Section 1981 Promotion Claims After *Patterson v McLean Credit Union*

Marc J. Fagel†

INTRODUCTION

Section 1981 mandates that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”¹ For the past two decades, plaintiffs have relied successfully on the statute in suits alleging racial discrimination within an employment relationship, including “post-formation” claims such as racial harassment and racially-motivated denial of promotion. In 1989, however, by a vote of 5-4, the Supreme Court rejected this expansive reading of § 1981. *Patterson v McLean Credit Union*² strictly limited the application of § 1981 to infringements of the right to make and enforce contracts, holding that those protected rights did not include post-formation conduct like racial harassment.

Patterson was one of the most controversial decisions of the 1988 term, and legislation presently pending before Congress would restore § 1981 to its pre-*Patterson* scope.³ Though eventual amendment of § 1981 seems likely, lower courts must contend in the interim with *Patterson*’s somewhat vague guidance. The Court did not explicitly define what the right to “make or enforce” a contract includes. The Court did, however, briefly explore one common type of “post-formation” conduct: the discriminatory denial

† A.B. 1988, Princeton University; J.D. Candidate 1991, The University of Chicago.

¹ 42 USC § 1981 (1982).

² 109 S Ct 2363 (1989).

³ Specifically, the legislation would amend § 1981 to include the following: “For purposes of this section, the right to ‘make and enforce contracts’ shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.” Civil Rights Act of 1990, HR 4000/S 2104, 101st Cong, 2d Sess (Feb 7, 1990). Passage of the bill may be complicated by the inclusion of several controversial amendments to Title VII; conservative legislators in both houses have responded by drafting legislation which would amend *only* § 1981. See Civil Rights Protections Act of 1990, HR 4081/S 2166, 101st Cong, 2d Sess (Feb 22, 1990).

of employment promotions.⁴ Rather than ruling that promotion decisions are not actionable under § 1981, as it had with racial harassment, the Court noted that promotions rising to the level of a “new and distinct relation” remain protected under § 1981.⁵ Because the defendant in *Patterson* had not challenged the promotion claim, the Court did not address the issue further. But lower courts faced with § 1981 promotion claims in the wake of *Patterson* have based their holdings on the “new and distinct relation” language.

The meaning of these words is far from clear, leading the courts to a wide array of outcomes. At least one lower court has recognized that § 1981 liability may exist where the promotion would involve a mere change in salary,⁶ while another has held that *all* promotion practices constitute post-formation conduct beyond the reach of § 1981.⁷ A promotion from clerk to supervisor coupled with an increase in responsibility and pay has been found to satisfy *Patterson*,⁸ while a promotion from supervisor to manager has not.⁹ Most of these courts have resolved the cases by applying ad hoc criteria to the facts rather than deriving a clear principle of § 1981 interpretation. In short, an important federal remedy is in considerable flux.

This Comment offers an interpretation of “new and distinct relation” that courts can use to determine which discriminatory denials of promotions are redressable under § 1981. The Comment begins with a brief historical overview of § 1981’s application to private discriminatory denials of promotion, and with a discussion of the *Patterson* decision itself. *Patterson* does not define “new and distinct relation,” but it does suggest two underlying concerns: that only promotions equivalent to *making* a contract be actionable under § 1981, and that those promotions be somehow similar

⁴ In the first four and one-half months following the *Patterson* decision, at least ninety-six discrimination claims in fifty cases were *dismissed*, of which sixteen were promotion claims. Linda P. Campbell, *Racial Bias Lawsuits Founder After Ruling*, Chicago Tribune 10 (Nov 20, 1989).

⁵ 109 S Ct at 2377.

⁶ *Fowler v McCrory Corp.*, 727 F Supp 228, 230 n 1 (D Md 1989).

⁷ *Newman v University of the District of Columbia*, 1989 US Dist LEXIS 12346, *22-24 (D DC).

⁸ *Mallory v Booth Refrigeration Supply Co., Inc.*, 882 F2d 908, 910 (4th Cir 1989).

⁹ *Anderson, et al v United Parcel Service, Inc.*, 1989 US Dist LEXIS 12195, *3-7 (N D Ill).

to that in *Hishon v King & Spalding*,¹⁰ a Title VII case involving the discriminatory denial of a promotion. Thus, any interpretation of “new and distinct relation” must fit within the parameters of contract law and *Hishon* while simultaneously reducing the number of discriminatory promotion denials actionable under § 1981. Finding that neither contract law nor Title VII alone can address both concerns and define a “new and distinct relation,” this Comment synthesizes principles from both sources to establish a definition consonant with *Patterson*. The Comment concludes that for a discriminatory promotion denial to rise to the level of a “new and distinct relation,” the claimed promotion must have involved a mutual, tangible change in responsibilities and wages and must not have been granted routinely to similarly situated workers. This definition is consistent with the Court’s suggested focus and can guide future promotion decisions towards fair and predictable solutions.

I. FRAMING THE ISSUE

A. *Patterson* and the History of Section 1981

For much of its history, § 1981 lay more or less dormant, limited by Supreme Court decisions to public, not private, acts of discrimination.¹¹ In 1968, the Court seemed to open the way to applying the statute to private discrimination,¹² and by 1976 there was no longer any doubt that, as the Court stated in *Runyon v McCrary*, § 1981 “prohibits racial discrimination in the making and enforcement of private contracts.”¹³ Section 1981 thus became an important source for civil rights claims.¹⁴ It was not until *Patterson*, however, that the Court squarely confronted the role of § 1981 in the employment context.

¹⁰ 467 US 69 (1984). Title VII prohibits discrimination with respect to “compensation, terms, conditions, or privileges of employment” based on an individual’s race, color, religion, sex, or national origin. 42 USC § 2000e-2(a) (1982).

¹¹ See *Corrigan v Buckley*, 271 US 323, 331 (1925), limiting an early version of § 1981 to acts of public discrimination and, even more restrictively, *Hodges v United States*, 203 US 1 (1906), limiting it to acts reducing the individual to slavery. See also *Civil Rights Cases*, 109 US 3, 22-24 (1883). *Hodges* was expressly overruled in *Jones v Alfred H. Mayer Company*, 392 US 409, 441-43 n 78 (1968).

¹² *Jones*, 392 US 409 (concerning not § 1981 but the companion provision, § 1982).

¹³ 427 US 160, 168 (1976) (citing *Jones and Johnson v Railway Express Agency, Inc.*, 421 US 454 (1975)).

¹⁴ For a statistical analysis of § 1981’s use, see Theodore Eisenberg and Stewart Schwab, *The Importance of Section 1981*, 73 Cornell L Rev 596, 602 (1988).

The Court greatly curtailed the scope of § 1981 in *Patterson*. Many circuits had been applying § 1981 to a wide range of "post-formation" acts, including discrimination in termination, failure to promote, racial harassment, and retaliatory discharge following the filing of a § 1981 or Title VII complaint.¹⁵ The *Patterson* majority construed the language of § 1981 far more narrowly, interpreting the right "to make and enforce contracts" as extending only to the formation of the contract, not to post-formation conduct.¹⁶ After affirming the dismissal of the plaintiff's racial harassment claim, concluding that harassment on the job involved neither a refusal to make a contract with the plaintiff nor an impairment of the plaintiff's ability to enforce her contract rights, the Court considered the plaintiff's charge that she had been denied a promotion based on her race. The Fourth Circuit had stated 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."¹⁷ The Supreme Court, noting that such a conclusion "somewhat overstates the case,"¹⁸ attempted to conform the promotion analysis to its narrowed interpretation of § 1981. Thus, the Court determined that

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. . . . 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 § 1981.¹⁹

The Court did not define what it meant by a "new and distinct relation." Its only guidance was an enigmatic citation to a Title VII employment case, *Hishon v King & Spalding*.²⁰ In *Hishon*, an Atlanta law firm had failed to consider a female associ-

¹⁵ A few examples include: *Lopez v S.B. Thomas, Inc.*, 831 F2d 1184 (2d Cir 1987); *Strong v Mercantile Trust Co. N.A.*, 816 F2d 429 (8th Cir 1987); *Warren v Halstead Industries, Inc.*, 802 F2d 746 (4th Cir 1986); and *Hunter v Allis-Chalmers Corp. Engine Division*, 797 F2d 1417 (7th Cir 1986). See also the promotion denial cases discussed in the text at note 42.

¹⁶ 109 S Ct at 2372-73.

¹⁷ *Patterson v McLean Credit Union*, 805 F2d 1143, 1145 (4th Cir 1986). The Fourth Circuit did hold, however, that § 1981 does not encompass racial harassment claims. *Id* at 1146.

¹⁸ *Patterson*, 109 S Ct at 2377.

¹⁹ *Id* (emphasis added).

²⁰ 467 US 69 (1984).

ate for partnership at the same time as male colleagues in the same associate class. The Court reversed the lower court's decision that Title VII was inapplicable, holding that the plaintiff could prove on remand that her employer had "made a contract to consider her for partnership," and that, if proven, a discriminatory refusal to consider her would violate Title VII.²¹ Since the *Patterson* Court explicitly declined to make § 1981 coextensive with Title VII, the citation to *Hishon* presumably was intended to illustrate the kind of discriminatory denial of a promotion that would still be actionable under § 1981.²²

The only other clue offered by the Court in *Patterson* was its reliance on the making of contractual relationships as the standard for § 1981 liability. As *Patterson*'s reading of § 1981 is fundamentally about contracts, any attempt to define "new and distinct relation" would naturally turn to contract law principles for guidance. Combined with the citation to *Hishon*, the Court's focus suggests that only those promotions that would be "new and distinct" under contract principles *and* that would be similar to the promotion denied in *Hishon* are actionable under § 1981.

B. The Response to *Patterson*

Most courts faced with promotion cases since *Patterson* have resorted to ad hoc determinations of whether the post-promotion employment agreement was sufficiently "new and distinct"; at most, courts have engaged in a rough comparison of the facts presented to those of *Hishon*. Other courts have in effect ignored *Patterson*, offering interpretations under which almost *all* promotions would be actionable,²³ or under which *no* promotions would be actionable.²⁴ Neither extreme is consistent with *Patterson*'s in-

²¹ Id at 74.

²² In *Patterson*, the Court expressly preserved Title VII as a remedy in discriminatory promotion cases. Title VII remedies are more limited, however, than those in § 1981. First, Title VII reaches only businesses with fifteen or more employees, leaving fifteen percent of the workforce unprotected. *Patterson*, 109 S Ct at 2391 (Brennan dissenting). Second, Title VII does not include the right to a jury trial. Id. Third, it restricts backpay recovery to two years prior to filing a complaint and disallows punitive and compensatory damages. See *Johnson v Railway Express Agency, Inc.*, 421 US 454, 460 (1975). Fourth, the statute of limitations can be substantially shorter under Title VII than under § 1981. *Developments in the Law—Section 1981*, 15 Harv CR-CL L Rev 29, 105 (1980). Finally, Title VII's administrative requirements are more burdensome than those of § 1981. See id.

²³ *Fowler v McCrory Corp.*, 727 F Supp 228, 230 n 1 (D Md 1989).

²⁴ *Newman v University of the District of Columbia*, 1989 US Dist LEXIS 12346, *22-24 (D DC).

tent to reduce, but not eliminate, the number of promotions actionable under § 1981.

Though not exemplars of judicial decisionmaking, these lower court decisions do illustrate the kinds of cases a post-*Patterson* framework must accommodate. The courts that rejected plaintiffs' claims of discriminatory denial of promotion were, for the most part, presented with promotions involving a change in pay without a corresponding increase in responsibilities. Typical of these cases is *Williams v National Railroad Passenger Corp.*,²⁵ in which a district court held that mere pay raises are not cognizable under § 1981: "[h]igher pay is a part of nearly all promotions and by itself can hardly make a promotion a 'new and distinct relation.'"²⁶ Similarly, in *Dicker v Allstate Life Insurance Co.*,²⁷ the court rejected the plaintiff's claim for relief where the promotion would have represented merely one step up a long ladder toward an eventual management position; the promotion itself entailed no new responsibilities and no change from hourly wages to salary. Notably, both the *Williams* and *Dicker* opinions were expressed in conclusory terms, with no reliance on any interpretive principle.²⁸

Other courts have rejected § 1981 claims where the promotion would have involved new responsibilities but no change in pay. In *Anderson v United Parcel Service, Inc.*,²⁹ for example, a promotion from supervisor to manager created no *automatic* salary increase, thus weakening plaintiff's claim. Finally, some courts have rejected claims involving increased responsibilities *and* increased pay, holding that the raise was somehow not "significant" enough.³⁰ Indeed, *Patterson* itself was dismissed on remand because the promotion was only from one hourly wage position to

²⁵ 716 F Supp 49 (D DC 1989).

²⁶ *Id.* at 51.

²⁷ 730 F Supp 111, 112, 114 (N D Ill 1989). See also *Williams v Chase Manhattan Bank*, 728 F Supp 1004, 1009 (S D NY 1990) (promotion from one supervisory position to another entails no new responsibilities); and *White v Federal Express Corp.*, 52 FEP Cases (BNA) 108, 113-14 (E D Va 1990) (dismissing a suit where there would be a *change*, but no *increase*, in responsibilities, making the promotion more like a lateral transfer).

²⁸ A variation of this scenario can be found in *Sofferin v American Airlines, Inc.*, 717 F Supp 597 (N D Ill 1989), in which an Illinois district court held that a promotion from probationary to tenured status failed to rise to the level of a "new and distinct relation"; the court found that although the promotion would have entailed a substantial increase in job security, plaintiff's job duties would have remained identical. Again, the court based its holding solely on a comparison to the situation in *Hishon* rather than on an analysis of the meaning of "new and distinct relation."

²⁹ 1989 US Dist LEXIS 12195, *6 n 3 (N D Ill).

³⁰ See *id.* at *5-6. See also *White*, 52 FEP Cases (BNA) at 113.

another.³¹ Nonetheless, § 1981 claims based on promotions that entail an increase in both responsibilities and wages account for the majority of successful plaintiffs' actions. Typical of these cases is *Luna v City and County of Denver*,³² in which a district court found a promotion from "Project Inspector I" to "Engineer III" to include a substantial change in "supervisory responsibility, duties performed, and required qualifications," as well as a conversion from wages to salary, thus meeting the *Patterson* standard.

Other courts have relied on a hodgepodge of factors in recognizing liability under § 1981. In *Green v Kinney Shoe Corp.*,³³ the court looked at whether the plaintiff's employer would evaluate him differently in his new job and whether he would have been considered for higher managerial positions. Post-promotion analysis may be at its most unstructured in *Hudgens v Harper-Grace Hospitals*,³⁴ where a Michigan district court noted numerous factors to be considered, such as changes in pay, duties, responsibilities, status (from hourly to salaried employee), required qualifications, potential liability, and pension and other benefits. The court noted that triers of fact must consider, in light of *Patterson*,

not only the number of resulting changes, but the magnitude of individual changes, and of the changes as a whole. A significant single change . . . would be enough to satisfy *Patterson*. In instances of smaller changes . . . a combination of two or more changes would be necessary to work a new relation between the parties.³⁵

In sum, the post-*Patterson* responses may be grouped to some extent by factual similarities, but the courts have based their outcomes on ad hoc comparisons of the factual scenario presented and the facts of previous cases. Thus, what little consistency one does find is largely the result of a rapidly building body of independently inadequate case law.

³¹ 729 F Supp 35 (M D NC 1990). The court noted that "the situation would be different if plaintiff were alleging the denial of a promotion from an hourly wage position to a salaried position." *Id* at 36.

³² 718 F Supp 854, 856-57 (D Colo 1989). See also *Williams v Chase Manhattan Bank*, 728 F Supp at 1009 ("increased supervisory responsibility and salary modification" are factors "militating toward" finding a new and distinct relation). Compare *Miller v Shawmut Bank of Boston N.A.*, 726 F Supp 337 (D Mass 1989); and *Hopeton Matthews v Northern Telecom, Inc.*, 1989 US Dist LEXIS 12926, *5-6 (S D NY).

³³ 728 F Supp 768, 777 (D DC 1989).

³⁴ 728 F Supp 1321, 1324-26 (E D Mich 1990).

³⁵ *Id* at 1325-26.

In developing a more principled interpretation of the phrase "new and distinct relation," it will be important to consider additional areas of law that the courts have used to resolve other ambiguities pertaining to § 1981. First, as § 1981 is a law aimed not simply at contracts, but at civil rights, many gaps have been filled by analogy to Title VII.³⁶ Second, because § 1981 fundamentally involves contract rights, many questions have been answered by reference to the principles of contract law.³⁷ With its use of contract terms and its reference to *Hishon*, *Patterson* counsels resort to both. In the sections that follow, this Comment first looks to Title VII in defining the "new and distinct relation" standard, and then turns to contract law for assistance.

II. TITLE VII AND *HISHON*

Prior to *Patterson*, the federal courts had uniformly "employed Title VII principles as a benchmark" against which the operation of § 1981 should be measured.³⁸ In § 1981 cases, courts have adopted Title VII standards for affirmative action plans,³⁹ seniority systems,⁴⁰ and federal law preemption.⁴¹ Courts have even treated the two statutes as if they both contained the same elements of proof.⁴²

Such immediate equation of the statutes is no longer tenable after *Patterson*, in which the Court attempted to limit the kinds of promotions cognizable under § 1981 and preserve Title VII as the *exclusive* remedy for at least *some* discrimination claims.⁴³ There are additional reasons, moreover, why Title VII cannot be used to interpret § 1981. First, it is somewhat anachronistic to define § 1981 according to Title VII principles. As Justice Brennan

³⁶ See notes 38-42.

³⁷ See text at notes 50-54.

³⁸ *Davis v County of Los Angeles*, 566 F2d 1334, 1340 (9th Cir 1977). See also *Waters v Wisconsin Steel Works of International Harvester Co.*, 502 F2d 1309, 1316 (7th Cir 1974).

³⁹ *Setser v Novack Investment Co.*, 657 F2d 962, 967-68 (8th Cir 1981).

⁴⁰ *Patterson v American Tobacco Co.*, 535 F2d 257, 270 (4th Cir 1976).

⁴¹ *McAlester v United Air Lines, Inc.*, 851 F2d 1249, 1255 (10th Cir 1988).

⁴² See, for example, *Lewis v University of Pittsburgh*, 725 F2d 910, 915 n 5 (3d Cir 1983). Compare *Mozee v Jeffboat, Inc.*, 746 F2d 365, 369 n 5 (7th Cir 1984) (promotion out of the plaintiff class does not bar Title VII claim).

⁴³ See *Jones v Alltech Associates, Inc.*, 1989 US Dist LEXIS 10422 (N D Ill). See also *Patterson*, 109 S Ct at 2373:

... post formation 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, matters more naturally governed by state contract law and Title VII.

points out in his *Patterson* dissent, it is doubtful that a law passed by the Reconstruction Congress was designed to accommodate a statute drafted a century later.⁴⁴ Moreover, it should be recalled that § 1981 was not revived as a means of addressing private discrimination until several years *after* the passage of Title VII,⁴⁵ leading one to question whether Title VII could possibly have been drafted to fill gaps left by § 1981.

Second, the cases using Title VII provisions to interpret § 1981 involved *procedural* issues, the results of which would vary depending on whether § 1981 was viewed strictly as a means of contract dispute resolution or as a federal civil rights statute. The issue before us now, however, is the fundamental basis of § 1981, not simply a procedural issue left open by the statute. Thus, however valuable Title VII may be as a tool for filling in the contours of § 1981, it does not follow that substantive issues—specifically, the applicability of § 1981 to discriminatory promotion practices—should be resolved by reference to Title VII.

Nonetheless, *Patterson*'s citation to *Hishon v King & Spalding*, immediately following the "new and distinct relation" language,⁴⁶ indicates that Title VII interpretations remain relevant to the question before us. In *Hishon*, a female associate in a law firm claimed she had been denied partnership on account of her sex in violation of Title VII. A unanimous Supreme Court agreed, holding Title VII applicable to "employees" of law firms. The Court's most obvious reason for referring to *Hishon* in *Patterson* was to provide one clear example of a promotion that rose to the level of a new and distinct relation cognizable under § 1981—namely, the leap from associate to partner.

In addition to this illustrative purpose, however, the *Hishon* citation suggests a means of interpreting § 1981 consistent with the Court's new restrictive policy. Title VII prohibits discrimination in the terms and conditions of employment.⁴⁷ Yet *Hishon* did not find the promotion from associate to partner itself to be a

⁴⁴ *Patterson*, 109 S Ct at 2379 (Brennan dissenting). See also *Guardians Ass'n of New York City Police Dept., Inc. v Civil Service Commission of the City of New York*, 633 F2d 232, 266 (2d Cir 1980) ("the breadth of the term 'contracts' . . . militates against reading into this century-old statute modern concepts developed primarily in the specialized area of employment discrimination"; holding that the more recently developed disparate impact standard could not be adapted into § 1981, which requires a finding of discriminatory intent).

⁴⁵ See text at note 13.

⁴⁶ *Patterson*, 109 S Ct at 2377.

⁴⁷ See note 10.

"term of employment." Rather, the Court held that if the plaintiff showed that her employer had "made a contract to consider her for partnership . . . that *promise* clearly was a term, condition, or privilege of her employment."⁴⁸ The natural inference is that certain promotions do not intrinsically constitute terms of employment, but might by virtue of a contractual guarantee of a promotion. Thus, "new and distinct relation" can be defined as comprising promotions that are not themselves contractually guaranteed by the employer, regardless of any promise to consider granting such a promotion. Under such an analysis, a promotion would most clearly be considered a term or condition of employment, and consequently fall outside of § 1981's protection, when the promotion was implicit in the original employment agreement, or when it was an automatic feature of the employment relation.

In illustration of this distinction, consider that promotion from associate to partner is not (regrettably) a standard condition of employment granted automatically after a period of time. Rather, partnership comes only with a lengthy investment of time and effort on the employee's part, and only some employees eventually obtain such a promotion. Indeed, the fact that an employer tends to offer partnership *consideration* as a contractual term strengthens the inference that such a promotion is not implicit in the original employment agreement. The same argument can be made for any number of promotions that are not granted routinely, but only as a result of some level of achievement.

Not all promotions, of course, are based on discretion or achievement. Consider the scenario in which a worker has simply been denied a raise, or a promotion to a slightly higher position on the job ladder without any corresponding increase in wages. Here, a court may find that such a change in position or pay is generally granted as a matter of course to employees after some specified length of employment. Thus, although such promotions clearly lie within the "terms of employment," they fall short of "new and distinct relations"; Title VII is applicable, but § 1981 is not.⁴⁹

⁴⁸ *Hishon*, 467 US at 74-75 (emphasis added).

⁴⁹ Because it explicitly prohibits discrimination with respect to *compensation*, Title VII seems clearly to encompass the denial of a promotion involving a mere increase in wages, offering further justification for keeping such a promotion beyond the grasp of § 1981 (under this analysis).

A variation on this analysis was alluded to in one early post-*Patterson* case. In *Malhotra v Cotter & Co.*, 885 F2d 1305, 1311 (7th Cir 1989), the court took notice of 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

The *Hishon* analysis, however, is not sufficient to define the new standard. The Court clearly wanted only promotions that are analogous to new contracts to be cognizable under § 1981. Furthermore, *Patterson*'s scaling back of § 1981 rests primarily on the Court's new emphasis on the actual *making* of a contract. The *Hishon* analysis tells us nothing about whether the plaintiff and employer were prevented from making a "new" contract by the discrimination; it tells us only which types of new contracts are sufficiently "distinct" to narrow § 1981's applicability to a subset of promotions. Thus, the next section of this Comment examines principles of contract law in order to determine which potential promotions can be considered "new" contracts.

III. CONTRACT LAW

A. Framing the Analogy

Because *Patterson* does not explicitly command the use of contract principles in analyzing § 1981 claims, but merely establishes the *making* and *formation* of a contract as the touchstones of liability, a definition incorporating these contract principles should be justified in the case law. There is in fact considerable precedent for borrowing contract principles to clarify the scope of § 1981. Section 1981 itself looks to state law in other contexts, such as in determining the applicable statute of limitations⁵⁰ and, sometimes, in ascertaining whether § 1981 can be applied to situations outside the employment context. Courts have often turned to substantive contract principles in non-employment contexts where it was unclear whether a "contract" protectable by § 1981 existed. In *Cook v Advertiser Company*, for example, the defendant, a newspaper, had refused to publish the wedding announcements of non-whites on its society page, and plaintiff sued under § 1981. The Fifth Circuit held that because the questionnaires used by the newspaper did not amount to an offer to publish the information, and the newspaper received no consideration from the plaintiff, no

employed by the firm could not sue even though his application for the identical position was turned down on the identical grounds.

The analysis suggested by *Hishon* would solve this problem by equating those promotions that are not routinely granted to awarding a position to an outsider, as both employment opportunities are sufficiently "new and distinct" that the plaintiff is really "making" a contract.

⁵⁰ *Johnson v Railway Express Agency, Inc.*, 421 US 454, 461 (1975).

binding contract existed. In the absence of a contractual relationship, § 1981 could not be invoked.⁵¹

Nor is reference to substantive state contract law unprecedented in § 1981 employment discrimination cases. In the recent case of *Judie v Hamilton*, the plaintiff alleged that his employer had refused to permit him to perform the supervisory duties contained in his job description.⁵² Looking to Washington state constitutional and common law, the court concluded that plaintiff's job description did not create contractual expectancies, thereby negating his § 1981 claim.⁵³

Such use of contract law is not compelled by precedent, however. At least one court has found state contract law inapplicable in determining § 1981's substantive scope within the sphere of employment relations, holding that § 1981 rests upon a much broader definition of "contract," one that includes any mutual exchange of promises.⁵⁴ Thus, because in that case the sheriff had promised to pay his deputy a set salary, and his deputy had promised to perform his job, the relationship was sufficient to fall under § 1981's protection.⁵⁵ Other courts have rejected state contract law as a benchmark of § 1981's scope due to the inconsistent outcomes that would result. These courts have recognized that § 1981, being a federal law, should not be impaired by *substantive* irregularities of state law (as opposed to *procedural* differences, such as statutes of limitations).⁵⁶

In addition to those courts expressly rejecting a state contract law analysis of § 1981, many cases addressing § 1981's statute of limitations contain language discouraging such reliance. In *Goodman v Lukens Steel Co.*, the Supreme Court held that the statute

⁵¹ 458 F2d 1119, 1122 (5th Cir 1972). More recently, in *Murray v National Broadcasting Co., Inc.*, 844 F2d 988 (2d Cir 1988), the plaintiff alleged that he had proposed the original concept for *The Cosby Show* to NBC, which had then stolen his idea and turned it over to a production team. Plaintiff, who was black, charged that the defendant had violated § 1981 by discriminatorily refusing to contract with him regarding his television show proposal, contracting instead with white producers. The Second Circuit relied exclusively on New York contract law in asserting that no contract right could exist in a non-novel idea. The court therefore concluded that, because plaintiff's concept was non-novel under New York law, "there could be no consideration for the alleged promise and hence no enforceable contract right upon which to base a section 1981 claim." *Id* at 995 (citations omitted).

⁵² 872 F2d 919 (9th Cir 1989).

⁵³ *Id* at 923 (citations omitted).

⁵⁴ *Adams v McDougal*, 695 F2d 104, 108 (5th Cir 1983) (citing *Cook*, 458 F2d at 1123 (Wisdom concurring)).

⁵⁵ *Adams*, 695 F2d at 108.

⁵⁶ See *Waters v Wisconsin Steel Works of Int'l Harvester Co.*, 502 F2d 1309, 1316 (7th Cir 1974) and other cases cited in notes 38-41.

of limitations for state *tort* claims, rather than for *contract* claims, must be applied to § 1981 actions.⁵⁷ Justice White, writing for the majority, reasoned that § 1981 deals with a “fundamental injury to the individual rights of a person,” not simply the breach of contractual rights.⁵⁸

Of course, the characterization of § 1981 as tort-oriented for one purpose does not render the borrowing of contract principles inappropriate in all circumstances. One might consider the statute as similar to the tort of interference with contractual relations, which possesses elements of both tort and contract. This tort imposes liability where the tortfeasor interferes with one party’s contract rights with another, incorporating traditional tort analysis of intent and causation.⁵⁹ At the same time, the tort depends upon the existence of a valid contract,⁶⁰ requiring the court to look for an underlying contract before determining whether to impose liability.

Nonetheless, the parallel between this tort and § 1981 does not necessarily bolster the argument for a contract analysis of § 1981’s scope. Courts tend to permit suits under this tort for “[v]irtually any type of contract,” including employment at will, even where the contract itself is unenforceable.⁶¹ One may therefore conclude that where such a tort is involved, the courts tend to be quite liberal in their interpretation of the underlying contract, concentrating instead on the wrongful act. The language of the § 1981 statute of limitations cases suggests a similar inclination where contract law is invoked. Such a broad reading of a contract clearly was not what the *Patterson* Court intended.

⁵⁷ 482 US 656 (1987).

⁵⁸ *Id.* at 661. Prior to *Goodman*, the lower courts had argued vociferously about whether, for statute of limitations purposes, § 1981 sounded in tort or in contract. In the words of one district court advocating the tort position:

§ 1981 recognizes . . . a status of racial equality in making and enforcing contracts, and impliedly imposes on all persons a duty not to interfere by racial discrimination with that status. An action alleging that defendant’s breach of that duty caused injury to plaintiff’s enjoyment of that status sounds in tort because plaintiff’s right and defendant’s duty are based on a statute embodying a social policy of equality of opportunity. . . rather than embodying a policy with respect to express or implied promises of the parties.

Ware v Colonial Provision Co., Inc., 458 F Supp 1193, 1195-96 (D Mass 1978); see also cases cited therein at 1195.

⁵⁹ William L. Prosser and W. Page Keeton, *The Law of Torts* §129 at 978, 989-94 (causation), 997 (intent) (West, 5th ed 1984).

⁶⁰ *Id.* at 994-95.

⁶¹ *Id.* at 994-96.

Finally, *Patterson* itself may be read to discourage the use of contract principles in interpreting the scope of § 1981. The Solicitor General had argued to the Court that, at least with respect to harassment claims, § 1981 requires courts "to look outside § 1981 to the terms of particular contracts and to state law for the obligations and covenants to be protected by the federal statute."⁶² The Court countered that such an interpretation would permit a § 1981 claim whenever a breach of contract claim alleged racial animus, a result at odds with both legislative intent and the Court's own reluctance to create a federal right of action for traditional state contract claims.⁶³ The Court reasoned that, even though the breach of contract may have been caused by racial harassment, a remedy still existed under state law and there was nothing in § 1981 indicating a congressional desire to federalize state breach of contract claims.⁶⁴

This conclusion, however, creates some inconsistency within *Patterson*, suggesting that it not be applied too rigidly. Precisely because it calls for a more restrictive treatment than the Title VII standard, *Patterson* requires resort to state contract law for interpretive guidance: it will not always be obvious whether a "new and distinct relation" exists.⁶⁵ In the wake of *Patterson*, some analysis of the contractual relation has become necessary even within the employment context.

Thus, despite courts' uncertain authority to examine state contract law principles in interpreting substantive provisions of § 1981, the reliance of *Patterson* on the making of a contract for creating liability and the difficulty of determining which promotions constitute a "new and distinct" contract relation seem to require at least consideration of contract principles as a means of fleshing out § 1981 and *Patterson*.

B. Applying the Analogy

A promotion can be viewed in one of two ways: as no different than an initial contract, or as an evolution of a prior contract. Two principles of contract law seem to apply to these situations. Contract law will recognize an initial negotiation as a new contract if

⁶² 109 S Ct at 2375.

⁶³ Id at 2376.

⁶⁴ Id.

⁶⁵ The Supreme Court commented in *Hishon*, by contrast, that "an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace." 467 US at 74.

sufficient consideration is present, while it will recognize an evolutionary deal as a new contract if the original contract has been modified. This section examines the principles of consideration and modification in an effort to determine which promotions can rise to the level of the "new" contract required by *Patterson*.

The traditional hornbook definition of "consideration" requires a promise supported by some benefit to the promisor or some detriment to the promisee.⁶⁶ For example, suppose that William Worker charges Ellen Employer with discriminatorily denying him a promotion. The typical promotion would involve an exchange on both sides, Worker promising to fulfill more duties and Employer promising greater pay. As both parties would be exchanging a benefit and a detriment, this promotion would constitute a "new" contract actionable under § 1981.

"Consideration" could be used to define "new and distinct relation" by assuming that one achieves a "new and distinct relation" when one makes an agreement supported by consideration. But in fact many promotions are not supported by consideration. Imagine a promotion whereby Worker receives a raise with no change in duties, or one in which Employer exacts a change in responsibilities with no increase in wages. In such a case, one party has made a promise (either to pay more or to work harder) with no corresponding detriment to the other side. Thus, under a simple consideration analysis, Worker's claim that he was denied this particular type of promotion will not be actionable under § 1981: absent consideration, he has not been denied the right to enter into a contract.

The flaw in reading this theory of consideration into § 1981 is that it presumes that either the benefit or the detriment must be objectively quantifiable. Can one realistically think of Worker or Employer as making a promise unsupported by consideration? Is Employer simply giving Worker a *gift* of higher wages? Is Worker simply making a *gratuitous promise* to undertake greater responsibility? Clearly not: neither party would be making a promise without expecting *something* in return. In the situation where Employer has given Worker a raise, one may safely assume that she has done so to ensure his continued employment. Whether under a regime of employment at will or for-cause termination, Worker may quit at any time, and periodic increases in wages serve Employer's interests in encouraging continued service. In the words of

⁶⁶ See E. Allan Farnsworth, *Contracts* §1.6 at 20 (Little, Brown, 1982).

one state court, "by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer"⁶⁷—the offer in our example being the proffered pay raise.

Similarly, Worker may accept a new position without a change in compensation for any number of personal reasons. Such a move may entail certain non-tangible benefits, or may be a necessary step on the career ladder towards a more "significant" promotion. As one court has noted, a new position constitutes a "'promotion,' although it does not represent an immediate increase in pay, if it has better working conditions or greater long term earnings potential."⁶⁸

The effect of this consideration analysis is that even a seemingly one-sided promotion constitutes a contract, and thus *any* claim by Worker that he has been discriminatorily denied a promotion satisfies § 1981's requirement of a "new and distinct relation."⁶⁹ This result cannot be what the Supreme Court intended, however, for it would nullify *Patterson's* purported alteration of § 1981's applicability to discriminatory denial of promotion cases.

A saving argument might be that consideration analysis only determines which contracts are "new," yet *Patterson* requires that the contract denied be not merely "new," but "distinct" as well. Pursuing this argument, it is perhaps possible to use contract law as a basis for interpreting the "distinctness" requirement as well. Specifically, one might view a promotion as a *modification* of an existing employment contract. By one definition, "[a] modification of a contract is a change in one or more respects which introduces new elements into the details of the contract, cancels some of them, but leaves the general purpose and effect undisturbed."⁷⁰

⁶⁷ *Pine River State Bank v Mettelle*, 333 NW2d 622, 627 (Minn 1983).

⁶⁸ *Carmichael v Birmingham Saw Works*, 738 F2d 1126, 1134 (11th Cir 1984) (vacating the dismissal of plaintiff's claim of discriminatory denial of promotion under Title VII).

The fact that the "consideration" in these examples is non-quantifiable should not prevent a court from finding the existence of adequate "consideration," because the courts do not generally inquire into the adequacy of consideration. See 1 Restatement (Second) of Contracts § 79 at 200-02, Comment c (1981) ("Restatement, Contracts") and cases cited in corresponding Appendix at 236-40 (rejecting any requirement of "adequacy" or "sufficiency" of consideration). See also, for example, *Altschul v Sayble*, 83 Cal App 3d 153, 147 Cal Rptr 716, 722 (1978); and *Harnett v Ryan Homes, Inc.*, 360 F Supp 878, 890 (W D Pa 1973), aff'd, 496 F2d 832 (3d Cir 1974).

⁶⁹ Under the "bargain theory" of consideration, any terms that are bargained for serve as consideration for the contract. The analysis above assumes that any promotion would be bargained for by the parties. See 1 Restatement, Contracts § 79 at 200, Comment a; and Farnsworth, *Contracts* § 2.2 at 41 (cited in note 66).

⁷⁰ *Chicago College of Osteopathic Medicine v George A. Fuller Co*, 776 F2d 198, 208 (7th Cir 1985) (applying Illinois law).

Such a modification will create a "new" contract consisting of the terms of the promotion and any terms of the original contract that remain unchanged.⁷¹ A modification that alters the purpose and effect of the contract and leaves no terms of the original contract intact rises to the level of a rescission of the original contract, thus making the new agreement "distinct" as well.⁷²

Consider again Ellen Employer's alleged discriminatory denial of a promotion to William Worker. Had he received the expected promotion, his new contract would include the terms of the promotion and any remaining terms from the original employment contract. For example, a simple raise would result in a new contract composed of Worker's original duties and his new wages. However, the contract would not appear to be "distinct" under modification analysis: all that has changed is one detail of the original contract, while the general purpose and effect remain the same.

On the other hand, Worker may argue that he has been denied a promotion that would have had a much greater impact on the general purpose of the contract. In such a case, the original contract would be rescinded, and no terms would be carried over to the post-promotion contract. For example, a promotion that changed Worker's duties as well as his wages may leave the original contract entirely ineffective, with all terms contained in the "new" contract. In this manner, one may argue that the promotion results in a contract that is not only "new," but "distinct" as well.

Like consideration analysis, modification analysis appears to offer some means of distinguishing promotions that merit § 1981 coverage. Unfortunately, like consideration analysis, modification analysis succeeds only as a technical, abstract concept, with little grounding in actual practice. First, sole reliance on modification principles would require some definition of what constitutes a

⁷¹ See, for example, *Barrett v Lawrence*, 110 Ill App 3d 587, 590-91, 66 Ill Dec 173, 442 NE2d 599 (1982); *Travelers Insurance Co. v Workmen's Comp. App. Bd.*, 68 Cal 2d 7, 64 Cal Rptr 440, 434 P2d 992, 998 (1967). Like any new contract, a modification will generally require consideration to support the new agreement; see *Chicago College of Osteopathic Medicine*, 776 F2d at 208; *Barnhart v Dollar Rent a Car Systems*, 595 F2d 914, 919 (3d Cir 1979) (applying Pennsylvania law). But see *Young v United States*, 327 F2d 933, 936 (5th Cir 1964) (applying Alabama law); and *Asbestos Products v Healy Mechanical Contractors, Inc.*, 306 Minn 74, 235 NW2d 807, 809 (1975) (both cases holding that the oral modification of a written contract needs no new consideration, because the consideration for the original contract attaches to the modified contract).

⁷² See *Travelers Insurance Co.*, 434 P2d at 998. Farnsworth defines "agreement of rescission" as a contract in which both parties agree to a discharge of all remaining duties. See Farnsworth, *Contracts* § 4.24 at 288 & n 18 (cited in note 66) (noting that "[a]n agreement of 'partial rescission,' which would discharge less than all the parties' remaining duties of performance, is best treated as a modification").

change in a contract's "purpose" and "effect." Consider two fairly typical examples of promotions. Suppose, first, that Worker's status is elevated from wage-earner to salaried employee. Such a promotion appears to be a change only in one detail of the employment contract, yet one that may represent a significant alteration in the "effect" of the contract. Alternatively, suppose that Worker's position is altered from clerk to supervisor. Again, this is in a sense a change in only one aspect of the original contract, but it is a modification with major repercussions for the contract's "purpose."

In each of these examples, modification analysis offers no principled means of determining just when the promotion rises beyond a simple change in the contractual details to a change in the actual purpose and effect of the contract, thereby becoming sufficiently "distinct" to merit § 1981 coverage. Contract law, looking as it does to the bargain of the parties rather than the value of the terms of the exchange, suggests no concrete, objective standard by which one may designate certain terms as significant enough to rescind the original employment contract.

This flaw in modification analysis could be excised by looking not at the "change in purpose" or "change in effect" language of the definition, but rather at the "change in *details*" language. This approach asserts that a post-promotion contract is "new and distinct" for § 1981 purposes if the details have been sufficiently altered so as to amount to a rescission of the original employment contract. Yet this requires the court to determine exactly what details are implicit in the original contract, and whether a change in these implicit details will be sufficient to confirm a rescission of the original contract in full. The court must still make a subjective determination of the terms of the contract itself.

Consider again the scenario in which Worker has been denied a pay raise entailing no corresponding change in his duties. The duties are identical in both contracts, allowing one to say that the original contract has been modified but not transformed into a "new and distinct" agreement. However, implicit in the promotion is Employer's heightened expectation of Worker's staying on the job. This expectation is not explicit in an at-will employment contract, yet it must be present to some extent. An identical argument may be made where Worker has been promoted to a higher job classification without an increase in wages. The original wages element of the contract remains after the promotion, yet the new contract contains the implicit term that Worker is now one step higher in the career ladder.

This complication is somewhat analogous to our earlier discussion of consideration. An employment contract by its very nature contains many implicit, perhaps intangible, details of the employment relationship.⁷³ The working relationship is composed of inter-related mechanics, a series of exchanges by which Worker and Employer each benefits, even though the benefits may not be manifested in the contract itself. Assuming that the typical promotion is devoid of gratuitous offers of higher pay or greater effort, any modification of the original agreement will to some extent alter the implicit terms of the contract. Looking only to the explicit details of the contract (namely, the wages and duties terms) ignores the realities of the employment relationship.

Thus, it is difficult to develop a satisfactory definition of "new and distinct relation" by drawing solely on contract law principles. True, the text of § 1981 requires a denial of the right to make a contract, and in some circumstances it thus becomes necessary to look to state contract law to determine whether a contract is involved. But dependence on state contract law is far more problematic in the promotion context. There, an employment contract is clearly present, and the post-*Patterson* problem is one of determining whether a *second*, suitably "new and distinct" contract has entered the picture. Whether one looks for an exchange of consideration, or for a modification sufficient to stand apart from the original contract, it is evident that *any* conceivable promotion may arguably reach the level of a "new and distinct" contract cognizable under § 1981. This result was clearly not intended by the *Patterson* Court. If one cannot garner any functional definition of a "new and distinct relation" from *Hishon* or contract law, where then can one turn?

IV. DESIGNING A FRAMEWORK

A. Initial Approaches

As should be evident, the "new and distinct relation" test has no explicit foundation. Yet the lower courts need a working definition that reflects *Patterson's* apparent desire to restrict the scope of § 1981 through reference to contract law and *Hishon*. We have seen that a workable definition of "new and distinct relation" cannot be divined from either of these sources individually. Abstracting an explanation of the *Hishon* citation produces a formula by

⁷³ *Travelers Insurance Co.*, 434 P2d at 998.

which courts can limit the types of promotions cognizable under § 1981, but it does not take into account the *Patterson* Court's explicit reliance on the making of a contract as the touchstone for liability. *Hishon* alone helps us to understand what a "distinct" relation is, but not what a "new" relation is. Contract law principles, meanwhile, provide no objective measures by which a court can assess a promotion claim, and even if functional, ignore *Patterson*'s express reference to *Hishon*.

The *Patterson* Court, at the very least, established that two chief concerns must underlie categorization of those promotions cognizable under § 1981: (1) a right to *make* a contract must be implicated; and (2) § 1981 must not be viewed as the mere extension of Title VII, thereby requiring that § 1981 cover fewer promotion denials than would Title VII. Using these two standards, this Comment provides a workable definition that satisfies the Court's twin concerns while anticipating the types of promotion cases that the lower courts are facing in the wake of *Patterson*.

Patterson's concern that a promotion contract must be narrowly defined to be cognizable under § 1981 can be met by focusing on only the tangible benefits received by both Employer and Worker. The consideration and modification analyses ran aground only when the courts were left with no principled basis for deciding which non-tangible benefits could support a finding that a promotion was "new and distinct." This indeterminacy problem can be solved by arguing that a promotion constitutes a "new and distinct relation" cognizable under § 1981 where *each* party has received some *tangible* benefit from the other. The only tangible benefits that are common to all promotions are responsibilities or wages, and it is to these benefits that courts seeking to implement *Patterson* have primarily looked. This requirement solves the consideration problem, because each party receives tangible benefits and agrees to undergo tangible detriments. The requirement also solves the modification problem because the purpose of the contract is cabined by the *concrete* terms of the agreement, the most essential of which are obviously one's responsibilities and wages. Thus, under this analysis some promotions will be actionable, but not all.

Reference to *Hishon* further bolsters this definition, incorporating the Court's citation of the case in *Patterson* and its preference that Title VII and § 1981 overlap as little as possible. As noted earlier, *all* promotions constitute terms, conditions, or privileges of employment under Title VII. *Hishon*, however, suggests that some promotions are more clearly included in the original contract agreement and hence are more clearly terms of employ-

ment than are others. Hence, by limiting § 1981 to those promotions that are granted not as a result of the original contract provision, but due to the employee's accomplishments, one can reduce the overlap between Title VII and § 1981 in a manageable and predictable manner. Under this standard, a promotion represents a "new and distinct relation" where it is not granted as a matter of course. Rather than focusing on the terms of the promotion, the court must focus on the regularity of such promotions among similarly situated employees.

B. The Proposed Standard

As illustrated in the previous section, any definition of "new and distinct relation" must satisfy the two main concerns of *Patterson* that the promotion would have involved the basic components of a new contractual arrangement and that the promotion would not have occurred as a matter of course. The following standard fulfills the *Patterson* Court's mandate: A promotion constitutes a "new and distinct relation" cognizable under § 1981 where there has been a tangible change in responsibilities and wages, *and* the discriminatorily denied promotion is not granted routinely to similarly situated workers.

This definition accommodates *Patterson* and *Hishon*. As noted earlier, *Hishon* rested on two chief considerations. First, one must consider the *contractual* nature of the employment relationship.⁷⁴ Second, one must consider whether the change in this relationship is so routine as to constitute a simple "term of employment."⁷⁵ *Patterson*'s reliance on *Hishon* as the sole support for the "new and distinct relation" standard strengthens the force of the framework proposed by this Comment.

The framework may prove somewhat harsh when the expected promotion would meet one of the two prongs of the proposed standard, but not both. Consider an employee who applies for a promotion available only to those who have achieved some outstanding level of performance. Suppose further that the promotion would involve taking on some supervisory responsibility, but would entail no immediate financial benefits; rather, the new position would put the employee directly in line for a management position. Denying an employee this particular promotion on account of his race

⁷⁴ 467 US at 74.

⁷⁵ *Id* at 76.

would not be actionable under the proposed standard, yet its clear satisfaction of the simple *Hishon* prong gives one pause.

Nonetheless, the analysis implements *Patterson* without being excessively severe. First, this definition eliminates judicial subjectivity in determining what constitutes a promotion, thereby increasing consistency of results. In most of the post-*Patterson* cases discussed in Section I, courts reached their final determinations either by asserting that the facts did not quite measure up to those in *Hishon*,⁷⁶ or by conclusorily stating that the promotion would not have been *sufficiently* "new and distinct."⁷⁷ The requirement of a mutual alteration in the positions of the employer and employee provides an objective definition of a "new" contract. The "non-routineness" of the promotion provides an objective standard that prevents § 1981 from applying to all promotions, in accordance with the Supreme Court's desire that the "new" contract be "distinct" as well.

Consider a promotion entailing a raise of thirty cents per hour accompanied by a minor change in the employee's duties. The promotion would clearly be covered by § 1981 under the proposed analysis (assuming no evidence of routineness), whereas some post-*Patterson* courts might find the change in position insufficiently new and distinct. Because there is no principled way of distinguishing this promotion from any other involving a mutual exchange of concrete terms between employer and employee, the proposed approach is satisfied without any encroachment on *Patterson*'s principles. This suggests that some post-*Patterson* cases were decided incorrectly, most notably *Patterson* itself on remand.⁷⁸

Second, the definition of a routine or non-routine promotion may be limited, further reducing judicial subjectivity. A "routine" promotion could safely be limited to a change in wages and/or responsibilities given to all employees at some point in time merely as a consequence of having entered into the original employment agreement.⁷⁹

⁷⁶ See *Sofferin*, 717 F Supp at 599.

⁷⁷ See *Dicker*, 730 F Supp at 114.

⁷⁸ See *Patterson*, 729 F Supp at 35.

⁷⁹ Note that the *Hishon* Court found that consideration for promotion to partner in a law firm might very well be "routine" under Title VII. 467 US at 76. Thus, a failure to interpret "routine" narrowly under § 1981 would require a court to find the *Hishon* scenario itself non-actionable after *Patterson*, an outcome somewhat absurd in light of the Supreme Court's citation to *Hishon*. On the other hand, the *Hishon* Court found partnership *consideration* to be routine, not actual *promotions* to partner. Hence, the denial of the actual

On the whole, this framework appears to offer sufficient protection to employees under § 1981, while at the same time adhering to both *Patterson* concerns: that a right to *make* a contract be infringed, and the preference for Title VII where a clear term of employment is involved. An application of the proposed approach to the leading lower court cases issued in the wake of *Patterson* will highlight its operation.

C. Applying the Standard

Rather than applying the proposed standard to hypothetical scenarios, in this Section I will apply the standard to the fact patterns of post-*Patterson* cases. These cases can be grouped into three basic categories based on their compliance with the two prongs of the proposed test: whether there has been a mutual, tangible change in responsibilities and wages, *and* whether the discriminatorily denied promotion is granted routinely to similarly situated workers.

1. Category 1: Both prongs satisfied.

Typical of this category are cases such as *Luna v City and County of Denver*,⁸⁰ *Green v Kinney Shoe Corp.*,⁸¹ and *Hudgens v Harper-Grace Hospitals*,⁸² each of which entailed an increase in both responsibilities and wages,⁸³ thus satisfying the contract law prong. The contract model allows us to avoid the additional factors considered by these courts, such as changes in required qualifications, potential liability, or pension benefits. These factors remain relevant only to the extent that they prove the employee's responsibilities (or wages) have indeed been altered. Thus, once a court has found a change in both responsibilities and compensation, it need not engage in the weighing of various factors as suggested by *Hudgens*.

The outcome under the simple *Hishon* prong is less certain, as few relevant facts were enunciated in any of these cases. However,

promotion to partner might arguably constitute a "non-routine" promotion cognizable under our § 1981 analysis.

⁸⁰ 718 F Supp 854 (D Colo 1989). The cases mentioned in this subsection are addressed more fully in the text at notes 32-34.

⁸¹ 728 F Supp 768 (D DC 1989).

⁸² 728 F Supp 1321 (E D Mich 1990).

⁸³ This analysis assumes that a change in status from hourly to salaried employee constitutes an increase in pay. Even the narrowest readings of *Patterson* have recognized such a contractual alteration as sufficient under § 1981. See, for example, *Patterson*, 729 F Supp at 36 (on remand).

one can probably safely assume that a promotion from "Project Inspector I" to "Engineer III"⁸⁴ or from salesman to manager⁸⁵ would not come part and parcel with the job, but rather as a result of the employee's individual achievement. At least one of these courts did note that plaintiff had to bid for his desired promotion, which would seem to make the advancement non-routine.⁸⁶

2. Category 2: Neither prong satisfied.

This category is best represented by *Dicker v Allstate Life Insurance Co.*,⁸⁷ where the plaintiffs had been denied promotions within a progressive line of positions that *ultimately* might result in a category-one type promotion. As the plaintiffs were not denied a promotion entailing a change in responsibilities, the mere achievement of greater proximity to such a promotion does not satisfy the contract model. Moreover, there is evidence that plaintiffs would also fail under the simple *Hishon* prong: such promotions were apparently granted frequently, with no need for employees to apply for the positions.⁸⁸ Thus, under either prong a mere step along the "line of progression" towards a category-one promotion falls short of a "new and distinct relation."⁸⁹

The same can be said of a case in which the promotion would have simply entailed an increase in wages, such as *Williams v National RR Passenger Corp.*⁹⁰ Again, only half the equation of the contract model has been satisfied. Moreover, although there was no evidence to this effect, a basic pay raise would probably serve as the clearest illustration of a term of employment granted routinely, without special consideration of the employee's achievements or promotion requests, thereby failing to satisfy the *Hishon* prong.

3. Category 3: Indeterminate cases.

Not every promotion fits comfortably into one of the above categories. Take, for example, *Sofferin v American Airlines, Inc.*, involving a promotion of an airline co-pilot from probationary to tenured status.⁹¹ The *Sofferin* decision, holding that the plaintiff's

⁸⁴ *Luna*, 718 F Supp at 857.

⁸⁵ *Green*, 728 F Supp at 777.

⁸⁶ *Hudgens*, 728 F Supp at 1321-22.

⁸⁷ 730 F Supp 111 (N D Ill 1989).

⁸⁸ *Id* at 112.

⁸⁹ See *id* at 114.

⁹⁰ 716 F Supp 49, 51 (D DC 1989).

⁹¹ 717 F Supp 597 (N D Ill 1989).

claim was not cognizable under § 1981, would appear correct under the contract model, as the court found that the plaintiff's responsibilities would not have changed had he been promoted.⁹²

On the other hand, the outcome under the *Hishon* prong may be quite different. Here, it is necessary to determine whether a promotion to tenured status *generally* followed the probation period. If not, then this promotion would rise to the level of a "new and distinct relation," a conclusion contrary to the outcome of the contract approach. But, even if the promotion would not have been made as a matter of course, courts should not hold this kind of transition in employment status to be sufficient for § 1981 coverage. To hold otherwise would "swallow up the rule announced in *Patterson*."⁹³

CONCLUSION

The Supreme Court's decision in *Patterson v McLean Credit Union* requires courts to remove certain promotions from the purview of § 1981, but provides no historically or legally supportable means of doing so. As a result, those courts that have addressed the promotion issue in the aftermath of *Patterson* have done so without any logical, consistent principle guiding their decisions. The approach proposed by this Comment offers one possible method of facing the issue in a somewhat less ad hoc fashion. The approach melds the abstract elements of both the contract law analogy and the Title VII analogy, thereby accommodating the two chief concerns of the *Patterson* Court—namely, that any definition of promotion be grounded in the text of § 1981, and that Title VII be preserved as a meaningful remedy for employment discrimination. This Comment's approach comfortably accommodates most of the cases decided in *Patterson*'s immediate aftermath, while at the same time balancing the concerns of the *Patterson* Court with § 1981's anti-discriminatory mandate.

⁹² Id at 599. The court reasoned that, in contrast to the employment status change in *Sofferin*, in *Hishon* "[p]romotion from associate to partner involves changes in compensation computation, responsibility, and, potentially, liability. In effect, it is a transformation from employee to employer." Id. See also text at notes 76-77.

⁹³ Id.