TEXTUALISM AT WORK

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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 Holmes

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 Stevens

INTRODUCTION

Much of the debate about textualism as a method of statutory interpretation centers on its propriety. Is it appropriate to reject recourse to legislative history? Does a textualist methodology lead to determinate judgments? 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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4. See, e.g., id. at 625 (arguing that legislative history is “at best, secondary and supporting evidence of statutory meaning”).
merely applying in more precise fashion principles already enunci-
ated. The Court's textualist decision in *Patterson v. McLean Credit
Union*, a case interpreting § 1981, exemplifies this line of think-
ing. 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," and accord the
statutory terms "their plain and common sense meaning." The
Court confidently declared its belief "that the lower courts will have
little difficulty applying the straightforward principles that we an-
nounce 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 applica-
tion of a statute. The post-*Patterson* cases provide an unusually rich
constellation of cases with which to examine whether the relation-
ship 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

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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 di-
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 ap-
lication. 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 interpre-
tation to maintain that the model challenges textualism.
I. THE PATTERSON DECISION

The Patterson decision was primarily directed toward determining the amplitude of rights protected under § 1981's prohibition against racial discrimination in the making and enforcement of contracts. In a ruling which surprised many, the Court narrowly interpreted these rights and held that Brenda Patterson's charge of racial harassment was not actionable under § 1981. 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." 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."

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.


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 *Pat-
terson* decision has affected the viability of claims in nearly 600 sub-
sequent 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 interpret-
ive 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 en-
dorsed 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 adju-
dication is that general principles are tested in the crucible of concrete con-
troversies. 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) (revers-
ing 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
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 re-
mained 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
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
Other courts and judges have independently confirmed the confusions generated by the *Patterson* opinion. Commentators have echoed these observations as well.


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 fair 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. L. AW. 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 TOUR O. 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-

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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”).


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. Marcosson, 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.\textsuperscript{30}

The Supreme Court appeared to hold that the application of § 1981's "right . . . to make . . . contracts" would pose little difficulty\textsuperscript{31} because that phrase bears a clear, easily ascertainable meaning.\textsuperscript{32} Section 1981 protects against discriminatory action only dur-

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\item \textsuperscript{30} Remaining interpretive issues include whether a right of enforcement survives if the employer's obstruction of legal access is less than complete. \textit{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), \textit{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' ", \textit{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 \textit{Patterson}. For example, in \textit{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."

\textit{Harvis}, 973 F.2d at 497 (Siler, J., concurring in part & dissenting in part) (quoting \textit{Carter}, 912 F.2d at 840-41). The \textit{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. \textit{See infra} notes 199-201 and accompanying text. For reasons of emphasis, my argument in the text follows the \textit{Patterson} Court in separating the right to make and the right to enforce a contract, but the \textit{Harvis} holding suggests that the Court's separation itself presents complicated problems in application.


\item \textsuperscript{31} 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

\item \textsuperscript{32} \textit{Patterson}, 491 U.S. at 185 n.6.
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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." The dividing line, then, is between conduct during contract formation and "postformation conduct." 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." 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 . . . '."

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-
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. 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.

Promotion claims have caused the most problems for courts trying to apply the contract formation test, and transfer and demotion claims have created difficulties as well. While courts have uniformly held discriminatory discharge claims not to be viable under § 1981, the reasoning behind these conclusions is troubling. 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.

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 "bootstrapping] 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

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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).
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." 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." 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.").

48. Hicks, 902 F.2d at 639.
was formed. 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. 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. Did the refusal to serve constitute a refusal to contract or was it postformation conduct? 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.

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.


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. Again, did the alleged discrimination occur at the time of or after contract formation? 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?

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.


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.

stance, according to the familiar terms of the *Restatement (Second) of Contracts*, if an offeror is indifferent to the manner or mode of acceptance, the offeree can accept either by promise or performance. 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." 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. 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. 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-


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{64} Most notoriously, one Denny’s refused to serve six African-American secret service agents because of their race.\textsuperscript{65} This past August, Denny’s settled the litigation arising from all these cases at a cost of $54.4 million.\textsuperscript{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

\begin{footnotes}
\item[61] For a discussion of the case which presents this factual scenario, see supra notes 50-52 and accompanying text.
\item[62] See supra notes 52-53 and accompanying text.
\item[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)).
\item[64] See id.
\item[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.
\item[66] See Kohn, supra note 63, at 48.
\end{footnotes}
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

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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.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.
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. 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." As the secondary commentators 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." 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").


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.76 While promotion claims


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.\textsuperscript{6} 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 \textit{Patterson} has caused some courts to treat these claims as an "exception" to the formation-postformation division.\textsuperscript{77}

\textbf{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

\textsuperscript{6} 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).


Worse are cases that do not recognize that promotion claims even present a challenge to the formation-postformation 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 \textit{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 \textit{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.").\textsuperscript{77} aff'd in part, rev'd in part, 990 F.2d 1397 (2d Cir. 1993).
§ 1981's right to make and enforce contracts. In section III (B), the Court applied these principles to Brenda Patterson's racial harassment claim. 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.

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. 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).

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.

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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{86} All other employment contracts could then have been interpreted as renewals or modifications of prior contracts and, therefore, as the "remaking" 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.\textsuperscript{87} Despite these possibilities of a more bright-line rule, the Court did not find such rules to make sense of the statute.\textsuperscript{88} If these interpretations of § 1981 seem an artifice, though, the question remains whether the Court's actual test is any less so.

\textsuperscript{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. \textit{See infra} notes 155-249 and accompanying text.

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

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

\textsuperscript{87} \textit{Cf.} \textit{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").

\textsuperscript{88} \textit{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." It also defined the statutory phrase "make . . . contracts" to include as actionable new formal contracts as well as new contractual relations. 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. Building on its prior statement that it thought lower courts would have "little difficulty applying the straightforward principles that we announce today," 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. 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.
tract\textsuperscript{104} — 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.\textsuperscript{108} 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. \textit{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”); \textit{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”); \textit{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. \textit{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 . . . .”).\textsuperscript{106}

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

\textsuperscript{104} \textit{Patterson,} 491 U.S. at 176-78.

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

\textsuperscript{106} \textit{Taylor v. Western & S. Life Ins. Co.,} 966 F.2d 1188, 1200 (7th Cir. 1992); \textit{accord Von Zuckerstein v. Argonne Nat’l Lab.}, 984 F.2d 1467, 1473 (7th Cir. 1993) (citing \textit{Partee} and \textit{McKnight}).
decisions that are made every day in the labor force.\textsuperscript{107} A Sixth Circuit review of post-\textit{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.'\textsuperscript{108} While the \textit{Patterson} Court's explicit reference to the \textit{Hishon}\textsuperscript{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.\textsuperscript{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,\textsuperscript{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 guidelines.\textsuperscript{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 \textit{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.

\textsuperscript{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.'").

\textsuperscript{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").

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

\textsuperscript{110} Butts v. City of New York, Dep't of Hous. Preservation & Dev., 990 F.2d 1397, 1411 (2d Cir. 1993).

\textsuperscript{111} See supra note 106 and accompanying text.

\textsuperscript{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.\textsuperscript{113} Under another variant, just as under \textit{Chevron}\textsuperscript{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.\textsuperscript{115}

Examination of the post-\textit{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 \textit{Patterson}, the Court's comments would be effectively eviscerated."\textsuperscript{116} Another court agreed that different duties and pay do

\begin{footnotes}
\item[113] \textit{See}, e.g., Philip Bobbitt, \textit{Constitutional Fate: Theory of the Constitution} 25-58 (1982) (distinguishing textual argument from doctrinal argument); Robert Post, \textit{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.").
\item[115] \textit{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).
\item[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 \textit{Patterson} Court.
\end{footnotes}
not in themselves suffice for a promotion claim because "Patterson clearly did not intend every such claim to be actionable under Section 1981." 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. These references may suggest that when the *Patterson* Court admonished the lower courts to adhere to "a fair and natural reading" of the statute, 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.

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-

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); Gulf & Western 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").
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." 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.128 After that point, as previously discussed,128 issues be-


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)).

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.


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.").


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. This test does not provide bright-line demarcations 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." 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.

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. 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.


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 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").

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.\textsuperscript{138} Other cases divide on whether a promotion from one supervisory position to another is actionable.\textsuperscript{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.\textsuperscript{140} This result slight the rights and status generally granted
regular or full-time employees, something recognized in the cases permitting these promotions to go forward. 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. 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 claim. 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]." 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."


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] the 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.


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”\textsuperscript{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 \textit{Malhotra v. Cotter & Co.}\textsuperscript{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.\textsuperscript{148} The \textit{Malhotra} court did not resolve the propriety of this approach, for it remanded the issue back to the district court.\textsuperscript{149} Yet the question generated significant diverse commentary from other members of the \textit{Malhotra} panel.\textsuperscript{150}

My interest in the anomaly identified is twofold. First, what does it say about the ease of the application of § 1981 under the \textit{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.” \textit{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?

\textsuperscript{146} Patterson v. McLean Credit Union, 491 U.S. 164, 185 (1989).

\textsuperscript{147} 885 F.2d 1305, 1311 (7th Cir. 1989).

\textsuperscript{148} \textit{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. \textit{See supra} note 136 and accompanying text. One commentator notes:

The following standard fulfills the \textit{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, \textit{and} the discriminatorily denied promotion is not granted routinely to similarly situated workers.

\textsuperscript{149} \textit{Malhotra}, 885 F.2d at 1318.

\textsuperscript{150} For Judge Cudahy, the test was appropriate, since nothing in \textit{Patterson} justified the different statutory treatment of current employee and outside applicant. \textit{Id.} at 1317 n.6 (Cudahy, J., concurring). Judge Ripple disagreed and held that the test would undermine rather than faithfully apply \textit{Patterson}. \textit{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. \textit{Id.} at 1317 (Ripple, J., concurring).
Judge Posner discussed 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 § 1981.151

Second, according to Judge Posner, the “new and distinct relation”152 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.”153 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 Dept’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. 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. 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.”

Another alternative, also similar to the promotion cases, 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


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.\textsuperscript{169} 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.\textsuperscript{160} A modest increase in wages upon transfer, then, is not sufficient; "otherwise every raise would be deemed the formation of a new contract."\textsuperscript{161}

Again the question is whether this latter conclusion is reached through application of the \textit{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.\textsuperscript{162} An African-American employee started to participate but had to withdraw because the inducements were not sufficient to offset other costs.\textsuperscript{163} Later she learned that white employees allegedly received relocation benefits in excess of those offered her.\textsuperscript{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 \textit{Patterson}.\textsuperscript{168}

\begin{footnotes}
\item[160.] \textit{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 \textit{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. \textit{McKnight}, 908 F.2d at 110.
\item[161.] \textit{Bush}, 990 F.2d at 932.
\item[163.] \textit{Id.} at *14.
\item[164.] \textit{Id.}
\item[165.] \textit{Id.} at *19. Note the emphasis that small changes affect a change in the \textit{contractual relationship}. This is in contrast to Judge Posner’s proposition that some significant, nonroutine changes may be actionable even though they effect “\textit{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).
\end{footnotes}
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"\(^\text{166}\) between employee and employer.\(^\text{187}\) 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.\(^\text{168}\) 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." \textit{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, \textit{supra} note 29, at 905 n.90.

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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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 \textit{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.\textsuperscript{172} This distinction fails, however, because as \textit{Patter-}

\textsuperscript{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 . . . ." \textit{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).

\textsuperscript{170} \textit{See, e.g.}, \textit{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."); \textit{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

\textsuperscript{171} \textit{Discharge claims will be discussed at greater length shortly. See infra} notes 179-249 and accompanying text.

\textsuperscript{172} \textit{See, e.g.}, \textit{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."\textsuperscript{178} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{178}

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.\textsuperscript{177} \textit{Patterson} has underscored this point in its admonishing lower courts "not [to] strain in an undue manner the language of § 1981."\textsuperscript{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."); \textit{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").

\textsuperscript{173} Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989).

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

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

\textsuperscript{175} See \textit{supra} note 168.

\textsuperscript{176} See, e.g., \textit{Newton}, 738 F. Supp. at 955 (explicitly acknowledging this result).

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

\textsuperscript{178} Patterson v. McLean Credit Union, 491 U.S. 164, 185 (1989). This language has been explicitly cited in the demotion context. See \textit{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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"); Courtenay 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.

\textsuperscript{183} Patterson v. McLean Credit Union, 491 U.S. 164, 185 n.6 (1989).

\textsuperscript{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).

\textsuperscript{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, 936 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 \textit{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 \textit{Patterson}. We should recognize initially that the \textit{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, \textit{Patterson} did not specifically discuss the viability of discharge claims under § 1981.\footnote{This silence has forced courts to apply \textit{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 \textit{Patterson} as all other claims.\footnote{At the other extreme, some courts have held that the logic of \textit{Patterson} is simply not relevant to discharge cases.\footnote{In between these poles are decisions insisting that the reasoning in \textit{Patterson} requires distinctive treatment of discharge claims.\footnote{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.}}\textit{A. Patterson as Distinguishable?}}\textit{Patterson} did not specifically discuss the viability of discharge claims under § 1981.\footnote{This silence has forced courts to apply \textit{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 \textit{Patterson} as all other claims.\footnote{At the other extreme, some courts have held that the logic of \textit{Patterson} is simply not relevant to discharge cases.\footnote{In between these poles are decisions insisting that the reasoning in \textit{Patterson} requires distinctive treatment of discharge claims.\footnote{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.}}\textit{A. Patterson as Distinguishable?}}\textit{Patterson} did not specifically discuss the viability of discharge claims under § 1981.\footnote{This silence has forced courts to apply \textit{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 \textit{Patterson} as all other claims.\footnote{At the other extreme, some courts have held that the logic of \textit{Patterson} is simply not relevant to discharge cases.\footnote{In between these poles are decisions insisting that the reasoning in \textit{Patterson} requires distinctive treatment of discharge claims.\footnote{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.}}\textit{A. Patterson as Distinguishable?}}\textit{A. Patterson as Distinguishable?}}
did not discuss discharges is quite telling. They pointed out that prior to Patterson, numerous lower courts held § 1981 protected against discriminatory discharge 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. 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. Further, some judges noted that two Supreme Court cases subsequent to Patterson expressed the view that the viability of § 1981 discharge claims was still open. 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.


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-Khazrajai, 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. 154, 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. They can be contested on their own grounds, but that discussion need not detain us here. 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.

numerous and long-settled cases in this circuit which hold that discriminatory discharge is actionable under Section 1981.”); Asare v. Sym's, 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. Given, however, that a promotion is clearly postformation conduct and that some promotions survive Patterson, this argument cannot do. 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." 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.\textsuperscript{203} If one cannot challenge a discriminatory dismissal, then the right to contract for employment becomes meaningless.\textsuperscript{204} Courts should not "permit[] an em-

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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. \textit{See, e.g.}, \textit{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."); \textit{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. . . ."); \textit{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. \textit{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 . . ."); \textit{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. \textit{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. \textit{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 \textit{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. \textit{See, e.g.}, \textit{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' \textit{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.”

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.’” 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.

Further and more fundamentally, courts holding discharge claims *not* actionable insist that these claims do *not* implicate the right to make a contract. 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-

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(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

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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).


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-

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. 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.”

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 \textit{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 \textit{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 \textit{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

\begin{footnotesize}
\begin{enumerate}
\item renewed contractual relationship.
\item Relying on the \textit{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); \textit{Prather}, 918 F.2d at 1261 (Boggs, J., dissenting).
\item \textit{Patterson} v. McLean Credit Union, 491 U.S. 164, 221 (1989) (Stevens, J., concurring in part & dissenting in part).
\item 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 \textit{Patterson} Court and post-\textit{Patterson} lower courts).
\item \textit{Drake}, 1990 U.S. Dist. LEXIS 7044, at *5.
\end{enumerate}
\end{footnotesize}
hired back to their now vacant position, should a discriminatory failure to hire be subsumed under the discharge? What if the failure to renew occurs at the end of a stated term of service? Would we approach a case differently if the failure to renew is not for employment but for a housing lease? If a new employer takes over an old contract, is the severance of an employee a discharge or a failure to contract? What if the allegedly new contract sought to be created does not embrace merely the old terms but new ones? 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? 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)).


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

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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 & Marcosson, 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).


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).
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.238

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.238 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-
ment relationship "new and distinct." 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.

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. If Judge Posner's observation


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.").


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 above 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.” 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 & Marcosson, 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 claims\(^\text{242}\) 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.\(^\text{243}\) 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.\(^\text{244}\) Should not the same logic be applied — perhaps be even more properly applied — to discharge

\(^\text{242. See supra notes 124-54 and accompanying text.}\)

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

\(^\text{244. Id.}\)
and refusal to hire cases? 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." 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.

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." 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."

245. Rossein, supra note 220, at 119 (making a similar argument).
247. Id. at 1576.
248. Id. at 1578.
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:

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<td>Discriminatory discharge</td>
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<td>Refusal to renew contract</td>
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II. Right to enforce a contract:

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III. Miscellaneous or nonenumerated coa:

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IV. Equal benefit, etc. clauses:

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**TOTAL CLAIMS:**

961

**TOTAL CASES BRINGING THESE CLAIMS:**

594
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

D,H

Alexander v. Gerhardt Enter., Inc., 40 F.3d 187 (7th Cir. 1994).


Allensworth v. General Motors Corp., 945 F.2d 174 (7th Cir. 1991).


Amos v. U.S. W. Communications, 986 F.2d 1426 (10th Cir. 1993) (table).


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).


Barnum v. Pacific Bell, 931 F.2d 896 (9th Cir. 1991) (table).


Bartek v. Urban Redevelopment Auth., 882 F.2d 739 (3d Cir. 1989).


Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994).


D Boutros v. Canton Regional Transit Auth., 997 F.2d 198 (6th Cir. 1993).


H Brazile v. Los Angeles Unified Sch. Dist., 922 F.2d 844 (9th Cir. 1993) (table).


Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).


D,H,P
Brownlee v. Chrysler Motors Corp., 966 F.2d 1451 (6th Cir. 1992) (table).

D,P,R,RD

D

H,P,R

D

H
Burrell v. Oklahoma Dep't of Transp., 28 F.3d 112 (10th Cir. 1994) (table).

H

CD,H

P

D,Dm,P,T


Carter v. Ball, 33 F.3d 450 (4th Cir. 1994).
Carter v. Philip Morris, USA, 36 F.2d 1091 (table).
Carter v. Sedgwick County, Kan., 929 F.2d 1501 (10th Cir. 1991), on further consideration, 36 F.3d 952 (10th Cir. 1994).
Casillan v. Regional Transp. Dist., 986 F.2d 1426 (10th Cir. 1993) (table).
Cason v. Rolfs, 930 F.2d 32 (10th Cir. 1991) (table).


Chicago Truck Drivers Union Pension Fund v. Steinberg, 32 F.3d 269 (7th Cir. 1994).


Clark v. Frank, 5 F.3d 535 (9th Cir. 1993) (table).


Cornish v. City of L.A., 15 F.3d 1084 (9th Cir. 1994) (table).

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<td>931 F.2d 1379 (10th Cir. 1991)</td>
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Dm,H,RD


Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991).

E,R,RK


D,H,P,R


D,H


CD,H


P


D


D


CD


D,Dm,H


Dm


H


Dickinson v. Ohio Bell Communications, Inc., 996 F.2d 1214 (6th Cir. 1993) (table).


Drake v. City of Fort Collins, 927 F.2d 1171 (10th Cir. 1991).


D


H,RR


Durham v. Xerox Corp., 18 F.3d 836 (10th Cir. 1994).

RR


D,Dm,E,H,P, R,RD


D,P

Easley v. General Motors, No. IP89-154-C (S.D. Ind. 1989) (slip op.).


P


D

Edmundson v. Continental Pipeline Co., 940 F.2d 665 (7th Cir. 1991) (table).

D


D,P


D


EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).


P Espinueva v. Garrett, 895 F.2d 1164 (7th Cir. 1990).

Estate of Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993).


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D,T
Gallegos v. City & County of Denver, 984 F.2d 358 (10th Cir. 1993), cert. denied, 113 S.Ct. 2962 (1993), on further consideration, 13 F.3d 405 (10th Cir. 1994) (table).

Dm,H,T
Garcia v. Spun Steak Co., 13 F.3d 296 (9th Cir. 1993).

M

H

D,RR

D,Dm,H

D,P

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D,H

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Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993).


Green v. State Bar, 27 F.3d 1083 (5th Cir. 1994).


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D, RD

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C D

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H
Harris v. Morris, 983 F.2d 1066 (6th Cir. 1993) (table).

H

D, R

P

R
P

Harrison v. Associates Corp. of N. Am., 917 F.2d 195 (5th Cir. 1990).

P

Harriston v. Chicago Tribune Co., 992 F.2d 697 (7th Cir. 1993).

RK


RD


D

Hatcher v. Greater Cleveland Regional Transit Auth., 911 F.2d 732 (6th Cir. 1990) (table).

D,E


D,H,R


D,H


D


DEPAUL LAW REVIEW


Hook v. Ernst & Young, 28 F.3d 366 (3d Cir. 1994).


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

RK Howard v. BP Oil Co., 32 F.3d 520 (11th Cir. 1994).


D

D,E

Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992).


H

P

P,T

RR

Jackson v. City of Albuquerque, 890 F.2d 225 (10th Cir. 1989).


E,H

Dm,E,H,RD

RK  Jackson v. Montgomery, 999 F.2d 547 (10th Cir. 1993) (table).


P   Jain v. Cleveland Clinic Found., 918 F.2d 178 (6th Cir. 1990) (table).


D   Jiminez v. Lancaster Colony Corp., 933 F.2d 1019 (10th Cir. 1991).


Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992), cert. denied, 114 S. Ct. 1641 (1994).

Johnson v. Walgreen, 980 F.2d 721 (1st Cir. 1992).


Jones v. City of Cleveland, 898 F.2d 154 (6th Cir. 1990).


P,T


P,RR


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H

Jones v. PPG Indus., Inc., 937 F.2d 608 (6th Cir. 1991) (table).

RR


H


Dm,R,RD


D


P


Khan v. Jenkins, 905 F.2d 1530 (4th Cir. 1990) (table).


Krain v. Kahn, 936 F.2d 578 (9th Cir. 1991) (table).


Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994).


D Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805 (5th Cir. 1990).


Leal-Rodriguez v. Immigration & Naturalization Serv., 990 F.2d 939 (7th Cir. 1993).


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<td>Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994).</td>
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Marshall v. Ormet, 932 F.2d 968 (6th Cir. 1991), modified on other grounds, 940 F.2d 661 (6th Cir. 1991) (table).


Miller v. GE Gov't Serv., 905 F.2d 1530 (4th Cir. 1990).


Mojica v. Gannett Co., 7 F.3d 552 (7th Cir. 1993).


Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989).


TEXTUALISM AT WORK

1995

D


D,H,P,R


Murphy v. Centerior Energy Corp., 38 F.3d 1216 (6th Cir. 1994).

CD

Murphy v. United Parcel Serv., Inc., 986 F.2d 1424 (7th Cir. 1993) (table).


D,H,R,RR


H,P

Nelms v. Montgomery County Combined Health Dist., 915 F.2d 1572 (6th Cir. 1990).

Dm


D,RK

Nesbit v. Louisiana-Pacific Corp., 39 F.3d 1184 (8th Cir. 1994).

D


P


Nsikak v. Union Oil Co., 7 F. 3d 1045 (10th Cir. 1993) (table).

Nunez v. First Union Nat'l Bank, 996 F. 2d 287 (11th Cir. 1993).


Oriedo v. Knudson, 979 F. 2d 853 (7th Cir. 1992).

O'Shea v. City of San Francisco, 966 F. 2d 503 (9th Cir. 1992).


RD Overby v. Chevron USA, Inc., 882 F.2d 470 (9th Cir. 1989).


D Parker v. Housing Auth., 996 F.2d 311 (10th Cir. 1993) (table).


P Partee v. Metropolitan Sch. Dist. of Washington Township, 954 F.2d 454 (7th Cir. 1992).


D,P,RD Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992).


People v. Latimer, 858 P.2d 611 (Cal. 1993).


Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (10th Cir. 1989).


Postema v. National League, 998 F.2d 60 (2d Cir. 1993).


Ramos v. Roche Prod., Inc., 936 F.2d 43 (1st Cir. 1991).

Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989).


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Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 (7th Cir. 1993).

Rodriguez v. General Motors Corp., 904 F.2d 531 (9th Cir. 1990), on reconsideration, 27 F.3d 396 (9th Cir. 1994).

Rodriguez v. General Motors, 904 F.2d 710 (9th Cir. 1990) (table).

Rodriguez-Padron v. Immigration & Naturalization Serv., 13 F.3d 1455 (11th Cir. 1994).


Rossy v. Roche Prod., Inc., 880 F.2d 621 (1st Cir. 1989).

Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992).


P
Rush v. McDonald's Corp., 966 F.2d 1104 (7th Cir. 1992).

P,R,RK

Russell v. Popper, 914 F.2d 1494 (6th Cir. 1990) (table).

Ryan v. City of Shawnee, 13 F.3d 345 (10th Cir. 1993).


H

D

Sampson v. Parker, 907 F.2d 1139 (4th Cir. 1990) (table).

EB,H

D


H
Sanchez v. City of Santa Ana, 936 F.2d 1027 (9th Cir. 1990).

Sanders v. Ogden Allied Leisure Serv., Inc., 5 F.3d 539 (9th Cir. 1993) (table).

D

**P,R,RR**


**E,H,P**


**P,R**


**D,H**


**P**


**D**


Shepherd v. Veterans Admin., 14 F.3d 602 (6th Cir. 1993) (table).

**E,RD**


Shuman v. General Motors Corp., 914 F.2d 258 (6th Cir. 1990) (table).


Sims v. Mulcahy, 902 F.2d 524 (7th Cir. 1990).


Sitgraves v. Allied-Signal Inc., 952 F.2d 570 (9th Cir. 1992).

Skeeter v. City of Norfolk, 898 F.2d 147 (4th Cir. 1990).


Smith v. Horizon Air, 996 F.2d 1227 (9th Cir. 1993) (table).


Snell v. City & County of Denver, No. 92-1370, 1993 U.S. Dist. LEXIS 17091 (10th Cir. July 2, 1993), tabled at, 999 F.2d 548 (10th Cir. 1993).


D Spiller v. Ella Smithers Geriatric Ctr., 919 F.2d 339 (5th Cir. 1990).


State v. Stevens, 511 N.W.2d 591 (Wis. 1994).


Steverson v. Goldstein, 24 F.3d 666 (5th Cir. 1994).


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<td><strong>D</strong></td>
<td>Taggart v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990), vacated, 935 F.2d 947 (8th Cir. 1991).</td>
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Thompson v. City of Hickman, 12 F.3d 214 (6th Cir. 1993) (table).


R Tillman v. M & I Bank, 30 F.3d 136 (7th Cir. 1994) (table).


United States v. Aman, 31 F.3d 550 (7th Cir. 1994).

United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989).


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TEXTUALISM AT WORK


P Wall v. Trust Co. of Ga., 946 F.2d 805 (11th Cir. 1991).


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Wileman v. Frank, 979 F.2d 30 (4th Cir. 1992).

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D,H,P

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Williams v. KETV Television, Inc., 26 F.3d 1439 (8th Cir. 1994).

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Young v. Vons Companies, 927 F.2d 612 (9th Cir. 1991) (table).


D


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D,RR