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PATTERSON v. McLEAN CREDIT UNION

by Merrick T. Rossein*

"What the Court declines to snatch away
with one hand, it takes with the other."¹

I. INTRODUCTION

In *Patterson v. McLean Credit Union*,² the Supreme Court continued the trend established during its 1988-89 Term by severely limiting the reach of the Reconstruction Era statutes³ and title VII of the Civil Rights Act⁴ as they apply to remedying discrimination in the employment context.⁵ In a five to four decision, the Court held that a racially motivated refusal to hire violates § 1981 of the 1866 Civil Rights Act,⁶ while a practice of racial harassment adopted after an employee was hired does not by itself violate the employee's rights under the statute. The procedural history of the *Patterson* case indicates the majority's hostility to civil rights law enforcement, particularly in the area of employment discrimination.

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1. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2379 (1989) (Brennan, J., concurring in part and dissenting in part).

2. 109 S. Ct. 2363 (1989).

3. 42 U.S.C. §§ 1981-1983, 1985-1986, 1988 (1988). *See also* U.S. CONST. amend. XIII, § 2.

4. 42 U.S.C. § 2000e-2(a) (1988).

5. *See* *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989); *Lorance v. AT & T Technologies, Inc.*, 109 S. Ct. 2261 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). *But see* *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (the Supreme Court lightened the burden of proof for plaintiffs in "mixed-motive" sex-discrimination actions, *i.e.*, cases that involve both permissible and impermissible reasons for adverse employment decisions).

6. Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted as amended pursuant to the ratification of the fourteenth amendment at Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. § 1981 (1988))).

When the case was first accepted and argued in the 1988-89 Term, the Court was presented with two questions: first, whether § 1981 encompassed a claim of racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race;⁷ and second, whether the district court erred in instructing the jury that for the plaintiff to prevail on her claim of discrimination in promotion she must prove that she was more qualified than the white person who received the promotion.⁸

After argument, the court *sua sponte* raised a new issue: whether or not the interpretation of § 1981 adopted by the Court in *Runyon v. McCrary*⁹ should be reconsidered.¹⁰ The Court's decision to reopen this thirteen-year precedent, which held that § 1981 reached *private discrimination* in a school context, was met with an unusually sharp dissenting opinion.¹¹ This dissenting opinion was the first in a series of outcries against the Court's attempt to wreak havoc in the area of employment discrimination litigation.¹²

Although the court did not overrule the *Runyon* decision, it took a scalpel to the guts of the first civil rights statute and severely limited the reach of this statute in the employment context. The reaction to this decision both editorially and in Congress was swift and condemnatory.¹³ Consequently, it is likely that before this article is published, the United States Congress will have reversed this decision through the enactment of

7. *Patterson*, 109 S. Ct. at 2369.

8. *Id.* at 2369, 2377.

9. 427 U.S. 160 (1976).

10. *Patterson*, 109 S. Ct. at 2369.

11. See *Patterson v. McLean Credit Union*, 485 U.S. 617, 619 (1988) (Blackmun, J., dissenting) (dissent was concerned with preserving the "accepted doctrine of *stare decisis*").

12. See, e.g., *infra* notes 13-19 and accompanying text. A brief *amicus curiae* opposing the reversal of the *Runyon* case was submitted by 118 members of the House of Representatives and 66 members of the Senate in addition to numerous other briefs representing a wide spectrum of organizations in this country. See, e.g., Brief of the States, *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (No. 87-107) (47 states, Puerto Rico, District of Columbia, Guam and the Virgin Islands); Brief for American Jewish Congress and 114 Other Organizations, *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (No. 87-107).

13. See, e.g., E. KENNEDY, REPORT TOGETHER WITH MINORITY VIEWS, S. REP. NO. 315, 101st Cong., 2d Sess. (1990) [hereinafter KENNEDY REPORT]. Secretary of Education Shirley M. Hufstедler described the Supreme Court's recent decisions as "an enormous step backwards in the enforcement of civil rights legislation." *Id.* at 11. Former Secretary of Labor Ray Marshall testified: "[M]any of the victims of discrimination feel that the clock is being turned back, and that the nation's policy makers really are not serious about eradicating discrimination." *Id.*

legislation.¹⁴

The Civil Rights Act of 1990¹⁵ was introduced in the House of Representatives and the Senate,¹⁶ to, among other things, overturn the Supreme Court's holding in *Patterson*.¹⁷ The Civil Rights Protection Act of 1990 drafted by the Bush Administration and introduced in Congress on February 20, 1990,¹⁸ also supports overturning *Patterson*. No significant opposition has been voiced in Congress or the Executive branch to the reversal of the *Patterson* decision. However, since the *Patterson* reversal provision contained in the proposed legislation is part of a broader bill, and because of significant employer and administration opposition, it is possible that this provision's enactment will be delayed.¹⁹

Part II of this article critically examines the Court's decision in *Patterson*. As part of this discussion, the majority's attempt at ignoring or masking the history of civil rights in the United States is explored. In Part III, the critical differences between § 1981 and title VII of the 1964 Civil Rights Act are briefly highlighted. Part IV sets out some of the issues remaining after *Patterson*, reviews lower courts' interpretation of the *Patterson* holding, and presents various analyses to persuade the courts that many adverse employment practices based on race are still unlawful under § 1981.

II. THE DECISION

The narrow five to four majority decision addressed three issues:

(1) whether the Court's decision in *Runyon v. McCrary* should be

14. The Civil Rights Act of 1990 will amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment.

15. See H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990) [hereinafter Civil Rights Act of 1990] (as introduced, both the Senate and House bills are textually the same).

16. *Id.* See Pinzler, *The Legislative Response*, 7 N.Y.L. SCH. J. HUM. RTS. 123 (Symposium 1990) (discussing proposed legislation).

17. The bill has already received the support of a bi-partisan coalition of 50 Senators and over 140 members of the House of Representatives. See KENNEDY REPORT, *supra* note 13, at 37.

18. *Id.*

19. In addition to overruling a number of 1988-89 Supreme Court decisions the Civil Rights Act of 1990 adds compensatory and punitive damages as well as jury trials for certain title VII cases. H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess. 14 (1990) (§ 8 provides for damages in cases of intentional discrimination). Also, the bill extends the statute of limitations from six months to two years at § 7. *Id.* at 13. See also Civil Rights Act of 1990, *supra* note 15, § 7

overruled;²⁰ (2) whether claims of racial harassment are actionable under § 1981;²¹ and (3) whether in a promotion claim the district court erred when it instructed the jury that the plaintiff-minority had to prove that she was better qualified than the white employee who received the promotion.²² The Court's answers to these questions and the concurring and dissenting justices' responses are set out below.

The differences between the majority's view and the dissenters' view of the first Reconstruction Era statute, with respect to whether claims of racial harassment are actionable, are their respective understanding of, or importance given to, the historical context in which the statute was formed. For the majority, the fact that the institution of slavery still existed, or that many citizens of formerly Confederate states actively engaged in violence, intimidation, threats, and used Jim Crow laws²³ to reimpose a new form of servitude, seems lost or of no relevance. Although the majority recognizes the fact that "[t]he law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension,"²⁴ it is astounding that they ultimately remove racial harassment as actionable under § 1981.²⁵

Further, the majority's sparse accounting of the specific facts raised by Brenda Patterson demonstrates its dehumanizing callousness toward the victims of racial discrimination.²⁶ The cold, calculating legal

20. *Patterson*, 109 S. Ct. at 2369.

21. *Id.*

22. *Id.* at 2369, 2377.

23. See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (the Court engaged in a thorough analysis of the Reconstruction Era statutes; this analysis presupposed that the statutes were designed, at least in part, to combat the Jim Crow laws and the Black Codes, both of which imposed severe restrictions on the freedmen in an effort to replicate pre-emanation conditions).

24. *Patterson*, 109 S. Ct. at 2379.

25. Originally enacted as part of the Civil Rights Act of 1866, § 1981 provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens . . ." 42 U.S.C. § 1981 (1988).

26. Brenda Patterson testified that her supervisor periodically stared at her for several minutes at a time; that he gave her too many tasks, causing her to complain that she was under too much pressure; that among the tasks given her were sweeping and dusting, jobs not given to white employees. On one occasion, she testified, [her supervisor] told [her] that blacks are known to work slower than whites. According to

argumentation used by the majority to advance their views of our society needs to be exposed, not only in the courts, but throughout all sectors of society. Even if the *Patterson* and other retrogressive 1988-89 Term decisions of the Court are reversed by enactment of the Civil Rights Act of 1990, the *Patterson* majority's hostility to people of color and women will remain intact.

A. On Reversing *Runyon* -- It Seems So Clear Now

In declining to overrule the Court's decision in *Runyon*, the majority beat a quick retreat from its *sua sponte* resurrection of this issue when, in the 1988-89 Term, it asked the parties to brief and argue this question not raised by either party.²⁷ After applying the doctrine of *stare decisis* to the *Runyon* holding, the majority decided that the "fundamental importance of this doctrine"²⁸ outweighed the asserted grounds for reversal of *Runyon*.²⁹ Having exhaustively searched for a "special justification" for overruling *Runyon*, the Court had no choice but to affirm the original holding. Further, noting that *Runyon* did not cause "inherent confusion created by an unworkable decision, . . . pose[] a direct obstacle to the realization of important objectives embodied in other laws,"³⁰ or become "more vulnerable as it becomes outdated and after being 'tested by experience, has been found inconsistent with the sense of justice or with the social welfare,'"³¹ the Court resumed its analysis of the issues originally granted *certiorari*. With respect to the third possible justification for overruling a prior case, the Court wrote:

Whether *Runyon*'s interpretation of § 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. To the contrary, *Runyon*

[Patterson, her supervisor] also criticized her in staff meetings while not similarly criticizing white employees.

Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986).

27. *Patterson*, 109 S. Ct. at 2369.

28. *Id.* at 2370 (citing *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 494 (1987)).

29. *Id.* at 2369.

30. *Id.* at 2371 (citations omitted).

31. *Id.* (citing *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921))).

is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin.³²

Lastly, in responding to an argument posed by Justice Brennan's dissent,³³ the majority agreed that the doctrine of *stare decisis* is further supported in cases of statutory interpretation because Congress could have amended the statute.³⁴

The majority's opinion reads as if there were no plausible reasons to consider overruling *Runyon*. The matter-of-fact rejection of its own invitation to dash on the rocks a significant ruling makes one wonder what their initial justification was for the attempted destruction of a crucial remedy for racial discrimination practiced by private parties.³⁵ One can only speculate that President Reagan's appointment of Justice Kennedy, eight years of consistent attacks on civil rights laws, and the virtual nonenforcement of these laws by the federal government created a judicial climate for the majority's blatant attempt to announce a retreat to an earlier era without the usual legal argumentation.³⁶

Having failed to accomplish the intended result under its initial strategy, the majority instead tore much of the muscle from the body of § 1981 in *Patterson* by ruling that a claim of racial harassment adopted after hiring does not by itself fall within the enumerated rights of the statute.³⁷

32. *Id.* at 2371 (citations omitted).

33. *See id.* at 2379; *id.* at 2380-88 (Brennan, J., dissenting).

34. *Id.* at 2371-72 n.1 (the majority rejected Justice Brennan's argument that congressional inaction is supportive of *stare decisis*).

35. Numerous decisions have held that § 1981 prohibits intentional discrimination based on race in the making and enforcement of private contracts, as well as in state action affecting individuals' ability to make and enforce contracts. *See, e.g., Runyon*, 427 U.S. at 168; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973).

36. *See* M. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 1.1, at 1-6 n.10 (1990). In announcing its reversal of an eighteen-year-old precedent in the title VII context one week before the *Patterson* decision was released, the Court effectively repealed a substantive provision of title VII in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (effectively repealed §§701-703(a) of the Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000e to 2000e-2(a))). However, the Court reasoned that it did not really reverse the burdens of proof, but simply clarified a mere procedural point by "acknowledg[ing] that some of our earlier decisions can be read as suggesting otherwise." *Id.* at 2125-26.

37. *Patterson*, 109 S. Ct. at 2379. *See also* 42 U.S.C. § 1981.

B. The Gutting of § 1981 Through the Eradication of History

In holding that § 1981 does not cover a claim of racial harassment,³⁸ the majority ignored compelling legislative and social history. Rather than take cognizance of the compelling nature of history, the majority reviewed and applied the "plain terms" of § 1981 and found that the statute's protection applied only to the *formation* of a contract.³⁹ Problems that arose after *formation* from *conditions* of continued employment were not covered by § 1981.⁴⁰

The majority found that § 1981 contained two provisions relevant to contracts. First, all persons have the same rights as white citizens "to make" contracts.⁴¹ Second, all persons have the same rights as white citizens "to enforce" contracts.⁴² Thus, the Court concluded that discrimination in the making or enforcement of contracts is prohibited.⁴³

According to the majority, such prohibition included refusal to enter into a contract or to make an offer to contract with someone on discriminatory terms.⁴⁴ However, once a contractual relationship is established, post-formation conduct is not covered by § 1981, including breach of the contract or the "imposition of discriminatory working conditions."⁴⁵ These types of matters, explained the majority, are "more naturally governed by state contract law and Title VII."⁴⁶

The second guarantee of § 1981, the right to enforce contracts, prohibits discrimination that interferes with the enforcement of this right. Thus, a statute, practice, or private effort based on race to impede access to the courts or non-judicial methods for adjudicating disputes is unlawful.⁴⁷

After articulating the principles, the Court applied the facts by first stating them in one paragraph as summarized by the court of appeals.⁴⁸ Finding all of Brenda Patterson's claims dealt with post-formation conduct by the employer relating to the terms and conditions of continued

38. *Id.*

39. *Id.* at 2372. *See supra* note 25.

40. *Id.* at 2372-73. *See also* 42 U.S.C. § 1981.

41. *Patterson*, 109 S. Ct. at 2372. *See also* 42 U.S.C. § 1981.

42. *Patterson*, 109 S. Ct. at 2373. *See also* 42 U.S.C. § 1981.

43. *Patterson*, 109 S. Ct. at 2373.

44. *Id.* at 2372.

45. *Id.* at 2373.

46. *Id.* (citation omitted).

47. *Id.*

48. *Id.* at 2373 (citing *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986)). *See supra* note 26 and accompanying text.

employment, it held that these claims were beyond § 1981's reach.⁴⁹ The majority found solace in the fact that the type of race discrimination raised by Brenda Patterson was "actionable under the more expansive reach of Title VII of the 1964 Civil Rights Act."⁵⁰

Moreover, the Court noted, extending work environment challenges to § 1981 would undermine "the detailed and well-crafted procedures for conciliation and resolution of Title VII claims."⁵¹ In the majority's view, reading an earlier statute broadly undermines the latter statute.⁵² Even though the majority noted that after *Patterson*, some overlap between § 1981 and title VII remained, their goal of preserving title VII's integrity was accomplished without "sacrificing any significant coverage of the civil rights laws."⁵³ However, a comparison of the two laws demonstrates their inherently crucial differences and the need for both independent substantive provisions.⁵⁴

Although refuted by the majority,⁵⁵ Justice Brennan argued that § 1981 makes racial harassment actionable when "the acts constituting harassment [are] sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner."⁵⁶ Although this standard was not accepted by the majority for instances arising when an employer refuses to make a contract, both the majority and Justice Brennan agreed that racial harassment may be used as evidence of discriminatory terms in the formation of a contract.⁵⁷ The question to be asked, as stated by Justice Brennan, is whether the evidence of racial harassment shows that, at the time of the formation of the contract, the employer intentionally refused to enter into a contract with the employee on racially neutral terms.⁵⁸

Justice Brennan's response to the majority's narrow reading of § 1981, similar to his response to the attempted overruling of *Runyon*,

49. *Patterson*, 109 S. Ct. at 2373.

50. *Id.* at 2374. See also *infra* notes 99-115 and accompanying text (a comparison of the two statutes demonstrates that § 1981 is more expansive than title VII with respect to race claims).

51. *Patterson*, 109 S. Ct. at 2374.

52. *Id.* at 2375.

53. *Id.* (footnote omitted).

54. See *infra* notes 99-115 and accompanying text.

55. See *Patterson*, 109 S. Ct. at 2375-76.

56. *Id.* at 2376 (citing *id.* at 2389 (Brennan, J., concurring in part and dissenting in part)).

57. *Id.*

58. *Id.* at 2376-77.

began with a detailed analysis of the legislative history of § 1981.⁵⁹

C. History Ignored, But Not Yet Buried, Reveals That Congress Intended to Bar Racial Harassment Through § 1981.

Even though the majority declined to "snatch away with one hand" the entirety of § 1981, Justice Brennan refused to allow them to hide two critical reasons for maintaining the *Runyon* Court's interpretation of § 1981. First, extensive legislative history demonstrated that *Runyon* was correctly decided.⁶⁰ Second, Congress ratified this original holding.⁶¹ As previously stated, the majority failed to respond to Justice Brennan's detailed explication of the pertinent legislative history. For the majority, it was unnecessary to respond because no "special justification" existed to depart from the doctrine of *stare decisis*.⁶² However, the majority's failure to respond to Justice Brennan's reading of history with respect to whether § 1981 makes racial harassment actionable is noteworthy.

As Justice Brennan wrote, the Court conducted "an ahistorical analysis that ignore[d] the circumstances and legislative history of § 1981 [in narrowing the reach of this statute]."⁶³ The absence of a sound examination of the historical context that was present when § 1981 became law can be seen in other 1988-89 Term civil rights cases as well.⁶⁴

59. *Id.* at 2379-88 (Brennan, J., concurring in part and dissenting in part) (in sharp contrast, the majority simply ignores the history, as if one of the most important parts of American history never occurred).

60. *See id.*

61. *Id.*

62. *Id.* at 2371-72 n.1.

63. *Id.* at 2388. *See Rosenfeld, Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1761-73 (1989). In discussing the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), Professor Rosenfeld describes two forms of interpretation. First is the "atomistic" mode which relies "on the disconnection of facts from the context in which they are embedded" *Id.* at 1761. Second is the "ecological mode" which is "holistic and systematic in nature, approaching social facts and events in terms of the interaction between individuals, groups, and their social, political, and historical environment." *Id.* at 1762.

64. *See Martin v. Wilks*, 109 S. Ct. 2180 (1989) (holding white firefighters in Birmingham who failed to intervene in an earlier employment discrimination proceeding in which consent decrees were entered could challenge employment decisions taken pursuant to those decrees). Although not part of the record, the sordid and sad history of the resistance to black freedom and basic constitutional rights as played out in Birmingham should not be forgotten. In 1963, Chief of Police "Bull" O'Connor set his police attack dogs on peaceful demonstrators, jailed thousands, and ordered *the all-white*

Justice Brennan understood and examined the critical legislative and social history in concluding that § 1981 encompasses claims of racial harassment.⁶⁵ The actions of Congress in enacting § 1981 must be examined in light of the historical conditions in 1866, at the close of the bloody conflict fought to end slavery.⁶⁶ When viewed in its entirety, the legislative history makes clear that Congress intended to pass comprehensive legislation that would outlaw all forms of discrimination or

fire department to aim high-pressured fire hoses at the demonstrators; how many of the majority recall the bombing of the Birmingham black church that year that resulted in the deaths of four young girls? *Id.* (emphasis in original); *See also* *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989). Justice Blackmun poignantly criticized the majority's revision of history, stating: "Sadly, [the Court's ruling] comes as no surprise. One wonders whether the majority still believes that race discrimination -- or, more accurately, race discrimination against nonwhites -- is a problem in our society, or even remembers that it ever was." *Id.* at 2136 (Blackmun, J., dissenting) (citation omitted). Further, Justice Stevens, in reviewing the facts of this case, noted that the segregation of housing and dining facilities and job stratification along racial and ethnic lines in *Wards Cove* "bear an unsettling resemblance to aspects of a plantation economy." *Id.* at 2127-28 n.4 (Stevens, J., dissenting) (citing *PLANTATION, TOWN AND COUNTY ESSAYS ON THE LOCAL HISTORY OF AMERICAN SLAVE SOCIETY* 163-334 (E. Miller & E. Genovese eds. 1974). *See also* *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). Justice Marshall noted that Richmond, the former capital of the confederacy "knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination." *Id.* at 740 (Marshall, J., dissenting). *See also* T. BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963*, at 756-901 (1988); D. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 236-62 (1986); R. WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT* 68-72 (1990); McDougall, *Social Movements, Law and Implementation: A Clinical Dimension for the New Legal Process*, 75 *CORNELL L. REV.* 83, 102-11 (describing the Civil Rights Movement as building an "interpretive community").

65. *Patterson*, 109 S. Ct. at 2388-89. *See also id.* at 2381-85 (Justice Brennan's discussion of the legislative history supporting the interpretation that § 1981 covers private as well as public discrimination).

66. Thousands of books have been written about slavery, the Civil War, and its aftermath. *See* J. MCPHERSON, *FREEDOM BOUND* (1988) (estimating that over 50,000 titles have been published about the Civil War alone). Some of the seminal works about the Reconstruction Era include: W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880* (1935); E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988); I. FREEDOM, *A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867* (Berlin ed. 1985); L. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1980); J. FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* (1961). For the legal history of the era, see Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship and Civil Rights After the Civil War*, 92 *AM. HIST. REV.* 45 (1987); Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 *N.Y.U. L. REV.* 863 (1986).

other attempts to subjugate former slaves, whatever the sources of those attempts. Some actions that these provisions sought to interdict were the official acts of various states, including the enactment of Black Codes.⁶⁷ Other actions which Congress was equally intent upon prohibiting were those of private parties seeking to reintroduce slavery by every means available to them.⁶⁸

The Congress that enacted the Civil Rights Act of 1866 had before it strong evidence of the efforts by plantation owners to retain former slaves under oppressive terms and conditions.⁶⁹ In a report to President Andrew Johnson and Congress, General Carl Schurz detailed these schemes and practices in 1865.⁷⁰ This report played an important role in the enactment of § 1981.⁷¹

General Schurz observed that the former slaveholders simply "adher[e], as to the *treatment of laborers*, as much as possible to the traditions of the old system, *even where the relations between employers and laborers had been fixed by contract*."⁷² Schurz noted that employers attempted to "introduce into that new system [of contractual employment] the element of physical compulsion."⁷³ He concluded that "[t]he habit is so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a Negro almost irresistible."⁷⁴

Although this was sufficient legislative history for Justice Brennan to conclude that Congress intended to encompass terms and conditions of employment within § 1981, a fuller legislative history exists and lends further support. For example, General Schurz appended to his report the proposal of a group of Louisiana planters regarding the employment of black workers.⁷⁵ Schurz described this plan as "true representations of the

67. *Patterson*, 109 S. Ct. at 2381. See also D. BELL, RACE, RACISM AND AMERICAN LAW 83-84 (1980); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955); A. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978).

68. See *Patterson*, 109 S. Ct. at 2380-83.

69. C. SCHURZ, REPORT ON THE STATES OF SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI AND LOUISIANA, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 2-15 (1865) [hereinafter REPORT OF C. SCHURZ].

70. *Id.* at 12.

71. See *Jones v. Mayer Co.*, 392 U.S. 409, 428 (1968).

72. *Patterson*, 109 S. Ct. at 2388 (Brennan, J., concurring in part and dissenting in part) (emphasis in original) (quoting REPORT OF C. SCHURZ, *supra* note 70, at 19).

73. See REPORT OF C. SCHURZ, *supra* note 70, at 19.

74. *Id.* at 20.

75. *Id.* at 22.

ideas and sentiments entertained by large numbers to-day [sic].⁷⁶ The plan did not contemplate racial discrimination in hiring or firing; rather it called for draconian conditions of employment.⁷⁷ Farm laborers were to work a sixty-hour week, and "[t]he rate of wages should be fixed -- *above which* no one should be allowed to go."⁷⁸ Farm workers could neither leave the plantation, nor receive visitors, without written permission of the proprietor.⁷⁹ Corporal punishment could be inflicted to correct many abuses, and fines or imprisonment would be imposed on any laborers who were not "respectful in tone, manner, and language to their employers . . ."

⁸⁰
In early 1866, Congress organized the Joint Committee on Reconstruction in an effort to follow up the *Schurz Report*.⁸¹ The Joint Committee heard testimony that the planters refused to pay freedmen a living wage.⁸² In some instances, the freedmen received no wages at all,⁸³ and the planters continued to resort to whipping and other acts of cruelty.⁸⁴

The southern states' legislation known as the Black Codes were of great concern to the framers of the 1866 Civil Rights Act.⁸⁵ The Black Codes were primarily concerned with controlling the terms and conditions of black workers through direct or indirect means. The Codes did not however, prevent blacks from entering into employment contracts.⁸⁶

However, proponents of the 1866 Act recognized and opposed those aspects of the Black Codes which directly impinged the terms and conditions of black employment. For example, Senator Wilson, in his statement opening the debate on the Civil Rights bill, decried provisions of a Georgia statutory proposal that "regulates contracts between master

76. *Id.*

77. *Id.*

78. *Id.* at 84 (emphasis added) (appendix of "suggestions by a committee at a meeting of planters" as to what is wanted before capital and time is invested in cultivating another crop).

79. *Id.* at 85.

80. *Id.*

81. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess. (1866).

82. *See generally id.*

83. *Id.* at 54, 55.

84. *Id.* at 54.

85. *See generally* *Memphis v. Greene*, 451 U.S. 100, 132 (1981) (White, J., concurring); *Jones v. Mayer*, 392 U.S. 409, 426, 432-33 (1968).

86. LAWS IN THE RELATION TO FREEDMEN, S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. 170 (1867) [hereinafter FREEDMEN LAWS].

and servant, . . . [sets] [w]ork hours, from sunrise to sunset, [makes] [t]he servant . . . responsible for damaging the master's property [and allows] [t]he employer [to] discharge servants for want of respect."⁸⁷

Considered in the light of this history, it is evident that § 1981 was intended to reach beyond discrimination simply in hiring, firing, and promotions, and also encompassed oppressive terms and all conditions of employment. For the *Patterson* majority, the elaborate schemes to reintroduce slavery by means of onerous terms and conditions of employment is buried with the lives of the freedmen and those African-American descendants who continue to be oppressed in the workplace by conscious and unconscious forms of racism that flows from this history.

Thus, for Justice Brennan, the question in a § 1981 claim of racial harassment should be

whether the acts constituting harassment were sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner. Where a black employee demonstrates that she has worked in conditions substantially different from those enjoyed by similarly situated white employees, and can show the necessary racial animus, a jury may infer that the black employee has not been afforded the same right to make an employment contract as white employees.⁸⁸

As was noted by Justice Brennan and conceded at oral argument, if an employer offers a black and a white applicant a contract on the same terms but indicates that worse working conditions will exist for the black applicant, the employer violates § 1981 for providing an unequal contract.⁸⁹ Therefore, for Justice Brennan, no relevant distinction exists between this scenario and one where the different contractual conditions are unspoken.

D. Brenda Patterson

Brenda Patterson worked ten years at McLean Credit Union, and

87. CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865). See also FREEDMEN LAWS *supra* note 86, at 180-86 (noting Louisiana measure authorizing penalties for "imprudence" for "swearing to or in the presence of the employer, his family or agent" and for "bad work").

88. *Patterson*, 109 S. Ct. at 2389 (Brennan, J., concurring in part and dissenting in part).

89. *Id.*

during that time was subjected to racial slurs, unequal work, demeaning tasks, singled out for scrutiny and criticism, and denied promotions, training and wage increases routinely given to other employees.⁹⁰ In contrast to the majority's one paragraph summation of the facts, Justice Brennan gives recognition to the reality of discrimination by discussing the details of Brenda Patterson's employment in detail.⁹¹

Brenda Patterson was subjected to various forms of racial harassment. The General Manager of McLean Credit Union told her a number of times that "blacks are known to work slower than whites by nature,' or as he put it in one instance, 'that some animals [are] faster than other animals.'⁹² She received unequal work assignments, and when she complained, she was given more work and was told that she should consider quitting.⁹³ She testified about being given more demeaning tasks than white employees.⁹⁴ For instance, no other clerical worker was required to dust and sweep.⁹⁵ Further, she was the only clerical worker whose work was not reassigned during vacations,⁹⁶ and the General Manager criticized the work of black employees publicly, while criticizing white employees only in private meetings.⁹⁷ This type of racial harassment is the modern-day equivalent of the oppressive terms and conditions of employment that the 1866 Congress intended to make unlawful under § 1981. As Justice Stevens wrote:

By requiring black employees to work in a hostile environment, the employer has denied them the same opportunity for advancement that is available to white citizens. A deliberate policy of harassment of black employees who are competing with white citizens is, I submit, manifest discrimination in the making of contracts in the sense in which that concept was interpreted in *Runyon v. McCrary*

. . . .

90. *Id.* at 2391.

91. *Compare id.* at 2391-93 (Justice Brennan's detailed treatment of the relevant facts) *with id.* at 2368-69 (majority's treatment of facts).

92. *Id.* at 2392 (Brennan, J., concurring in part and dissenting in part) (citations omitted).

93. *Id.*

94. *Id.* at 2391.

95. *Id.* at 2392.

96. *Id.*

97. *Id.* at 2373 (majority opinion) (quoting *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986) (testimony of petitioner)).

The Court's repeated emphasis on the literal language of § 1981 might be appropriate if it were building a new foundation, but it is not a satisfactory method of adding to the existing structure. In the name of logic and coherence, the Court today adds a course of bricks dramatically askew from "the secure foundation of the courses laid by others," replacing a sense of rational direction and purpose in the law with an aimless confinement to a narrow construction of what it means to "make" a contract.⁹⁸

III. CRITICAL DISTINCTIONS BETWEEN § 1981 AND TITLE VII

The majority, in reaching its conclusion that racial harassment is not covered by § 1981, reasoned that title VII of the 1964 Civil Rights Act is "more expansive"⁹⁹ and that extending work environment challenges to § 1981 would undermine the integrity of title VII, particularly its procedures for conciliation and resolution.¹⁰⁰ With respect to race discrimination, § 1981 is much broader in scope.¹⁰¹ The following chart graphically demonstrates the critical differences:

- | | | |
|----|-----------------|---|
| 1. | COVERAGE | |
| | TITLE VII | Employers with 15 or more employees. ¹⁰² |
| | § 1981 | All employers. ¹⁰³ |
| 2. | BACK PAY | |
| | TITLE VII | Limited to two years. ¹⁰⁴ |
| | § 1981 | May be extended beyond two years. ¹⁰⁵ |

98. *Id.* at 2396 (Stevens, J., concurring in part and dissenting in part).

99. *Id.* at 2374 (majority opinion).

100. *Id.* (footnote omitted).

101. *Id.* at 2391 (Brennan, J., concurring in part and dissenting in part).

102. 42 U.S.C. § 2000e(b) (1988).

103. Section 1981 would potentially reach 15% of the workforce not covered by title VII. *Patterson*, 109 S. Ct. at 2391 (citing Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 (1988)).

104. 42 U.S.C. § 2000e-5(g).

105. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

- | | | | |
|----|----------------------------------|---------------------|---|
| 3. | <i>DAMAGES</i> | TITLE VII
§ 1981 | Limited to back pay. ¹⁰⁶
Damages, including punitive in appropriate cases. ¹⁰⁷ |
| 4. | <i>JURY TRIAL</i> | TITLE VII
§ 1981 | No right to a jury trial. ¹⁰⁸
Right to jury trial. ¹⁰⁹ |
| 5. | <i>STATUTE OF LIMITATIONS</i> | TITLE VII
§ 1981 | 180 or 240 day period. ¹¹⁰
Generally longer because governed by state personal injury statutes of limitations. ¹¹¹ |
| 6. | <i>ADMINISTRATIVE EXHAUSTION</i> | TITLE VII
§ 1981 | Administrative exhaustion required. ¹¹²
No administrative exhaustion required. ¹¹³ |

The chart makes vivid the significant differences between the two statutes. The availability of damages and a jury trial in § 1981 actions are particularly crucial. First, the possibility of damages makes it more likely

106. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975).

107. *Johnson*, 421 U.S. at 460.

108. M. ROSSEIN, *supra* note 37, § 13.12, at 13-60 n.314 (1990).

109. *Id.* § 4.3(5).

110. 42 U.S.C. § 2000e-5(e). In non-deferral states, a complaint must be filed within 180 days. In states with an authorized deferred agency, complainants must file within 300 days of the alleged discriminatory act. *Id.* However, since the complaint must be referred to the state agencies for 60 days, charges filed after the 240th day are likely to be considered untimely. See M. ROSSEIN, *supra* note 37, § 12.4(1), at 12-7.

111. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). The States' statute of limitations periods run from one to six years. See M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES 59-61 (1986 & 1987 Supp.) (for a state-by-state chart summarizing the applicable state limitation period).

112. 42 U.S.C. § 2000e-5(f). A private party must both file a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and upon receipt of a right-to-sue letter from the EEOC file a timely charge in federal court. Additionally, in "deferral" states, the state fair employment agency may become involved in the administrative process. The EEOC can retain a charge for 180 days, and often longer. *Id.*

113. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

that an attorney would represent a victim of discrimination. Second, the award of damages beyond backpay gives employers a stronger incentive to prevent potentially discriminatory practices by management.

The hostility of the judiciary to claims of discrimination also is why the right to a jury is of heightened importance. President Reagan and President Bush have appointed to the federal judiciary ideological conservatives generally hostile to victims of discrimination.¹¹⁴ Increasingly, litigants would rather place the facts of discrimination before a jury. To this end, the proposed Civil Rights Act of 1990 includes a provision for a jury trial in title VII actions, thereby recognizing that the right to a jury should be extended to women as well as people of color.¹¹⁵

IV. POST-PATTERSON LITIGATION

The need for Congressional reversal of the *Patterson* decision quickly became evident as the onslaught of § 1981 claims were dismissed by the federal courts between June 15, 1989, and November 1, 1989.¹¹⁶ In a study conducted by the NAACP Legal Defense and Education Fund, Inc., (LDF), they found at least ninety-six § 1981 claims dismissed in fifty different cases because of *Patterson*.¹¹⁷ Additionally, in a large number of the dismissed racial harassment claims, the plaintiffs were black women who alleged that they were also victims of sexual harassment.¹¹⁸

114. In one study, although Reagan appointed judges whose views differed little from those of other Republican judges, generally, in the area of discrimination suits they were "more extreme." See Note, *All The President's Men: A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals*, 87 COLUM. L. REV. 766, 783 (1987).

115. H.R. 4000, 101st Cong., 2d Sess., § 8(a) (1990); S. 2104, 101st Cong., 2d Sess., § 8(a) ("If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury."). See also Pinzler, *supra* note 16, at 134 n.102; Appendix: *Proposed Civil Rights Act of 1990*, 7 N.Y.L. SCH. HUM. RTS. 141, § 8, at 148.

116. See *The Impact of Patterson v. McLean Credit Union*, a report by the NAACP Legal Defense and Educational Fund, Inc. 3-27 (Nov. 20, 1989) [hereinafter Report of the LDF].

117. See 223 Daily Lab. Rep. (BNA) D1-D9 (Nov. 21, 1989). Although 22 out of the 96 were claims of harassment, 31 were discharge claims, 16 promotion and 8 retaliation. See *id.* In an update of this study, the LDF found an additional 105 dismissals as of February 23, 1990. See *Additional Cases Dismissed Under Patterson v. McLean Credit Union As of February 23, 1990* (on file with the author and the NAACP Legal Defense and Education Fund, Inc.).

118. See, e.g., *Matthews v. Freedman, Darryl and McCormack, Taylor & Co.*, 882 F.2d 83 (3d Cir. 1989); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Dangerfield v. The Mission Press*, 50 Fair Empl. Prac. Cas. (BNA) 1171 (N.D. Ill. 1989); *Mathis v. Boeing Military Airplane Co.*, 50 Fair Empl. Prac. Cas. (BNA) 188 (D.

One of the cases, *Brooms v. Regal Tube Co.*,¹¹⁹ illustrates the insidious nature of racial harassment and other discrimination no longer covered under § 1981. In *Brooms*, a thirty-six year old black woman was employed for sixteen months as an industrial nurse at the Regal Tube Company.¹²⁰ The district court found that Brooms' supervisor subjected her to repeated explicit racial and sexual remarks, and in one instance propositioned her.¹²¹ The supervisor also displayed to her on two occasions illustrations of interracial sexual acts, telling her that she was hired to perform the depicted acts.¹²² After the supervisor threatened to kill her, Brooms fled screaming and fell down a flight of stairs.¹²³ She left her job and received two months disability pay for severe depression caused by the repeated harassment, which resulted in her inability to work on a permanent basis for several years.¹²⁴ These findings appear hauntingly similar to findings contained in the *Schurz Report* which, as stated earlier, played a large role in Congress' adoption of the 1866 Civil Rights Act.¹²⁵ Nevertheless, after *Patterson* was decided, the Seventh Circuit summarily dismissed the complaint because the claim did not relate to "conduct at the initial formation of the [employment] contract."¹²⁶

What discriminatory practices are forbidden by § 1981 is quite unclear; the lower courts are already divided on some of these issues, and a good deal of uncertainty lies ahead. Judge Posner recently asked, "[h]ow many plaintiffs can successfully negotiate the treacherous and shifting shoals of present-day federal employment discrimination law?"¹²⁷

In the event *Patterson* is not reversed by the Civil Rights Act of 1990, the next several years will bring uncertainty and confusion. Hostile district court judges will be able to dismiss under *Patterson* virtually any § 1981 case not involving hiring discrimination. As demonstrated by the *LDF Study*, some district court judges have already interpreted the broadly framed passages in *Patterson* to conclude that § 1981 prohibits only discrimination in hiring despite the existence of other language indicating

Kan. 1989); *Busch v. Pizza Hut, Inc.*, 1989 U.S. Dist. LEXIS 11974 (N.D. Ill.); *Harris v. Home Savings Ass'n*, 1989 U.S. Dist. LEXIS 7015 (W.D. Mo.).

119. 881 F.2d 412 (7th Cir. 1989). See also *Leong v. Hilton Hotels*, 50 Fair Empl. Prac. Cas. (BNA) 738 (D. Haw. 1989).

120. *Brooms*, 881 F.2d at 417.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. See REPORT OF C. SCHURZ, *supra* note 69, at 14. See also *supra* note 3.

126. *Brooms*, 881 F.2d at 424.

127. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989).

that certain specific post-hiring discriminatory acts do remain actionable.¹²⁸ Other judges uphold non-harassment, post-hiring claims, and it is this fundamental disagreement that will not only increase in complexity but also in the number of cases it effects.¹²⁹

Despite the substantial disagreements among the federal courts in interpreting and applying *Patterson*, it is an unwarranted overreaction for plaintiffs to abandon pending or potential § 1981 claims. Nevertheless, responding to these new issues will require, at the very least, procedural maneuvering. For instance, it may be critical -- particularly in harassment cases -- to submit an amended complaint, adding or recasting allegations to fall within the terms of *Patterson*.¹³⁰ The following subsections discuss post-*Patterson* issues of promotions, discharges and retaliation.

A. Promotions

In holding that some, but not all, promotion claims fall within the scope of § 1981, the Court left the door ajar for a significant amount of promotion claim litigation.¹³¹ The court of appeals had found that "[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."¹³² For the majority in *Patterson* however, this articulation overstated the rule. Instead, the majority looked to:

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 [with the employee] is actionable under § 1981. . . . Only where the promotion

128. See, e.g., Report of the LDF, *supra* note 116, at 12 (the numerous dismissals since *Patterson* indicate that post-hiring discriminatory acts appear to be foreclosed or "protected" by *Patterson*).

129. *Id.*

130. Some lower courts have indicated a willingness to allow such amendments. See *Cardona v. American Express, Inc.*, 50 Fair Empl. Prac. Cas. (BNA) 1510, 1511-12 (S.D. Fla. 1989); *English v. General Dev. Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 825, 826 (N.D. Ill. 1989). It may be possible to replead a harassment case as a promotion case, rely on the evidence of harassment to prove that the denial of a promotion was racially motivated, and then use the common factual issues to add a pendent state claim that the harassment violated state civil rights law.

131. *Patterson*, 109 S. Ct. at 2378.

132. *Id.* at 2377 (citing *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986)). Justice Brennan agreed with the Fourth Circuit's formulation. *Id.* at 2934 (Brennan, J., concurring in part and dissenting in part).

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 § 1981.¹³³

The Court went on to hold that the district court had erred when it instructed the jury that in order for the plaintiff to prevail, she had to prove that she was better qualified than the employee who received the promotion.¹³⁴ In reality, the plaintiff need only show as part of her prima facie case that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for an available position or filled the position with a white employee.¹³⁵ After the employer articulates a legitimate nondiscriminatory reason, the plaintiff has an opportunity to show that the reason was mere pretext.¹³⁶ This proof, the Court stated, can take a variety of forms including evidence that the employer's claim to have promoted a person more qualified is untrue because in fact she is better qualified or that the employer had another reason for passing over her in the promotional decision.¹³⁷ Here, evidence of the employer's past treatment of the plaintiff, such as instances of racial harassment and failure to train, could persuade the trier of fact that the employer's stated reason for its decision was pretextual.¹³⁸

Which promotion claims are and are not actionable under § 1981 will be addressed by the lower courts. Using traditional common law principles is one helpful approach to ascertain whether or not a promotion involves a "new contract." Comparing the obligations and rights of the employer or the employee concerning the new and old positions is one method to test whether a new contract has been formed. Two critical questions are raised utilizing this approach. First, in the new position, would the employer be entitled to require the employee to do tasks, or work under conditions, that could not have been required in the old

133. *Id.* (majority opinion) (emphasis added) (citation omitted). Justice Brennan disagreed with this formulation, arguing that such a rule "display[s] nicely how [the majority] seeks to eliminate with technicalities the protection of § 1981 was intended to afford -- to limit protection to the form of the contract entered into, and not to extend it, as Congress intended, to the substance of the contract as it is worked out in practice." *Id.* at 2394-95 (Brennan, J., concurring in part and dissenting in part).

134. *Id.* at 2377 (majority opinion). *See also id.* at 2393 (Brennan, J., concurring in part and dissenting in part).

135. *Id.* at 2378 (majority opinion).

136. *Id.*

137. *Id.*

138. *Id.* *See also id.* at 2394 (Brennan, J., concurring in part and dissenting in part).

position? Second, in the new position, is the employer obligated to pay a different salary or provide some other different form of compensation for the work involved in the new job, whatever it might be? An affirmative answer to either question would render the promotion claim actionable under § 1981.

Of course, the answers to these questions are not necessarily straightforward. For instance, with respect to the first question, the duties of the new position are ill-defined. Some promotions involve only a different title and salary in reward for excellent or long term service and do not involve a change of duties. Answering the second question may also involve uncertainty. For example, as a theoretical matter, a salary increase alone might suffice to prove the existence of a new contract. However, this could also be described as a "raise" rather than a promotion.¹³⁹ A plaintiff's strongest argument is to allege and prove that both a change in salary and a change of duties were involved.¹⁴⁰

Judge Posner in *Malhotra v. Cotter & Co.*¹⁴¹ suggested an analysis of the meaning of *Patterson* that would be favorable to plaintiffs:

This interpretation emphasizes the anomaly created by a rule that a stranger to the firm could sue under section 1981 if his application for a position was turned down on racial grounds but a person already employed by the firm could not sue even though his application for the identical position was turned down on identical grounds. Viewed in this light the "new and distinct relation" test would distinguish such a case from one where promotion

139. See, e.g., *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989); *Green v. Kinney Shoe Corp.*, 728 F. Supp. 768 (D.D.C. 1989).

140. *Mallory v. Booth Refrigeration Supply Co.*, 882 F.2d 908 (4th Cir. 1989) (promotion from clerk to supervisor with a consequent increase in responsibility and pay). See also *Green v. Kinney Shoe Corp.*, 728 F. Supp. 768 (D.D.C. 1989). The "new and distinct relationship" raises other issues in different factual contexts. For example, what if a single contract provided for different types of responsibilities and levels of salary? For instance, an employment contract between a college teacher and a university might specify that in the first year the teacher would be an assistant professor at \$26,000 a year and in the third year be an associate professor at \$35,000 a year. The duties of the teacher, and new salary obligations of the employer, would both be detailed in the original contract. Another example is in the case of a hiring agreement in which the employer promised to give the employee the next available position with a different salary.

In both of the above situations, there would be a point in time where the individual would, under the *original* contract, have a right to that higher salary. However, a refusal to pay the higher salary would merely constitute a breach of the contract, therefore no "new contract" is involved, resulting in no claims under § 1981.

141. 885 F.2d 1305 (7th Cir. 1989).

was the sort of routine advancement that only existing employees qualify for. To get an in-grade promotion in federal employment, for example, you must already be a federal employee, and the "promotion" is a raise, rather than a transfer to a new job. Complaints about discrimination in routine "promotions" of this sort can no longer be litigated under section 1981.¹⁴²

However, Judge Posner's approach probably would exclude from coverage genuine promotions (e.g., from patrol officer to sergeant) which public employers always make from within its own workforce.

B. Discharge

The majority opinion in *Patterson* is silent concerning discharge. Justice Brennan, in his dissenting opinion, asserted that the 39th Congress intended § 1981 "to go beyond protecting the freedmen from refusals to contract . . . and from discriminatory decisions to discharge" to reach racial harassment as well.¹⁴³ While the majority expressly disagreed with Brennan's view regarding harassment,¹⁴⁴ it conspicuously avoided any comment about discharges. A week after *Patterson* was released, in *Jett v. Dallas Independent School District*,¹⁴⁵ the Court in an opinion joined by the *Patterson* majority, "assume[d] . . . without deciding, that petitioner's rights under § 1981 have been violated" by his removal from a job for allegedly racial reasons.¹⁴⁶ And, in *Lytle v. Household Manufacturing, Inc.*,¹⁴⁷ the petitioner alleged that he had been denied his right to a jury trial in a § 1981 claim.¹⁴⁸ The Court in dicta, citing Justice Brennan's separate opinion in *Patterson*, stated: "Had the District Court not dismissed Lytle's § 1981 claims, Lytle would have been entitled to a jury trial on

142. *Id.* at 1311.

143. *Patterson*, 109 S. Ct. at 2388 (Brennan, J., concurring in part and dissenting in part).

144. *Id.* at 2376 (majority opinion).

145. 109 S. Ct. 2702 (1989).

146. *Id.* at 2710. The Court on five different occasions assumed that discriminatory discharges were forbidden by § 1981. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *St. Francis College v. Al-Krazraji*, 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, Inc.*, 421 U.S. 454, 459-60 (1975).

147. 110 S. Ct. 1331 (1990).

148. *Id.* at 1334.

these claims.¹⁴⁹

There have been several favorable decisions on this issue since *Patterson*.¹⁵⁰ In *Padilla v. United Air Lines*,¹⁵¹ the court upheld the discharge claim, because, after having been discharged, the plaintiff was unable to *get back* his old job.¹⁵² The court found that *Patterson* did not preclude termination as involving the formation process, reasoning that:

United's argument fails because termination is part of the making of a contract. A person who is terminated because of his race, like one who was denied an employment contract because of his race, is without a job. Termination affects the existence of the contract, not merely the terms of its performance. Thus, discriminatory termination directly affects the right to make a contract contrary to § 1981.

. . . .
I hold that Padilla's claim was actionable pursuant to § 1981. Padilla did not simply complain that he was harassed. Padilla's case was based upon the premise that United discriminated against him because of his race . . . by terminating him and by preventing him from obtaining future employment with United.¹⁵³

149. *Id.* at 1335. The Court directed the Fourth Circuit to consider, on remand, the impact of *Patterson* on *Lytle's* claims. *Id.* at 1336 n.3. The Fourth Circuit in *Patterson* held that "[c]laims of racially discriminatory . . . firing . . . go to the very existence and nature of the employment contract and thus fall easily within section 1981's protection." *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986). *Accord* *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1509 (1989). *Cf.* *Flanagan v. Aaron E. Henry Community Health Servs. Center*, 876 F.2d 1231 (5th Cir. 1989) (upholds § 1981 claim, but does not discuss *Patterson*).

150. *See* *Birdwhistle v. Kansas Power and Light Co.*, 723 F. Supp. 570 (D. Kan. 1989); *Padilla v. United Air Lines*, 716 F. Supp. 485 (D. Colo. 1989); *Gamboa v. Washington*, 716 F. Supp. 353 (N.D. Ill. 1989); *Jones v. Pepsi-Cola Gen. Bottlers*, 1989 U.S. Dist. LEXIS 16220 (W.D. Mo.).

151. 716 F. Supp. 485 (D. Colo. 1989).

152. *Id.* at 490. United argued that the facts implicated performance of established contract obligations and conditions of continued employment, thus this post-formation conduct was not actionable. *Id.* at 489.

153. *Id.* at 490 (footnote omitted). In footnote 4, the court noted that the defendant's refusal to reconsider the plaintiff for rehire was clearly unlawful under § 1981. *See id.* at 490 n.4. Because the employer assigned Padilla to an "Ineligible for Rehire" status, this action prevented him from entering into a future contract with United. It is unclear from the district court opinion whether Padilla had actually applied for his old job, or some other position, at United.

In *Jones v. Pepsi-Cola General Bottlers*,¹⁵⁴ the plaintiff, after being dismissed as a truck driver, "requested a different job, offering to sweep floors if necessary to stay employed. Defendant refused."¹⁵⁵ The district court declined to dismiss the plaintiff's § 1981 claim:

[P]laintiff argues that *Patterson* does not require dismissal here because, by requesting a different job, plaintiff was attempting to make a new employment contract. The argument is that, in refusing on the basis of race to make a new contract, defendant violated § 1981. Such a claim is actionable under *Patterson*.¹⁵⁶

The arguments suggested in *Jones* and *Padilla*¹⁵⁷ present the most promising basis for preserving discharge claims after *Patterson*.¹⁵⁸

Formal employment contracts are not ordinary. If one exists, the dismissal would involve *two* contracts -- the old contract the employer is terminating, and the new contract into which the employer refuses to

154. 1989 U.S. Dist. LEXIS 16220 (W.D. Mo.).

155. *Id.* at 3.

156. *Id.* at 5.

157. *Padilla*, 716 F. Supp. at 490 n.4.

158. *Id.* The Fourth Circuit theory, that § 1981 protects the right to be *in* a contractual relationship with an employer, seems broader than, and inconsistent with, the Supreme Court's view that § 1981 protects only the creation of a contract, not the continuation of or compliance with the contract. *See Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986). Notwithstanding *Padilla*, termination is no more "part of the making of a contract" than blowing up a bridge is part of building a bridge. The suggestion in *Birdwhistle* that discriminatory termination falls within the enforcement clause of § 1981 does not seem compatible with the limited interpretation of that clause in *Patterson*. The simple termination of a contractual relation, even if wrongful and racially motivated, does not easily fall within the Supreme Court's construction of § 1981. Such a dismissal seems, with regard to the pre-existing contract, to be post-formation conduct. *See, e.g., Obago v. Union of Am. Hebrew Congregations*, 52 Fair Empl. Prac. Cas. (BNA) 509 (S.D.N.Y. 1989).

In most cases, as a matter of fact and experience, a discharge involves both the termination of a contractual relation and a refusal to contract anew. The employer's ordinary intent in discharging an employee is not to employ that person again, precluding layoffs for economic reasons. In contrast, most discharged employees desire their old jobs. The discharged worker would not have appeared for work on the day of the dismissal if the employee did not want the job. Employers know that the discharged worker, at the time of the dismissal, wants his or her job back. In other words, the discharged employee still wants to contract.

enter. Most employees are covered by the employment-at-will doctrine.¹⁵⁹ These "at-will" employees offer their services daily and the employer accepts by putting them to work. Professor Corbin characterized the employment-at-will as "hiring-at-will."¹⁶⁰ Judge Posner's "anomaly" argument in *Malhotra*¹⁶¹ works well in a discharge case. For example, one black worker leaves work on Friday, and upon appearing for work the following Monday is told by the personnel director that the company will no longer hire blacks. A new black applicant is told the same message by the director. Both the prospective and old workers are seeking work and are denied work because of race.¹⁶² Nevertheless, some judges would use *Patterson* to dismiss the § 1981 claim of the old worker, while permitting the claim of the prospective worker.

Since *Patterson* created this "anomaly," cases previously characterized as discharge claims now need to be pled as refusals to contract. Three elements should now be pled and proved: (1) the discharged employee nevertheless desired his or her job back; (2) the employer knew of this desire in order to transform the employee into an applicant; and (3) a vacancy existed. The ideal plaintiff would produce evidence of a request for the job. An objection to or an appeal of the dismissal would be strong evidence to prove elements one and two.¹⁶³ However, a plaintiff could argue that requesting rehire was futile under the circumstances, but a constructive request should be recognized because the employer knew of the desire.

Constructive discharge cases are more difficult to recast after *Patterson* because it appears that it is the employee, not the employer, who is refusing to contract. However, these cases can be pled as cases of employer refusal to contract on equal terms with blacks and whites. If the

159. This concept has been described as follows:

Under the traditional rule governing employment contracts, any hiring is presumed to be "at will"; that is, the employer is free to discharge individuals for good cause, or bad cause, or no cause at all, and the employee is equally free to quit, strike, or otherwise cease work. Technically, the rule operates on a principle of mutuality: both the employer and the employee are free to terminate their relationship at any time, without reason and without notice.

ROTHSTEIN, KNAPP & LEIBMAN, EMPLOYMENT LAW 738 (Foundation Press 1987).

160. A. CORBIN, CORBIN ON CONTRACTS § 70 (1952).

161. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1311 (7th Cir. 1989).

162. *Id.*

163. A formal grievance asking for reinstatement is one example.

employer's unfair treatment forces blacks, but not whites, out of the workplace, once more, there should be no different analysis if this treatment was part of an initial employment offer.

C. Retaliation

Retaliation claims will probably have the most success if brought within the equal enforcement provision of § 1981.¹⁶⁴ The threat of discharge for exercising a state court or a non-judicial method of enforcing adjudication of disputes would be an effective deterrence to the enforcement of a contract right. Any effort to "impede access to the courts,"¹⁶⁵ or non-judicial forums, whether successful or not, would be actionable under *Patterson*.

The majority expressly considered within the scope of § 1981 union enforcement of labor contracts, a process that is usually "non-judicial."¹⁶⁶ Likewise, an employee complaining to company supervisors should also consider resorting to non-judicial methods. This argument is strengthened if there is a more formal grievance procedure, particularly where employers encourage employees to utilize such internal processes.

In one post-*Patterson* retaliation case, *Jourdan v. U.S. West Direct Co.*,¹⁶⁷ the plaintiff had complained to company officials and filed charges with the state civil rights commission.¹⁶⁸ The court held that retaliation for either the informal complaint or the state agency charge was actionable under § 1981.¹⁶⁹ In addition, retaliation for the state agency charge violated title VII.¹⁷⁰ In Justice Cudahy's concurring opinion in *Malhotra v. Cotter & Co.*, § 1981 claims based on retaliation for advocacy of compliance with § 1981 were expressly approved.¹⁷¹ The judge reasoned that where a statute or constitutional provision creates an affirmative, substantive right, an employer who punishes an employee for exercising those rights violates the law.¹⁷² Otherwise the retaliation for exercising

164. 42 U.S.C. § 2000e-5(g) (1988).

165. *Patterson*, 109 S. Ct. at 2373.

166. *Id.*

167. 50 Fair Empl. Prac. Cas. (BNA) 633 (D. Colo. 1989).

168. *Id.* at 636.

169. *Id.* at 637.

170. *Id.* at 634-35. See also *Malhotra*, 885 F.2d at 1314 n.1 (Cudahy, J., concurring (quoting *Patterson*, 109 S. Ct. at 2373)) ("Clearly, when an employer punishes an employee for attempting to enforce her rights under section 1981, this conduct 'impairs the employee's ability to enforce her contract rights.'").

171. *Id.* at 1314-17.

172. *Id.* at 1314-16.

the right nullifies the substantive right granted.¹⁷³

IV. CONCLUSION

The decision in the *Patterson* case represents one more signal to the nation that a majority of the Supreme Court intends to erode the national commitment to the eradication of racial and other forms of discrimination. While the majority was unable to eliminate § 1981 with one hand it proceeded to severely cripple the statute with the other hand by restricting the reach of § 1981 in the employment context to the formation of contracts. Rejecting Brenda Patterson's claim of racial harassment was accomplished by ignoring the well documented legislative and social history of racism that the 39th Congress found when it adopted the 1866 Civil Rights Act. Passage of the Civil Rights Act of 1990 is critical to both reversing this decision and send the hostile majority a clear message that racial and other forms of discrimination will not be tolerated.

173. *Id.* at 1314.

