminatory reasons, over the weekend? Is it not nonsensical in this and the prior cases mentioned that the availability of § 1981 depends on such minute distinctions?

The judgment that the interpretation of a statute leads to seemingly nonsensical results is not an idle one. In numerous cases the Supreme Court has rejected apparently plain statutory language where application of this meaning would lead to absurd results.⁷¹ Further and finally, contract law itself is alert to and has responded to the kind of difficulties created by the *Patterson* analysis. If the Court had been more attentive to the insights of contract law, it would have realized that contract law denies that the moment of contract formation is decisive. The Uniform Commercial Code, for example, acknowledges the potential need to define contract formation where "the moment of its making is undetermined."⁷² As the secondary commentaries have suggested, the Code recognizes the possibility of circumstances contrary to the "orthodox catechism [that] there is a definite moment in time when a party becomes contractually bound on a promise."⁷³ Explicitly addressing *Patterson*,

dissenting) (referring to the *Perry* holding).

71. See, e.g., *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1994) (finding that the particular language of a statute should not be given its "most natural grammatical reading" where such an application "would produce results that were not merely odd, but positively absurd"); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 454 (1989) (rejecting application of a statute's meaning where that meaning "would 'compel an odd result'") (quoting *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989)). Importantly, even more textualist justices such as Justice Kennedy and Justice Scalia agree that it is appropriate for the Court to reject a seemingly literal construction of a statute where that construction would lead to absurd consequences. See, e.g., *Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring) (acknowledging that there is no need to apply the language of the statute if it "would lead to 'patently absurd consequences,' . . . that 'Congress could not possibly have intended,'" (citations omitted); *Bock Laundry*, 490 U.S. at 527 (Scalia, J., concurring in the judgment) (proposing to "verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word"). Disagreement among members of the Court rests not on the propriety of the general principle, but on how broadly or narrow it should be drawn. See, e.g., *Public Citizen*, 491 U.S. at 470-71 (Kennedy, J., concurring) (arguing that the principle should be applied only where the consequences "would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, . . . and where the alleged absurdity is so clear as to be obvious to most anyone").

72. U.C.C. § 2-204(2) (1979).

73. FARNSWORTH, *supra* note 59, § 3.2, at 161; see also 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE Series § 2-204:02, at 110 (1993) ("If the parties have, in fact, come to an agreement as to the sales transaction, a contract is formed, even though an offer or acceptance cannot be isolated, or the moment the contract was made cannot be determined."). The U.C.C. provides that an affirmation by a seller to a buyer becomes an element of "the basis of the bar-

Steven Burton maintains that the Supreme Court could have avoided the consequences of its interpretation of § 1981 if it had understood that contract law rejects the Court's basic distinction between contract formation and post-contract formation.⁷⁴

These final observations take us beyond the terms of the Court's analysis. They also go further than the boundaries more generally assumed in this Article, which pursues the logic of the Court's analysis on its own grounds. As the cases reveal even on these more narrow terms, however, in evaluating refusal to hire claims, a cause of action that clearly remains vital after *Patterson*, the lower courts have faced significant difficulties in applying what the Court thought was rather plain meaning, and that meaning has expanded in unforeseen ways upon its application.

III. PROMOTION CLAIMS

The viability of § 1981 promotion cases remains one of the most vexing areas for courts post-*Patterson*.⁷⁵ While promotion claims

gain" and thus an express warranty, U.C.C. § 2-313(1) (a) (1978), and it is immaterial that the precise moment of the affirmation may occur after the main contractual agreement has been struck. *Id.* at § 2-313, Comment 7. "The sole question is whether the language . . . [is] fairly to be regarded as part of the contract." *Id.*; see also MURRAY, *supra* note 59, § 100, at 545 (arguing that the authors of § 2-313 "were pursuing a bargain continuum which is a bargaining process extending beyond the moment in time when the contract of sale was made."). From the rather different perspective of Critical Legal Studies, Mark Kelman offers a more extended critique of the ability to determine the moment a contract is formed. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 18-19 (1987).

74. Steven J. Burton, *Racial Discrimination in Contract Performance: Patterson and a State Law Alternative*, 25 HARV. J. C.R.-C.L. L. REV. 431, 445 (1990). Burton stated:

Far from isolating formation, performance, and enforcement from each other, the modern law of contracts treats the stages of contract as interdependent and mutually supporting parts of a coherent social practice. In this light, "the same right . . . to make and enforce contracts" is not an independent statutory phrase to be bifurcated into two separate rights, with contract performance dropping out. The phrase is a singular reference to the legal power of contract, encompassing all stages of a contract.

Id.; see also STEVEN J. BURTON, JUDGING IN GOOD FAITH 83-84 (discussing *Patterson* and noting that "[t]he performance stage of a contract cannot be excised from the 'right . . . to make and enforce contracts' within a coherent understanding of the modern law of contracts"). As for his reference to *modern* contract law, Burton maintains that § 1981 should be interpreted according to contemporary notions of contract in order to "coordinate[] the statute with the law that actually governs the relevant transactions and relations as a practical matter." Burton, *supra*, at 447. As noted previously, the Court itself made no assessment of whether its interpretation of § 1981 accords with the original, rather than a contemporary, meaning of the statutory terms. See *supra* note 57.

75. See *infra* notes 106-54 and accompanying text (discussing lower court applications of the *Patterson* decision).

fall under § 1981's right to make a contract, they present a difficulty under the Court's analysis because promotion claims do not neatly follow the Court's division between formation conduct — which, as we have seen, remains actionable — and postformation conduct — which does not.⁷⁶ Promotion is at once a postformation activity, and yet at the same time arguably the formation of a new contract. This split character of promotion claims under *Patterson* has caused some courts to treat these claims as an "exception" to the formation- postformation division.⁷⁷

A. *The Patterson Court's Ruling*

Although it has not yet been generally recognized, the Court's evaluation of promotion claims must be understood as functioning not as an exception to but as entirely congruent with the remainder of its analysis of the § 1981 right to make a contract. A careful structural analysis of the Court's opinion establishes this insight. In section III (A) of the opinion, the Court explicated the meaning of

76. In the words of the Seventh Circuit, these claims "straddle the line" between formation and postformation conduct. *Partee v. Metropolitan Sch. Dist.*, 954 F.2d 454, 456 (7th Cir. 1992).

77. See, e.g., *Berry v. General Motors Corp.*, 796 F. Supp. 1409, 1426 (D. Kan. 1992) ("The *Patterson* decision . . . provided an exception for promotion claims."); *Holt v. Michigan Dept. of Corrections*, 771 F. Supp. 201, 204 (W.D. Mich. 1991) (holding that the *Patterson* court intended "to limit the 'failure to promote' exception to those situations involving a fundamental and distinct change in the contractual relationship between the employer and the employee. . .") *aff'd*, 974 F.2d 771 (6th Cir. 1992), *cert. denied*, 114 S.Ct. 1641 (1994); *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1544 (E.D. Va. 1990) ("With [the] single exception [of promotion claims,] *Patterson* draws a bright line distinction between pre-contract formation conduct . . . and post-contract formation conduct."), *aff'd*, 939 F.2d 157 (4th Cir. 1991); *Williams v. Chase Manhattan Bank*, 728 F. Supp. 1004, 1008 (S.D.N.Y. 1990) (holding that *Patterson* "carved out a narrow exception with respect to failure to promote claims of discrimination.").

Worse are cases that do not recognize that promotion claims even present a challenge to the formation- post-formation division. See, e.g., *Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir. 1990) ("Section 1981 does not apply to employment discrimination cases involving the federal government . . . and would not authorize damages on account of failure to promote even if it did . . . § 1981 'covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process'") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80 (1989)); *Washington v. Court of Common Pleas*, 845 F. Supp. 1107, 1108 n.1 (E.D. Pa. 1994) (noting that "failure to promote claims are not cognizable under § 1981"); *Maddox v. Norwood Clinic, Inc.*, 783 F. Supp. 582, 582-83 (N.D. Ala. 1992) ("At the time this action was filed, Title VII proscribed the alleged misconduct [failure to promote] of defendant but Section 1981 did not. Section 1981 made unlawful racial discrimination only in the formation of contracts."); *Butts v. City of New York, Dept. of Hous. Preservation & Dev.*, No. 91 Civ. 5325 (LJF), 1992 U.S. Dist. LEXIS 998, at *12 (S.D.N.Y. July 7, 1992) (dismissing promotion claim on the basis that *Patterson* "held that an employee has no claim for employment discrimination under § 1981 unless the acts complained of related to the making or enforcement of a contract."), *aff'd in part, rev'd in part*, 990 F.2d 1397 (2d Cir. 1993).

§ 1981's right to make and enforce contracts.⁷⁸ In section III (B), the Court *applied* these principles to Brenda Patterson's racial harassment claim.⁷⁹ Section IV in turn *applied* the Court's prior interpretation of § 1981 to Patterson's promotion claim:

Consistent with what we have said in Part III, supra, the question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981.⁸⁰

The remainder of the Court's analysis is extremely brief. The Court used only one sentence to insist that courts making a determination of the viability of a promotion claim should "give a fair and natural reading to" and "not strain in an undue manner" the language of § 1981.⁸¹ Then, in the course of one additional sentence and one citation, the Court provided its only substantive clue as to what, in its view, would constitute a viable § 1981 promotion claim:

Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981. *Cf. Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (refusal of law firm to accept associate into partnership) (Title VII).⁸²

The Court went no further in assessing the validity of Patterson's promotion claim under § 1981 and later remanded the issue to the lower courts.⁸³

In my view, the Court's substantive application to promotion claims of what it means to "make" a contract under § 1981 is the critical moment in its entire analysis. The Court's textual analysis in *Patterson* rises or falls on the basis of its accomplishment here. Not only do the lower courts have difficulty applying the meaning of *Patterson* to promotion cases, but also the Court does itself. The Court's weak effort to apply to promotion claims the meaning it discerns in § 1981 demonstrates how tenuous is the textualist meaning

78. *Patterson*, 491 U.S. at 176-78.

79. *Id.* at 178-82. "Applying these principles to the case before us, we agree with the Court of Appeals that petitioner's racial harassment claim is not actionable under § 1981." *Id.* at 178 (emphasis added). Section III(C) of the case responds to interpretations of § 1981 by Justice Brennan and the Solicitor General and is irrelevant to the present discussion. *Id.* at 182-85.

80. *Id.* at 185 (emphasis added).

81. *Id.*

82. *Id.* at 185-86.

83. *Id.* at 189. The remainder of Section IV discusses a subject not relevant for our purposes, the jury instructions on Patterson's promotion claim. *Id.* at 186-88.

drawn. The fundamental frailty in the Court's analysis becomes evident because the soft footing cannot bear the weight of analysis built upon it.⁸⁴ Examination of lower court promotion cases only confirms the difficulty the Court's analysis presents.

Before turning to these cases, several points about the Court's analysis warrant emphasis. First, as previously observed, the *Patterson* opinion's discussion of promotion claims clarifies that these claims are not an exception to the Court's determination of the meaning of § 1981 but an application of this meaning.⁸⁵ Second, the Court could have largely avoided the problem of promotion claims by simply declaring that § 1981's protection of "the same right . . . to make . . . contracts" extended only to entirely new contracts, that is, contracts at the moment of original hire.⁸⁶ All other employment contracts could then have been interpreted as renewals or modifications of prior contracts and, therefore, as the "re-making" of an existing contract rather than the making of an initial contract. Alternatively, the Court could have expanded the meaning going beyond moment of entry and still limited when a "contract" is formally made by looking to such evidence as memorialization or detailed negotiation of terms. These distinctions would have permitted the maintenance of a bright-line — or at least a much brighter line — between formation and postformation conduct.⁸⁷ Despite these possibilities of a more bright-line rule, the Court did not find such rules to make sense of the statute.⁸⁸ If these interpretations of § 1981 seem an artifice, though, the question remains whether the Court's actual test is any less so.

84. As I shall subsequently argue, the Court's analysis here informs assessment not only of promotion claims but also demotion, transfer, and discriminatory discharge claims. See *infra* notes 155-249 and accompanying text.

85. Reiterating the statement by the Court, the district court on subsequent remand said that the *Patterson* Court developed principles differentiating formation and postformation conduct and "also developed a special rule, consistent with the rules stated above, regarding discriminatory promotion practices." *Patterson v. McLean Credit Union*, 784 F. Supp. 268, 281 (M.D.N.C. 1992) (emphasis added), *aff'd*, 39 F.3d 515 (4th Cir. 1994).

86. 42 U.S.C. § 1981 (1994). I use the example of employment, although it should be noted that § 1981 is not so limited.

87. Cf. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1317-18 (7th Cir. 1989) (Ripple, J., concurring) (noting the potential lack of symmetry in promotion claims depending on whether the aggrieved is a new or a current employee, but remarking that "I do not see how that condition, an accident of history or of political will, permits us to revise the scheme. If making statutes logical or symmetrical was the judicial task, we would be a law revision commission, not a court").

88. *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989) (holding a § 1981 promotion claim viable where it gives rise "to the level of an opportunity for a new and distinct relation between the employee and employer").

In any event, the Court did not hesitate to say that at least some promotions are actionable under § 1981 if they do "involve[] the opportunity to enter into a new contract with the employer."⁸⁹ It also defined the statutory phrase "make . . . contracts" to include as actionable new formal contracts as well as new contractual *relations*.⁹⁰ The test is a functional, not formal, one. What is functionally a new contractual relation may exist within what is formally the same contract as before; at a time when the formal contract does not change, the contractual relationship may.

In its *Patterson* opinion, the Court did not register an awareness that application of § 1981's meaning to promotion claims would be in any way problematic.⁹¹ Building on its prior statement that it thought lower courts would have "little difficulty applying the straightforward principles that we announce today,"⁹² the Court seemed to believe that its own application of these principles to promotion claims was, as we have seen, simply "consistent with" these principles.⁹³ The moment of application was not worthy of much independent inquiry evidently because it merely involved derivation from prior standards already enunciated. The Court did not recognize that locating promotion claims on either side of the divide between formation or postformation conduct might present intractable difficulties. Hence, the Court also did not recognize that application to promotion claims of the meaning it held § 1981 to have would require extension, clarification, and reformulation of this meaning.

The Court's attempt to move rather seamlessly from meaning to application is belied, however, not only by later cases in the lower courts but also by what follows in its own discussion. After insisting on the congruity of promotion claims with prior principles interpreting the making of a contract, the Court issued a directive. In making a determination about the viability of a promotion claim,

89. *Id.*

90. *Id.* ("Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981.") (emphasis added).

91. It is also interesting that the viability of promotion claims under § 1981 received little discussion in oral argument. And about the only time the subject was discussed, respondent McLean Credit Union argued simply that if hostile work conditions influenced a promotion decision, then an employee had a viable claim. Oral Argument of Respondent at 24, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (No. 87-107) (Feb. 29, 1988).

92. *Patterson*, 491 U.S. at 185 n.6. This footnote appears at the very end of Section III and immediately prior to the Court's discussion of promotion claims that begins Section IV.

93. *Id.* at 185.

a lower court should give a fair and natural reading to the statutory phrase "the same right . . . to make . . . contracts," and should not strain in an undue manner the language of § 1981. Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981.⁹⁴

On the one hand, this statement can be read as the Court's emphasis that interpretation should remain textualist — lower courts must derive meaning from what the text says rather than impose meaning upon it. Under this view, the "new and distinct relation" test simply represents the proper textualist reading of the statute. Yet consider the difference between the statutory language — "right . . . to make . . . contracts" — and the "new and distinct relation" requirement. Why does the making of contracts require that the relation be "new and distinct?" The statutory text does not directly point to this requirement. It is rather the Court's own creation which it then imposed on the statute — the exact activity the Court directs lower courts to abjure.⁹⁵ Moreover, cannot a textualist interpretation of § 1981 apply the statute to promotions in ways quite divergent from the Supreme Court's? The Fourth Circuit *Patterson* decision, for example, found no need to distinguish among kinds of promotion claims and held rather that "[c]laims of racially discriminatory . . . promotion . . . fall easily within § 1981's protection."⁹⁶

Viewed more critically, it seems that the Court's "new and distinct relation" test determines rather than reflects what is "a fair and natural reading"⁹⁷ of the statutory text. The Court decided the

94. *Id.*

95. A number of commentators have had difficulty locating the basis for this language. See, e.g., *Malhotra v. Cotter & Co.*, 885 F.2d F.2d 1305, 1317 n.6 (7th Cir. 1989) (Cudahy, J., concurring) (stating that "although the *Patterson* decision is replete with contract terminology of established meaning ('pre-' and 'post-formation conduct,' 'breach,' 'performance,' etc.), the term 'new and distinct relation' nowhere appears in the generally accepted contracts jurisprudence"); 1 *Joint House Hearings*, *supra* note 25, at 184 (prepared statement of Julius Chambers, Director-Counsel, NAACP Legal Defense and Education Fund) ("This 'new and distinct relation' [test] was entirely a novel concept in the law . . ."); Marc J. Fagel, Comment, *Section 1981 Promotion Claims After Patterson v. McLean Credit Union*, 57 U. CHI. L. REV. 903, 921 (1990) ("As should be evident, the 'new and distinct relation' test has no explicit foundation."). *But see* Byrd v. Pyle, 728 F. Supp. 1, 1 (D.D.C. 1989) ("Although this language [of 'new and distinct relation'] is essentially dictum, the principle it states follows inexorably from the Court's core holding.").

96. *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986). For elaboration of the theory behind this holding as an alternative textualist approach, see *infra* notes 202-07 and accompanying text. The Supreme Court responded directly to the Fourth Circuit's judgment, first quoting the lower court and then responding, "We think that somewhat overstates the case." *Patterson*, 491 U.S. at 185.

97. *Patterson*, 491 U.S. at 185.

implications of the statutory language, and this interpretation is stamped with the imprimatur of being "fair and natural."⁹⁸ The lower courts are then told not to "strain in an undue manner the language of § 1981,"⁹⁹ where the notion of "strain" is a question of the extent of deviance from the Court's test.¹⁰⁰ But again, although the Court did not acknowledge this, other interpretations of the statutory language are at least equally plausible. The issue is whether the statutory text permits implication of the right to make a contract in circumstances more modest than creation of a "new and distinct" contractual relation.

The question raised, then, is whether the Court's "new and distinct relation" test is not so much an independent reading of the statutory language as one designed to restrict the application that the text otherwise permits. Without the Court's gloss on the text, application of the statute's meaning to promotion cases would not be as straightforward as the Court seemed to intend. More precisely, the barrier between formation conduct and postformation conduct would break down.¹⁰¹ The Court may have asserted it was simply trying to make the best sense of the statute, but Justice Stevens' dissent claimed no less.¹⁰² Recall that the textualist goal is to derive the statute's meaning from the text itself — adhere to what Congress has wrought — rather than to impose on the language Congress has written what the Court views as the best sense, rule, or purpose.¹⁰³ The Court's very insistence that lower courts give the text a fair reading — an emphasis not present in its original discussion of what it means under § 1981 to make and enforce a con-

98. The threat is that the Court becomes like Lewis Carroll's oft-cited Humpty Dumpty, an entity that decides on its own what the meaning of words will be. LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 124-25 (1993).

99. *Patterson*, 491 U.S. at 185.

100. *See, e.g.*, *Wall v. Trust Co. of Ga.*, 946 F.2d 805, 808 (11th Cir. 1991) ("Effectively, *Patterson* held that in the promotion context, a new contract is not *made* for purposes of section 1981 unless such a new and distinct relationship would flow from the promotion.").

101. This breakdown was evident in Justice Stevens' dissent:

Whenever significant new duties are assigned to the employee — whether they better or worsen the relationship — the contract is amended and a new contract is made. Thus, if after the employment relationship is formed, the employer deliberately implements a policy of harassment of black employees, it has imposed a contractual term on them that is not the "same" as the contractual provisions that are "enjoyed by white citizens."

Patterson, 491 U.S. at 221 (Stevens, J., concurring in part & dissenting in part).

102. *Id.* at 219-20 (interpreting § 1981).

103. *See supra* note 3 and accompanying text.

tract¹⁰⁴ — seems an attempt to discipline courts into reading the text more with an eye to the Court's own interpretation rather than to primary attention to the statutory language itself.¹⁰⁵ Under the "new and distinct relation" test, the language of the text recedes from view, and the lower courts' obligation is to attend to and decipher what the Court intended by this test. Under this view, then, the Court has not simply explicated the text of § 1981 but has interposed itself and its decisions between the lower courts and the text.

B. Lower Court Applications as Textualist?

Suppose, though, that we bracket any criticism of the Court's own movement here from meaning to application and consider simply the lower courts' application of the "new and distinct relation" test. If the Court's interpretation of what it means to make a contract in the promotion context aims to provide further guidance on what is a viable promotion claim, then how well does this more delimited sense of the meaning of the text assist the lower courts' application of § 1981? Those courts have commented specifically on the gap between the Court's enunciated rule and its application. The Seventh Circuit, for instance, has remarked:

As this court has noted on several occasions, the "new and distinct relation" standard is difficult to apply. *Partee v. Metropolitan Sch. Dist.*, 954 F.2d 454,457 (7th Cir. January 21, 1992) (acknowledging that this court has "expressed some uncertainty as to the precise meaning of *Patterson's* 'new and distinct relation' test"); *McKnight [v. General Motors Corp.]*, 908 F.2d [104,] 109-10 [7th Cir. (1990)] (noting that "the question of what constitutes a new employment relation under *Patterson* is difficult and unsettled"); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("We show no disrespect to the Supreme Court by suggesting that the scope of *Patterson* is uncertain."). Indeed, we have remarked that there is no simple, bright-line test to apply. *McKnight*, 908 F.2d at 109 ("Precisely how different the new employment relation must be to make a racially motivated refusal to create it actionable under section 1981 is not susceptible of a blanket answer . . .").¹⁰⁶

A district court questioned "whether any bright line formulas can be uniformly applied as a matter of law to the plethora of promotion

104. *Patterson*, 491 U.S. at 176-78.

105. This is not to say that any court can read a statute independent of external context. See generally Taylor, *Structural Textualism*, *supra* note 5.

106. Taylor v. Western & S. Life Ins. Co., 966 F.2d 1188, 1200 (7th Cir. 1992); accord Von Zuckerstein v. Argonne Nat'l Lab., 984 F.2d 1467, 1473 (7th Cir. 1993) (citing *Partee* and *McKnight*).

decisions that are made every day in the labor force.”¹⁰⁷ A Sixth Circuit review of post-*Patterson* promotion cases revealed that “courts have had to undertake subtle, sometimes hairsplitting analyses to determine whether a change in employment constitutes a ‘new and distinct relation.’”¹⁰⁸ While the *Patterson* Court’s explicit reference to the *Hishon*¹⁰⁹ case — which involved the failure to promote a law associate to partner — may be intended as a paradigm of a “new and distinct relation,” the Second Circuit stated that it “does not assist . . . in defining the border between actionable and non-actionable promotions under § 1981.”¹¹⁰

Admittedly, application of the Court’s standard has not been as inchoate as these judicial observations suggest. For example, after its statement quoted above,¹¹¹ the Seventh Circuit noted that “despite the absence of a definitive framework, a substantial body of law has developed among the circuits to provide adequate guideposts.”¹¹² Before evaluating this body of law, however, we must recognize that its development may have occurred in at least three different ways, only one of which maintains fidelity to textualism.

First, from a textualist perspective, it would appear that the “new and distinct relation” test should be understood as akin to the Court’s clarification of a word’s or phrase’s definition. The meaning of the word or phrase seems ambiguous, and through closer scrutiny of the statute’s language and structure, the Court resolves the apparent tension. The clarification either provides needed rigor to the disputed word or phrase or, as in *Patterson*, serves as substitute language for the contested terms. Once the meaning of the text is defined, then application of this language to a particular case proceeds by a process of derivation, according to the logic of the statute itself.

107. *Dash v. Equitable Life Assurance Soc’y*, 753 F. Supp. 1062, 1068 (E.D.N.Y. 1990); see also *Duse v. IBM Corp.*, 748 F. Supp. 956, 964-65 (D. Conn. 1990) (stating that “the line dividing promotions that continue to be actionable under § 1981 and those that do not is hardly one that is precisely drawn”); *Zaidi v. Block Drug Co.*, 57 Fair Empl. Prac. Cas. (BNA) 964, 965 (D.N.J. Apr. 18, 1990) (“It is not surprising that lower federal courts are struggling to discern a workable definition of ‘new and distinct relation.’”).

108. *Holt v. Michigan Dept. of Corrections*, 974 F.2d 771, 774 (6th Cir. 1992), cert. denied, 114 S. Ct. 1641 (1994); *accord* *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 801 (10th Cir. 1993) (describing the courts as having engaged “in subtle hairsplitting analyses”).

109. *Patterson v. McLean Credit Union*, 491 U.S. 164, 185-86 (1989) (citing *Hishon v. King & Spaulding*, 467 U.S. 69 (1984)).

110. *Butts v. City of New York, Dep’t of Hous. Preservation & Dev.*, 990 F.2d 1397, 1411 (2d Cir. 1993).

111. See *supra* note 106 and accompanying text.

112. *Taylor v. Western & S. Life Ins. Co.*, 966 F.2d 1188, 1200 (7th Cir. 1992).

By contrast, according to a second alternative, judicial attention is no longer directed toward a supposed unfolding of the text's intrinsic logic but to the Court's own resolution of the statutory inquiry. Under one variant of this model, attention is turned from the Court's elucidation of the statutory text to the Court's own development of doctrine.¹¹³ Under another variant, just as under *Chevron*¹¹⁴ a court would defer in a situation of statutory ambiguity to a reasonable interpretation of the statute by a governing agency, here a lower court would defer to the Supreme Court's resolution of ambiguous statutory language. Whatever the variant, focus is no longer on the language of the statute but on the logic and intent of the Court's judgment.

A third alternative finds only the broadest implications deducible from either the statute or the Court's judgment. Under this approach, interpretation proceeds in the lower courts in a fashion more akin to a common law development — application and development of a principle worked out in varied circumstances over time.¹¹⁵

Examination of the post-*Patterson* promotion cases reveal that they basically fall within the second and third alternatives. Under the second alternative, a number of courts have emphasized the intent lying behind the Court's introduction of the "new and distinct relation" test. One court observed, for example, that it cannot be enough under this test for a promotion to involve merely increased responsibilities and pay, because "were such a showing sufficient to survive *Patterson*, the Court's comments would be effectively eviscerated."¹¹⁶ Another court agreed that different duties and pay do

113. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 25-58 (1982) (distinguishing textual argument from doctrinal argument); Robert Post, *Theories of Constitutional Interpretation*, in *LAW AND THE ORDER OF CULTURE* 13, 31 (Robert Post ed., 1991) ("Doctrinal interpretation . . . applies not the words of the document, but legal rules that judges have subsequently created.").

114. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

115. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (holding that § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, was intended to create a body of federal common law).

116. *Byrd v. Pyle*, 728 F. Supp. 1, 2 (D.D.C. 1989). One commentator has noted similarly:

[I]t is difficult to develop a satisfactory definition of "new and distinct relation" by drawing solely on contract law principles. . . . Whether one looks for an exchange of consideration, or for a modification sufficient to stand apart from the original contract, it is evident that any conceivable promotion may arguably reach the level of a "new and distinct" contract cognizable under § 1981. This result was clearly not intended by the *Patterson* Court.

Fagel, Comment, *supra* note 95, at 921.

not in themselves suffice for a promotion claim because "*Patterson* clearly did not intend every such claim to be actionable under Section 1981."¹¹⁷ A third court rejected the availability of a standard emphasizing simply some quantitative differences in pay or function, because "we do not believe that the Supreme Court had a quantitative standard in mind when it spoke of a 'new and distinct relation between the employee and the employer.'"¹¹⁸ Other courts have cited the Court's reference to *Hishon* as evidence that the Court intended the "new and distinct relation" test to be limited only to fundamental changes in the contractual relationship.¹¹⁹ These references may suggest that when the *Patterson* Court admonished the lower courts to adhere to "a fair and natural reading" of the statute,¹²⁰ this requirement is satisfied in actuality more by attention to the Court's own views of the statute rather than to what is ineluctably entailed by the statute itself.¹²¹

A number of courts also fall within the third alternative and have concentrated on the definition of a "new and distinct relation" as it has evolved through the case law. In these cases, attention has been focused less on the statute or on the *Patterson* Court's intentions, neither of which provides definitive guidance, than on the judgments that have developed in the case-by-case application of *Patterson* over time. To quote the Seventh Circuit again, with somewhat different emphasis, the sense promoted is that "despite the absence of a definitive framework [provided by the Supreme Court], a substantial body of law has developed *among the circuits* to provide ade-

117. *Malhotra v. Cotter & Co.*, No. 86 C 9460, 1990 U.S. Dist. LEXIS 16653 (N.D. Ill. Dec. 4, 1990), *aff'd*, 963 F.2d 375 (7th Cir. 1992).

118. *Sitgraves v. Allied-Signal, Inc.*, 953 F.2d 570, 573 (9th Cir. 1992).

119. *See, e.g., Conerly v. CVN Cos.*, 785 F. Supp. 801, 809 (D. Minn. 1992) (holding that the reference to *Hishon* by the *Patterson* Court suggested that the "failure to promote" exception is limited to those situations involving a fundamental and distinct change in the contractual relationship) (citing *Holt v. Michigan Dept. of Corrections*, 771 F. Supp. 201, 204 (W.D. Mich. 1991)); *Guliford v. Beech Aircraft Corp.*, 768 F. Supp. 313, 320 (D. Kan. 1991) (noting the *Hishon* court's intention to apply § 1981 only to "promotions involving a fundamental change"); *Sofferin v. American Airlines, Inc.*, 717 F. Supp. 597, 599 (N.D. Ill. 1989) (citing *Hishon* to require a "true 'change' in position"); *Byrd v. Pyle*, 728 F. Supp. 1, 2 (D.D.C. 1989) (citing *Hishon* as suggesting a "fundamental change is necessary").

120. *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989).

121. *But see Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1318 (7th Cir. 1989) (Ripple, J., concurring) ("Here, we ought to be particularly circumspect because the Supreme Court has warned us rather pointedly that we are to apply *Patterson*, not undermine it. When dealing with this very issue [of promotion claims], the Supreme Court specifically warned us to give "a fair and natural reading to the statutory phrase 'the same right . . . to make . . . contracts.'").

quate guideposts."¹²² Another court observed that "[n]umerous courts have offered factors to guide in assessing the existence of a cognizable [promotion] claim under § 1981"¹²³

C. *The Lower Courts' Tests*

Suppose, though, we set aside the fact that the lower courts may be applying *Patterson* more on the basis of either developing case law or the Court's intent and assume for the sake of argument that the task is to apply the "new and distinct relation" test according to a textualist methodology. Does the Court's test afford courts the ability to derive criteria uniformly applicable in concrete cases? Because, according to the Court, the statute only prohibits racial discrimination in the making of contracts, the interpretive goal is to establish standards that prevent nonactionable racial harassment or discriminatory conditions claims from transforming themselves into viable promotion claims.¹²⁴ The task is then to decipher when a change in working conditions should be actionable. Virtually no court has disputed that changes such as routine pay raises are not actionable.¹²⁵ After that point, as previously discussed,¹²⁶ issues be-

122. *Taylor v. Western & S. Life Ins. Co.*, 966 F.2d 1188, 1200 (7th Cir. 1992) (emphasis added). An earlier decision noted to similarly relevant effect: "The parameters of the 'new and distinct relation' test are still being *defined by the federal courts.*" *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1556 (E.D.N.Y. 1990) (emphasis added).

123. *Patterson v. McLean Credit Union*, 784 F. Supp. 268, 284 (M.D.N.C. 1992) (emphasis added), *aff'd*, 39 F.3d 515 (4th Cir. 1994); *see also* *Sitgraves v. Allied-Signal, Inc.*, 953 F.2d 570, 573 (9th Cir. 1992) ("The circuit courts' decisions since *Patterson* sensibly suggest"); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 998 n.4 (W.D. Tex. 1990) ("The developing body of case law has identified several significant changes"); *Hudgens v. Harper-Grace Hosp.*, 728 F. Supp. 1321, 1325 (E.D. Mich. 1990) ("Other district courts considering [the failure to promote claims] have found facts sufficient to support a new and distinct relationship."); *Williams v. Chase Manhattan Bank*, 728 F. Supp. 1004, 1008 (S.D.N.Y. 1990) ("Although no bright line test has emerged [in the lower courts] to determine whether a promotion alone constitutes a 'new and distinct relation,' several Courts have proposed factors to guide in this assessment").

As the reference to *Sitgraves* here suggests, some cases fall within both the second and third alternatives. *See supra* note 118 and accompanying text (citing *Sitgraves* within the second alternative).

124. *See, e.g., Patterson*, 784 F. Supp. at 283 (holding that minor differences between positions do not give rise to new contracts else "virtually all requests for changes in job assignments would be swept back within the ambit of § 1981, a result at odds with the thrust of *Patterson*") (citing *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1546 (E.D. Va. 1990)).

125. *See, e.g., Williams v. National R.R. Passenger Corp.*, 716 F. Supp. 49, 51 (D.D.C. 1989) ("Higher pay is a part of nearly all promotions and by itself can hardly make a promotion a 'new and distinct relation.'") (citation omitted), *aff'd*, 901 F.2d 1131 (D.C. Cir. 1990). *But see* *Fowler v. McCrory Corp.*, 727 F. Supp. 228, 230 n.1 (D. Md. 1989) ("Presumably . . . any promotion which would involve a concrete change in the terms of employment (such as salary or benefits)

come much more murky.

At one extreme are cases that have held that the promotion must be comparable to that at issue in *Hishon*¹²⁷ — from law firm associate to partner, a change from employee to owner status. Either a new contract of employment or the functional equivalent must be formed; there must be a *fundamental* change in the nature of the employment relationship.¹²⁸ Here, for example, the failure of an employee to be promoted from account administrator to manager would not be actionable, as the difference between management and non-management positions differed “only in responsibility and compensation,” and in either job, the employee would have remained in the status of employee and would have been governed by the same employment handbook.¹²⁹

More common is a test that does not demand that the promotion effect a fundamental change but rather a *substantial* one. This is the test toward which most courts seem to be coalescing over time. In an early assessment a circuit judge contended the standard should be whether the promotion is the equivalent of a “new job,” something requiring “a substantial change in the plaintiff’s duties and responsibilities.”¹³⁰ But some more recent decisions have emphasized that the change must be “qualitative.”¹³¹ More generally,

would be covered by § 1981.”) (dictum).

126. See *supra* notes 106-10 and accompanying text.

127. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

128. See, e.g., *James v. IBM Corp.*, 737 F. Supp. 1420, 1525 (E.D. Pa. 1990) (adopting this test); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1311 (7th Cir. 1989) (Posner, J.) (identifying the test as “whether the promotion would change the terms of the contractual relationship between the employee and the employer”); *Waller v. Consolidated Freightways Corp.*, 767 F. Supp. 1548, 1557 (D. Kan. 1991) (adopting the test that “the basic terms of the contractual relationship between the employer and employee must be so affected as to necessitate or create a new contract”); *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1556 (E.D.N.Y. 1990) (identifying the test as whether “the promotion sought would actually entail a new contract or otherwise dramatically alter the past structure of the employer/employee relationship”).

129. *James*, 737 F. Supp. at 1425; see also *Jenkins v. Ward*, 53 Fair Empl. Prac. Cas. (BNA) 1839, 1843 (S.D.N.Y. July 17, 1990) (“If plaintiff were promoted [from police officer] to police sergeant, he would not have entered into a new contractual relationship, since the New York City Police Department will still remain his employer.”).

130. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1317 n.6 (7th Cir. 1989) (Cudahy, J., concurring).

131. *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 802 (10th Cir. 1993); *Taylor v. Western and S. Life Ins. Co.*, 966 F.2d 1188, 1200-01 (7th Cir. 1992); *Sitgraves v. Allied-Signal, Inc.*, 953 F.2d 570, 573 (9th Cir. 1992). The emphasis on a qualitative change also responds to objections of the earlier test requiring only substantial change. See, e.g., *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1545-46 (E.D. Va. 1990) (holding that the latter might erroneously permit the viability of transfer claims), *aff’d*, 939 F.2d 157 (4th Cir. 1991); see *infra* notes 155-65 and accompanying text (discussing transfer claims).

the standard has been described as fact specific and encompassing, looking not only at changes in pay, duties, and responsibilities, but changes in responsibility level, in pay status from hourly wage to salary, job qualifications, status within the organization, move from nonsupervisory to supervisory role, pension and other benefits, and so on.¹³² This test does not provide bright-line demarcations¹³³ and demands that a court "exercise reasoned judgment as to whether that change will work a new and distinct relation between the parties. This judgment must consider not only the number of resulting changes, but the magnitude of individual changes, and of the changes as a whole."¹³⁴ Under this kind of test, Brenda Patterson's claim that she was discriminatorily not promoted from bank teller to Account Intermediate did not survive, since in both positions she would remain in the same office, receive hourly wages, have the same supervisor, little increase in pay, a modest change in tasks, and no change in her level of responsibility.¹³⁵

As a result of this functional test, courts have held that "routine" advancement, advancement that is an outgrowth of or expectation deriving from the original employment contract, does not present a viable § 1981 claim.¹³⁶ Courts have also held nonactionable promotions that are a necessary but prior step to subsequent promotions that would give rise to a new employment relation.¹³⁷

132. See, e.g., *Patterson v. McLean Credit Union*, 39 F.3d 515, 519 (1994); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994, 998 n.4 (W.D. Tex. 1990); *DeBailey v. Lynch-Davidson Motors, Inc.*, 734 F. Supp. 974, 977 (M.D. Fla. 1990) (quoting *Brown v. American Food Serv. Corp.*, 56 Fair Empl. Prac. Cas. (BNA) 706, 707 (E.D. Pa. Oct. 25, 1990)); *Hudgens v. Harper-Grace Hosps.*, 728 F. Supp. 1321, 1325 (E.D. Mich. 1990).

133. See *supra* note 107 and accompanying text.

134. *Guzman*, 756 F. Supp. at 998 n.4.

135. *Patterson*, 39 F.3d at 519.

136. See, e.g., *Butts v. City of New York, Dept. of Hous. Preservation & Dev.*, 990 F.2d 1397, 1411 (2d Cir. 1993) ("With respect to promotions, the inquiry is whether a promotion effectively creates a new contract between employer and employee or is simply the fulfillment of a stated promise or an implicit expectation in the original contract."); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370-72 (5th Cir. 1992) (citing cases) *cert. denied*, 114 S. Ct. 1641 (1994); *Waller v. Consolidated Freightways Corp.* 767 F. Supp. 1548, 1558 (D. Kan. 1991) (holding promotion was part of ordinary employee progression); *Dash v. Equitable Life Assurance Soc'y*, 753 F. Supp. 1062, 1069 (E.D.N.Y. 1990) (ruling that the issue is whether a promotion is "a natural outgrowth of the original terms and conditions of employment"); *Watson v. Sears, Roebuck Co.*, 742 F. Supp. 353, 355 (M.D. La. 1990) (holding promotion was "routine advancement").

137. See, e.g., *Harris v. Blue Cross & Blue Shield, Inc.*, No. 88-4271-R, 1991 U.S. Dist. LEXIS 14140, at *9 (D. Kan. Sept. 27, 1991), *aff'd*, 963 F.2d 375 (9th Cir. 1992); *Malhotra v. Cotter & Co.*, No. 86 C 9460, 1990 U.S. Dist. LEXIS 16653 (N.D. Ill. Dec. 4, 1990). An exception may be if the prospect of the future promotion is not speculative but an element of the position being sought. See, e.g., *Patterson v. McLean Credit Union*, 784 F. Supp. 268, 285

This test has also led to a number of continuing disputes, sometimes within the same circuit. For example, the Ninth Circuit and a decision in the Seventh Circuit have held that the move from nonsupervisory to supervisory status is in itself sufficient to form an actionable promotion claim, whereas the Fifth Circuit and two other cases from the Seventh Circuit have held that it is not.¹³⁸ Other cases divide on whether a promotion from one supervisory position to another is actionable.¹³⁹

Particularly striking is the judicial division as to whether various kinds of generally blue-collar promotions are actionable. Cases here include promotions from probationary to regular employee or from part-time to full-time employment. The majority of decisions appear to find these cases not actionable, generally because the promotions involve no or little change in the employee's duties and responsibilities.¹⁴⁰ This result slights the rights and status generally granted

(M.D.N.C. 1992) (noting that the plaintiff did not produce any support to show that the new position was a prerequisite to movement up the company ladder thereby making such movement an element of a new contractual relationship), *aff'd*, 39 F.3d 515 (4th Cir. 1994); *Saunders v. George Washington Univ.*, 768 F. Supp. 857, 864 (D.D.C. 1991) (finding that promotion to tenure-track position will, at this school, almost inevitably lead to tenure and holding that grant of tenure is a new and distinct employment relationship). Ironically, then, if the promotion is an outgrowth of the original contract it may not be considered a new and distinct relation. *See supra* note 136 and accompanying text (citing cases which held that promotions are considered part of the existing relation). However, if the promotion is an outgrowth of a subsequent position attained, it may be so considered.

138. *Compare* *Sitgraves v. Allied-Signal, Inc.*, 953 F.2d 570, 573 (9th Cir. 1992) (holding promotion claim viable) and *Taylor v. Western & S. Life Ins. Co.*, 966 F.2d 1188, 1200 (7th Cir. 1992) with *Johnson*, 965 F.2d at 1371 (holding promotion claim not viable) and *Partee v. Metro. Sch. Dist.*, 954 F.2d 454 (7th Cir. 1992) and *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1054-55 (7th Cir. 1991), *reh'g denied*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 644 (1993).

139. *Compare* *Holt v. Michigan Dept. of Corrections*, 974 F.2d 771, 774-75 (6th Cir. 1992) (holding promotion not actionable), *cert. denied*, 114 S. Ct. 1641 (1994) and *Williams v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1004, 1009 (S.D.N.Y. 1990) with *Payne v. General Motors Corp.*, 731 F. Supp. 1465, 1474 (D. Kan. 1990) (holding that claim survives summary judgment).

140. *See, e.g.*, *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1119-20 (7th Cir. 1992) (involving employee who claimed promotion to full-time word processor was deserved as she was already doing work of full-time employee; court held it would be anomalous to find that this promotion created a new employment relationship); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1373 (8th Cir. 1992) (holding promotion from part-time to full-time mailroom employee "did not constitute . . . a new and distinct contractual relation"); *White v. Union Pacific R.R.*, 805 F. Supp. 883, 887-88 (D. Kan. 1992) (holding that part-time and full-time trackman positions involved the same hours, benefits, rate of pay, job responsibilities, duties, and same qualifications and, therefore, did not create a new employment relationship); *Sofferin v. American Airlines, Inc.*, 717 F. Supp. 597, 599 (N.D. Ill. 1989) (ruling that promotion from probationary to "tenured status" is not actionable as employee would be performing same job functions), *aff'd in part, rev'd and remanded in part on other grounds*, 923 F.2d 552 (7th Cir. 1991), *on remand*, 785 F. Supp. 780 (N.D. Ill. 1992); *Hannah v. Philadelphia Coca-Cola Bottling Co.*, No. 89-0699, 1990 U.S. Dist.

regular or full-time employees,¹⁴¹ something recognized in the cases permitting these promotions to go forward.¹⁴² For additional contrast, consider the right given a faculty member to pursue a promotion claim that would move her from yearly contracts to permanent status because of the grant of tenure.¹⁴³ On the other hand, according to at least one court, a promotion from associate to full professor (where both are tenured positions) may not present a viable § 1981 claim.¹⁴⁴ Questions of value, stigma, and perception, stated the Third Circuit, should be discounted; none of these factors "indicate the creation of a new contract because they do not touch any of the terms of the contract as to duties, tenure, compensation or essential function[s]."¹⁴⁵ These cases highlight the ambiguity of what it

LEXIS 3586, at *4-5 (E.D. Pa. Mar. 29, 1990) (holding driver's promotion to permanent route not an actionable claim as would entail same job responsibilities); *see also* *Bush v. Commonwealth Edison, Co.*, 778 F. Supp. 1436, 1446-47 (N.D. Ill. 1991) (ruling promotion between two jobs governed by different union locals and restoring lost seniority not actionable as collective bargaining agreements were virtually identical and only relevant differences were the specific positions and their rate of pay), *on further consideration*, 812 F.Supp. 808 (N.D. Ill. 1992).

141. As the plurality noted in *Wygant*:

A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home."

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (plurality opinion) (quoting Richard H. Fallon, Jr. & Paul Weiler, *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 58). Though the citation refers specifically to the rights of unionized workers, non-unionized workers often have parallel legitimate contractual expectations.

142. *See, e.g.*, *Patrick v. Miller*, 953 F.2d 1240, 1251 (10th Cir. 1992) (holding that cause of action survives if employee "was an 'at will' and probationary employee who was denied 'permanent employee status [since] [t]he Personnel Handbook makes clear that permanent employees have rights, privileges and benefits not available to probationary employees'"); *Bohanan v. United Parcel Serv.*, 918 F.2d 178 (6th Cir. 1990), *reported in full*, No. 90-3155, 1990 U.S. App. LEXIS 20154 (6th Cir. Nov. 14, 1990) (holding actionable promotion from part-time to full-time supervisor as promotion would increase pay, stock shares, and supervisory responsibilities); *see also* *Suggs v. Capital Cities/ABC, Inc.*, No. 86 Civ. 2774 (LLM), 1991 U.S. Dist. LEXIS 5631 (S.D.N.Y. Apr. 30, 1991) at *12-13 (ruling actionable promotion that would entail move from one collective bargaining unit to another actionable because of loss of seniority and overtime pay, etc.).

143. *See, e.g.*, *Busch v. St. Xavier College*, No. 90 C 5285, 1991 U.S. Dist. LEXIS 421, at *4 (N.D. Ill. Jan. 15, 1991) (holding promotion claim viable). The result here should not be a product of the fact that tenure ensures permanent employment, since that seems irrelevant in other cases where duties and responsibilities otherwise remain the same. Perhaps the difference is that tenure also may provide a faculty member significant additional rights, such as the ability to vote on appointments and promotions, and these may establish a new contractual relationship with the employer.

144. *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 169-70 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 956 (1992).

145. *Id.*; *accord* *Revis v. Slocomb Indus., Inc.*, 814 F. Supp. 1209, 1215 (D. Del. 1993).

After the quoted language in the text, the *Bennun* court stated that "[h]olders of these two

means under § 1981 for an employee to make a new contract or achieve "a new and distinct relation"¹⁴⁶ with an employer.

A final anomaly arises from a potential peculiarity in the logic of promotion cases. Consider a current employee of a hypothetical firm and a candidate from outside the firm who are both applying for the same job. If the applications of both are rejected on racial grounds, should it be the case that the current employee has no cause of action under § 1981 because the promotion does not rise to the level of a new employment relationship, whereas the applicant would have a viable action under a refusal to contract claim? Judge Posner was the first to raise this issue in the 1989 Seventh Circuit case of *Malhotra v. Cotter & Co.*¹⁴⁷ If the two situations should be treated similarly, then § 1981 should protect these kinds of promotions, but would not protect the more routine promotions, for example an in-grade advance, available only to present employees.¹⁴⁸ The *Malhotra* court did not resolve the propriety of this approach, for it remanded the issue back to the district court.¹⁴⁹ Yet the question generated significant diverse commentary from other members of the *Malhotra* panel.¹⁵⁰

My interest in the anomaly identified is twofold. First, what does it say about the ease of the application of § 1981 under the *Patterson* Court's interpretation that such anomalies arise? Is the test

positions do nothing different day-in and day-out except for those few weeks out of the year when they evaluate candidates, if any, for a full professorship." *Bennun*, 941 F.2d at 169. Under this standard, is the difference between the duties of non-tenured and tenured faculty of such significant difference that a promotion from one to the other rises to the level of a new contractual relationship with the employer?

146. *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989).

147. 885 F.2d 1305, 1311 (7th Cir. 1989).

148. *Id.* Attention to the implications of this test may be one reason the more widely adopted functional test differentiates between routine and non-routine promotions. See *supra* note 136 and accompanying text. One commentator notes:

The following standard fulfills the *Patterson* Court's mandate: A promotion constitutes a "new and distinct relation" cognizable under § 1981 where there has been a tangible change in responsibilities and wages, and the discriminatorily denied promotion is not granted routinely to similarly situated workers.

Fagel, Comment, *supra* note 95, at 923.

149. *Malhotra*, 885 F.2d at 1318.

150. For Judge Cudahy, the test was appropriate, since nothing in *Patterson* justified the different statutory treatment of current employee and outside applicant. *Id.* at 1317 n.6 (Cudahy, J., concurring). Judge Ripple disagreed and held that the test would undermine rather than faithfully apply *Patterson*. *Id.* at 1317-18 (Ripple, J., concurring). Judge Ripple did agree, though, that whether a position can be filled by an outsider may be a factor in assessing the viability of an employee's promotion claim. *Id.* at 1317 (Ripple, J., concurring).

Judge Posner discussed¹⁵¹ a clarification of the Supreme Court's test or one, on the basis of case experience, that modified it? These problems in application raise the question of whether the Court is correct in its interpretation of the meaning of § 1981.¹⁵²

Second, according to Judge Posner, the "new and distinct relation"¹⁵³ pressed by current employees' promotion claims is something other than a new and distinct *contractual* relation. The issue here, then, he stated, was whether the *Patterson* Court's test "embraces promotions which, while nonroutine, involve no change in the terms of the express or implied contractual relationship between employee and employer."¹⁵⁴ I question whether these promotions so clearly do not involve a change in the contractual relationship. Should the focus be only on duties or responsibilities, and on only those duties and responsibilities stipulated by express or implied contract? Or, to put it another way, what terms comprise in actuality the implied contract? Is not the change, for example, from part-time to full-time employee, despite the consistency in job activities, a change in the contractual relationship between employee and employer? Do changes in job, reputation, or employment status function simply within a pre-existing contract, or do these changes modify the contract? At what point is a contract made or remade?

151. See *supra* notes 147-48 and accompanying text.

152. In other words, if application of the Court's test has illogical results, then the test should not be so applied, as the result could not have been intended. Cf. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (stating that where the plain language of a statute would lead to absurd results that could not have been intended, courts need not apply the language in such a fashion). One response, of course, is that the problem, if any, lies not with the Court but with Congress. Judge Ripple wrote:

As the [*Malhotra*] majority suggests, there may be a lack of symmetry in a regulatory scheme that provides different remedies to those who are already employees of the defendant and those who have no preexisting contractual relationship with the defendant. I do not see how that condition, an accident of history or of political will, permits us to revise the scheme. If making statutes logical or symmetrical was the judicial task, we would be a law revision commission, not a court.

Malhotra, 885 F.2d at 1317-18 (Ripple, J., concurring). It may also be true that any anomaly presented is mitigated by an employee's remaining ability to bring suit under Title VII, see e.g., *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1546 (E.D. Va. 1990); but this coordination of Title VII and § 1981 does not alter the propriety of inquiry into either the logic of § 1981 or the Court's interpretation of this logic. As the *Patterson* Court itself stated, the fact that racial harassment is forbidden under Title VII may be a sign of Congress's understanding of the reach of § 1981 and, more importantly, "should lessen the temptation of this Court to twist the interpretation" of § 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). The crux remains the nature of § 1981, not whether other statutes mitigate its effects.

153. *Patterson*, 491 U.S. at 185.

154. *Malhotra*, 885 F.2d at 1311.

Judge Posner at least raised the question of whether the barrier of some express or implied contract should divide actionable from non-actionable § 1981 promotion claims. My question is whether this barrier constrains acknowledgment of the extent to which a contractual relationship changes, despite the possible lack of change in some more formal contract. If the boundary is vague between when a contract does and does not change, or between when a contract is made or remade, that also pushes the boundary between viable and nonviable § 1981 claims. The post-*Patterson* § 1981 promotion claims provide the evidence of how slippery in application this dividing line may be.

IV. TRANSFER CLAIMS

Some courts have rejected the viability of transfer cases out of hand, on the ground that transfers do not create the opportunity for a new contract with an employer but are simply a continuation of a previous contractual relationship.¹⁵⁵ Others raised the more subtle issue whether, if under *Patterson* the change must be a change in contractual status, a transfer is ever of this character.¹⁵⁶ Under this logic, a transfer is more akin to a routine promotion, part of the typical progression in a career, "and it would be very odd to regard each rung on the career ladder as a different employment relation The turn of the rotation wheel does not create a new employment relation at each stop."¹⁵⁷

Another alternative, also similar to the promotion cases,¹⁵⁸ is to focus less on a change in contractual status than on the qualitative nature of the change. Because a transfer generally does not entail much, if any, increase in compensation or responsibility, it would

155. See, e.g., *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 537 (11th Cir. 1992); *White v. Federal Express, Corp.*, 939 F.2d 157, 159 (4th Cir. 1991); *Berry v. General Motors Corp.*, 796 F. Supp. 1409, 1426 (D. Kan. 1992).

156. See, e.g., *McKnight v. General Motors Corp.*, 908 F.2d 104, 110 (7th Cir. 1990) (Posner, J.) (raising but not deciding the issue), *cert. denied*, 499 U.S. 919 (1991). A change in contractual status would be on the order of a move from employee to company officer or partner. *Id.*

157. *Id.* But see *Franceschi v. Edo Corp.*, 736 F. Supp. 438, 443 (E.D.N.Y. 1990) (stating, "it would seem that a lateral transfer . . . would more likely require an employer and employee to enter a new contract than a promotion which is often simply a condition of the already existing contract"). The *Franceschi* court held, however, that the transfer at issue did not rise to the level of a new and distinct relation and so was not actionable. *Id.* My question is whether even routine changes do perhaps alter the contractual relationship.

158. See *supra* notes 75-154 and accompanying text.

not be actionable.¹⁵⁹ If, on the other hand, the transfer is to another division of the company and the job is significantly different, a transfer claim might be viable.¹⁶⁰ A modest increase in wages upon transfer, then, is not sufficient; "otherwise every raise would be deemed the formation of a new contract."¹⁶¹

Again the question is whether this latter conclusion is reached through application of the *Patterson* Court's textualist clarification of § 1981's meaning or through attention to the supposed intent lying behind and framing the Court's interpretation of the statute. Consider, for example, a case where an employer offered employees a relocation program that included numerous inducements.¹⁶² An African-American employee started to participate but had to withdraw because the inducements were not sufficient to offset other costs.¹⁶³ Later she learned that white employees allegedly received relocation benefits in excess of those offered her.¹⁶⁴ The court held her § 1981 transfer claim was not actionable:

If the court were to conclude that the simple use of the words offer and acceptance in the relocation brochure constituted a new and distinct relationship between the parties then the court would by inference be supporting the proposition that "every step down the path of one's career.[sic]" does create a new and distinct relationship because in each change of position, an employee, whether expressly or impliedly, "accepts" the change in position with at least some minimal change in terms, whether it be in pay, benefits, title, duties, or location. Such a conclusion would allow every employee to argue that there was at minimum an implied offer and acceptance by the very nature of the slightest change in job position. This result would be in direct contrast to the analysis set forth in *Patterson*.¹⁶⁵

159. See, e.g., *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 932 (7th Cir. 1993), cert. denied, 114 S. Ct. 1648 (1994); *Waller v. Consolidated Freightways Corp.*, 767 F. Supp. 1548, 1558 (D. Kan. 1991); *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1557 (E.D.N.Y. 1990).

160. *McKnight*, 908 F.2d at 110 (discussing but not resolving the issue). Judge Posner also invoked the possible utility, raised first in the promotion setting, see *supra* note 147 and accompanying text, of examining whether a transfer claim should be viable depending on whether the new position might be assumed by an applicant from outside the company rather than a more routine move available only to current employees. *McKnight*, 908 F.2d at 110.

161. *Bush*, 990 F.2d at 932.

162. *Graham v. State Farm Mut. Auto. Ins. Co.*, No. 92-2864, 1992 U.S. Dist. LEXIS 16817, at *13 (E.D. Pa. Nov. 2, 1992).

163. *Id.* at *14.

164. *Id.*

165. *Id.* at *19. Note the emphasis that small changes affect a change in the *contractual* relationship. This is in contrast to Judge Posner's proposition that some significant, nonroutine changes may be actionable even though they effect "no change in the terms of the express or implied contractual relationship between employee and employer." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1311 (7th Cir. 1989) (emphasis added).

Was there or was there not a change in the employment relationship here? If there was, does not § 1981 require that the claim be actionable? On what grounds can it be said that the statute requires the change to be "significant" in order to cross the statutory threshold?

V. DEMOTION CLAIMS

Demotion claims form a point of transition between promotion or transfer claims and claims of discriminatory discharge. For those courts which have treated demotion claims as actionable, they generally do so because the demotion, like an actionable promotion, is a significant one, and the level of change creates a "new and distinct relation"¹⁶⁶ between employee and employer.¹⁶⁷ Under these cases, the fact that a demotion was in one sense postformation conduct is irrelevant because the issue was whether the demotion involved formation conduct, in this situation as in promotions the making of a new contract.

Some cases that rejected demotion claims did so simply on the ground that a demotion was postformation conduct.¹⁶⁸ Given the survival of some promotion claims, which technically require

166. *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989).

167. *See, e.g., Kriegel v. Home Ins. Co.*, 739 F. Supp. 1538, 1540 (N.D. Ga. 1990) (holding that "substantial" demotion claims remain actionable); *Nelson v. School Bd.*, 738 F. Supp. 478, 479-80 (S.D. Fla. 1990) (involving demotion from position as school principal to position as classroom teacher); *DeBailey v. Lynch-Davidson Motors, Inc.*, 734 F. Supp. 974, 977 (M.D. Fla. 1990) (observing that plaintiff would have gone from "a supervisory position to a non-supervisory position, her job responsibilities were to have been completely altered, and her pay was to have been cut in half"). Offering a broader rationale is *Gamboa v. Washington*, 716 F. Supp. 353 (N.D. Ill. 1989) in which the court noted that "[the] plaintiff cannot recover for discipline or harassment not amounting to a demotion or a constructive discharge." *Id.* at 359.

One commentator argued that although the viability of most promotion cases depend on whether the promotion is routine or more significant, that "analysis is not clearly applicable to demotions. Although a demotion like a promotion necessarily involves a change in jobs, few demotions can be considered 'routine.'" Frederickson, *supra* note 29, at 905 n.90.

168. *See, e.g., Berry v. General Motors Corp.*, 796 F. Supp. 1409, 1426 (D. Kan. 1992) (stating that "[d]emotion claims . . . do not involve contract formation or enforcement and are not actionable under section 1981."); *Guliford v. Beech Aircraft Corp.*, 768 F. Supp. 313, 320 (D. Kan. 1991) (asserting that "[p]laintiff's demotion claims do not involve either the making of a contract or its enforcement."); *Duse v. IBM Corp.*, 748 F. Supp. 956, 961 (D. Conn. 1990) (declaring that "an employer's demotion and discharge of an employee, even where racially motivated, is outside the scope of § 1981."); *Franceschi v. Edo Corp.*, 736 F. Supp. 438, 442-43 (E.D.N.Y. 1990) (holding plaintiff's demotion claim not actionable under §1981); *Alexander v. New York Medical College*, 721 F. Supp. 587, 588 (S.D.N.Y. 1989) (noting that because "[d]emotions . . . take place after the initial employment contract is made. . . they do not implicate the process of making an employment contract").

postformation conduct of at least some quality, this formalism is insufficient. More rigorous judicial denials of demotion claims typically acknowledged that significant demotions may create a new and distinct relationship between employer and employee.¹⁶⁹ They emphasized, however, that a demotion claim, unlike a promotion claim, should be characterized more as an objection to the course of conduct in the old relationship, rather than to the formation of the new one.¹⁷⁰

As this analysis elucidates, what is striking about demotion claims is that analytically they bear resemblance to both promotion claims and to discharge claims. Like discharge claims,¹⁷¹ demotion claims are in one sense disputes arising over the ending of an existing contractual relationship; as such, they register an objection to postformation conduct and are, therefore, not viable after *Patterson*. Yet like promotion claims, demotion claims also protest the allegedly discriminatory terms of the "new" contractual relationship.

Cases rejecting demotion claims have responded to this analysis in two ways. First, some decisions held promotion claims, but not demotion claims, viable because the former rest on an employer's discriminatory refusal to enter a new contract, while the latter present no such refusal.¹⁷² This distinction fails, however, because as *Patter-*

169. By contrast an early demotion denial did not only rest on the fact that demotion is postformation conduct, but also insisted that "there was no 'new' contract at issue . . ." *Williams v. National R.R. Passenger Corp.*, 716 F. Supp. 49, 51 (D.D.C. 1989), *aff'd*, 901 F.2d 1131 (D.C. Cir. 1990).

170. *See, e.g., Von Zuckerstein v. Argonne Nat'l Lab.*, 760 F. Supp. 1310, 1316 (N.D. Ill. 1991) ("Although . . . significant demotions may lead to 'new and distinct relations' between the employer-demoter and the employee-demotee — those similarities are not significant for section 1981 purposes The discrimination in demotion cases does not occur in the formation of the new relationship; rather, it lies in the termination of the old."), *on further consideration*, 984 F.2d 1467 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 419 (1993); *Newton v. A.B. Dick Co.*, 738 F. Supp. 952, 954 (D. Md. 1990) (noting that, "it is far more logical to view a demotion as a change in the terms of a continuing employment relationship rather than the beginning of a new one"); *Jackson v. GTE Directories Serv. Corp.*, 734 F. Supp. 258, 266 (N.D. Tex. 1990) ("A demoted employee is not complaining of discrimination in the making of a new contract, but is instead urging that he was discriminated against in his previous position."); *Bush v. Commonwealth Edison Co.*, 732 F. Supp. 895, 899 (N.D. Ill. 1990) ("While a new contractual relationship may have arisen after the demotion, this new contract is not the source of the § 1981 claim."), *aff'd*, 990 F.2d 928 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1648 (1994); *Barr v. Wittek Mfg. Co.*, No. 87 C 2940, 1990 U.S. Dist. LEXIS 2302, at *3 (N.D. Ill. Mar. 5, 1990) (noting that "[e]ven if a demotion involves a new contractual relation, the complained-of conduct is not the creation of a new contract, but rather the termination of the existing contract").

171. Discharge claims will be discussed at greater length shortly. *See infra* notes 179-249 and accompanying text.

172. *See, e.g., Duse*, 748 F. Supp. at 962 n.6 (noting that a failure to promote claim may be viable but that a demotion or discharge does not involve "the denial of an opportunity for the

son details, § 1981 prohibits *both* "the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms."¹⁷³ Second and more substantively, a number of demotion denial decisions dismissed the analytic analogy between demotion and promotion, finding the resemblance between demotion and discharge much more compelling.¹⁷⁴ As we have seen, these courts have held that demotion cases are ultimately not a protest about terms of a new contract but about postformation conduct under the old one.¹⁷⁵ These holdings are maintained despite the fact that if the significant change in job positions occurred in reverse order and the dispute was now over a promotion rather than a demotion, the claim would survive.¹⁷⁶

The courts' concerns here are understandable. They contend plaintiffs should not be allowed to subvert the limits of § 1981 by transforming their claims into something they are not.¹⁷⁷ *Patterson* has underscored this point in its admonishing lower courts "not [to] strain in an undue manner the language of § 1981."¹⁷⁸ And yet the issue remains: are demotion claims not protected because of fidelity to the statutory language or, rather, because of deference to the Court's restrictive interpretive intent? Demotions have a dual character: they are at once the outgrowth of an existing contract and the initiation of a new one. If a demotion displays this duality, why should a court come down on the side that the claim represents only postformation conduct? If a demotion also involves new contract

plaintiff to enter into a new contract with the defendant."); *Newton*, 738 F. Supp. at 954 (stating that "where in a claim for discrimination in promotions the new contract . . . is being *denied* on the basis of race, . . . [in a claim for discriminatory demotion] the new contract . . . was in fact *offered* to the claimant"); *Jordan v. United States W. Direct Co.*, 716 F. Supp. 1366, 1368 (D. Colo. 1989) (declaring that "[i]n the case of an alleged wrongful demotion, as opposed to a failure to promote, there is no refusal by the employer to enter into a new contract with the employee").

173. *Patterson v. McLean Credit Union*, 491 U.S. 164, 177 (1989).

174. *See, e.g., Bush*, 990 F.2d at 932-33 ("The decisive point is that under *Patterson* the discharge of a worker on racial grounds is not actionable; and demotions should be treated the same way . . ."); *Von Zuckenstein*, 760 F. Supp. at 1316 ("The analogy to discharge cases . . . is more persuasive . . .").

Whether a *discharge* claim *should be* held not actionable under *Patterson* is a point to which we shall return. *See infra* notes 179-249 and accompanying text.

175. *See supra* note 168.

176. *See, e.g., Newton*, 738 F. Supp. at 955 (explicitly acknowledging this result).

177. *See, e.g., Bush*, 990 F.2d at 933 ("A worker who has been fired, demoted or transferred should not be allowed to circumvent *Patterson* by seeking reinstatement, promotion, or retransfer and characterizing the employer's refusal as the refusal of a new contract.").

178. *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989). This language has been explicitly cited in the demotion context. *See Jackson v. GTE Directories Serv. Corp.*, 734 F. Supp. 258, 266 (N.D. Tex. 1990) (heeding the Supreme Court's admonition).

formation and the statute protects the making of a contract, should not a demotion claim be actionable under § 1981? More generally, the dual character of demotions heightens the difficulty earlier seen in promotion and transfer cases of drawing a dividing line between formation and postformation conduct, between making a contract and working on the basis of an existing one. Once again, the meaning of § 1981 ascertained by the *Patterson* Court stubbornly resists easy or mechanical application.

VI. DISCHARGE CLAIMS

Discriminatory discharge claims represent the most frequently litigated type of § 1981 claim post-*Patterson*. Of the more than 960 § 1981 claims decided by the courts since *Patterson*, nearly 275 were discriminatory or constructive discharges.¹⁷⁹ Only harassment claims approach that count.¹⁸⁰ Of the nearly 275 discharge claims, just over 10 were ever found viable.¹⁸¹ Even this small group was effectively overruled when ultimately all circuits which decided the issue ruled that after *Patterson*, § 1981 does not protect against discriminatory discharge.¹⁸² Given the resolution of discharge claims

179. See *infra* Appendix. Henceforth, I shall incorporate without further differentiation constructive discharge claims into the discussion of discriminatory discharge claims, since they are typically analyzed interchangeably. See, e.g., *McKnight v. General Motors Corp.*, 908 F.2d 104, 110 (7th Cir. 1990) (Posner, J.) (“We have just held that explicit discharges are not actionable under section 1981. No more are constructive discharges.”), *cert. denied*, 499 U.S. 919 (1991).

Hereafter, all constructive or discriminatory discharge claims will simply be called “discharge” claims. These should be distinguished from retaliatory discharge claims, which generally are evaluated not under the right to make a contract but under the right to enforce a contract. See *supra* note 29.

180. Just under 250 harassment or discriminatory conditions claims have been adjudicated post-*Patterson*. See *infra* Appendix.

181. See *infra* Appendix.

182. See *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1571 (D.C. Cir. 1991) (agreeing with other courts of appeal which have “almost universally interpreted *Patterson* to mean that termination of a contract is not covered by § 1981 because termination constitutes postformation conduct”), *vacated on other grounds*, 112 S. Ct. 960 (1992), *aff'd*, 975 F.2d 886 (D.C. Cir. 1992); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990) (noting that “we are not inclined to view the termination of a contract as involving either its ‘mak[ing]’ or its ‘enforce[ment]’”); *Hayes v. Community Gen. Osteopathic Hosp.*, 940 F.2d 54, 56 (3d Cir. 1991) (finding that discriminatory “discharge is not actionable under § 1981”), *cert. denied*, 112 S. Ct. 940 (1992); *Williams v. First Union Nat'l Bank*, 920 F.2d 232, 234 (4th Cir. 1990) (concurring with majority of courts of appeal and holding that discriminatory discharge claims are not viable under § 1981), *cert. denied*, 111 S. Ct. 2259 (1991); *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805, 808 (5th Cir. 1990) (declaring that “termination amount[s] to postformation conduct. . . . [and] is not actionable under section 1981”); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258 (6th Cir. 1990) (holding it unnecessary “to apply section 1981 to discharge cases”), *cert. denied*, 501 U.S. 1250 (1991); *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09

since *Patterson*, it would at first appear that in this area if anywhere at all the Court's belief was well-founded that lower courts would have "little difficulty applying the straightforward principles that we announce today."¹⁸³

Of course, as the *Patterson* decision itself attested, consensus in the courts of appeals does not necessarily coincide with the Supreme Court's textualist judgment if faced with that same issue.¹⁸⁴ And the paramount test is not the fact of agreement among various courts but the analytical persuasiveness of these courts' reasoning. It is relevant to point out, for instance, that several courts of appeals' decisions denying the viability of § 1981 discharge claims were met by vigorous dissents.¹⁸⁵

(7th Cir. 1990) (stating that discriminatory termination does not infringe the right to make a contract), *cert. denied*, 499 U.S. 919 (1991); *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947, 948 (8th Cir. 1991) (*en banc*) (concluding that "*Patterson* bars discriminatory discharge claims under section 1981"); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990) (holding that "[d]ischarge is the type of postformation 'breach of contract' conduct not protected by section 1981"); *Trujillo v. Grand Junction Regional Ctr.*, 928 F.2d 973, 976 (10th Cir. 1991) (agreeing with other appellate courts which have concluded that "a claim for discriminatory discharge cannot be asserted under section 1981"); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1520 (11th Cir. 1991) (determining that "*Patterson's* interpretation of § 1981 precludes claims for retaliatory discharge . . . and . . . discriminatory discharge claims as well").

Of the regional circuits, only the First has not been faced with a discriminatory discharge claim.

183. *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 n.6 (1989).

184. For instance, of the courts of appeals cases to examine racial harassment claims under § 1981 prior to *Patterson*, only the Fourth Circuit *Patterson* case, 805 F.2d 1143 (4th Cir. 1986), challenged the statute's applicability. See Sullivan, *supra* note 16, at 31-32 & n.4 (citing cases). Of more direct relevance to discharge claims, there was little question prior to *Patterson* that these claims were covered by § 1981. See, e.g., *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 638 n.18 (8th Cir. 1990) (citing cases).

185. *Gersman*, 931 F.2d at 1574-78 (Wald, J., dissenting in part); *Prather*, 918 F.2d at 1259-62 (Boggs, J., dissenting); *Wilmer v. Tennessee Eastman Co.*, 919 F.2d 1160, 1165 (6th Cir. 1990) (Jones, J., dissenting); *McKnight*, 908 F.2d at 117-18 (Fairchild, J., concurring in part & dissenting in part); *Weaver*, 922 F.2d at 1530-31 (Clark, J., concurring); *Taggart*, 935 F.2d at 949-50 (McMillan, J., dissenting) (citing *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 637-40 (8th Cir. 1990) which held that § 1981 discharge claims are actionable). *Hicks* was vacated and remanded for further consideration in light of the *en banc* opinion to be filed in *Taggart*, 499 U.S. 914 (1991), and eventually reversed, adhering to *Taggart*. 946 F.2d 1344 (8th Cir. 1991).

As perhaps more concrete evidence of the intensity of feelings on the issue, consider the subsequent proceedings in *Hicks*. The *Hicks* case was again appealed to the Supreme Court and the Court again vacated for reconsideration in light of the Civil Rights Act of 1991. *Hicks v. Brown Group, Inc.*, 112 S. Ct. 1255 (1992). In an *en banc* decision on remand, the Eighth Circuit held that the Civil Rights Act did not apply retroactively, therefore reinstating the earlier panel verdict that after *Taggart* *Hicks* had no viable discharge claim under § 1981. *Hicks v. Brown Group, Inc.*, 982 F.2d 295 (8th Cir. 1992) (*en banc*). As part of Judge Heaney's dissent, he argued that he still thought Judge McMillan's original panel opinion in *Hicks*, 902 F.2d 630, was "the better view of the law" and urged that "[b]ecause the Supreme Court did not specifically address the

Despite the general uniformity in discharge rulings, I want to show that discharge claims exhibit many of the same difficulties as other claims in the application of the *Patterson* Court's distinction between formation and postformation conduct. It will take a few steps to get to that point, however, as discharge claims present some distinctive characteristics under *Patterson*. We should recognize initially that the *Patterson* Court was not directly faced with a discharge issue. Whereas harassment and promotion claims were explicitly before the Court and derivative implications about transfer and demotion claims can arguably be drawn, *Patterson* did not specifically discuss the viability of discharge claims under § 1981.¹⁸⁶ This silence has forced courts to apply *Patterson*'s interpretation of § 1981 to claims the Court did not in any direct way consider. Hence, discharge claims again raise the question whether the act of application involves primarily the derivation from or a recasting of general principles. Courts have responded to the challenge of discharge claims in a variety of ways. Some have held that these claims may be analyzed the same under *Patterson* as all other claims.¹⁸⁷ At the other extreme, some courts have held that the logic of *Patterson* is simply not relevant to discharge cases.¹⁸⁸ In between these poles are decisions insisting that the reasoning in *Patterson* requires distinctive treatment of discharge claims.¹⁸⁹ The methods of these cases vary as well, ranging from broader attempts to deduce the Court's intent on the subject to more narrow attention to discerning the implications of the Court's textualist analysis of the statute. As always, the latter quest is my more specific interest, but the other analyses provide an important frame to this inquiry.

A. *Patterson as Distinguishable?*

Particularly for those courts or dissents judging that discharge claims are viable under § 1981, the fact that the *Patterson* Court

issue of discriminatory discharge in *Patterson*, it is my hope that it will accept certiorari in this case and resolve the issue once and for all." *Hicks*, 982 F.2d at 299 (Heaney, J., dissenting). A petition for certiorari was subsequently filed on this issue, but the Court denied the petition. 114 S.Ct. 1642 (1994).

186. Brenda Patterson did file a § 1981 discriminatory discharge claim. *Patterson*, 491 U.S. at 169. However, this issue was not presented to the Supreme Court. *Id.* at 170-71.

187. See *infra* notes 220-49 and accompanying text.

188. See *infra* notes 190-95 and accompanying text.

189. See *infra* notes 202-05, 213-19 and accompanying text. Some decisions combine these approaches.

did not discuss discharges is quite telling. They pointed out that prior to *Patterson*, numerous lower courts held § 1981 protected against discriminatory discharge¹⁹⁰ and that the Court had itself been presented with several § 1981 discharge cases where the viability of these claims, though not directly before the Court, were never challenged.¹⁹¹ Additionally held relevant is the fact that the *Patterson* majority, while objecting to much of Justice Brennan's dissent, did not challenge his statement that in passing § 1981, Congress intended to prevent discriminatory discharge.¹⁹² Further, some judges noted¹⁹³ that two Supreme Court cases subsequent to *Patterson* expressed the view that the viability of § 1981 discharge claims was still open.¹⁹⁴ The courts and dissents concluded that because precedent prior to *Patterson* held § 1981 discharge claims actionable and because *Patterson* did not challenge these precedents, discharge claims remain viable.¹⁹⁵

190. See, e.g., *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 638 n.18 (citing cases); *McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491, 1500 (11th Cir. 1990) (Hill, J., dissenting) ("[T]he majority cites no cases prior to *Patterson* stating that racially discriminatory discharge is not actionable under section 1981."); *Asare v. Syms*, 52 Fair Empl. Prac. Cas. (BNA) 1049, 1052 (E.D.N.Y. Sept. 20, 1989) (citing cases).

191. See, e.g., *Hicks*, 902 F.2d at 637-38 (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 275 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975)).

Some courts also acknowledged that *Johnson* was specifically mentioned in *Patterson* without any indication that the discriminatory discharge claim present in that case was no longer viable. See, e.g., *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1531 (11th Cir. 1991) (Clark, J., concurring); *Hicks*, 902 F.2d at 637-38; *McDonald*, 427 U.S. at 285.

192. See, e.g., *Hicks*, 902 F.2d at 638 ("Congress intended [in the employment context,] 'to go beyond protecting the freedmen from refusals to contract for their labor and from discriminatory decisions to discharge them.'") (quoting Brennan's statement from *Patterson v. McLean Credit Union*, 491 U.S. 164, 206 (1989) (Brennan, J., concurring in part & dissenting in part)); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1260-61 (6th Cir. 1990) (Boggs, J., dissenting) (citing Brennan statement); *McKnight*, 908 F.2d at 118 (Fairchild, J., dissenting) (quoting Brennan statement).

193. See, e.g., *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1575 n.1 (D.C. Cir. 1991) (Wald, J., dissenting); *Prather*, 918 F.2d at 1262 (Boggs, J., dissenting); *Hicks*, 902 F.2d at 637; *Kriegel v. Home Ins. Co.*, 739 F. Supp. 1538, 1539 (N.D. Ga. 1990), *overturned by Weaver*, 922 F.2d at 1515.

194. See *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990) ("On remand, the Fourth Circuit should consider the impact of *Patterson* on Lytle's § 1981 [discriminatory discharge and retaliation] claims."); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 711 (1989) ("[W]e assume for purposes of these cases, without deciding, that petitioner's rights under § 1981 have been violated by his removal and reassignment."); see also *Lytle*, 494 U.S. at 556 (O'Connor, J., concurring) (stating that "the question whether the petitioner has stated a valid claim under § 1981 remains open").

195. See, e.g., *Hicks*, 902 F.2d at 635 ("A careful analysis of *Patterson* demonstrates that discharge was not at issue or discussed, and nothing in that opinion requires us to overrule the

These arguments did not find favor in the federal circuits.¹⁹⁶ They can be contested on their own grounds, but that discussion need not detain us here.¹⁹⁷ Because these arguments do not focus judgment on the *Patterson* Court's interpretation of the statutory text, their merits may be set aside for the purposes of this Article.¹⁹⁸

numerous and long-settled cases in this circuit which hold that discriminatory discharge is actionable under Section 1981."); *Asare v. Syms*, 52 Fair Empl. Prac. Cas. (BNA) 1049, 1052 (E.D.N.Y. Sept. 20, 1989) ("Nothing in the Supreme Court's decision in *Patterson* requires this court to conclude that § 1981 is no longer an appropriate vehicle by which to challenge a dismissal motivated by racial animus."). Stated in broader terms, the argument is, in the words of a dissenter to this line of thought, that "*Patterson* is not a controlling precedent in this case." *Hicks*, 902 F.2d at 656 (Fagg, J., dissenting).

A similar logic may have been at work in *Jackson v. City of Albuquerque* where the court in a footnote at the very end of the opinion addressed the applicability of *Patterson* to a discriminatory discharge claim. 890 F.2d 225, 236 n.15 (10th Cir. 1989). The court held that *Patterson* "do[es] not affect either the analysis or outcome of this case." *Id.* Interestingly, however, in subsequent cases discussing the availability of a discharge claim under § 1981, the Tenth Circuit has made no reference to *Jackson* or to its precedential value. *See, e.g.,* *Trujillo v. Grand Junction Regional Ctr.*, 928 F.2d 973, 975-76 (10th Cir. 1991) (holding discriminatory discharge claim under section 1981 not viable after *Patterson*); *Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877, 880-81 (10th Cir. 1990) (discussing precedents in other circuits but then deciding the case on the merits).

196. *See supra* note 182 and accompanying text.

197. Some possible responses are the following: If Supreme Court § 1981 discharge cases prior to *Patterson* simply assumed the viability of the cause of action, this should have no bearing on a decision on the merits. Or, take the fact that two Supreme Court cases subsequent to *Patterson* noted that the viability of § 1981 discharge claims was still open. This observation could simply indicate that *Patterson* did not address the issue explicitly, something that expresses no necessary uncertainty about the import of the *Patterson* analysis when facing such a case. *See Gersman*, 931 F.2d at 1570 n.1; *Carter v. Sedgwick County*, 929 F.2d 1501, 1503-04 (10th Cir. 1991); *Trujillo*, 928 F.2d at 975. Or finally, consider the fact that the *Patterson* majority did not respond to Justice Brennan's comment that the intent of Congress in passing § 1981 was, among other things, to prevent discriminatory discharge. Justice Brennan derives this intent from a study of the legislative history. *Patterson v. McLean Credit Union*, 491 U.S. 164, 206 (1989). Just as it also ignores legislative history in the same Brennan passage that Congress intended § 1981 to apply to acts of harassment occurring after a contract was formed, *see id.*, the Court may ignore this evidence out of fidelity to its textualist orientation.

198. It is worthy of note that non-textualist searches for the Court's intent regarding discharge claims were not limited to those holding for the viability of these claims. A most instructive example appears in a concurring opinion in the Eighth Circuit's *en banc* decision in *Taggart v. Jefferson County Child Support Enforcement*, 935 F.2d 947 (8th Cir. 1991). The court convened in *Taggart* to review the merits of *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), which had been followed but questioned in the *Taggart* panel opinion. 915 F.2d 396, 397 (8th Cir. 1990). At the time of the *en banc* review, *Hicks* was the only circuit court opinion nationwide that upheld the viability of § 1981 discharge claims. *Taggart*, 935 F.2d at 948. *See also supra* note 185 (describing *Hicks* as the only court of appeals decision then or subsequently to so hold). With virtually no other discussion than a citation to the circuit opinions elsewhere, the *en banc* court sided with the weight of authority and against *Hicks*. *Hicks*, 935 F.2d at 948. This judgment was formally acknowledged in a later *Hicks* opinion. 946 F.2d 1344, 1345 (8th Cir. 1991).

In the *en banc Taggart* decision, Judge Loken concurred. 935 F.2d at 948-49. For reasons beyond the scope of this Article, Judge Loken disagreed with the decisions in the other circuits but nevertheless joined the majority conclusion on the following grounds: that the Supreme Court

B. *The Implications of Patterson*

For a perspective more reliant on the *Patterson* Court's interpretation of § 1981, discriminatory discharges will be held actionable or not depending on whether they can be linked to contract formation or are instead depicted as simply an instance of postformation conduct. For some courts holding discharge actions not viable, it

had remanded *Hicks* expressly for reconsideration in light of the *en banc* decision in *Taggart* and the Court had also denied the petition for certiorari in *McKnight v. General Motors Corp.*, in which the Seventh Circuit had held discharge claims not actionable. *Id.* at 949. Judge Loken concluded that these actions demonstrated the Supreme Court's judgment that after *Patterson*, § 1981 did not permit discriminatory discharge claims. *Id.*

This conclusion is remarkable. While it is true that denials of certiorari, for example, can have important practical consequences for the area of law affected, see generally H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991), the Supreme Court has repeatedly affirmed that "the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.' The 'variety of considerations [that] underlie denials of the writ' counsels against according denials of certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (citations omitted). See also *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.) ("The Court has said this again and again; again and again the admonition has to be repeated.").

For our purposes, it is relevant to consider what may have been the "variety of considerations" that led the Court to vacate *Hicks* and deny certiorari in *McKnight*. (In this context the vacatur is sufficiently similar to a denial of certiorari as an indeterminate expression of the Court's intent.) What else can these decisions possibly mean other than an intent to deny the viability of § 1981 discharge claims?

As previously mentioned, the Court vacated and remanded *Hicks* to the Eighth Circuit so that the appeals court might reconsider that case in light of the decision to rehear *Taggart en banc*. The vacatur occurred on March 18, 1991. 111 S. Ct. 1299 (1991). *Taggart* was submitted *en banc* on February 13, 1991 and decided on June 6, 1991. 935 F.2d 947 (1991). The Court remand might then have had the following diverse consequences. On the one hand, the *Taggart* decision might have rejected — as it did — the *Hicks* reasoning and joined the other circuits in holding § 1981 did not protect against discriminatory discharge. If this occurred, circuit conflict would be eliminated. As it did in *McKnight*, the Court could then deny any other petition for certiorari on the issue, not necessarily because it agreed with the judgments of the lower courts but perhaps as a matter of judicial economy. The latter is not simply hypothetical. At the time of the vacatur, Congress was considering passage of the Civil Rights Act of 1991, which if passed might — as it did — eliminate any question of whether § 1981 covered discharges. P.L. 101-166 § 101(b), 105 Stat. 1071, 102d Cong., 1st Sess. (1991). On the other hand, if the *en banc Taggart* court had reached the same conclusion as did the *Hicks* panel, a petition for review of *Hicks* could again have been filed for review by the Supreme Court, and the Court would have had the chance to determine whether or not it wanted to resolve the conflict among the circuits.

All of these alternatives are contained in the *Hicks* Supreme Court amicus brief filed by the Solicitor General. Brief for the U.S. as Amicus Curiae on Petition for Writ of Certiorari, at 9-11, *Brown Group, Inc. v. Hicks*, No. 90-324, (Feb. 1991). The ultimate action taken by the Court — the vacatur for reconsideration in light of *Taggart* — was exactly the recommendation urged by the Solicitor General. Brief for the U.S. as Amicus Curiae at 10. This is not to suggest that the amicus brief provides evidence of the Supreme Court's actual intent here — which is unknown — but it does indicate that a variety of reasons may have motivated the Court's action and that such action may provide no indication of how the Court would rule on the viability of § 1981 discharge claims were it ever to face the issue directly.

suffices that termination necessarily occurs after a contract has been formed and is obviously therefore postformation conduct.¹⁹⁹ Given, however, that a promotion is clearly postformation conduct and that some promotions survive *Patterson*,²⁰⁰ this argument cannot do.²⁰¹ The question is whether discharges, even if postformation, implicate the right to make a contract.

1. Discharge as Affecting the Right to Contract

Many courts holding discharge claims *actionable* point to a fundamental characteristic of discharge. Whereas other postformation conduct, such as racial harassment, impinges on the enjoyment of a contract, discharge destroys the complete existence of the contract because “discriminatory discharge goes to the very existence and nature of the employment contract. A discriminatory discharge completely deprives the employee of his or her employment, the very *essence of the right to make employment contracts.*”²⁰² Analogizing

199. See, e.g., *Duse v. IBM Corp.*, 748 F. Supp. 956, 961 (D. Conn. 1990) (quoting *Hall*); *Hall v. County of Cook*, 719 F. Supp. 721, 723 (N.D. Ill. 1989) (“[U]nder *Patterson*, once an individual has secured employment, the statute’s protection of the right to make a contract is at an end.”). A bit more subtle variant of this reasoning also appears in the cases: “[T]he plain language of the Supreme Court in *Patterson* rejects any claim based on actions which occur after the contract has been formed. *Patterson* clearly held that section 1981’s right to make contracts provision governs only conduct prior to the formation of the contract” *Williams v. First Union Nat’l Bank*, 920 F.2d 232, 234 (4th Cir. 1990), cert. denied, 500 U.S. 593 (1991). This statement appears to indicate that the Court has established a bright-line between formation and postformation conduct, and discharge claims fall unmistakably on one side of that line. As the *Williams* court observed, this reasoning finds direct support in *Patterson*, where the Court held that “the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established” *Id.* (quoting *Patterson*, 491 U.S. at 177). As we immediately proceed to discuss in the text, however, these statements in *Williams* and *Patterson* must be examined within the larger context that some postformation conduct is in fact held to be actionable, such as certain promotions.

200. *Patterson*, 491 U.S. at 185-86.

201. See, e.g., *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1260 (6th Cir. 1990) (Boggs, J., dissenting) (noting that the *Patterson* Court held that postformation conduct is not protected by § 1981, yet promotions, which may be considered postformation conduct, are protected by § 1981. “These two principles point to directly opposite conclusions”).

202. *Hicks*, 902 F.2d at 639 (emphasis added); accord *Gersman*, 931 F.2d at 1577 (Wald, J., dissenting) (noting that, “discriminatory contract termination involves nothing less than the complete unmaking of contracts”); *Prather*, 918 F.2d at 1259 (Boggs, J., dissenting) (“A common sense understanding of § 1981 is that the right to be free from discrimination in the making of a contract includes the right to be free from discrimination in the unilateral termination of that contract.”); *Padilla v. United Air Lines*, 716 F. Supp. 485, 490 (D. Colo. 1989) (“Termination affects the existence of the contract, not merely the terms of its performance.”), rev’d, 950 F.2d 654 (10th Cir. 1991); see also *Ginwright v. United Sch. Dist. No. 457*, 756 F. Supp. 1458, 1472 (D. Kan. 1991) (quoting *Padilla*, 716 F. Supp. at 490); *Mayhue v. St. Francis Hosp., Inc.*, 748 F. Supp. 1484, 1486 (D. Kansas, 1990) (quoting *Padilla*, 716 F. Supp. at 490), *aff’d on other*

to property rights, one may say that while harassment strips an employee of one or more of the bundle of contract rights, discharge divests the employee of the entire bundle.²⁰³ If one cannot challenge a discriminatory dismissal, then the *right to contract* for employment becomes meaningless.²⁰⁴ Courts should not "permit[] an em-

grounds, 969 F.2d 919 (10th Cir. 1992); Frederickson, Note, *supra* note 29, at 907 (discussing this approach).

A few courts argue tangentially that discharge implicates not only the right to make, but also the right to enforce a contract, in the sense that one should have the right to enforce the existence of a contract. *See, e.g., Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1530-31 (11th Cir. 1991) (Clark, J., concurring) ("It stands to reason that since schools and employers are forbidden from refusing to make contracts (admitting children to schools or hiring employees) for racial reasons, a person discriminated against in either of these contexts can enforce the contract under section 1981 in the event of a termination of the contract for racial reasons."); *Birdwhistle v. Kansas Power & Light Co.*, 723 F. Supp. 570, 575 (D. Kan. 1989) ("[D]ischarge is directly related to contract enforcement and thus is still actionable . . ."); *see also Ginwright v. Unified Sch. Dist. No. 457*, 756 F. Supp. 1458, 1472 (D. Kan. 1991) (citing *Birdwhistle*); *EEOC v. DPCE, Inc.*, No. 89-8696, 1990 LEXIS 5022, at *4 (E.D. Pa. Apr. 25, 1990) (citing *Birdwhistle*); *Booth v. Terminix Int'l, Inc.*, 722 F. Supp. 675, 676 (D. Kan. 1989) (citing *Birdwhistle*).

These views seem not to integrate *Patterson's* restrictions on enforcement claims. *See, e.g., Butler v. Elwyn Inst.*, 765 F. Supp. 243, 249 (E.D. Pa. 1991) ("Although racially motivated terminations of employment would appear to involve rights concerning the enforcement of contracts, under *Patterson*: '[t]he right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.' *Patterson*, 491 U.S. at 177-78 . . ."); *see also supra* note 29. These cases may also improperly collapse the viability of discriminatory discharge with that of retaliatory discharge. The latter alone is correctly brought under § 1981's enforcement clause, though the viability of these claims remains contested. *See supra* note 29.

203. *See Gersman*, 931 F.2d at 1576-77 (Wald, J., dissenting). In making the analogy between property and contract rights, Judge Wald also directly evoked the common origin of § 1981 (contract rights) and § 1982 (property rights) in the Civil Rights Act of 1866. *Id.* at 1577, 1577 n.4. She explicitly recalled Supreme Court precedent that the two sections should, when possible, "be given a common interpretation." *Id.* at 1577 n.4.

204. *Hicks*, 902 F.2d at 639 ("The right to make contracts would be rendered virtually meaningless unless it encompasses the right to be free from discriminatory deprivations of such contracts."); *Prather*, 918 F.2d at 1260 (Boggs, J., dissenting) ("It seems to me that a firing at any date raises the same concerns as a failure to hire . . ."); *Wilmer v. Tennessee Eastman Co.*, 919 F.2d 1160, 1165 (6th Cir. 1990) (Jones, J., dissenting) ("The argument that *Patterson*, which dealt with a racial harassment claim, should limit discriminatory firing claims appears to me to shortchange the significance of section 1981."); *Ginwright*, 756 F. Supp. at 1472 ("If § 1981 is to have any meaning, the creation of the contract and its termination must be seen as two sides to a single coin.").

Consider the extension of this analysis based on the *Prather* quotation. Under the majority view, discharges are generally not actionable. On the other hand, discharges may be actionable if — like other forms of postformation conduct — they can be used as evidence that an employer refused to contract initially on nondiscriminatory terms. *See, e.g., Patterson*, 491 U.S. at 184 (citing the use of racial harassment for such evidence); *Gersman*, 931 F.2d at 1572; *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 722 (2d Cir. 1990); *Green v. Bankers Trust*, No. 86 Civ. 6591 (CSH), 1991 U.S. Dist. LEXIS 6945 at *7 (S.D.N.Y. May 23, 1991). The minority view, as in Judge Boggs' *Prather* dissent, criticized the particular artificiality of this distinction as applied to discharge cases. *Gersman*, 931 F.2d at 1578 (Wald, J., dissenting); *Weaver*, 922 F.2d at 1530

ployer to accomplish through the back door what § 1981 will not permit the employer to do directly."²⁰⁵

Thus, this analysis maintains that the viability of discharge claims under § 1981 must be evaluated in a distinctive fashion. While the *Patterson* Court insisted that other claims' viability be assessed according to whether these claims *themselves* involve contract formation, the argument here for § 1981 embracing discharge claims rests on a distinguishable foundation. Unlike nonviable § 1981 claims such as harassment, discharge *implicates the right* and affects the very ability to make a contract.

This analysis may seem compromised, however, because of its similarity to arguments that the Court has rejected. For example, while the Fourth Circuit *Patterson* opinion held that harassment was not viable, it differentiated promotions because, as the Supreme Court quoted, "[c]laims of racially discriminatory . . . promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection."²⁰⁶ However, the Supreme Court responded that this "somewhat overstates the case" and then reiterated that the test is whether a claim such as a promotion itself involves contract formation rather than affects the existence of a contract.²⁰⁷

Further and more fundamentally, courts holding discharge claims *not* actionable insist that these claims do *not* implicate the right to make a contract.²⁰⁸ Whereas hiring and certain promotion decisions themselves involve the right to make a contract, discharge only implicates a contract *made earlier*. Because the contract was estab-

(Clark, J., concurring) ("It defies common sense and logic to hold that section 1981 permits an action for a discriminatory refusal to hire and then deny an action for a discriminatory discharge."). A response to the minority view is that, despite the unavailability of a discharge action under § 1981, a plaintiff would still have available causes of action under Title VII and state civil right statutes. See *Prather*, 918 F.2d at 1258.

205. *Prather*, 918 F.2d at 1259 (Boggs, J., dissenting).

206. *Patterson*, 491 U.S. at 185 (emphasis added) (quoting *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986)).

207. *Id.*

208. Some courts go so far as to maintain that to hold otherwise would undermine *Patterson*. See, e.g., *Jackson v. GTE Directories Serv. Corp.*, 734 F. Supp. 258, 265 n.10 (N.D. Tex. 1990) ("This reading of *Patterson* creates an exception that would swallow up the interpretation the *Patterson* Court gives § 1981."); *Doffoney v. Board of Trustees for Beaumont Indep. Sch. Dist.*, 731 F. Supp. 781, 783 (E.D. Tex. 1989) (holding that *Patterson* requires that courts not unduly strain the language of § 1981); *Coleman v. Domino's Pizza, Inc.*, 728 F. Supp. 1528, 1530-31 (S.D. Ala. 1990) (cautioning against an "ingenious construction of the statute" that would permit discharge claims to go forward).

lished previously, discharge is not the type of postformation conduct protected under § 1981.²⁰⁹ Discharge is an issue of the terms and conditions of employment, a matter of the performance of an existing contract rather than its formation.²¹⁰ Although promotion and discharge claims are both classified as involving postformation conduct, the only differentiation which distinguishes their viability is that one may involve contract formation and the other one does not. Through this perspective, a more unambiguous interpretation can arguably be given to the *Patterson* Court's directives that § 1981 "does not apply to conduct which occurs after the formation of a contract" ²¹¹ and, more fully, that "the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established," ²¹²

In response to these rulings, those courts holding discharge claims viable have taken two different approaches. First, some courts continue to rely, along the lines previously described,²¹³ on the distinctiveness of discriminatory discharge: discharge is different from all other forms of postformation conduct because it implicates the very existence of a contract. Discharge, in this view, may not itself involve the making of a contract, but unlike other postformation conduct it destroys the contract previously made. More subtle variants

209. *See, e.g.,* *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990). Note the difference in analysis between saying that no postformation conduct is protected and that discharge, because it does not itself involve the right to make a contract, is not the type of postformation conduct protected by the statute. *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990) (using language of "type of postformation . . . conduct"); *Sofferin v. American Airlines, Inc.*, 923 F.2d 552, 560 (7th Cir. 1991) (quoting *Courtney*).

210. *Hayes v. Community Gen. Osteopathic Hosp.*, 940 F.2d 54, 56 (3d Cir. 1991); *Carter v. South Cent. Bell*, 912 F.2d 832, 839 (5th Cir. 1990); *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 657 (8th Cir. 1990) (Fagg, J., dissenting).

211. *Patterson*, 491 U.S. at 171. *See, e.g.,* *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1571 (D.C. Cir. 1991) (quoting this language).

212. *Patterson*, 491 U.S. at 177. *See, e.g.,* *McKnight v. General Motors Corp.*, 908 F.2d 104, 108 (7th Cir. 1990) (quoting this language), *cert. denied*, 499 U.S. 919 (1991). Of course, what does it say about the plainness of application when the meaning of a sentence has to be situated in order to liberate it from ambiguity?

213. *See, e.g.,* *Padilla v. United Air Lines*, 716 F. Supp. 485, 490 (D. Colo. 1989). *Padilla* quoted in support language from the Fourth Circuit *Patterson* decision that "'[c]laims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981 protection.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986)). Recall that the Supreme Court also quoted this language in part, but challenged the conclusion drawn by the Fourth Circuit. *See supra* notes 206-07 and accompanying text. For further discussion of this language, see *infra* note 219.

of this approach find support for its differentiation between discharge and other forms of postformation conduct in the language of *Patterson* itself. The Court stated, for example, that § 1981 protects contract formation but not the “problems that arise later from the *conditions of continuing employment*.”²¹⁴ Elsewhere, the Court emphasized that “*postformation* conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the *conditions of continuing employment*”²¹⁵ If “conditions of *continuing employment*” do not “involve the right to make a contract,” then perhaps discharge *does* involve the right to make a contract because it is not a condition of *continuing employment*.²¹⁶ It is true, as we have seen, that the Court also said that “§ 1981 . . . does not apply to conduct which occurs after the formation of a contract,”²¹⁷ but if that statement were applied to the full extent of its scope it could eliminate protection not only of discharge claims but of all promotion claims as well.²¹⁸ Thus, according to these decisions, if § 1981 excludes pro-

214. *Patterson*, 491 U.S. at 176 (emphasis added).

215. *Id.* at 177 (emphasis added).

216. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1260 (6th Cir. 1990) (Boggs, J., dissenting) (quoting *Patterson's* passages referring to “conditions of continuing employment” and “postformation conduct”); *accord Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1575 (D.C. Cir. 1991) (Wald, J., dissenting) (quoting *Patterson's* passage referring to “postformation conduct by the employer relating to the terms and conditions of continuing employment”); William E. Mahoney, Jr., Comment, *Section 1981 and Discriminatory Discharge: A Contextual Analysis*, 64 TEMP. L. REV. 173, 196-97 (1991) (citing *Patterson's* passage referring to nonactionable behavior such as “conduct by employer after the contract relation has been established” and “problems that may arise later from the conditions of continuing employment”).

217. *Patterson*, 491 U.S. at 171. See also *id.* at 177 (“[T]he right to make contracts does not extend . . . to conduct by the employer after the contract relation has been established . . .”).

218. To similarly ambiguous effect, when the Court observed that “some overlap will remain” between § 1981 and Title VII, it pointed as an example of this overlap only to “a refusal to enter into an employment contract on the basis of race.” *Id.* at 182 (emphasis added). This may be an indication that the Court did not contemplate that discharges would be an area of overlap, meaning the claims would not be viable under § 1981. On the other hand, it may be that the Court simply did not consider the role of discharges here. *McKnight v. General Motors Corp.*, 908 F.2d 104, 118 (7th Cir. 1990) (Fairchild, J., concurring in part & dissenting in part) (noting these options).

Other courts cite the Court's discussion of the interrelation between § 1981 and Title VII as having less ambiguous implications for discharge claims. As seen previously, some courts have suggested the availability of Title VII mitigates any awkwardness in denying § 1981 discharge claims. See *supra* note 204. By contrast, some courts that have held discharge claims viable maintain that the *Patterson* Court's interest in protecting Title VII's mediation and conciliation procedures against overlap by a § 1981 action, see 491 U.S. at 180-82, is not a problem at discharge “because the interest in preserving the integrity of Title VII procedures is lessened considerably when an employment relationship does not exist.” *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 640-41 (8th Cir. 1990); *Kriegel v. Home Ins. Co.*, 739 F. Supp. 1538, 1540 (N.D. Ga. 1990) (quoting

tection only of matters of continuing employment, then discharges should be actionable.²¹⁹ More modestly, the Court's focus on excluding conditions of continuing employment suggests that its directive was not formulated with the intention of excluding discharge claims from coverage, and that opens the way for the alternative analysis these courts have proposed.

2. Discharge as Refusal to Contract

As just discussed, some courts have responded to the charge that discharge is postformation conduct and so not a viable cause of action under § 1981 by claiming that discharge affects the right to contract. A second, distinguishable approach protecting the viability of discharge claims resists the notion that discharge itself does not involve contract formation. Rather than insisting that not only contract formation but conduct annulling prior contract formation should be actionable, the argument here is that discharge does involve contract formation, or more precisely, an employer's refusal to form a contract. "[O]ne facet of termination of employment is a refusal to enter into a contract for the future, and thus termination is a violation of § 1981 if based on race."²²⁰ This focus attends not

Hicks). This seems to minimize that following discharge, mediation and conciliation procedures may be instrumental in effectuating reinstatement. *See, e.g., Prather*, 918 F.2d at 1257; *Trujillo v. Grand Junction Regional Ctr.*, 928 F.2d 973, 976 (10th Cir. 1991); *Carter v. South Cent. Bell*, 912 F.2d 832, 839 (5th Cir. 1990); *Ceesay v. Miller, Mason & Dickenson*, No. 90-2800, 1990 U.S. Dist. LEXIS 10876 at *5 (E.D. Pa. Aug. 15, 1990).

219. Another possible argument here would pursue the Court's quotation of the Fourth Circuit *Patterson* opinion. The full text of that quotation reads: "Claims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection." *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986) (emphasis added), *aff'd in part, vacated in part*, 491 U.S. 164 (1989). The Court's abbreviation of the quotation may have arisen for a variety of reasons: the context of the discussion was promotion cases only, the Court wanted to leave application to discharge claims open, the Court believed discharge claims appropriately fell under the Fourth Circuit's reasoning, and so on. Yet while the Court's decision only to partially quote the Fourth Circuit opinion has indeterminate implications for discharge claims, the quotation at least suggests that the Court had the opportunity to foreclose protection of these claims and did not explicitly choose to do so.

220. *McKnight*, 908 F.2d at 118 (Fairchild, J., concurring in part & dissenting in part); *see also Williams v. Avco Lycoming*, 755 F. Supp. 47, 51 (D. Conn. 1991) (allowing a claim under § 1981 to stand where plaintiff alleged that he was fired and his employer refused to rehire him because of the employee's race); *Tillman v. Beaver Express Serv., Inc.*, No. 89-1326-K, 1991 U.S. Dist. LEXIS 2519, at *4 (D. Kan. Feb. 28, 1991); *Kozam v. Emerson Electric Co.*, 739 F. Supp. 307, 313 (N.D. Miss. 1990) (allowing action under § 1981 where plaintiff allegedly was fired and his employer refused to offer him an alternative position because of the employee's race). This argument has found some favor among commentators. *See, e.g., Player, supra* note 26, at 199-200 ("A termination, or discharge, is a way of articulating the employer's expressed refusal to offer a

to the action undertaken under the previous contract but to the independent action whereby the employer refuses to contract anew.²²¹

When faced with this argument, a number of courts have objected to this reasoning in frontal terms. They concluded that such an approach not only seeks to evade but also completely subverts the *Patterson* holding that postformation conduct is not actionable.²²² They perceived its emphasis on the remaking of contracts to perpetuate the type of reasoning advanced by Justice Stevens in *Patterson*²²³ and soundly rejected by the Court.²²⁴ These lower courts concluded that an employee should not be able to avoid the fact of discharge — or the lack of its viability under § 1981 — by claiming a new employment relationship was sought.²²⁵

This response has some strong initial persuasiveness. At first glance it does seem that the attempted separation of discharge and refusal to contract is mere artful pleading, a sleight of hand, and an evasion of what *Patterson* demands. Yet I would suggest that this response is itself too simplistic. Consider whether in the following cases the alleged moment of contract renewal is rightly subservient to and properly treated conceptually as inseparable from the moment of discharge. If a person is terminated and then seeks to be

renewed contractual relationship.”); Merrick T. Rossein, *Patterson v. McLean Credit Union*, 7 N.Y.L. SCH. J. HUM. RTS. 95, 118-19 (1990) (“Formal employment contracts are not ordinary. If one exists, the dismissal would involve *two* contracts — the old contract the employer is terminating, and the new contract into which the employer refuses to enter.”).

221. Relying on the *Patterson* language in the promotion context that the test of viability is whether employer and employee achieve “a new and distinct relation,” a few judicial opinions do not concentrate on the employer’s refusal to contract but on the fact that the discharge creates “a new and distinct relation” between the parties. 491 U.S. at 185. See, e.g., *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947, 950 (8th Cir. 1991) (McMillan, J., dissenting); *Prather*, 918 F.2d at 1261 (Boggs, J., dissenting).

222. See, e.g., *Holland v. First Va. Banks, Inc.*, 937 F.2d 603 (4th Cir. 1991) (*per curiam*) (criticizing the sidestepping of *Patterson*); *Gregory v. Harris-Teeter Supermarkets, Inc.*, 728 F. Supp. 1259, 1262-63 (W.D.N.C. 1990) (viewing this reasoning to unduly stretch § 1981’s meaning); *Drake v. Jewel Co.*, No. 87 C 8545, 1990 U.S. Dist. LEXIS 10532, at *6 (N.D. Ill. Aug. 13, 1990) (holding that this reasoning would circumvent *Patterson*); *Williams v. General Motors Acceptance Corp.*, No. 89-6661, 1990 U.S. Dist. LEXIS 7044, at *1 (E.D. Pa. June 6, 1990); *Rick Nolan’s Auto Body Shop v. Allstate Ins. Co.*, 718 F. Supp. 721, 722 (N.D. Ill. 1989) (holding that this reasoning “would completely vitiate the ruling in *Patterson* . . .” and that the result is “absurd”).

223. *Patterson v. McLean Credit Union*, 491 U.S. 164, 221 (1989) (Stevens, J., concurring in part & dissenting in part).

224. See, e.g., *Brereton v. Communications Satellite Corp.*, 735 F. Supp. 1085, 1088-89 (D.D.C. 1990) (noting that “the great creativity of this argument is inversely proportional to the acceptance that it has garnered” and citing the rejection of this interpretation by the *Patterson* Court and post-*Patterson* lower courts).

225. *Drake*, 1990 U.S. Dist. LEXIS 7044, at *5.

hired back to their now vacant position, should a discriminatory failure to hire be subsumed under the discharge?²²⁶ What if the failure to renew occurs at the end of a stated term of service?²²⁷ Would we approach a case differently if the failure to renew is not for employment but for a housing lease?²²⁸ If a new employer takes over an old contract, is the severance of an employee a discharge or a failure to contract?²²⁹ What if the allegedly new contract sought to be created does not embrace merely the old terms but new ones?²³⁰ Should it make a difference whether, after discharge, the new position sought within the former place of employment is not one's old position but a different one?²³¹ What if the new position could be considered

226. *Snell v. City & County of Denver*, No. 92-1370, 1993 U.S. Dist. LEXIS 17091, at *11-12 (10th Cir. July 2, 1993) (deciding on merits rather than on viability of action where former police officer applied for department position ten years after initial termination), *tabled at*, 999 F.2d 548 (10th Cir. 1993); *see also Alexander v. U.S. Ecology, Inc.*, 956 F.2d 268 (6th Cir. 1992) (holding that failure to rehire cause of action survived where plaintiff sought old job after having been terminated one year previously).

227. *See, e.g., Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991) (holding § 1981 claim not actionable where charge is discriminatory refusal to continue business contract, whose terms renewed automatically on monthly basis), *vacated on other grounds*, 112 S. Ct. 960 (1992); *Durrani v. Valdosta Technical Inst.*, 810 F. Supp. 301, 305 (M.D. Ga. 1992) (holding no cause of action for nonrenewal of teacher contract); *Vakharia v. Swedish Covenant Hosp.*, 765 F. Supp. 461, 471 (N.D. Ill. 1991) (holding that failure to rehire claim failed where hospital staff privileges were subject to annual renewal), *on further consideration*, 824 F. Supp. 769 (N.D. Ill. 1993); *Russell v. District of Columbia*, 747 F. Supp. 72, 76 (D.D.C. 1990) (ruling that cause of action survived where fire company refused to rehire fire fighter at expiration of stated term of employment); *Chawla v. Klapper*, 743 F. Supp. 1284, 1291 (N.D. Ill. 1990) (holding not actionable employer decision not to renew year to year contract); *see also Player, supra* note 26, at 200 (maintaining that failure to offer professor contract for next academic year could be considered refusal to contract, citing the pre-*Patterson* § 1983 case of *Delaware State College v. Ricks*, 479 U.S. 250 (1980)).

228. *Ward v. Harte*, 794 F. Supp. 109 (S.D.N.Y. 1992) (holding of liability under § 1981 on basis of offensive collateral estoppel; § 1981 claim treated as refusal to renew lease).

229. *Compare Baker v. Elmwood Dist., Inc.*, 940 F.2d 1013, 1018 (7th Cir. 1991) (holding termination by new employer was a discharge, not a failure to hire) *with Carter v. O'Hare Hotel Investors*, No. 88 C 10713, 1990 U.S. Dist. LEXIS 2439 (N.D. Ill. May 14, 1990) (holding viable a new employer's failure to hire current employee).

230. *See, e.g., Craig v. Ohio Dept. of Admin. Servs.*, 790 F. Supp. 758 (S.D. Ohio 1992) (discussing situation where minority contractor previously hired for demolition work allegedly discovered that specifications for job had been discriminatorily presented; contractor was refused a change order, and had to terminate contract; court rejected argument that refusal of change order constituted discriminatory refusal to contract).

231. *See, e.g., Williams v. Atchison, Topeka & Santa Fe Ry. Corp.*, No. 91-4221-C, 1993 U.S. Dist. LEXIS 8198, at *2 (D. Kan. May 3, 1993) (treating as discharge and deciding on merits case of employer refusal to recall employee to a job in another craft position); *Von Zuckerstein v. Argonne Nat'l Lab.*, 760 F. Supp. 1310, 1315-16 (N.D. Ill. 1991) (holding viable failure to rehire after layoff, when new positions opened; layoff here held to be equivalent to termination, so issue is one of contract formation), *rev'd on other grounds*, 984 F.2d 1467, 1474 (7th Cir. 1993) (assuming cause of action viable but reversing on the merits); *Kozam v. Emerson Electric Co.*, 739 F.

comparable to a promotion?²³²

To sort out what properly should be considered an action for discriminatory discharge (and therefore postformation conduct) from what properly should be characterized a discriminatory refusal to contract (and therefore formation conduct), a sounder analytic classification is required. Courts have responded to this challenge by articulating two basic approaches.²³³ First, courts have generally rejected the argument that a new contract is implicated simply by virtue of the fact that termination occurs to an at-will employee. As explained in an influential opinion by Judge Posner:

We are mindful of the argument that employment at will . . . should be analyzed not as a single contract but as a series of fresh contracts made every day of continued employment; on this view, termination on racial grounds prevents the employee from making the next day's contract of employment, and is therefore actionable. This analysis is artificial Employment at will is not a state of nature but a continuing contractual relation. Wages, benefits, duties, working conditions, and all (but one) of the other terms are specified and a breach of any of them will give the employee a cause of action for breach of contract. All that is missing is a provision that gives the contract a fixed term or that entitles one or both parties to a specified amount of notice before the other party can cancel the contract without liability. A contract for employment at will may end abruptly but it is a real and continuing contract nonetheless, not a series of contracts each a

Supp. 307, 313 (N.D. Miss. 1990) (holding action viable where employee sought new position within firm); *Padilla v. United Air Lines*, 716 F. Supp. 485, 490 n.4 (D. Colo. 1989) (ruling actionable a failure to rehire claim viable where, upon discharge, employee was classified with "Ineligible for Rehire" status; this classification prevented future employment contract of any kind between employee and employer), *rev'd*, 950 F.2d 654 (10th Cir. 1991).

232. *See, e.g., Williams v. Greendolf, Inc.*, 735 F. Supp. 137, 139 (S.D.N.Y. 1990) (holding action viable where employee was discharged at end of temporary employment and did not receive promised permanent position); *cf. Holland v. Boar. of Trustees of Univ. of D.C.*, 794 F. Supp. 420, 424 (D.D.C. 1992) (holding failure to contract claim viable where administrator was not provided promised permanent position); *see also Shanor & Marcossan, supra* note 29, at 172 n.113 (maintaining that discriminatory decision to deny faculty member tenure presents both a non-actionable discharge claim and a viable refusal to contract claim).

233. Though not cast in the analytic framework presented here, for a good, early presentation of the way courts have proceeded in this area, see *Vakharia v. Swedish Covenant Hosp.*, 765 F. Supp. 461, 469-70 (N.D. Ill. 1991), *on further consideration*, 824 F. Supp. 769 (N.D. Ill. 1993).

In contrast to the two approaches to be discussed in the text, some courts have chosen, at least in the actions presented to them, *not* to recognize that refusal to rehire might in some circumstances be properly treated differently than discharge. *See, e.g., Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 418 (E.D.N.Y. 1992) (ruling, without further inquiry, that the § 1981 claim alleged when an employer refused to rehire a minority employee to another position, although the employer habitually did so for similarly situated white employees, was simply a matter of discriminatory discharge and, therefore, barred); *Hayes v. Community Gen. Osteopathic Hosp.*, 730 F. Supp. 1333, 1335 (M.D. Pa. 1990) ("A discharge does not create a new and distinct contractual relationship. To the contrary, it destroys and terminates any prior relationship."), *aff'd*, 940 F.2d 54 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992).

day — or a minute — long.²³⁴

The discharge does not prevent contract formation, because the next day's employment is not a new contract but part of a "continuing contractual relation." In this light the employee's objection is to the employer's postformation conduct. This analysis has been extended to deny § 1981 claims where the alleged "new" contract was not at-will but derived from monthly or yearly renewals.²³⁵

Under the second approach, courts acknowledge that the refusal to renew a contract generally arises as part of an ongoing relationship. Yet they hold that certain types of contract "renewals" may in fact create a new contractual relationship between employee and employer. Here the courts have extended to discharge/refusal to contract claims the *Patterson* Court's analysis of promotion claims. They evaluate whether the proposed contract either rose to the level of a "new" contract with the employer or created a "new and distinct relation" between employee and employer.²³⁶ Most courts that have applied either of these tests to contract renewal claims have not found it difficult to do. Because the position the employee sought was typically the same one from which he or she had been discharged, the contract would not have been "new" nor the employ-

234. *McKnight v. General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (Posner, J.) (citations omitted), *cert. denied*, 499 U.S. 419 (1991); *accord Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1572 (D.C. Cir. 1991), *vacated on other grounds*, 112 S. Ct. 960 (1992). *But see* Alfred W. Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Gold Mine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175, 181 (1989) (maintaining that where employment is at-will, "[a] new contract [is] continually being made;" therefore discriminatory discharge may create actionable "new contract'" because based on unequal terms).

Interestingly, neither Judge Posner's opinion in *McKnight* nor the D.C. Circuit decision in *Gersman* anywhere directly relies on or cites in support the Supreme Court's rejection, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 185 n.6 (1989), of Justice Stevens' argument that "[a]n at-will employee . . . is constantly remaking [a] contract." *Id.* at 221. This may suggest that the debate in the *Patterson* Court revolved around activity during an employment relationship and not activity at its termination. *McKnight*, 908 F.2d at 118 (Fairchild, J., concurring in part & dissenting in part). Therefore, it requires an extension of the Court's holding to apply it to discriminatory discharges, and this is the argument that Judge Posner undertakes. *But see* Shanor & Marcossan, *supra* note 29, at 172 (arguing that non-application to termination is implicit in the Supreme Court's rejection of Justice Stevens' dissent).

235. *See, e.g., Gersman*, 931 F.2d at 1572-73 (denying claim to a non-renewable monthly contract); *Chawla v. Klapper*, 743 F. Supp. 1284, 1290-91 (N.D. Ill. 1990) (finding the discharge of employee who worked under a year-to-year contract to be postformation conduct where the "[p]laintiff's relationship with [his employer] was akin to that of an at-will employee. [The fact] [t]hat he had a 'guaranteed' term of employment is not significant for purposes of the *Patterson* analysis").

236. *Patterson*, 491 U.S. at 185.

ment relationship "new and distinct."²³⁷ Where, however, an employee was seeking a new position within his or her former company, some courts have found the difference sufficient under the *Patterson* Court's test to create a viable claim.²³⁸

Setting aside the ultimate merits of these decisions, what deserves attention is the very fact of the analytic distinction between the second type of inquiry and the first.²³⁹ If Judge Posner's observation

237. For examples of courts using the "new and distinct" relationship test to deny claims alleging a failure to rehire to a former position of employment, see *Jackson v. Boeing Co.*, 982 F.2d 528 (10th Cir. 1992); *Baker v. Elmwood Dist., Inc.*, 940 F.2d 1013, 1019 (7th Cir. 1991); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd.*, 926 F.2d 505, 509 (6th Cir. 1991), *cert. denied sub nom. Hull v. Shuck*, 501 U.S. 1261 (1991); *Vakharia v. Swedish Covenant Hosp.*, 461 F. Supp. 461, 471, (N.D. Ill. 1991), *on further consideration*, 824 F. Supp. 769 (N.D. Ill. 1993); *Boyd v. Telecab of Overland Park*, 752 F. Supp. 388, 391 (D. Kan. 1990); *Smith v. Continental Ins. Co.*, 747 F. Supp. 275, 282 (D.N.J. 1990), *aff'd*, 941 F.2d 1203 (3d Cir. 1991); *McCullough v. Certified Tool & Mfg. Corp.*, No. 89 C 4598, 1990 U.S. Dist. LEXIS 2608, at 6-7 (N.D. Ill. Mar. 7, 1990); *Jones v. ANR Freight Sys., Inc.*, No. 89 C 7105, 1990 U.S. Dist. LEXIS 501, at *10 (N.D. Ill. Jan. 17, 1990); *Carter v. O'Hare Hotel Investors*, 736 F. Supp. 158, 160 (N.D. Ill. 1989), *on further consideration*, *Carter v. O'Hare Hotel Investors*, No. 88 C 10713, 1990 U.S. Dist. LEXIS 2439 (N.D. Ill. May 14, 1990); *Eklöv v. Bramalea Ltd.*, 733 F. Supp. 935, 937 (E.D. Pa. 1989).

For examples of courts using the "new" contract test to deny similar rehire claims, see *Gersman*, 931 F.2d at 1573; *Chawla*, 743 F. Supp. at 1291; *Rick Nolan's Auto Body Shop v. Allstate Ins. Co.*, 718 F. Supp. 721, 722 (N.D. Ill. 1989). More bold are courts that deny that a refusal to rehire claim could ever consist of an employee's "new" relationship with a former employer. *See, e.g., White v. Federal Express Corp.*, 729 F. Supp. 1536, 1545 (E.D. Va. 1990) (quoting *Morgan v. Kansas City Transp. Auth.*, 720 F. Supp. 758 (W.D. Mo. 1989)), *aff'd*, 939 F.2d 157 (4th Cir. 1991); *Morgan*, 720 F. Supp. at 760 n.2 ("The court cannot conceive of a situation where the decision to discharge an employee would involve a 'change in position . . . involv[ing] the opportunity to enter into a new contract with the employer' . . ."). *But see Jones v. United States Postal Serv.*, No. 89-399-CMW, 1990 U.S. Dist. LEXIS 821, at *17 n.19 (D. Del. Jan. 26, 1990) ("This court believes that a contract renewal is analogous to a promotion in that it may be construed as an opportunity to enter into a new contract. The court thus believes that refusal to renew a contract . . . may state a claim under § 1981.").

238. *Von Zuckerstein v. Argonne Nat'l Lab.*, 760 F. Supp. 1310, 1315-16 (N.D. Ill. 1991) (discussing failure to promote claim), *rev'd on other grounds*, 984 F.2d 1467, 1474 (7th Cir. 1993) (assuming viability of claim but reversing on the merits); *Toliver v. Sullivan Diagnostic Treatment Ctr.*, 748 F. Supp. 223, 226-27 (S.D.N.Y. 1990); *Kozam v. Emerson Electric Co.*, 739 F. Supp. 307, 313 (N.D. Miss. 1990). *But see Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 418 (E.D.N.Y. 1992) (treating refusal to renew contract claim simply as discharge claim even though employee sought different position).

239. For an example of this differentiation, consider the following:

Carter's legal conclusion that her employment relationship consisted of an ongoing series of daily unilateral contracts is not accepted by this court. To the extent that the complaint alleges a § 1981 claim based upon a racially motivated *termination*, it is precluded by *Patterson*. . . . Similarly, to the extent the complaint alleges a racially motivated decision to *not rehire her*, it fails to state a claim under § 1981. Reinstatement of the identical employment relationship, with the same rights, duties and obligations of the old agreement, is not a new and distinct relation covered by § 1981.

Carter v. O'Hare Hotel Investors, 736 F. Supp. 158, 160 (N.D. Ill. 1989) (emphases added); *see*

quoted above²⁴⁰ were read in isolation, one might obtain the mistaken impression that a contract renewal claim should necessarily be denied where the contract concerns an at-will employee. Because the contractual relationship is ongoing, this theory would hold that the challenged employer's action by definition must be classified as postformation conduct. Yet reference to the Court's analysis of promotion claims demonstrates the inadequacies of this assessment. A promotion or refusal to contract claim may derive from an ongoing relationship and still give rise to a "new" contractual relationship. A refusal to hire "is analogous to a promotion in that both involve a change in the employment relationship that may be described as formation-like in certain respects but, nonetheless, also present strong aspects of contractual continuity."²⁴¹ While it may be the case, then, that an at-will contract is not by definition "new" each day the contract is "remade," neither is it — or other contractual relationships — by definition not new because it derives from a relationship previously ongoing. The "new" relationship exists within the borders of the continuing relationship.

This returns us to the question pursued throughout application of the *Patterson* Court's interpretation of § 1981: how easy is it ultimately to distinguish the moment of contract formation, which is actionable under *Patterson*, from the moment of postcontract formation, which is not? Even if we assume that under *Patterson* it is inappropriate to hold discharge claims viable because they implicate — completely undo — an earlier contract formation, we are not home free. Intuitively, discharge seems to mark the end of a contractual relationship; as such, it should easily be termed postformation conduct, since it does not itself involve contract formation. Yet this intuition is inadequate because we must consider the discharge within the context of the potentially continuing relationship between employer and employee. If we did not, then the discharge would end one contractual relationship and subsequent attempts to be rehired

also Shanor & Marcossou, *supra* note 29, at 172, 172 n.113 (noting that § 1981 refusal to renew contract claims generally do not survive *Patterson* Court's rejection of Justice Stevens' argument that contract is process of constant renewal; yet arguing that if discharge entails discrimination in formation of different relationship than one terminated, claim should survive).

240. See *supra* note 234 and accompanying text.

241. *Jones v. ANR Freight Sys., Inc.*, No. 89 C 7105, 1990 U.S. Dist. LEXIS 501 (N.D. Ill. Jan. 17, 1990) (ultimately rejecting plaintiff's § 1981 rehire claim because the position sought was the employee's previous job and therefore the contractual relationship would not have been "new").

could be considered contract formation. As we have also seen, however, it is insufficient to define discharge as conduct within a potentially ongoing relationship and, therefore, as postformation conduct. Like promotions, discharges themselves may involve contract formation. And as in promotion cases, the potential difficulty of defining at which point a relationship is sufficiently “new” to create a viable § 1981 exemplifies the difficulty in defining when the relationship does or does not change.

Many of these points were developed in the prior discussion of promotion claims²⁴² and do not require reiteration here. But the nexus of discharge claims and refusal to rehire claims moves the analysis to a higher level. Just as in the difficulty of sorting out viable from nonviable promotion claims, here the dilemma is distinguishing nonviable discharge claims from viable refusal to hire claims. As we have seen, several matters are at stake in resolving this issue. How do we sort out whether the *Patterson* Court’s interpretation of the meaning of § 1981 adequately addresses application of this meaning to discharge claims? Should we assume that a viable discharge claim must itself involve the making of a contract? Even if we do so, is invocation of the Court’s analysis of promotion claims appropriate? Why do most courts assume that *Patterson* requires that for a discharge or refusal to hire to be actionable it must rise to the level of a “new” or “new and distinct” contractual relationship? More particularly, why should we require in the discharge context that a “new and distinct” contractual relationship be marked by a qualitative change from the old? Why is it not enough that one contract has ended and another begun (or been refused by the employer)? Judge Posner has observed that promotion cases may arguably be differentiated depending on whether an employee new to the firm would be hired to the position at issue.²⁴³ Only this standard, Judge Posner stated, would prevent the “anomaly” of someone outside the firm being able to sue for a discriminatory refusal to hire while an employee discriminatorily refused a promotion to the same position would not be.²⁴⁴ Should not the same logic be applied — perhaps be even more properly applied — to discharge

242. See *supra* notes 124-54 and accompanying text.

243. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1311 (7th Cir. 1989) (Posner, J.) (proffering but not deciding the propriety of this test under *Patterson*).

244. *Id.*

and refusal to hire cases?²⁴⁵ Should it matter that this logic implies that were an employee to be rehired to a former position, a contract is "made" under § 1981 even where no change in the terms of the contract occurs?

In a dissenting D.C. Circuit opinion, Judge Wald spoke of the majority view differentiating discharge from refusal to hire as depending "almost entirely on drawing very fine and formal distinctions among . . . concepts . . . even when actual events indicate that any or all of these concepts might apply."²⁴⁶ She then argued:

The real world of contract belies such stark formalisms. In the context of automatically renewing contracts . . . termination and a refusal to renew are, for all intents and purposes, the same thing. In such situations, it is pointless (or, what is worse, conclusory) to quibble over whether the cancellation of a contract is "preformation" or "postformation" conduct — cancellation is *both*: it is both the end of an existing contract and a refusal to enter into a new contract. Despite these realities, the majority's analysis hangs precariously upon such ethereal distinctions.²⁴⁷

Judge Wald's solution was to apply *Patterson's* interpretation of § 1981's protection of the right to make a contract as prohibiting someone, whether in a refusal to contract, discharge, or refusal to renew a contract, "from refusing to stand in a contractual relationship with another party solely because of that party's race."²⁴⁸ Would this or Judge Posner's proposal open the door to many more § 1981 claims? Certainly. Would this be contrary to *Patterson*? That is unclear. It should be underscored, however, that these proposals do attempt to be faithful to the Court's insistence that "[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."²⁴⁹

245. Rossein, *supra* note 220, at 119 (making a similar argument).

246. *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1575 (D.C. Cir. 1991) (Wald, J., dissenting).

247. *Id.* at 1576.

248. *Id.* at 1578.

249. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989).

CONCLUSION

Application of the Court's interpretation of the meaning of § 1981 presents difficulties that the Court did not expect or foresee. The point at which a contract can be said to be "made," and the point at which it changes or does not change, is not anywhere near as evident as the Court had anticipated. As the epigraphs that begin this Article reveal, a particularly fascinating consequence is the nexus between the interpretive and substantive inquiries at issue in the post-*Patterson* cases: it may be equally as subtle to determine when a contract is re-made as it is to determine when, in the process of application, a statute is re-made. Ironically, in a case involving difficult substantive assessment of when a contract is re-made, the *Patterson* Court may be faulted for a falsely contractualist interpretive model that holds a statute is only made, never re-made.²⁵⁰

APPENDIX: THE POST-PATTERSON CASES

The following cases comprise all cases that have made reference to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The listing is drawn from published cases, unpublished cases on electronic databases, and unpublished cases cited by other courts or commentators.

Case Summary

The case summary includes all those decisions from the larger case list whose § 1981 cause of action was affected by *Patterson*. (These cases are marked in the larger case list by introductory letters which depict the causes of action claimed). This summary excludes decisions in the case list which mention *Patterson* but where

250. If the analogy between contract and statutory interpretation were to be pursued, it would be worthwhile to analyze concepts of relational contract as developed by such scholars as Ian Macneil. See, e.g., IAN MACNEIL, *THE NEW SOCIAL CONTRACT* (1980); *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974). Some work in this area has been begun by Peter Strauss. See, e.g., Peter L. Strauss, *When the Judge is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI-KENT L. REV. 321, 328 (1990) (analogizing to relational contract as the model for agency interpretation of statutes). As Strauss recognizes, see *id.* at 328 n.24, analogy between relational contract and statutory interpretation may provide additional support for theories of dynamic statutory interpretation such as proposed by William Eskridge. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

Patterson had no bearing on the viability of the cause of action. It thus excludes cases where the court assumed or did not reach the viability of a cause of action under *Patterson* but decided the case on the merits. Included are cases where the cause of action survived under *Patterson* but the court held against the plaintiff on the merits.

This summary generally includes no more than one count of each cause of action per case and does not distinguish cases with multiple plaintiffs.

Claims or causes of action ("coa"):

I. Right to make a contract:

1. Refusal to contract:	no coa: 10;	yes: 29
2. Harassment/discr. conditions:	no coa: 246;	yes: 0
3. Promotion:	no coa: 98;	yes: 57
4. Transfer:	no coa: 26;	yes: 1
5. Demotion:	no coa: 27;	yes: 3
6. Discriminatory discharge:	no coa: 252;	yes: 8
7. Constructive discharge:	no coa: 22;	yes: 4
8. Refusal to renew contract:	no coa: 26;	yes: 10
SUBTOTAL:	no coa: 581;	yes: 112

II. Right to enforce a contract:

1. Enforcement:	no coa: 15;	yes: 9
2. Retaliation:	no coa: 48;	yes: 8
3. Retaliatory discharge:	no coa: 41;	yes: 5
SUBTOTAL:	no coa: 104;	yes: 22

III. Miscellaneous or nonenumerated coa:	no coa: 7;	yes: 1
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IV. Equal benefit, etc. clauses:	no coa: 5;	yes: 3
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SUBTOTAL OF ALL CLAIMS:	no coa: 823;	yes: 138
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TOTAL CLAIMS:		961
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TOTAL CASES BRINGING THESE CLAIMS:		594
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Claim Chart

- CD = Constructive Discharge
 D = Discriminatory Discharge (or termination)
 Dm = Demotion
 E = Enforce
 EB = Equal Benefits (or give evidence, etc.)
 H = Harassment (or discriminatory conditions)
 M = Miscellaneous (or unspecified)
 P = Promotion
 R = Retaliation
 RD = Retaliatory Discharge
 RK = Refusal to Contract
 RR = Refusal to Renew Contract (or refusal to rehire)
 T = Transfer

Where a claim below is italicized, the highest court to hear the case ruled that if the plaintiff's factual claims were proven, the plaintiff presented a viable §1981 claim. The court therefore allowed the claim to go forward (it survived summary judgment, was remanded, was successful or denied on the merits, etc.); if not underlined, the claim was dismissed.

The Post-PATTERSON Cases

- H,P,T *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548 (E.D.N.Y. 1990).
 Adams v. City of Chicago, 865 F. Supp. 445 (N.D. Ill. 1994).
- D,H *Adams v. Lever Bros. Co.*, 734 F. Supp. 815, *on further consideration*, No. 87 C 9037, 1990 U.S. Dist. LEXIS 7423 (N.D. Ill. Mar. 12, 1990).

- CD,E,H,RR,T Aiken v. Bucks Ass'n for Retarded Citizens, 61 Fair Empl. Prac. Cas. (BNA) 652 (E.D. Pa. Nov. 14, 1991), *on reconsideration*, 799 F. Supp. 522 (E.D. Pa. 1992).
- RD Alexander v. Gerhardt Enter., Inc., 40 F.3d 187 (7th Cir. 1994).
- H Alexander v. Jefferson Parish, No. 89-4673, 1990 U.S. Dist. LEXIS 1326 (E.D. La. Feb. 6, 1990).
- Dm,H,RD Alexander v. NY Medical College, 721 F. Supp. 587 (S.D.N.Y. 1989).
- H Alexander v. Unified Sch. Dist. No. 259, No. 92-1550-PFK, 1993 U.S. Dist. LEXIS 18603 (D. Kan. Dec. 30, 1993).
- RR Alexander v. U.S. Ecology, Inc., 956 F.2d 268 (6th Cir. 1992) (table).
Allen v. City of Chicago, 828 F. Supp. 543 (1993).
- H Allen v. Denver Publ. Sch. Bd., 928 F.2d 978 (10th Cir.1991).
- P Allen v. District of Columbia, 812 F. Supp. 1239 (D.D.C. 1993).
- D,H Allen v. McEntee, 61 Fair Empl. Prac. Cas. (BNA) 867 (D.D.C. Apr. 2, 1993).
- H Allensworth v. General Motors Corp., 945 F.2d 174 (7th Cir. 1991).
- H Alvarez v. Norden Sys., Inc., 52 Fair Empl. Prac. Cas. (BNA) 828 (S.D.N.Y. Aug. 22, 1989).
Amos v. U.S. W. Communications, 986 F.2d 1426 (10th Cir. 1993) (table).
- D Anderson v. United Auto Workers, 738 F. Supp. 441 (D. Kan. 1990).

- P Anderson v. United Parcel Serv., Inc., 55 Fair Empl. Prac. Cas. (BNA) 532 (N.D. Ill. Oct. 5, 1989).
- D Ang v. Procter & Gamble Co., 932 F.2d 540 (6th Cir. 1991).
- Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992).
- RK Aragon v. Columbia Univ., 9 F.3d 1550 (9th Cir. 1993) (table).
- Armstrong v. City of Dallas, 997 F.2d 62 (5th Cir. 1993).
- Arnett v. Aspin, 846 F. Supp. 1234 (E.D. Pa. 1994).
- P Arnett v. Davis County Sch. Dist., 62 Fair Empl. Prac. Cas. (BNA) 1184 (D. Utah Apr. 5, 1993).
- RR Artis v. U.S. Indust., 720 F. Supp. 105 (N.D. Ill. 1989), *aff'd sub nom.* Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132 (7th Cir. 1992).
- D Asare v. Syms, Inc., 52 Fair Empl. Prac. Cas. (BNA) 1049 (E.D.N.Y. Sept. 20, 1989).
- H Askew v. May Merchandising Corp., No. 87 Civ. 7835, 1991 U.S. Dist. LEXIS 1919 (S.D.N.Y. Feb. 20, 1991).
- H, RD Assa'ad-Faltas v. Commonwealth of Va., 738 F. Supp. 982 (E.D. Va. 1989).
- RR Atkins v. Boeing Co., No. 91-1404-MLB, 1993 U.S. Dist. LEXIS 7394 (D. Kan. MAY 5, 1993).
- D, H, RD Atluru v. Anesthesia Serv. Medical Group, 62 Fair Empl. Prac. Cas. (BNA) 1696 (D. Kan. May 7, 1991).
- D Bailey v. Johnsen, No. 90 C 01795, 1990 U.S. Dist. LEXIS 10436 (N.D. Ill. Aug. 9, 1990).

- H Bailey v. Northern Ind. Pub. Serv. Co., 910 F.2d 406 (7th Cir. 1990).
- D,P Baker v. Elmwood Distrib., Inc., No. 83 C 0215, 1990 U.S. Dist. LEXIS 5644 (N.D. Ill. May 11, 1990), *aff'd*, 940 F.2d 1013 (7th Cir. 1991).
- D Baker v. Gulf & W. Indus., 961 F.2d 222 (11th Cir. 1992) (table), *cert. denied*, 113 S. Ct. 965 (1992).
- H Bank Realty, Inc. v. Practical Management Technology, Inc., No. HAR-88-3681, 1990 U.S. Dist. LEXIS 7480 (D. Md. June 15, 1990), *aff'd*, 935 F.2d 267 (4th Cir. 1991) (table).
- Dm Bapat v. Connecticut Dept. of Health Serv., 815 F. Supp. 525 (D. Conn. 1992).
- H,RD Barefield v. Scanlon, No. 86-2407-WF, 1990 U.S. Dist. LEXIS 6166 (D. Mass. May 15, 1990).
- Barnes v. Southeastern Pa. Transp. Auth., No. 93-3644, 1994 U.S. Dist. LEXIS 15999 (E.D. Pa. Nov. 7, 1994).
- H,P Barnum v. Pacific Bell, 931 F.2d 896 (9th Cir. 1991) (table).
- Dm Barr v. Wittek Mfg. Co., No. 87 C 2940, 1990 U.S. Dist. LEXIS 2302 (N.D. Ill. Mar. 5, 1990).
- D Barringer v. AT&T Technologies, Inc., 902 F.2d 27 (4th Cir. 1990) (table).
- Barron v. Sullivan, No. 93 C 6644, 1994 U.S. Dist. LEXIS 11408 (N.D. Ill. Aug. 12, 1994).
- Bartek v. Urban Redevelopment Auth., 882 F.2d 739 (3d Cir. 1989).
- H,P,RD Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992).
- Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994).

- Dm,H Becton v. Burlington N. R.R., 878 F.2d 1436 (6th Cir. 1989) (table).
Beesley v. Hartford Fire Ins. Co., 717 F. Supp. 781, *on further consideration*, 723 F. Supp. 635 (N.D. Ala. 1989).
- T Bell v. Krogers, Inc., 897 F.2d 529 (6th Cir. 1990) (table).
- P Bennun v. Rutgers, 737 F. Supp. 1393 (D.N.J. 1990), *aff'd in part and rev'd in part*, 941 F.2d 154 (3d Cir. 1991), *cert. denied sub nom.*, Rutgers v. Bennun, 112 S. Ct. 956 (1992).
- D,H Bernard v. Volunteers of Am., No. 89-Z-408 (D. Colo. 1989).
- H Bernhard v. Daskocil Co., 861 F. Supp. 1006 (D. Kan. 1994).
- Dm,T,R Berry v. General Motors Corp., 796 F. Supp. 1409 (D. Kan. 1992).
- P Berry v. Stinson Chevrolet, 804 F. Supp. 121 (D. Colo. 1992).
- D Birdwhistle v. Kansas Power & Light Co., 723 F. Supp. 570 (D. Kan. 1989).
- D Blanding v. Pennsylvania State Police, 811 F. Supp. 1084 (E.D. Pa. 1992), *aff'd*, 12 F.3d 1303 (3d Cir. 1993).
- H Blount v. Alabama Coop. Extension Serv., No. 92-D-1052-E, 1994 U.S. Dist. LEXIS 16627 (M.D. Ala. Oct. 5, 1994).
- EB,H Board of Managers v. West Chester Area Sch. Dist., 838 F. Supp. 1035 (E.D. Pa. 1993).
- P,RD Bohanan v. United Parcel Serv., 918 F.2d 178 (6th Cir. 1990) (table), *reported in full*, No. 90-3155, 1990 U.S. App. LEXIS 20154 (6th Cir. Nov. 14, 1990).

- D Booth v. Terminix Int'l, Inc., No. 88-2401-S, 1989 U.S. Dist. LEXIS 10618 (D. Kan. Aug. 21, 1989), *on reconsideration*, 722 F. Supp. 675 (D. Kan. 1989).
- H,RD Borja-Fierro v. Girozentrale Vienna Bank, No. 91 Civ. 8743, 1994 U.S. Dist. LEXIS 9409 (S.D.N.Y. July 12, 1994).
Bouton v. BMW, 29 F.3d 103 (3d Cir. 1994).
- D Boutros v. Canton Regional Transit Auth., 997 F.2d 198 (6th Cir. 1993).
- R Boyce v. Fleet Finance, Inc., 802 F. Supp. 1404 (E.D. Va. 1992).
- D Boyd v. Telecable of Overland Park, 752 F. Supp. 388 (D. Kan. 1990).
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- D,P Moore v. Seven-Up Bottling Co., No. 93-0026, 1994 U.S. Dist. LEXIS 10401 (E.D. Pa. July 20, 1994).
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- H,P Nelms v. Montgomery County Combined Health Dist., 915 F.2d 1572 (6th Cir. 1990).
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