

Maurice A. Deane School of Law at Hofstra University

Scholarship @ Hofstra Law

Hofstra Law Faculty Scholarship

2001

Making a Federal Case Out of It: Section 1981 and At-Will Employment

Joanna L. Grossman

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 Brook. L. Rev. 329 (2001)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/364

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

MAKING A FEDERAL CASE OUT OF IT: SECTION 1981 AND AT-WILL EMPLOYMENT*

Joanna L. Grossman†

Employment at will is not a state of nature but a continuing contractual relation.¹

INTRODUCTION

Most Americans work at will—they can quit in a huff, but be fired on a whim. That is the double-edged sword of at-will employment.² What these workers gain in freedom, they sometimes lose in rights. One of the rights at-will employees have tried to claim, with moderate success, is the right not to be fired or otherwise treated adversely on the basis of race. For many of them, Title VII of the Civil Rights Act of 1964³ (“Title VII”) provides that protection, prohibiting employers from taking any racially motivated adverse employment action.

But millions of these workers are not able to make use of Title VII’s protections, either because the employers they work for are too small, and therefore exempt, or because they have failed to comply with its procedural prerequisites like

* ©2001 Joanna L. Grossman. All Rights Reserved.

† Associate Professor, Hofstra Law School. B.A., Amherst College; J.D., Stanford Law School. I am grateful to Michael Collins for helping me work through the source of law issues. My thanks to Amy Chu, Allison Maue, and Matthew Melnick for their dedicated research assistance, and to Hofstra University for a generous summer research grant.

¹ *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (Posner, J.).

² “‘Employment at will’ is a term long used to mean that an employer may discharge an employee without restriction, that is, for any reason or for no reason, without incurring any liability to the employee.” 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2000).

³ See 42 U.S.C. § 2000e-§ 2000e-17 (1994 & Supp. V 1999).

administrative exhaustion and a relatively short statute of limitations. For this group of workers, another federal civil rights statute provides some relief.

Section 1981,⁴ the modern iteration of a reconstruction-era civil rights act, prohibits race discrimination in contracting. For the last three decades, the predicate for most § 1981 cases has been an employment contract. At-will employees, however, do not have a piece of paper labeled "contract" nor a standard oral agreement that clearly brings them within the purview of the statute. Federal courts across the country have thus been grappling for the past few years with the question whether such employees have a contractual relationship with their employers, such that § 1981 may be invoked to challenge discrimination against them on the basis of race. The Second Circuit weighed in last term in *Lauture v. IBM*.⁵

At-will employees have racked up considerable successes, convincing four federal courts of appeals—including, most recently, the Second Circuit—to apply § 1981 to them, while losing in only one circuit. While these decisions have quite assuredly reached the right outcome, their reasoning makes them precarious. Most have relied on contract law in the state where the suit was brought to determine whether the employee-employer relationship is contractual. In most states, that approach will ensure that § 1981 applies to at-will employees. But not in all. Some states, although recognizing at-will employment, do not view the relationships as contractual.⁶ If state law supplies the definition of contract for § 1981 purposes, at-will employees in those states lose the protection provided by the statute. This approach is wrong. The benefits of an important federal civil rights law should not be hamstrung by the idiosyncrasies of a particular state's rules of contract law. What these decisions should turn on instead is federal common law—a uniform, federal interpretation of § 1981 that protects all at-will employees, even those in states with stricter definitions of contractual relationships.

⁴ 42 U.S.C. § 1981 (1994).

⁵ 216 F.3d 258 (2d Cir. 2000).

⁶ See, e.g., *Jones v. Becker Group*, 38 F. Supp. 2d 793, 796-97 (E.D. Mo. 1999) (noting that, under Missouri law, at-will employees do not have a contractual relationship with their employers). See *infra* note 133.

This Article is divided into four parts. Part I describes the history and origins of § 1981, its bloodletting by the Supreme Court, and its ultimate restoration and reinvigoration by Congress. Part II first describes the federal appellate opinions addressing the applicability of § 1981 to at-will employment. It then examines the source of law question: whether state law, federal law, or some combination ought to dictate the definition of "contract" in § 1981. It concludes that federal common law, which may draw on well-established state law principles, should control. Part III examines the possible interpretations of "contract" as used in § 1981, looking at both state and federal law, ultimately concluding that at-will employees should be protected from race discrimination on the same terms as other employees. Part IV explores why § 1981 continues to be important, in light of the substantial protections provided by Title VII. This section looks at the doctrinal differences between the two statutes and examines some empirical evidence about § 1981's continuing use. It concludes that § 1981 remains an important tool in the fight for racial equality.

I. SECTION 1981'S BIRTH AND REBIRTHS

A. *Enactment and Early History*

Immediately following the Civil War and ratification of the Thirteenth Amendment to the federal Constitution, Congress enacted the Civil Rights Act of 1866, a wide-ranging ban on race discrimination. Part of this Act, eventually codified as 42 U.S.C. § 1981,⁷ addressed the problem of race discrimination in contracting. As originally enacted, § 1 of the Civil Rights Act provided, in relevant part:

⁷ See Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. This provision of the Civil Rights Acts of 1866 and 1870 was first codified as Revised Statutes § 1977, then recodified as 8 U.S.C. § 41, then finally recodified as 42 U.S.C. § 1981. When § 1981 was amended by the Civil Rights Act of 1991, the original § 1981 was renumbered "1981(a)." Sections 1981(b) and 1981(c), discussed below, were added in 1991.

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 for the security of persons and property as is enjoyed by white citizens⁸

To remove any doubt about its authority to pass this act pursuant to the Thirteenth Amendment (which, narrowly construed, did nothing more than abolish slavery),⁹ Congress re-enacted this provision as § 16 of the Civil Rights Act of 1870 after ratification of the Fourteenth Amendment.¹⁰

As first enacted, § 1981 was used to challenge the Black Codes used by southern states to limit the rights and opportunities of newly freed slaves.¹¹ But after the 1870s, the statute went largely unused for nearly a century¹²

The modern use of § 1981 came about through a series of cases in the 1970s and 1980s, in which the Supreme Court both breathed new life into the statute and hammered out its contours more precisely.¹³ Section 1981 was resurrected by the Supreme Court's decision in *Johnson v. Railway Express Agency*,¹⁴ which held that the statute applied not only to government-sponsored discrimination, but to private discrimination as well.¹⁵ Section 1981's breadth had been in

⁸ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1994)).

⁹ The competing view of the Thirteenth Amendment gave Congress the right to federalize and enforce civil rights more generally, rather than simply the power to make sure "slavery per se did not return." Sanford V. Levinson, *New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 481 (1974).

¹⁰ See Act of May 31, 1870, ch. 114 §§ 16, 18, 16 Stat. 144. The re-enactment made only two minor changes. See generally Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 385-86 (1982) (discussing legislative history of § 1981).

¹¹ See, e.g., Hart v. Hoss, 26 La. Ann. 90, 93 (La. 1874) (interpreting the Civil Rights Act of 1866 to annul all existing state laws creating legal disabilities on the basis of race).

¹² See generally HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 325 (2001).

¹³ Section 1983, arguably the most important federal civil rights statute, lay similarly dormant for nearly a century, before being resurrected in 1961 by *Monroe v. Pape*, 365 U.S. 167 (1961), as a "broad cause of action to remedy constitutional violations." Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 53 (1986).

¹⁴ 421 U.S. 454 (1975).

¹⁵ *Id.* at 459-60. The Court established the groundwork for this ruling seven

question for nearly a century, since the Court's ruling in the *Civil Rights Cases*.¹⁶ In those cases, the Court invalidated significant portions of another reconstruction-era civil rights act, the Civil Rights Act of 1875,¹⁷ which prohibited race discrimination in public accommodations like inns, restaurants, and the like.¹⁸

In those cases, the Supreme Court took an extremely narrow view of Congress' power under the Thirteenth and Fourteenth Amendments to legislate against race discrimination.¹⁹ The Court's rebuke arguably stood for the proposition that neither the Thirteenth nor Fourteenth Amendment was broad enough to enable Congress to regulate or prohibit private acts of race discrimination.²⁰ Although not directly considering the validity of the Civil Rights Acts of 1866 or 1870, the Supreme Court obliquely suggested that they should also be construed, because of limits on Congress' power, to apply only to "state action."²¹ It would, the Court cautioned, be "running the slavery argument into the ground" to characterize acts of private discrimination as inflicting

years earlier in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), in which it held that § 1982, a companion provision dealing with race discrimination affecting property rights, applied to purely private conduct. The rationale for that decision was equally applicable to § 1981. See Levinson, *supra* note 9 at 482, for the critique of this reading of Congressional intent because "it would have been a stunning repudiation of an almost omnipresent racism for Congress to have committed itself in 1866 to such equality for blacks." *Id.* See also Gerhard Casper, *Jones v. Myer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89 (discussing the legislative history of the Civil Rights Act of 1866).

¹⁶ 109 U.S. 3 (1883).

¹⁷ *Id.* at 26.

¹⁸ See Civil Rights Act of 1875, 18 Stat. 335.

¹⁹ See generally Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (discussing the gradual restriction of federal civil rights laws and constitutional amendments by strict constructionist judges who were hostile to the idea of nationalized civil rights); Levinson, *supra* note 9, at 468, 470 (noting the Supreme Court's "potential antagonism to Reconstruction," which "did nothing to discourage the [South's] policy of noncooperation").

²⁰ The prohibition against race discrimination in public accommodations was resurrected nearly a century later by the Civil Rights Act of 1964, this time pursuant to the Constitution's Commerce Clause. See Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994) (prohibiting race discrimination in public accommodations); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Title II against challenge that Congress did not have sufficient authority under the Commerce Clause to enact it); cf. *EEOC v. Ratzliff*, 906 F.2d 1314, 1315 (1990) (noting that Title VII was enacted pursuant to the Commerce Clause).

²¹ *The Civil Rights Cases*, 109 U.S. at 6.

"badges of slavery"²² Thus, § 1981 stood on shaky ground until the Court's ruling in *Railway Express*.²³

B. *Section 1981 and Employment*

The Court's ruling in *Railway Express*, later reaffirmed in *Runyon v. McCrary*²⁴ and *Patterson v. McLean Credit Union*,²⁵ and eventually codified by Congress,²⁶ transformed § 1981 into an effective and frequently used weapon in the arsenal of employment discrimination lawyers. In addition to its holding that § 1981 was broad enough to reach private discrimination generally, the Court in *Railway Express* directly held that § 1981 was applicable to claims of employment discrimination,²⁷ a conclusion that had already been reached by several federal courts of appeals.²⁸ The Court applied § 1981 to employment contracts despite the fact that it overlapped to a significant extent with Title VII.²⁹ Although the justifications for permitting both statutes to stand side-by-side have lessened somewhat in the quarter-century since *Railway Express* was

²² *Id.* at 24, 25; see also Casper, *supra* note 15, at 126 (noting that the *Civil Rights Cases* left the applicability of § 1981 to private discrimination in question for nearly a century).

²³ 421 U.S. 454 (1975).

²⁴ 427 U.S. 160, 168, 173-75 (1976).

²⁵ 491 U.S. 164, 171-72 (1989). The Supreme Court in *Patterson* expressly requested that the parties submit briefs on whether its decision in *Runyon* (and, by implication, *Railway Express*) ought to be overruled or affirmed. See *infra* note 38.

²⁶ See 42 U.S.C. § 1981(c); see *infra* notes 51-52 and accompanying text; see also H.R. REP. No. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630 ("[t]his subsection also confirms section 1981's coverage of both public and private sector employment").

²⁷ 421 U.S. at 459-60.

²⁸ *Id.* at 460 (discussing cases); see also *Long v. Ford Motor Co.*, 496 F.2d 500, 505 (6th Cir. 1974); *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979, 993-94 (D.C. Cir. 1973); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 622 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1385 (4th Cir. 1972); *Caldwell v. Nat'l Brewing Co.*, 443 F.2d 1044, 1045 (5th Cir. 1971); *Young v. ITT*, 438 F.2d 757, 759-60 (3d Cir. 1971); *Waters v. Wis. Steel Works*, 427 F.2d 476, 481-84 (7th Cir. 1970).

²⁹ *Railway Express*, 421 U.S. at 461 (concluding that while Title VII and § 1981 are not entirely co-extensive in their coverage, they are not mutually exclusive and the remedies that are available, therefore, "although related, and directed to most of the same ends, are separate, distinct, and independent").

decided,³⁰ it remains possible today for aggrieved employees to pursue claims of race discrimination under both statutes simultaneously

1. The Supreme Court Limits § 1981

Although Congress expressly declined an opportunity to eliminate the overlap between Title VII and § 1981 in the employment context,³¹ the Supreme Court in the 1980s dealt § 1981 two major blows. First, the Court in *General Building Contractors Ass'n v. Pennsylvania* held that § 1981 could not be used to attack unintentional, or disparate impact, discrimination.³² The District Court in that case had, contrary to most other courts, interpreted § 1981 to be roughly co-extensive with Title VII.³³ Title VII had been interpreted early on, and later expressly amended, to permit employees to attack facially neutral employment practices with a disproportionately adverse impact on a protected group.³⁴ The

³⁰ See *infra* text accompanying notes 222-36.

³¹ In *Runyon v. McCrary*, the Supreme Court noted that Congress, "in enacting the Equal Employment Opportunity Act of 1972 specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in [*Railway Express*], insofar as it affords private-sector employees a right of action based on racial discrimination in employment." 427 U.S. at 174. The principle of enhanced stare decisis—applicable to court interpretations that have been ratified implicitly by Congress—is ultimately what saved the ruling in *Railway Express* and *Runyon* against later attacks.

³² See 458 U.S. 375, 391 (1982). The Court had failed to reach this question in at least three prior cases involving § 1981 claims that were premised on a disparate impact theory of discrimination. See *County of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979) (dismissing case on ground of mootness); *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (declining to reach question whether § 1981 applies to unintentional discrimination); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977) (vacating class certification in case brought under disparate impact theory).

³³ See *Pennsylvania v. Int'l Union of Operating Eng'rs*, 469 F. Supp. 329, 401 (E.D. Pa. 1978). But see *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 267 (2d Cir. 1980) (refusing to apply § 1981 to disparate impact claims because "the language, structure and history of § 1981 all point to the conclusion that the statute was simply intended to prohibit purposeful racial discrimination"), *aff'd*, 463 U.S. 582 (1983); *Mescall v. Burrus*, 603 F.2d 1266, 1270 (7th Cir. 1979) (interpreting § 1981 more narrowly than Title VII because of the former's strong ties to the Fourteenth Amendment).

³⁴ The Supreme Court first sanctioned this use of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress ultimately amended Title VII to make clear that it protected against disparate impact discrimination. See 42 U.S.C. § 2000e-2(k) (1994). Proof of disparate impact discrimination only entitles its victims to equitable

Supreme Court, however, declined to interpret § 1981 as broadly as Title VII, given the different contexts in which each statute was enacted. The "principal object of the legislation was to eradicate the Black Codes," the Court explained, laws that embodied "express racial classifications" and imposed a "range of civil disabilities on freedmen."³⁵ Although some of the Black Codes were in fact facially neutral, such as those penalizing vagrancy, the Court concluded that § 1981 was created to target the facially discriminatory aspects of these laws.³⁶

Then, six years later, the Court drastically limited the scope of § 1981 in *Patterson v. McLean Credit Union*.³⁷ In *Patterson*, the Court was asked to interpret the "make and enforce" language in § 1981, specifically to decide whether it permitted plaintiffs to challenge post-hiring conduct.³⁸

Brenda Patterson, an African-American bank teller, brought suit against McLean Credit Union, alleging that her supervisor harassed her, failed to promote her, and ultimately laid her off, all on the basis of race.³⁹ In response, the defendant argued that § 1981 did not provide a cause of action for racial harassment.⁴⁰

The Supreme Court agreed, holding that § 1981 did not regulate all aspects of the relationship between two contracting parties, but instead merely prohibited race discrimination in the "making" and "enforcement" of contracts.⁴¹ Sharply

relief, however, rather than the full panoply of remedies available to plaintiffs able to prove intentional discrimination. See Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (1994).

³⁵ *Gen. Bldg. Contractors*, 458 U.S. at 386-87.

³⁶ *Id.* at 387-88 (Congress "acted to protect the freedmen from intentional discrimination by those whose object was 'to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.'") (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1839 (1866) (Rep. Clarke)).

³⁷ 491 U.S. 164 (1989).

³⁸ The Court also requested briefing and argument on whether to overrule *Runyon v. McCrary* and thereby limit § 1981 to protect only against discrimination by state actors. See *Patterson v. McLean Credit Union*, 485 U.S. 617, 617 (1988) (ordering briefing and reargument). The Court ultimately decided to adhere to precedent and continue to apply § 1981 to purely private conduct. See *Patterson*, 491 U.S. at 175.

³⁹ *Patterson*, 491 U.S. at 169.

⁴⁰ *Id.* at 170.

⁴¹ *Id.* at 176-77.

deviating from lower court precedent,⁴² the Court held that the right to *make* contracts applied only to contract formation. In other words, an employer could not refuse to enter into an employment contract with an applicant because of race without running afoul of § 1981. But that protection against discrimination did not extend to conduct by an employer after the contractual relationship has been established.⁴³ Thus, for § 1981 purposes,⁴⁴ an employer could—under *Patterson*—harass, transfer, or demote an employee on the basis of race with impunity. The right to *enforce* contracts, according to the Court in *Patterson*, applied only to conduct of an employer designed to impair an employee's ability to avail herself of the legal process.⁴⁵

Despite its tolerance of overlap between Title VII and § 1981 in *Railway Express*, the Court in *Patterson* expressly tried to limit it.⁴⁶ Applying § 1981 to post-formation conduct, the Court reasoned, would undermine Title VII's elaborate administrative scheme designed to promote conciliation rather than litigation.⁴⁷

For the plaintiff in *Patterson*, the Court's narrowing of § 1981 left her harassment and layoff claims unremediable.⁴⁸ But her failure-to-promote claim was perhaps viable. Whether such a claim would be actionable under § 1981, the Court held, "depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new

⁴² Prior to *Patterson*, every federal court to consider the issue had held that § 1981 applied to both pre- and post-formation conduct. See Harry Hutchison, *The Collision of Employment-At-Will, Section 1981 & Gonzalez: Discharge, Consent and Contract Sufficiency*, 3 U. PA. J. LAB. & EMP. L. 207, 226 (2001).

⁴³ *Patterson*, 491 U.S. at 177.

⁴⁴ As discussed below, there is considerable overlap between § 1981 and Title VII in the employment context. Thus, although *Patterson* seemingly permitted employers to discriminate in a variety of ways, Title VII would, for some employees, provide an alternative remedy. See *infra* text accompanying notes 203-47.

⁴⁵ *Patterson*, 491 U.S. at 177-78.

⁴⁶ See *id.* at 181 (despite accepting some "necessary overlap," the Court was "reluctant" to impose a "tortuous construction" or use a "twist[ed] interpretation" to read § 1981 and Title VII to cover the same post-formation discriminatory conduct).

⁴⁷ *Id.* at 180-81 ("By reading section 1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws.").

⁴⁸ *Id.* at 179.

contract with the employer.”⁴⁹ If the sought-after promotion would create a “new and distinct relation” between the parties, the right to make contracts on race-neutral terms might be implicated.⁵⁰

2. Congress Breathes New Life Into § 1981

Patterson’s life was short. Congress overruled the Court’s restrictive interpretation of § 1981 by statute as part of the Civil Rights Act of 1991. Renumerating the original provision as § 1981(a), Congress added the following subsections:

(b) For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.⁵¹

The express purpose of subsection (b) was to undo the damage wrought by *Patterson* and restore § 1981’s fuller scope.⁵² Subsection (c) served to validate the Court’s decision to apply § 1981 to private conduct.

3. The Immediate Aftermath of *Patterson*

In the first few years after the Civil Rights Act of 1991 was passed, *Patterson* continued to wield some power. To resolve a developing circuit split, the Supreme Court granted certiorari in a case questioning the retroactivity of the 1991 amendments to § 1981. In that case, the Court held that the amendments were not retroactive and thus did not apply to

⁴⁹ *Id.* at 185.

⁵⁰ *Patterson*, 491 U.S. at 185. Whether Brenda Patterson’s promotion met this test was never reached by the Supreme Court because the defendant had not challenged the applicability of § 1981 to that claim.

⁵¹ 42 U.S.C. § 1981 (1994).

⁵² See, e.g., H.R. REP. NO. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630 (“there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination”).

claims that arose before November 1991.⁵³ Thus, for some time, courts were busy interpreting *Patterson* as it applied to those cases, even though the case itself had been overruled by statute.⁵⁴

In *Patterson*'s wake, lower courts agreed that claims of racially motivated discharge were no longer cognizable under § 1981.⁵⁵ Most courts gave even broader effect to the Court's intent to narrow § 1981, finding it inapplicable to claims of wrongful transfer as well.⁵⁶

With respect to claims other than discharge, some courts tried to determine whether the allegedly discriminatory action created a "new and distinct relation," the touchstone identified by the Court in *Patterson*. The results were mixed. Some courts that undertook this inquiry rejected transfer claims, for example, on the theory that a transfer is "simply a continuation of a previous contractual relationship."⁵⁷ Others treated significant transfers as effecting a change in contractual status, thereby falling within § 1981's rubric.⁵⁸

The hardest category of cases involved failure-to-promote claims because the Supreme Court in *Patterson* had specifically suggested that such claims might remain cognizable under § 1981. Determining whether a particular wrongfully denied promotion would have created a "new and distinct relation," as the Court seemed to require under § 1981, was an endeavor described by courts and commentators alike

⁵³ See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

⁵⁴ A decade later, the non-retroactivity ceases to have much meaning, but for several years after *Patterson* was decided, new cases based on past conduct were affected. According to one commentator, the Court's decision in *Patterson* caused 825 of 961 then pending cases to be dismissed on the merits. See George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259, 262 (1995); see also H.R. REP. NO. 102-40(I), at 90 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 629 (statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense & Education Fund, Inc.) (noting that hundreds of race discrimination claims had been dismissed in the year following the Court's decision in *Patterson*).

⁵⁵ See, e.g., *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 493 (6th Cir. 1992); *Hayes v. Cmty. Gen. Osteopathic Hosp.*, 940 F.2d 54, 56 (3d Cir. 1991); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1257 (6th Cir. 1990). See also Taylor, *supra* note 54, at 299 n.181 (collecting cases). Ultimately, every circuit to consider the issue ruled that discriminatory discharge cases were not cognizable under § 1981. *Id.* at 299 n.182.

⁵⁶ See Taylor, *supra* note 54, at 294 n.155 (collecting cases).

⁵⁷ See *id.* at 294.

⁵⁸ See *id.* at 294-95.

as "hairsplitting."⁵⁹ In the end, courts looked for some substantial change in compensation, level of responsibility, and status before treating a sought-after promotion as protected by § 1981.⁶⁰ Indeed, Brenda Patterson herself was unable to sustain this burden, and thus her failure-to-promote claim was ultimately dismissed, despite the Supreme Court's encouraging words about her prospects for success.⁶¹ For all practical purposes, § 1981 was relegated to refusal-to-hire claims, the most difficult cases in which to prove discrimination.⁶²

II. SECTION 1981, AT-WILL EMPLOYMENT, AND THE SOURCE OF LAW

As courts began to hear cases involving post-1991 conduct, the emphasis shifted from understanding *Patterson* to understanding the effect of its reversal. One obvious consequence of Congress' overruling *Patterson* was that employees working pursuant to a contract could use § 1981 to challenge discriminatory conduct of their employers at any stage—including, of course, a discriminatory discharge. One of the issues repeatedly raised in litigation was whether § 1981 could also be used by *at-will* employees to challenge discriminatory discharges.⁶³ At the heart of these cases is the determination whether at-will employees have a sufficiently contractual relationship with their employers to bring them within the purview of § 1981, which applies only to discrimination in contracting.⁶⁴ The sticking point in contract

⁵⁹ See *id.* at 283 (collecting citations).

⁶⁰ See *id.* at 289.

⁶¹ See *Patterson v. McLean Credit Union*, 39 F.3d 515, 519 (4th Cir. 1994).

⁶² See, e.g., *Wright v. Southland Corp.*, 187 F.3d 1287, 1297 n.12 (11th Cir. 1999) (noting refusal-to-hire claims still cognizable after *Patterson*); Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination? The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 795 (1997) (stating that compared to discharge cases, "refusal-to-hire cases are much more difficult to prove where the number of applicants outnumbers positions available and where many factors unknown to the potential litigant could have been taken into consideration").

⁶³ Prior to *Patterson*, courts routinely applied § 1981 to at-will employees without considering the propriety of doing so. See *Hutchison*, *supra* note 42, at 226.

⁶⁴ The original provision of § 1981 refers to the making and enforcement of "contracts"; one of the provisions added in 1991 refers to incidents of a "contractual relationship." See 42 U.S.C. § 1981(a), (b) (1994).

terms, discussed in detail in Part III below,⁶⁵ is that at-will employment is terminable by either party without notice or cause—a feature that sets it apart from arrangements conventionally recognized as contracts.

In the course of considering this question, courts have paid little or no attention to the source of law, assuming for the most part that the answer can—and should—be found in state decisional reporters. This Part first describes the analysis undertaken by each of the five appellate courts that have considered the applicability of § 1981 to at-will employees, noting both the outcome reached and the source of law. It then raises the question whether courts should look to state or federal common law to define “contract” under § 1981. The touchstone of this inquiry is an analysis of 42 U.S.C. § 1988, a statute which governs the role of state law in construing federal civil rights acts.

A. *Federal Appellate Cases*

In the past three years, five federal appellate courts have considered whether at-will employees may invoke § 1981 to challenge racially motivated discharges. Four of these courts addressed the issue head-on, each holding that § 1981 protects at-will employees just as it protects employees working pursuant to a formal employment contract.⁶⁶ The fifth court considered, but did not decide the issue. However, in the course of its discussion, that court strongly suggested that at-will employees *would not* find protection against wrongful discharge under § 1981.⁶⁷ All five courts relied on state law to characterize the at-will employment relationship for § 1981 purposes.

⁶⁵ See *infra* notes 167-68, 176 and accompanying text.

⁶⁶ See *Lauture v. IBM*, 216 F.3d 258, 264 (2d Cir. 2000); *Perry v. Woodward*, 199 F.3d 1126, 1133-34 (10th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000); *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018-19 (4th Cir. 1999); *Fadeyi v. Planned Parenthood Ass'n*, 160 F.3d 1048, 1051-52 (5th Cir. 1998).

⁶⁷ See *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1034-35 (7th Cir. 1998).

1. The First Round of Decisions

The Fifth Circuit was the first to rule on whether § 1981 covers at-will employees. In *Fadeyi v. Planned Parenthood Ass'n*,⁶⁸ the plaintiff complained of racially discriminatory scheduling, allocation of office resources, and, ultimately, termination.⁶⁹ She also objected when she and another black employee facetiously were given applications for membership in the Ku Klux Klan. Important to the court's decision was Texas law, which clearly treats at-will employment as contractual in nature.⁷⁰ Just as voidable contracts, which are enforceable at one-party's option, are contracts nonetheless, so are contracts that either party may terminate at will.⁷¹ The court thus concluded that, under § 1981, "even though an at-will employee can be fired for good cause, bad cause, or no cause at all, he or she cannot be fired for an illicit cause."⁷² The court made clear that its decision relied on state law, noting in a footnote that it was not bound to follow any "federal case law interpreting at-will employment relationships in other states."⁷³

The Tenth Circuit followed suit in *Perry v. Woodward*,⁷⁴ a case in which the plaintiff filed a racial harassment suit under § 1981 because, among other things, she had been repeatedly chastised for hiring "hot blooded" Hispanics.⁷⁵ The court of appeals relied on New Mexico law, which characterizes at-will employment as a contract of indefinite duration. The contract consists of the employee's provision of services in exchange for the employer's payment of wages.⁷⁶ And although duration is not one of the terms of the contract, the contractual nature of the arrangement is sufficient to bring it within § 1981. The otherwise unfettered right of termination becomes therefore limited by that statute.⁷⁷ As with the Fifth Circuit,

⁶⁸ 160 F.3d at 1048.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1050-51.

⁷¹ *Id.*

⁷² *Id.* at 1051-52.

⁷³ *Fadeyi*, 160 F.3d at 1049 n.11.

⁷⁴ 199 F.3d 1126 (10th Cir. 1999).

⁷⁵ *Id.* at 1130-31.

⁷⁶ *Id.* at 1133.

⁷⁷ *Id.*

the court here made some casual references to Congressional intent and general principles of statutory interpretation, but, in the end, made its decision based on state contract law

Third in line, the Fourth Circuit decided *Spriggs v. Diamond Auto Glass*.⁷⁸ James Spriggs filed a § 1981 claim for racial harassment when his supervisor called him “dumb monkey” and “nigger,” leading him eventually to quit his job.⁷⁹ Like its sister circuits, the court relied on state law (Maryland) to characterize the relationship as contractual, despite the indefinite duration of the employment relationship. The contract consisted of a promise to pay in exchange for a promise to provide services.⁸⁰ The court thus found § 1981 to be broad enough to encompass at-will employment relationships because Maryland has defined them as contractual.

2. The Latest Decision

Recently, the Second Circuit joined these three federal appellate courts by concluding in *Lauture v. IBM*⁸¹ that at-will employees are protected by § 1981 from race discrimination in employment, resolving a long brewing split among district courts within that circuit.⁸² Plaintiff Jackie Lauture, an at-will employee, sued her employer, alleging a racially discriminatory discharge. The court of appeals ostensibly drew on the “ordinary meaning” of the word “contract,” garnered primarily from the *Second Restatement of Contracts*, to evaluate the at-will relationship between the plaintiff and her employer.⁸³ But the court also drew on New York’s treatment of at-will employment as a contractual relationship in other contexts.⁸⁴ Although the court suggested that § 1981 plaintiffs need not

⁷⁸ 165 F.3d 1015 (4th Cir. 1999).

⁷⁹ *Id.* at 1017 n.2.

⁸⁰ *Id.* at 1018.

⁸¹ 216 F.3d 258 (2d Cir. 2000).

⁸² Compare, e.g., *Moorer v. Grumman Aerospace Corp.*, 964 F. Supp. 665, 675-76 (E.D.N.Y. 1997) (at-will employees not covered by § 1981), *aff’d*, 162 F.3d 1148 (2d Cir. 1998) with *Hartzog v. Reebok Int’l Ltd.*, 77 F. Supp. 2d 478, 479-80 (S.D.N.Y. 1999) (at-will employees are protected by § 1981). See also *Hutchison*, *supra* note 42, at 214 (noting the “distinct split of opinion” within the Second Circuit).

⁸³ *Lauture*, 216 F.3d at 261.

⁸⁴ *Id.* at 262-63 (noting that an at-will employee may have a cause of action under New York law for tortious interference with employment relationships).

prove that their employment relationships conformed to state contract law, "as opposed to the ordinary common-law definition,"⁸⁵ it nonetheless proceeded to distinguish a case from another circuit because it was interpreting Washington rather than New York law.⁸⁶ And in the course of reviewing the decisions of its three sister circuits, the court referred to the "state law at issue" in each case⁸⁷—an odd statement given that the task of each court was to interpret a federal statute. In the end the court joined the growing consensus with the following explanation: "We do not see how the law of the state of New York requires a different result."⁸⁸ Applying this vague amalgamation of general common law and New York law, the court found Lauture's relationship with her employer to be sufficiently contractual for § 1981 purposes.

3. The Lone Dissenting Voice

Among federal appellate courts, only the Seventh Circuit has hesitated to find that § 1981 protects at-will employees from race discrimination. Although the court in *Gonzalez v. Ingersoll Milling Machine Company*⁸⁹ purportedly refused to consider plaintiff Juana Gonzalez' § 1981 claim because it was not properly before them,⁹⁰ it nonetheless addressed it in dicta. Because she was an at-will employee and "did not have any contractual rights regarding the term of her employment,"⁹¹ the court suggested, she could not claim protection under § 1981.⁹²

⁸⁵ *Id.* at 261.

⁸⁶ *Id.* at 261 n.4.

⁸⁷ *Id.* at 263.

⁸⁸ *Lauture*, 216 F.3d at 263.

⁸⁹ 133 F.3d 1025 (7th Cir. 1998).

⁹⁰ *Id.* at 1033 (holding that Gonzalez was barred from raising claims regarding her termination on appeal because she had failed to raise them in the court below).

⁹¹ *Id.* at 1035.

⁹² Later in the opinion, the court clarifies that its words are dicta: "However, we need not determine whether Gonzalez's at-will status provided adequate support for her § 1981 claim because even if we were to allow Gonzalez' § 1981 claim to stand, based on finding Gonzalez had a contractual relationship with Ingersoll, it would fail [because she could not prove intentional discrimination.]" *Id.* at 1035.

Thus, the Seventh Circuit diverged not only in its ultimate conclusion about the applicability of § 1981 to at-will employees, but also in its approach to the problem. The four other circuits each embarked on a search for an underlying contractual relationship. Once found, the courts then superimposed § 1981—and its prohibition on racial discrimination—on the relationship. With that approach, an at-will employment relationship remains terminable at-will, provided the termination does not violate § 1981's strictures. Thus the Fifth Circuit's mantra that an at-will employee can be fired for *no* cause, but not for an *illicit* cause.

But the Seventh Circuit apparently did not find Gonzalez' § 1981 claim invalid because the underlying employment relationship was not sufficiently contractual.⁹³ Instead, it concluded that § 1981 did not operate to prevent a racially motivated discharge because the employment relationship did not include a provision regarding the term of employment.⁹⁴ In other words, the court suggested that to challenge a racially motivated discharge under § 1981, an employee must be able to show that—as a matter of contract rather than statute—she had some protection against termination. Without a durational term for § 1981 to modify, it had no effect. Without contractual rights “regarding the term of her employment,” she could be laid off (and not recalled) on the basis of race, as she could for any other reason.⁹⁵

⁹³ In fact, the court seemed to concede that prior Seventh Circuit precedent treating at-will employment as contractual was correct. *Id.* at 1035 (discussing *McKnight v. Gen. Motors Corp.*, 908 F.2d 104 (7th Cir. 1990)).

⁹⁴ *Id.* at 1035.

⁹⁵ *Id.* There is some division among the district courts in the Seventh Circuit about whether to follow *Gonzalez*' dicta, but the majority have deviated from it, holding that at-will employees are covered by § 1981. Compare *Stone v. Am. Fed'n of Gov't Employees*, 135 F Supp. 2d 873, 875-76 (N.D. Ill. 2001) (declining to follow *Gonzalez*' dicta and holding that at-will employees are protected by § 1981) and *Riad v. 520 S. Mich. Ave. Assocs.*, 78 F Supp. 2d 748, 756-57 (N.D. Ill. 1999) (same) with *Payne v. Abbott Labs.*, No. 97-C-3822, 1999 U.S. Dist. LEXIS 2443, at *10-11 (N.D. Ill. Mar. 2, 1999) (declining to find at-will employees covered by § 1981 without additional evidence of an employment contract). The Seventh Circuit itself has not had occasion to revisit the question.

B. *Federal Common Law, § 1981, and the Role of State Law*

The sole question in these cases is whether an at-will employment relationship constitutes a "contract" for purposes of § 1981.⁹⁶ Because § 1981 contains no precise definition of contract, courts have scrambled to come up with one. They have looked primarily to state law to supply the needed definition, without considering whether that is the appropriate choice of law.⁹⁷

1. Federal Common Law

How should courts determine whether the term "contract," as used in § 1981, is broad enough to encompass at-will employment relationships? One possibility is federal common law. Although modern law students are taught early on that there is no such thing as *general* federal common law under the doctrine of *Erie v. Tompkins*,⁹⁸ there is still an important role for federal common law.⁹⁹ It is presumptively the source of law to be used, for example, in defining the rights and obligations of the federal government under nationwide federal programs.¹⁰⁰

⁹⁶ *Gonzalez* takes a bifurcated approach, discussed *supra*, which asks first whether there is an employment contract and second whether there is a durational term that can be modified by § 1981. See *Gonzalez*, 133 F.3d at 1034. One commentator advocates this approach. See Hutchison, *supra* note 42, at 240-44.

⁹⁷ See *supra* Part II.A.

⁹⁸ 304 U.S. 64 (1938). *Erie* and its progeny established the principle that federal courts hearing cases premised on diversity jurisdiction must apply state substantive law and federal procedural law. *Id.* at 78.

⁹⁹ See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 307-09 (1947) (noting distinction between the specifics of federal common law eradicated by *Erie* and those still alive and well afterward); see also Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964).

¹⁰⁰ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."); see also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (stating that when Congress has not spoken about an issue relating to a federal program, "*Clearfield* directs federal courts to fill the interstices of federal legislation according to their own standards" (citing *Clearfield*, 318 U.S. at 367)).

Federal common law is also presumptively the source of law to determine the meaning of a federal statutory term.¹⁰¹ As the Supreme Court explained in *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁰² “[W]e start, however, with the general assumption that ‘in the absence of a plain indication to the contrary, Congress when it enacts a statute is not making the application of the federal act dependent on state law.’ ”¹⁰³

The preference for relying on federal rather than state law to interpret federal statutes reflects the view that “federal statutes are generally intended to have uniform nationwide application.”¹⁰⁴ Relying on federal common law, the Supreme Court has many times over interpreted a federal statutory term in a way that is inconsistent with the law of the particular state in which the case was brought.

For example, the Supreme Court in *Holyfield* interpreted the word “domicile” in the Indian Child Welfare Act (“ICWA”), by reference to a uniform federal law, rather than the law of the state where a protected child is located.¹⁰⁵ The Court in that case was motivated by concerns about the lack of uniformity that would result from reliance on state law definitions of “domicile.”¹⁰⁶ It would mean not only that different Indian children were governed by different rules, but that different rules might apply to the same child over time if he was transported across state lines.¹⁰⁷

The Court in *Holyfield* also took into account its concern about the relations between Indian families and state authorities, noting that one of the primary purposes of the ICWA was to prevent states from exercising jurisdiction over some custody cases involving Indian children.¹⁰⁸ Allowing state law to control the interpretation of a Congressional enactment would potentially subvert the purpose behind it.

¹⁰¹ See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989); see also generally RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 762-70 (4th ed. 1996).

¹⁰² 490 U.S. 30.

¹⁰³ *Id.* at 43 (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 47.

¹⁰⁶ *Id.* at 43.

¹⁰⁷ *Holyfield*, 490 U.S. at 44.

¹⁰⁸ *Id.* at 45.

There are other examples as well. The Supreme Court in *Dickerson v. New Banner Institute*¹⁰⁹ held that the term "convicted," as used in the Gun Control Act of 1968, had to be interpreted according to federal law even though the predicate offense and punishment were defined by state law. Again, uniformity was cited as the motivating force behind the preference for federal over state law.¹¹⁰ Likewise the Court in *NLRB v. Hearst*¹¹¹ rejected an argument that the term "employee," as used in the Wagner Act, should be defined by state law. As the Court explained, in the course of holding that "employee" included independent contractors,

Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is intended to solve a national problem on a national scale. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.¹¹²

A decision that federal law is controlling does not, however, render state law irrelevant.¹¹³ Courts interpreting federal statutory terms look first for their "ordinary meaning," in light of the "object and policy" of the statutory scheme.¹¹⁴ State law may be important in determining the "ordinary meaning" of the words used.¹¹⁵ It may also be adopted as the federal rule if necessary to preserve intrastate rule

¹⁰⁹ 460 U.S. 103 (1983).

¹¹⁰ *Id.* at 111-12.

¹¹¹ 322 U.S. 111 (1944).

¹¹² *Id.* at 123. The Court's definition of "employee" was trumped three years later when Congress, in the Taft-Hartley Act, expressly excluded independent contractors from the definition. See Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 61 Stat. 136 (codified at 29 U.S.C. § 152(3) (1994 & Supp. IV 1998)).

¹¹³ See *Kimbell Foods*, 440 U.S. at 728 (explaining that although federal law controls, the Court must still decide "whether to adopt state law or to fashion a nationwide federal rule").

¹¹⁴ *Holyfield*, 490 U.S. at 46 (1989).

¹¹⁵ *Id.* at 47 ("That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine 'the ordinary meaning of the words used.'").

uniformity,¹¹⁶ to accommodate the interests of states more generally, or if nationwide uniformity is not important.¹¹⁷

Thus, in *Reconstruction Finance Corp. v. Beaver County*,¹¹⁸ the court defined "real property" as used in a federal statute under state law. Because the law permitted local taxation of the covered property, which guaranteed different approaches in different places, the presumption that Congress intended nationwide uniformity was not warranted.¹¹⁹ And adopting state law as the federal rule of decision did not threaten to frustrate any federal program.¹²⁰

The application of this body of law to our § 1981 question would point almost certainly to federal common law as the source from which the definition of contract should be drawn. Considerations of statutory purpose, the need for uniformity, and Supreme Court precedent all confirm this result.

A powerful case can be made that § 1981 is indeed a statute that requires a controlling, uniform federal interpretation. There is a strong tradition of federal involvement in anti-discrimination law, particularly in the context of employment, where § 1981 is most frequently invoked.¹²¹ In fact, § 1981 was specifically enacted as an antidote to the Black Codes of the southern states, designed to prevent recently freed black men from realizing their rights.¹²² Thus, the concerns present in *Holyfield* about states mistreating the protected group may operate here as well. Permitting the rights of at-will employees to be determined by

¹¹⁶ See, e.g., *Kimbell Foods*, 440 U.S. at 739 (resorting to state law regarding the priority of liens arising from federal programs to avoid disrupting expectations about priority from competing creditors).

¹¹⁷ See Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 412 (1997) (noting view of some commentators that "the interests of the states ordinarily deserve at least some consideration in the decision whether to fashion federal common law").

¹¹⁸ 328 U.S. 204 (1946).

¹¹⁹ *Id.* at 209.

¹²⁰ *Id.* at 210.

¹²¹ See, e.g., *NLRB v. Hearst*, 322 U.S. at 123.

¹²² See *supra* text accompanying notes 7-11.

state law may undermine Congress' clear intent to provide full and robust protection against race discrimination in employment and elsewhere.¹²³

The Supreme Court has interpreted other statutory terms in federal civil rights acts by reference to federal common law. For example, in *Burlington Industries v. Ellerth*, the Court relied on federal law to determine whether the term "employer" encompassed supervisory employees.¹²⁴ In so doing, the Court found state law and treatises, like the *Second Restatement of Agency*, instructive but not dispositive.¹²⁵

The Supreme Court's recent decisions in two cases involving reconstruction-era civil rights acts also rely primarily on federal law in defining statutory terms. First, in *Patterson*, the case in which the Court limited § 1981 to pre-formation conduct, the Supreme Court declined the Solicitor General's invitation to interpret the "make and enforce" language of § 1981 according to state contract law. The Court rejected the view that § 1981 "has no actual substantive content, but instead mirrors only the specific protections that are afforded under the law of contracts of each state."¹²⁶ The Court looked instead to the plain meaning of the statute to ultimately conclude that, as a matter of federal law, the "make and enforce" language limited § 1981 to pre-formation conduct.¹²⁷

Second, and more recently, the Court in *Haddle v. Garrison*¹²⁸ took a similar approach to interpreting § 1985, another civil rights act of the same era, which prohibits certain conspiracies to deprive individuals of rights.¹²⁹ In *Haddle*, the

¹²³ See *Burnett v. Grattan*, 468 U.S. 42, 55 (1984) (noting the "central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief").

¹²⁴ See 524 U.S. 742, 754-55 (1998); see also *NLRB v. Hearst*, 322 U.S. at 123 (refusing to define "employee" as used in the Wagner Act according to state law because it was designed to "solve a national problem on a national scale").

¹²⁵ *Burlington Indus.*, 524 U.S. at 754.

¹²⁶ *Patterson*, 491 U.S. at 164. Specifically, the Solicitor General argued that racial harassment should be actionable under § 1981 only if it amounted to a breach of contract under state law. *Id.*

¹²⁷ See *supra* text accompanying notes 41-45.

¹²⁸ 525 U.S. 121 (1998).

¹²⁹ See 42 U.S.C. § 1985(2) (1994). Section 1985 was originally enacted as the Civil Rights Act of 1871 to make the Ku Klux Klan vulnerable to suit for its racially motivated hostile acts. See *Monroe v. Pape*, 365 U.S. 167, 200 (1961).

Court was asked to determine whether a retaliatory firing of an at-will employee inflicted an injury to "person or property" as required by § 1985. Although the meaning of "property" is certainly something usually relegated to state law, the Court looked at a variety of general sources, including treatises and past federal decisions, to determine that an at-will employee did possess a sufficient property interest to come within § 1985.¹³⁰ The Court did refer to Georgia law, the state where the case was brought, but did so only by way of example.¹³¹ Thus, although it did so without discussion, the Court made use of federal common law and general principles of property law to define the relevant term. Concerns about uniformity and the relationship between states and their black citizens operate with equal strength under § 1985 and § 1981.

2. The Relevance of 42 U.S.C. § 1988

The automatic resort to federal common law to interpret § 1981 is complicated, however, by another federal statute, which directs courts interpreting the federal civil rights statutes to look at state law in some circumstances. Section 3 of the Civil Rights Act of 1866 stated that district court jurisdiction to hear claims under § 1981

shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, *or are deficient in the provisions necessary to furnish suitable remedies* and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States. ¹³²

¹³⁰ *Haddle*, 525 U.S. at 126.

¹³¹ *Id.* at 127.

¹³² 42 U.S.C. § 1988(a) (1994) (emphasis added). It is not just the existence of § 1988 that complicates matters, but also the utter clumsiness of the drafting. As Justice Clifford once noted, § 1988 is "a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which amounts to no more than a direction to a judge [to conduct proceedings] as well as he can." *Tennessee v. Davis*, 100 U.S. 257, 299 (1880) (Clifford, J., dissenting), *quoted in* Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 501 (1980).

Later codified as § 1988, and applied to all federal civil rights acts, this provision has come to be used as a source of law provision guiding enforcement of § 1981. Section 1981, like other civil rights statutes of its era, is meagerly drafted. Even as amended by the Civil Rights Act of 1991, it has no statute of limitations. It has no express provision for damages. It says nothing about whether claims survive a plaintiff's death. And, relevant to our purposes here, it gives no definition of contract.

The question, then, is whether § 1988 authorizes or requires that the definition of "contract" in § 1981 be gleaned from state law. That requires a determination that § 1988 applies in the first instance and that it mandates the importation of state contract law into § 1981. At stake in this issue is whether at-will employees in every state will be protected against racially discriminatory discharges by § 1981, or only in those states that treat at-will employment as a contractual relationship. There are states that have refused to view at-will employment relationships as contractual outside of the § 1981 context.¹³³ And those federal courts that have refused to apply § 1981 to at-will employees have done so precisely because state law does not permit it.¹³⁴

The Supreme Court has been agnostic on the appropriate breadth of § 1988, and academics have divergent views on its meaning.¹³⁵ It is clear that § 1988 neither creates

¹³³ See, e.g., *Thompson v. Bridgeport Hosp.*, No. CV 98352686, 2001 Conn. Super. LEXIS 1755, at *17 (Conn. Super. Ct. June 18, 2001) (denying at-will employee's breach of contract claim because under Connecticut law she was part of an at-will employment relationship, but "not part of a contract"); *McManus v. MCI Communications Corp.*, 748 A.2d 949 (D.C. 2000) (denying at-will employee's claim for tortious interference with contract because she did not have a "contractual" relationship).

¹³⁴ See, e.g., *Gatson v. Home Depot USA, Inc.*, 129 F. Supp. 2d 1355 (S.D. Fla. 2001) (noting uncertainty under Florida law whether at-will employees have a sufficiently contractual relationship to warrant protection under § 1981); *Tucker v. Cassidy*, No. 99C4001, 2000 U.S. Dist. LEXIS 9864, at *11-12 (N.D. Ill. July 12, 2000) (refusing to apply § 1981 to at-will employee because she was not working pursuant to a contract under Illinois law); *Jones v. Becker Group*, 38 F. Supp. 2d 793, 796 (E.D. Mo. 1999) (refusing to apply § 1981 to an at-will employee because Missouri law requires a statement of duration as an "essential element to an employment contract"), *aff'd*, No. 99-1827, 1999 U.S. App. LEXIS 38377 (8th Cir., Nov. 15, 1999).

¹³⁵ See generally Jack M. Beerman, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665 (1986); Eisenberg, *supra* note 132; Seth F. Kreimer,

an independent cause of action,¹³⁶ nor authorizes the "wholesale importation" of state causes of action into federal law.¹³⁷ But how far it does extend is unclear. The Court has, on the one hand, interpreted it to leave almost no room for principles of state law. In *Sullivan v. Little Hunting Park*,¹³⁸ for example, the Court construed § 1988 to mean that when a federal civil rights statute is "deficient," the court has the discretion to draw on either federal or state sources, "whichever better serves the policies expressed in the federal statutes."¹³⁹ Courts after *Sullivan* were barely nudged in the direction of state law. But a decade later, the Court decided *Robertson v. Wegmann*,¹⁴⁰ in which it read § 1988 as a mandatory directive to courts to fill in all statutory gaps with rules borrowed from state law.¹⁴¹ *Robertson* set the stage for a more inclusive approach to state law.¹⁴²

The Supreme Court has applied § 1988 to a § 1981 claim only a handful of times.¹⁴³ In *Runyon v. McCrary*, the Court refused to allow it to be used to authorize borrowing a state rule that would have allowed fee-shifting in a § 1981 case.¹⁴⁴ The Court next considered § 1988's relevance to § 1981 in *Burnett v. Grattan*.¹⁴⁵ In that case, the Court established a three-step process to determine when and whether to borrow a particular state rule under § 1988 and apply it to § 1981.¹⁴⁶

The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. PA. L. REV. 601 (1985); Wells, *supra* note 13.

¹³⁶ See *Moor v. County of Alameda*, 411 U.S. 693, 704 n.17 (1973).

¹³⁷ See *id.* at 703-04.

¹³⁸ 396 U.S. 229 (1969).

¹³⁹ *Id.* at 240.

¹⁴⁰ 436 U.S. 584 (1978).

¹⁴¹ *Id.* at 588.

¹⁴² See generally Eisenberg, *supra* note 132, at 502-07 (discussing tension between *Robertson* and *Sullivan*).

¹⁴³ See generally *Runyon v. McCrary*, 427 U.S. 160 (1976); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 712-23 (1989).

¹⁴⁴ 427 U.S. at 184-85. Ironically, § 1988 was itself amended to add a provision authorizing fee-shifting to prevailing plaintiffs under § 1981 and other civil rights statutes. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988(b) (1994 & Supp. V 1999)).

¹⁴⁵ 468 U.S. 42 (1984).

¹⁴⁶ *Id.* at 47.

First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."¹⁴⁷

In short, this test asks: whether to resort to state law in the first instance (deficiency); which rule of state law might be applicable (relevancy); and, if there is a relevant rule, whether it is consistent with federal law and policy (consistency).

In *Burnett*, the Court was considering whether to borrow and apply an administrative statute of limitations from Maryland law to an employee's § 1981 discrimination claim.¹⁴⁸ Prior to *Burnett*, the Court had already sanctioned borrowing state statutes of limitations because § 1981 does not contain its own.¹⁴⁹ Section 1981 is arguably "deficient" with respect to a limitations period, and, the Supreme Court held, § 1988 authorizes the use of state law to remedy such a deficiency

Thus, the real issue in *Burnett* was whether this was the appropriate state rule to govern claims under § 1981—a question of relevancy. The Court rejected the administrative statute of limitations because, under the second step of the Court's test, there were more closely analogous rules. The Court found the three-year personal injury statute of limitations in Maryland law more appropriate.¹⁵⁰ The result of the Court's approach in *Burnett* is that § 1981 plaintiffs in different states may be governed by different statutes of limitations.¹⁵¹ The cases on at-will employment under § 1981

¹⁴⁷ *Id.* at 47-48 (alteration in original) (citations omitted) (quoting 42 U.S.C. § 1988 (1982)).

¹⁴⁸ *Id.* at 46.

¹⁴⁹ *Id.* at 49.

¹⁵⁰ *Burnett*, 468 U.S. at 46 n.8.

¹⁵¹ The potentially great state variation was limited by later cases holding that courts must apply the state's general personal injury statute of limitations to federal civil rights acts claims, "whether or not the state itself would characterize the action as a personal injury claim." *Beerman*, *supra* note 135, at 58; *see also* *Wilson v. Garcia*, 471 U.S. 261, 275-76 (1985) (federal interest in uniformity requires that

do not seem to implicate the relevancy question because in most states there are not competing rules about whether to treat at-will employment as contractual. But the deficiency and consistency prongs of the *Burnett* test are both raised.

a. Does § 1988 Apply?

Before reaching the other prongs of the *Burnett* test, it must initially be determined that the federal statute is "deficient." Without a deficiency, § 1988 does not authorize the incorporation of state law and a consideration of other factors becomes superfluous.¹⁵²

Whether an at-will employee is protected by § 1981 turns on the meaning of the federal statutory term "contract." Is § 1981 "deficient" in failing to precisely define contract? If not, § 1988 does not apply and the conventional rules governing federal statutory interpretation apply instead.

There are some strong arguments that § 1988 does not apply to the question raised by *Lauture*—whether at-will employees are protected by § 1981 from race discrimination in employment—or to related questions. Section 1988 itself refers to the inability of federal law to "furnish suitable remedies."¹⁵³ Commentators have noted that § 1988 has in fact, whether by design or inadvertence, only been applied to remedial and enforcement provisions of the federal civil rights acts.¹⁵⁴ While the Supreme Court has never expressly said § 1988 should be so limited, it has only been applied, in the § 1981 context, to fill gaps relating to damages,¹⁵⁵ survival of actions,¹⁵⁶ and statutes

courts rely on general personal injury limitations period for federal civil rights claims); *Okure v. Owens*, 488 U.S. 235, 249 (1989) (rejecting argument that court should apply state's shorter intentional tort limitations period because doing so would be inconsistent with § 1983's "broad scope").

¹⁵² See, e.g., *Basista v. Weir*, 340 F.2d 74, 86 (3d Cir. 1965) (refusing to resort to state law on question of availability of punitive damages because federal civil rights act was not "deficient").

¹⁵³ See 42 U.S.C. § 1988 (1994).

¹⁵⁴ *Beerman*, *supra* note 135, at 58. One commentator, Theodore Eisenberg, argued that § 1988 should only be applied in cases that have been removed from state court pursuant to the civil rights removal provisions. See Eisenberg, *supra* note 132. That approach has not carried the day.

¹⁵⁵ See, e.g., *Sullivan*, 396 U.S. at 239-40 (suggesting that § 1988 authorizes the use of federal and state law to determine what damages are available under § 1982).

of limitations.¹⁵⁷ These deficiencies all arguably relate to remedies and enforcement, whereas the definition of "contract" clearly relates to a substantive provision of § 1981.

If § 1988 applies, it is also curious that it was not mentioned in either *Haddlee* or *Patterson*. In *Haddlee*, the Court was grappling with an almost identical problem under § 1985—whether at-will employees had a sufficient property interest to be hurt by a conspiratorial firing within the meaning of the statute.¹⁵⁸ Section 1988 clearly applies generally to § 1985,¹⁵⁹ which used terms it failed to define. Yet the Supreme Court made no reference to a § 1988 deficiency in analyzing the plaintiff's claim. It instead assumed that general principles of tort law—without dependence upon the law of any particular state—could guide their analysis.

The Court was similarly undeterred by § 1988 in *Patterson*. In interpreting the "make and enforce" language of § 1981, it paid attention to congressional intent, statutory structure, and general principles, which led to the narrow interpretation discussed above. Again, the Court made no mention of § 1988 or a statutory deficiency, completely ignoring § 1988.¹⁶⁰ These are only two examples of times the Supreme Court has ignored "the potential application of § 1988 to other aspects of civil rights actions that are not directly addressed by federal law"¹⁶¹

The meaning of the term "contract" in § 1981 is a very similar issue to those raised in *Haddlee* and *Patterson*. Thus one might expect § 1988 to be similarly inapplicable.

¹⁵⁶ See, e.g., *Robertson v. Wegmann*, 436 U.S. 584 (1978) (applying Louisiana survivorship law to § 1983 claim pursuant to § 1988).

¹⁵⁷ See, e.g., *Burnett*, 468 U.S. 42 (applying state statute of limitations to § 1981 claim pursuant to § 1988).

¹⁵⁸ See *Haddlee v. Garrison*, 525 U.S. 121 (1998).

¹⁵⁹ See *Moor*, 411 U.S. at 702 (section 1988 is "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights," including § 1985).

¹⁶⁰ *Patterson*, 491 U.S. at 183. There are other examples as well. In defining "person" for purposes of § 1983, the Supreme Court made no reference to § 1988 on state law at all. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

¹⁶¹ D. Bruce LaPierre, *Enforcement of Judgments Against States & Local Governments: Judicial Control Over the Power to Tax*, 61 GEO. WASH. L. REV. 299, 404 n.639 (1993) (noting other examples, such as the doctrine of official immunity under § 1983, where § 1988 was not invoked despite an apparent statutory deficiency).

Finally, a review of § 1988 cases reveals that it is only used when the court finds abject silence on a seemingly important or necessary issue. Section 1981's failure to contain any statute of limitations is one example.¹⁶² It is virtually inconceivable that the Court would allow a cause of action that allowed significant money damages to exist without a limitations period. Thus § 1988 was necessary as a gap-filler. The failure to state whether "contract" includes at-will employment relationships does not create such a deafening silence; thus, the role for § 1988 is not as obvious.

b. Does § 1988 Authorize the Adoption of
State Contract Law?

Even if § 1988 does apply to the at-will question because § 1981 is deficient in failing to define "contract," there is still an additional step before state law may be used to supply the definition. Each state rule that is borrowed pursuant to the authority of § 1988 must also be tested for consistency with overarching federal law and policy. Courts in many circumstances have refused to apply particular state rules because, under the *Burnett* test, they are inconsistent with federal law.¹⁶³

There are two potential inconsistencies in this context. First, if the law of a particular state refused to treat an at-will employment relationship as contractual,¹⁶⁴ thereby depriving such employees of the protection of § 1981, it would be inconsistent with federal law because, as explained in Part III below, federal common law principles support the treatment of at-will employment as contractual.

¹⁶² See *Burnett*, 468 U.S. at 42.

¹⁶³ See, e.g., *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966) (refusing to consider state law where it would be inconsistent with the federal policy underlying the cause of action); *Hardin v. CNA Ins. Cos.*, 103 F. Supp. 2d 1091, 1097 (S.D. Ind. 1999) (applying federal common law to determine the date on which the statute of limitations for a § 1981 claim begins to run); *Williams v. City of Oakland*, 915 F. Supp. 1074, 1079 (N.D. Cal. 1996) (refusing to apply California's survivorship law to a § 1983 claim because it was inconsistent with the broad, compensatory purposes of the federal civil rights laws).

¹⁶⁴ See *supra* note 133.

Second, because incorporation of state law creates the possibility that § 1981 will mean different things for different people, it may be inconsistent with the federal policy of strong, uniform enforcement of § 1981 and other statutes prohibiting employment discrimination.¹⁶⁵ If nationwide uniformity in interpretation is important to make the statute meaningful, state law should be looked to in fashioning a federal rule of decision rather than expressly incorporated.¹⁶⁶ That way, federal law can give effect to well-established state law principles accepted by a majority of states without giving unnecessarily subversive power to rogue states with different ideas.

In the end, the back-and-forth between federal and state law should operate under § 1988 much as it does outside it. That is, even where state law is not expressly adopted, it may be persuasive in fashioning the federal rule. Arguably the only relevance of making the threshold determination whether § 1988 applies is to gauge whether the presumption is in favor of federal law or state law. If § 1988 does not apply, federal law is presumptively controlling unless special circumstances make state law more appropriate. If § 1988 does apply, state law is presumptively operative unless it is inconsistent with federal law. With respect to the question of § 1981's applicability to at-will employment, the better approach is to leave § 1988 out of it.

III. WHY § 1981 SHOULD APPLY TO AT-WILL EMPLOYEES: A CONTRACTUAL ANALYSIS

Both state and federal common law ultimately provide the same conclusion to the question whether at-will employees should be protected by § 1981. An examination of state contract

¹⁶⁵ See *supra* notes 111-12, 123-24 and accompanying text.

¹⁶⁶ *Holyfield*, 490 U.S. at 43-45 ("[T]he cases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended."); *Kimbell Foods*, 440 U.S. at 728 ("federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules" (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966))); *Basista*, 340 F.2d at 86 ("Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended.").

law and commentary, as well as federal decisions, reveals that the four circuits who agreed that at-will employees deserve protection were correct. This Part explains why

A. *Basic Contract Law Principles*

There are two potential doctrines implicated in the effort to describe an at-will employment relationship as contractual: mutuality of obligation and definiteness.

1. Mutuality of Obligation

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.¹⁶⁷ Promises are enforceable (i.e., the law gives a remedy for their breach) when they are supported by legally sufficient consideration.

Under traditional consideration theory, a promise that is illusory—one that takes the form of a promise, but does not in fact oblige the promisor to do anything—is not sufficient consideration for a return promise or performance.¹⁶⁸ An agreement premised on *one* illusory promise is said to lack mutuality of obligation—a fancy way of saying one party's promise is not supported by consideration—and is therefore unenforceable. An agreement premised on *two* illusory promises simply lacks consideration and is also unenforceable. At-will employment is vulnerable to this characterization if one views the employer's promise as a promise to pay for services unless he chooses not to (and terminates the employee), and the employee's promise as a promise to work unless he chooses not to (and quits).

Modern courts, however, are slow to invalidate contracts based on a lack of mutuality, resorting instead to legal fictions to save agreements that are, in practice, useful. For example, a requirements contract, pursuant to which a

¹⁶⁷ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

¹⁶⁸ See generally JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.17 (rev. ed. 1993) (describing illusory promises) [hereinafter CORBIN ON CONTRACTS]; RESTATEMENT, *supra* note 167, at § 77, cmt. a ("Where the apparent assurance of performance is illusory, it is not consideration for a return promise.").

buyer agrees to buy all the widgets he needs from a single seller, lacks mutuality in the traditional sense because if he does not need any, he need not buy any. The buyer, then, has not obligated himself to do anything in exchange for the seller's promise to make adequate supplies available.

The needs of the modern economy have forced courts to relax the requirement of mutuality. Many businesses are unable to forecast their precise needs or output and, therefore, depend on requirements and outputs contracts. Accommodating this need, courts today uniformly agree that these are valid, enforceable contracts.¹⁶⁹ How do they justify this result?

One way to validate requirements and outputs contracts is to look harder for consideration. Courts might ask whether there is anything the buyer could do to breach the contract—a backwards way of assessing whether he has obligated himself to do anything. The answer for a requirements contract is that the buyer can breach the contract by buying some of his requirements from a second seller. He has, therefore, made a non-illusory promise, which can serve as consideration for the seller's promise. Courts will look hard to find express or implied limits on the promisor's putative free-way-out of the contract,¹⁷⁰ and almost any limit is sufficient to render a promise non-illusory.¹⁷¹

¹⁶⁹ See, e.g., *McMichael v. Price*, 58 P.2d 549 (Okla. 1936) (finding a promise to purchase all the sand he needed for his business non-illusory, despite the fact that the buyer could go out of business and evade his promise without penalty). See also U.C.C. § 2-306 cmt. 2 (1988) ("Under this Article, a contract for output or requirements [does not] lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure.").

¹⁷⁰ See, e.g., *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (finding an implied promise of best efforts on the part of the marketer to save an exclusive dealing contract); see also RESTATEMENT, *supra* note 167, at § 77 cmt. d ("A limitation on the promisor's freedom of choice need not be stated in words. It may be an implicit term of the promise, or it may be supplied by law."); see U.C.C. § 2-306 (2) (1988) ("A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.").

¹⁷¹ See RESTATEMENT *supra* note 167, at § 77, cmt. b, illus. 5 (right of termination conditioned upon thirty-days notice makes promise non-illusory because promisor is bound to terms of the contract for at least thirty days).

Apply the same analysis to at-will employment agreements. The employer can breach the agreement by refusing to pay for services already rendered. His promise is, then, not entirely illusory. But the same cannot be said about the employee. There is nothing the employee could do that would enable the employer to sue to enforce the contract. Thus, the use of implied limitations to remedy the lack of mutuality does not work in this context.

But the late Arthur Corbin, one of the preeminent contracts scholars, characterized the at-will employment arrangement differently. The employer is the offeror to a unilateral contract (promise exchanged for performance rather than a return promise).¹⁷² And although he can withdraw the offer at any time, the terms of the employer's offer obligate him to pay for any service rendered by the employee.¹⁷³

The employee, for his part, has not obligated himself to do anything, since he can perform or not perform under the terms of the offer.¹⁷⁴ But unilateral contracts do not, by definition, require mutuality of obligation.¹⁷⁵ The offeree is always free to make the choice between performance and non-performance. Corbin's analysis thus supports the conclusion that an at-will employment arrangement is indeed contractual.

2. Definiteness

Another stumbling block for at-will employment is the doctrine of definiteness, which states that the material terms of a contract must be specified with certainty in order for the agreement to be valid.¹⁷⁶ The argument is that an at-will

¹⁷² See CORBIN ON CONTRACTS, *supra* note 168, at 213.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ The requirement of mutuality is, even outside of this context, losing its hold on contract law. The *Restatement* ostensibly denounces it, though it mimics the requirement in other ways. *RESTATEMENT*, *supra* note 167, at § 79; see, e.g., *id.* at § 7; see also CORBIN ON CONTRACTS, *supra* note 168, at 224 (agreeing with a recent case advocating for the "interment" of the principle of mutuality and all the rules that flow from it).

¹⁷⁶ See *RESTATEMENT*, *supra* note 167, at § 33(1) (1979) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

employment relationship cannot be a valid contract because it does not specify a term of duration. The counterargument is that the relationship can be characterized as a contract of indefinite duration, which is valid despite the lack of a specific term regarding length.

Several courts have relied on the *Second Restatement of Contracts* ("*Second Restatement*") to support their conclusion that at-will employment is contractual. Although the illustration cited does not obviously support that proposition,¹⁷⁷ the *Second Restatement* may be read more generally to support the characterization of at-will employment as a contract of indefinite duration. Section 33 of the *Second Restatement*, which addresses contracts with uncertain terms, uses an illustration of A's promise to serve as B's chauffeur in exchange for \$100 per month. The contract is silent as to duration. According to the *Second Restatement*, this agreement is presumed to be a contract for one month, and, absent revocation, renewed at the end of each month. This characterization saves the indefinite contract unless, the illustration states, circumstances "show that such an agreement merely specifies the rate of compensation for an employment at will."¹⁷⁸ The question is whether the carve-out for at-will employment means it is not an enforceable contract, or that it is valid but the parties are not bound to continue performance a month at a time. Ultimately, this illustration does little to advance the analysis of whether the at-will employment relationship qualifies as a contract.

Comment (d) to § 33 of the *Second Restatement* does, however, seem to suggest that a truly at-will arrangement qualifies as a contract. "Valid contracts are often made which do not specify the time for performance. When the contract calls for successive performances but is indefinite in duration, it is commonly terminable by either party, with or without a requirement of reasonable notice."¹⁷⁹ This provision, of course,

¹⁷⁷ See, e.g., *Lauture*, 216 F.3d at 262 (citing RESTATEMENT, *supra* note 167, at § 33 cmt. d, illus. 6 for the proposition that an at-will employment agreement is enforceable as a contract of indefinite duration); *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018 (4th Cir. 1999) (same).

¹⁷⁸ RESTATEMENT, *supra* note 167, at § 33 cmt. d, illus. 6

¹⁷⁹ *Id.* § 33 cmt. d.

suggests that an at-will employment relationship, which fits this description, is a valid contract.

But in other instances, the *Second Restatement* wavers in its commitment to the notion that at-will employment is contractual by refusing to apply general rules of contract. For example, in § 188, which deals with the validity of non-compete clauses, comment (g) off-handedly describes “the case of employment at will,” as one where “no contract of employment is involved.”¹⁸⁰

The *Uniform Commercial Code*, though not applicable to employment contracts, recognizes an arrangement akin to at-will employment as a valid contract. Section 2-309 provides that “[w]here the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party”¹⁸¹

Taken together, most general commentary seems to accept the notion that an at-will employment arrangement can be a valid contract, even though it sometimes has to stretch basic principles of contract law to reach that conclusion.

B. *State Contract Law*

State courts are not, of course, always restrained by basic principles of contract law. In a variety of contexts, without much discussion of contract doctrine, courts have assumed that at-will employment relationships are contractual in nature.

There has been considerable litigation about whether employee manuals and handbooks devolve rights on employees. With respect to at-will employees, this issue arises when a handbook outlines disciplinary procedures that include, for example, hearings and other incidents of due process. The at-will employee, in receipt of such a document, tries to argue that the employer’s right of termination—a central incident of the at-will relationship—is now limited. For an employee who is terminable at-will, courts take one of two approaches to determining whether the employer is bound to follow the

¹⁸⁰ *Id.* § 188 cmt. g.

¹⁸¹ UNIFORM COMMERCIAL CODE § 2-309(2) (2001).

procedures—or, in the alternative, is free to fire at will. Some courts ask whether the handbook *creates* an employment contract that limits the employer's ability to terminate the employee without adhering to the process outlined in the handbook.¹⁸² With this approach, the nature of the underlying at-will relationship without the benefit of the handbook is irrelevant.

But other courts ask, instead, whether the handbook adds a term to an existing contractual, albeit terminable-at-will relationship. The effect of a handbook, then, may be to modify or change the existing contractual relationship.¹⁸³ Implicit in this approach is an acknowledgment that an at-will employment relationship is contractual, despite the fact that the right not to be terminated is not one of the contract's terms.¹⁸⁴

Courts have also broached the issue of how to characterize the contractual status of at-will employment for tort law purposes. Specifically, they have considered whether an at-will employee can bring a suit alleging tortious interference with a contract, which includes, as an element of proof, that a valid contract exists. Several courts have permitted at-will employees to maintain a tortious interference claim,¹⁸⁵ though some apply a higher standard to such

¹⁸² See, e.g., *Jackson v. Georgia-Pacific Corp.*, 685 A.2d 1329, 1334 (N.J. Super. Ct. App. Div. 1996) (stating that an employee handbook can, depending on certain criteria, create an implied contract of employment that protects an at-will employee).

¹⁸³ One of the niceties of contract law ignored by most of these cases is that a handbook given *after* employment has begun is not supported by consideration because the employee has given nothing in return. Thus, a pure contract analysis would never enforce promises made therein. The unilateral contract analysis, discussed *supra*, might save such promises, however. See, e.g., CORBIN ON CONTRACTS, *supra* note 168, at § 6.2 ("where the employer promise[s] job security through restrictions on the power to terminate the employment, the employee's services provide consideration for a unilateral contract").

¹⁸⁴ See, e.g., *Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999, 1006 (M.D. Tenn. 1993) (recognizing that "an employee handbook may, under certain circumstances, become a part of the contract" for an at-will employee).

¹⁸⁵ See, e.g., *Albert v. Loksen*, 239 F.3d 256, 276 (2d Cir. 2001) (finding an at-will employee's claim for tortious interference actionable); *Terhune v. Frank*, 1993 WL 316006 (W.D. Mich. Apr. 23, 1993) (same); *Nelson v. Fleet Nat'l Bank*, 949 F. Supp. 254, 261 (D. Del. 1996) (predicting that Delaware would recognize a tortious interference claim brought by an at-will employee); *Keith v. Mendus*, 661 N.E.2d 26, 32-33 (Ind. Ct. App. 1996) (same); *GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs.*, 99 Cal. Rptr. 2d 665, 676 (Cal. Ct. App. 2000) ("It is well established that the

claims.¹⁸⁶ Implicit in these cases again is recognition of the underlying relationship as being contractual in nature.

At-will employees have also been permitted to sue their employers for breach of contract. Termination without cause is not, of course, a breach of an at-will employment agreement, but the failure to pay wages or promised benefits may be.¹⁸⁷ This approach is consistent with the *Second Restatement*, which defines a contract as "a set of promises for the breach of which the law gives a remedy"¹⁸⁸ By allowing an employee to bring a breach-of-contract action, courts are recognizing that the relationship is contractual, despite the lack of guarantees about duration. In miscellaneous other contexts as well, courts have treated at-will employment as a contract or made pronouncements about the contractual nature of the relationship.¹⁸⁹

at-will nature of a contract does not preclude a tortious interference claim."). *But see* Kadco Contract Design Corp. v. Kelly Servs., Inc., 38 F. Supp. 2d 489, 494 (S.D. Tex. 1998) (refusing to recognize a claim of tortious interference by an at-will employee); Fellhauer v. City of Geneva, 568 N.E.2d 870, 878-79 (Ill. 1991) (recognizing an at-will employee's claim for tortious interference with a "legitimate expectancy of continued employment," but not with a contract).

¹⁸⁶ See, e.g., *Water Dev. Co. v. Bd. of Water Works*, 488 N.W.2d 158, 162 (Iowa 1992) (requiring a showing of "substantial evidence of a predominant motive on the part of [the defendant] to terminate the [contract] for improper reasons").

¹⁸⁷ See, e.g., *Lane v. Ogden Entm't, Inc.*, 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998) (permitting the plaintiff to bring a § 1981 claim for failure to receive a promotion).

¹⁸⁸ RESTATEMENT, *supra* note 167, at § 1.

¹⁸⁹ See, e.g., *McKnight*, 908 F.2d at 109 ("Employment at will is not a state of nature but a continuing contractual relation."); *EEOC v. Chestnut Hill Hosp.*, 874 F Supp. 92, 96 (E.D. Pa. 1995) (finding an implied duty of good faith inherent in every contract, including those for at-will employment); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 614 A.2d 1021, 1030 (Md. Ct. Spec. App. 1992) ("In Maryland, at-will employment is a contract of indefinite duration that can be terminated at the pleasure of either party at any time."); *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (same). Many courts have permitted at-will employees to bring a claim for fraudulent inducement—typically a contract formation defense—when the employer led them to accept the position through misrepresentations. Implicit in the recognition of this defense, again, is the contractual nature of the at-will employment arrangement. See, e.g., *Franz v. Iolab, Inc.*, 801 F Supp. 1537, 1542 (E.D. La. 1992). Under the Texas Whistleblower Act, at-will employees have been held to work under contract. See *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1181 (5th Cir. 1992).

C. *The Supreme Court on Contracts*

The Supreme Court has implicitly resolved the question whether § 1981 applies to at-will employees on two separate occasions. First, in *Patterson* itself, the plaintiff was an at-will employee.¹⁹⁰ Although the Court used her case as an opportunity to limit § 1981's applicability to contract formation, it implicitly recognized that the underlying employment relationship was contractual in nature. Recall that in *Patterson* the Court hinted that the plaintiff's failure-to-promote claim might fall within the newly constricted § 1981 if it involved formation of a "new and distinct relation,"¹⁹¹ or, in other words, if the employer's action could be fairly described as a "refusal to enter the new contract."¹⁹² Implicitly, the Court was treating the underlying at-will relationship as a contract, and the putative promotion as a new contract.

Then, in 1998, the Court decided *Haddle v. Garrison*,¹⁹³ a case involving the scope of another federal civil rights statute, § 1985.¹⁹⁴ Section 1985 protects against conspiracies to deprive individuals of their civil rights. The question presented in *Haddle* was whether it could be used by an at-will employee to challenge a conspiratorial firing.¹⁹⁵ At issue was the requirement of § 1985 that the plaintiff suffer "actual injury" to "person or property." The employer argued (and the district and appellate courts agreed) that because an at-will employee has no right against termination, he suffers no such injury when he is fired, regardless of whether it was induced by a prohibited conspiracy.¹⁹⁶

The Court looked to tort law to determine whether an at-will employee deprived of employment suffers actual harm. Relying primarily on a treatise, it concluded that malicious or other wrongful discharge by an employer could be actionable,

¹⁹⁰ *Patterson*, 491 U.S. at 221 (Stevens, J., concurring in part and dissenting in part).

¹⁹¹ *Id.* at 185.

¹⁹² *Id.*

¹⁹³ 525 U.S. 121, 126 (1998).

¹⁹⁴ See *supra* notes 128-31, 158-59 and accompanying text.

¹⁹⁵ Specifically, the plaintiff alleged that his employer conspired to have him fired from his job in retaliation for obeying a grand jury subpoena. *Haddle*, 525 U.S. at 122.

¹⁹⁶ *Id.* at 123-24.

regardless of "whether the employment was for a fixed term not yet expired or is terminable at the will of the employer."¹⁹⁷ But the Court stopped short of holding, as a matter of federal law, that an at-will employment relationship is strictly contractual. Instead, it described Haddle's claim as "a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations."¹⁹⁸

It is true that at-will employees might be able to maintain a tort claim in some states for third-party interference without showing that the underlying relationship qualifies as a contract. The cause of action in many states includes interference with a prospective business relation as well as a contract per se. And for purposes of § 1985, the Court needed only to find that the plaintiff had *some* interest that could be tortiously interfered with, not necessarily that the interest was contractual in nature. But the case the Court primarily relied on to illustrate this point in fact recognized that an at-will employee has a "valuable contract right."¹⁹⁹ The Court's analysis thus provides some additional support for the conclusion that at-will employment relationships are contractual.

The bulk of the authority supports the same conclusion: at-will employees function in a contractual relationship with their employers that is sufficient to render them protected by § 1981.

IV WHY § 1981 MATTERS

Whether § 1981 applies to at-will employees is a matter of some significance. A majority of American employees work at-will.²⁰⁰ Forty states recognize at-will employment,²⁰¹ and

¹⁹⁷ *Id.* at 126 (quoting 2 THOMAS COOLEY, LAW OF TORTS 589-591 (3d ed. 1906)).

¹⁹⁸ *Id.* at 126.

¹⁹⁹ *Id.* at 127 (quoting *Ga. Power Co. v. Busbin*, 250 S.E.2d 442, 444 (1978)).

²⁰⁰ See John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 HARV. J. L. & PUB. POL'Y 555, 556 (1997) ("Since the start of the twentieth century, the majority of employment relationships in the United States have been governed by the common law employment-at-will presumption.").

most of those indulge a presumption of at-will employment in the absence of clear evidence that the parties agreed to a specific term of employment.²⁰² Section 1981's applicability to those workers is not, then, something to be ignored. But given the often parallel protection provided by Title VII, the need for § 1981 is worth further consideration. This Part looks first at doctrinal similarities and differences between the two statutes, and then at some empirical evidence about how § 1981 is actually used in practice.

A. *A Statutory Comparison*

1. Coverage

For some at-will employees, § 1981 provides the only available protection against race discrimination in employment. Title VII applies only to employers that have at least fifteen full-time employees.²⁰³ Based on extrapolation from census data, nineteen percent of the American workforce is not covered by Title VII.²⁰⁴ But even where employees have

²⁰¹ See Gary Minda, *Employment At Will in the Second Circuit*, 52 BROOK. L. REV. 913, 915 (1986); see also Hutchison, *supra* note 42, at 208.

²⁰² See, e.g., *Gonzalez*, 133 F.3d at 1034 ("Under Illinois law, an employer-employee relationship without an explicit durational term is presumed to be an at-will relationship.").

²⁰³ See 42 U.S.C. § 2000e(b) (1994). Title VII is of course broader than § 1981 in that it protects against discrimination on bases other than race. See *id.* at 42 U.S.C. § 2000e-2(a)(1).

²⁰⁴ This method for determining the number of employees without Title VII protection is borrowed from Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602, n.42 (1988). The authors of that article conducted a comprehensive study of § 1981 litigation, discussed *supra*. Their method, which in 1988 led them to estimate that fourteen percent of the workforce and eighty-six percent of employers are covered by § 1981 but not Title VII, is based on census data. County business patterns data lists the number of employees who work for different size employers as well as the number of employers who have different numbers of employees. Because a single category includes employers with ten to nineteen employees, they added the number of employers with fewer than ten employees and half of the employers from the category "ten to nineteen employees" to estimate the number of Title VII-covered employers. Using that same approach, I estimate that in 1999, nineteen percent of employees (21 million workers) and eighty percent of employers are not covered by Title VII. See U.S. Census Bureau, U.S. Dept of Commerce, *County Business Patterns 1999*, at 3 (2001), available at

protection under both § 1981 and Title VII, there are other meaningful differences that make § 1981 important.

2. Administrative Exhaustion

Section 1981 claims are not subject to any administrative exhaustion requirements, unlike those brought under Title VII. Title VII plaintiffs must first file complaints with the Equal Employment Opportunity Commission ("EEOC") or a state work-sharing organization, give the EEOC the opportunity to investigate and urge conciliation of the claims, and then wait for EEOC permission to sue. Only then can a Title VII plaintiff turn to a court for relief.²⁰⁵ Claims under § 1981, in contrast, can be brought directly to court. The ability of plaintiffs alleging race discrimination to bypass the EEOC's conciliation scheme simply by bringing their complaints under § 1981 prompted the Supreme Court to take a serious look at whether § 1981 ought to apply to employment discrimination. But, in *Railway Express*, the Court acknowledged the overlap and its potential to undermine Title VII's administrative scheme, but nonetheless permitted plaintiffs to continue pursuing either or both avenues of relief.²⁰⁶

3. Statutes of Limitations

Title VII requires that plaintiffs file complaints with the EEOC within either 180 or 300 days, depending on whether the complaint goes to the EEOC directly or to a state work-sharing organization, respectively.²⁰⁷ Section 1981, in contrast, does not impose a particular statute of limitations. The

<http://www.census.gov/prod-/2001pubs/cbp99/cbp99-1.pdf>. (last visited Jan. 21, 2002).

²⁰⁵ See 42 U.S.C. § 2000e-5 (1994).

²⁰⁶ 421 U.S. at 461. Although § 102 of the Civil Rights Act of 1991 states that damages under Title VII can be recovered only if the complainant "cannot recover" under § 1981, 42 U.S.C. § 1981A(a)(1) (1994), the EEOC has taken the position that it bars double recovery for the same injury, but not the simultaneous pursuit of claims under both statutes. See ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE CIVIL RIGHTS ACT OF 1991 (July 14, 1992) (interpreting "cannot recover" language of § 1981A).

²⁰⁷ 42 U.S.C. § 2000e-5(e) (1994).

Supreme Court has held that § 1981 claims should be governed by state law,²⁰⁸ and that the most analogous limitations period is the one that governs residual or general personal injury rather than intentional torts.²⁰⁹ In many states, this approach means that the statute of limitations under § 1981 is considerably longer than that under Title VII.²¹⁰ In *Patterson*, for example, the plaintiff pursued her claim under § 1981 precisely because she filed too late to bring it under Title VII.²¹¹

4. Proof Structure

Under Title VII, there are two proof structures plaintiffs use to show disparate treatment discrimination. The first is a pretext model, which requires the plaintiff to make out a prima facie case of discrimination. To support a claim of a racially motivated failure-to-hire, the plaintiff must prove: (i) he belongs to a racial minority; (ii) he applied for and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected for the position; and (iv) thereafter, the employer continued to seek applicants with complainant's qualifications.²¹² The employer then bears a burden of production—which requires it to come forth with legitimate non-discriminatory reasons for its actions. The plaintiff, who has at all times retained the burden of proof, can win the case either by disproving the reason proffered by the employer or introducing other evidence of discrimination.²¹³ The jury then

²⁰⁸ See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987) (holding that § 1981 claims are governed by the limitations period prescribed for personal injury under state law); see also *supra* notes 148-51 and accompanying text.

²⁰⁹ See *Owens v. Okure*, 488 U.S. 235 (1989); see *supra* notes 150-51 and accompanying text.

²¹⁰ See, e.g., *Morse v. Univ. of Vt.*, 973 F.2d 122, 126 (2d Cir. 1992) (noting that § 1981 claims in New York are governed by the three-year personal injury statute of limitations); *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 131 (2d Cir. 1996) (applying Connecticut's three-year personal injury statute of limitations to § 1981 claim). The statute of limitations under § 1981 is not, however, tolled by filing an administrative claim with the EEOC under Title VII. See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975).

²¹¹ See 805 F.2d at 1144 n.* ("presumably for statute of limitations reasons, *Patterson* did not assert a claim under Title VII of the Civil Rights Act of 1964").

²¹² See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²¹³ *Id.* at 802-03.

has the opportunity to decide whether or not the employer violated Title VII.²¹⁴ Following the Supreme Court's lead in *Patterson*,²¹⁵ most courts have applied this proof structure to § 1981 claims as well.²¹⁶

Title VII also allows a plaintiff with some direct evidence of discrimination to proceed under an alternative proof structure, labeled "mixed-motive." Faced with the plaintiff's evidence that race was "a motivating factor" in the adverse employment decision, the employer must prove (not just produce evidence) that it would have made the same decision even if race had not been a factor.²¹⁷ Initially, this showing by the employer was sufficient to avoid liability entirely.²¹⁸ But Congress amended Title VII in 1991 to provide that an employer who succeeds in that endeavor is still liable for committing discrimination, but can avoid paying money damages for its violation.²¹⁹ The plaintiff can still seek declaratory and injunctive relief, as well as attorneys' fees as the "prevailing party."

Although it seems clear that § 1981 plaintiffs may rely on a mixed-motive theory to prove discrimination,²²⁰ it is not clear whether the pre- or post-1991 rules regarding liability and available remedies will be applied. The Civil Rights Act of 1991, which changed the mixed-motive proof structure, did not explicitly amend § 1981. Most circuits, therefore, continue to hold that a defendant who makes the appropriate showing will be excused from both liability and damages.²²¹ Such

²¹⁴ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 140 (2000).

²¹⁵ See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (applying the pretext proof structure to an employment discrimination claim brought under § 1981).

²¹⁶ See, e.g., *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001); *Bass v. Bd. of County Comm'rs*, 242 F.3d 996 (11th Cir. 2001).

²¹⁷ See 42 U.S.C. § 2000e(2)(m) (1994).

²¹⁸ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989).

²¹⁹ See 42 U.S.C. § 2000e-2(m) (1994).

²²⁰ This assumption comes from *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), a decision which permits § 1983 defendants to prove that a challenged employment action would have been taken for legitimate reasons separate and apart from any discriminatory motive.

²²¹ See, e.g., *Pulliam v. Tallapoosa County Jail*, 185 F.3d 1182, 1184 (11th Cir. 1999). But see *Lewis v. American Foreign Serv. Ass'n*, 846 F. Supp. 77 (D.D.C. 1993) (holding that CRA 1991 provisions regarding remedies in mixed-motive cases are applicable to § 1981 claims).

an interpretation makes § 1981 a less desirable cause of action for mixed-motive plaintiffs.

5. Remedies

Plaintiffs who prevail under § 1981 are entitled to equitable relief and monetary damages.²²² Although Title VII plaintiffs are now entitled to these same types of remedies,²²³ some meaningful differences remain. Damages under Title VII, for example, are capped according to the size of the defendant employer.²²⁴ Damages under § 1981 are not similarly limited,²²⁵ and awards of backpay are not limited under § 1981 to two years, as they are under Title VII.²²⁶

There may also remain some differences in the availability of punitive damages under the two statutes. Under § 1981a, the statutory provision making monetary damages available for violations of Title VII, punitive damages may be awarded when plaintiff shows "that the respondent engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual."²²⁷ In 1999, the Supreme Court interpreted § 1981a to provide an additional limitation on punitive damages. In *Kolstad v. American Dental Ass'n*,²²⁸ the Court held that punitive damages may not be imposed where liability is vicarious based on the acts of a supervisor or agent whose discriminatory or harassing conduct is contrary to the employer's efforts to comply with Title VII.²²⁹

Section 1981a does not expressly amend § 1981. Prior to 1991, courts were deeply divided about the proper standard for punitive damages under § 1981, a statute with no separate

²²² *Johnson*, 421 U.S. at 460 (section 1981 plaintiffs are "entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages").

²²³ See 42 U.S.C. § 1981a(b) (1994).

²²⁴ 42 U.S.C. § 1981a(b)(3) (1994). Title VII plaintiffs won a recent victory in *Pollard v. E.I. DuPont de Nemours*, 532 U.S. 843 (2001), in which the Supreme Court held that awards of front pay were not subject to the statutory cap on damages.

²²⁵ 42 U.S.C. § 1981a(b)(4) (1994).

²²⁶ *Johnson*, 421 U.S. at 460.

²²⁷ See 42 U.S.C. § 1981a(b)(1) (1994).

²²⁸ 527 U.S. 526 (1999).

²²⁹ *Id.* at 540-46.

provision governing punitive damages. Some courts required evidence of some egregious misconduct, beyond mere intentional discrimination, to justify an award of punitive damages.²³⁰ Others found that simple proof of intentional discrimination, a mere violation of the statute, is sufficient to put the request for punitive damages to the jury.²³¹ But at least one of the latter cases was overruled in light of *Kolstad*.²³² Whether *Kolstad* will universally be understood to limit claims for punitive damages under § 1981, too, is unclear.

6. Jury Trials

The jury trial right for § 1981 plaintiffs is rooted in the Seventh Amendment, which preserves the right to trial by jury in “suits at common law.”²³³ Claims brought under § 1981 fall within that category.²³⁴ Prior to 1991, Title VII plaintiffs were not entitled to a jury trial because the relief available to them was exclusively equitable.²³⁵ But the Civil Rights Act of 1991 made it possible for victims of intentional discrimination to seek monetary damages—legal relief—and concomitantly granted them a right to jury trial.²³⁶ Thus, today, there is no meaningful difference in the jury trial right under either statute.

²³⁰ See, e.g., *Hampton v. Dillard Dep’t Stores, Inc.*, 247 F.3d 1091, 1115 (10th Cir. 2001) (“the standard for punitive damages for discrimination [under § 1981] is that the discrimination must have been malicious, willful, and in gross disregard of plaintiffs’ rights”) (quoting *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir. 1989)); *Stephens v. S. Atlantic Cannery, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (requiring discrimination that “constitutes reprehensible and abhorrent conduct”); *Beauford v. Sisters of Mercy-Province*, 816 F.2d 1104, 1109 (6th Cir. 1987) (punitive damages are generally “limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant”).

²³¹ See, e.g., *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (requiring only proof of “intentional wrongdoing”), *overruled in part*, *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999).

²³² See *Iacobucci*, 193 F.3d at 27 (overruling *Rowlett* to the extent it made punitive damages available under § 1981 based solely on intentional wrongdoing).

²³³ U.S. CONST. amend. VII; see also *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990).

²³⁴ *Id.* at 550 (assuming that claims brought under § 1981 are legal in nature and, therefore, deserving of a right to jury trial).

²³⁵ See, e.g., *Lehman v. Nakshian*, 453 U.S. 156 (1981).

²³⁶ 42 U.S.C. § 1981a(c) (1994).

7 Potential Plaintiffs and Defendants

Although in most respects Title VII is considerably broader than § 1981—as it protects against discrimination on the basis of sex, religion, color, and national origin, as well as race²³⁷—independent contractors are protected by the latter but not the former.²³⁸

Section 1981 allows for more potential defendants than Title VII.²³⁹ Supervisors who commit discriminatory acts in violation of § 1981 can be held individually liable.²⁴⁰ This is in stark contrast to court interpretations of Title VII, which have uniformly held that the statute does not permit individual liability.²⁴¹

Except with respect to state and local governments, entity liability under § 1981 is roughly coextensive with Title VII. Under Title VII, “employer” is defined to include both the employer and its agents. The employer is automatically liable for any tangible discriminatory act taken by a supervisor

²³⁷ Section 1981 protects individuals of any race from discrimination on the basis of race or ancestry, but not national origin or alienage status directly. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (whites as well as blacks can assert rights under § 1981, even though the statute secures to all the same contracting rights as “white citizens”); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

²³⁸ See, e.g., *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999).

²³⁹ One exception to this is with respect to federal employees, who may sue under § 1981 only when they are not covered by Title VII. See *Brown v. Gen. Servs. Admin.*, 425 U.S. 820 (1976). Title VII, as amended in 1991, applies to most federal employees. See 42 U.S.C. §2000e-16 (1991).

²⁴⁰ See, e.g., *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997) (permitting individual liability against employees who have the authority to act on behalf of an employer with respect to making and enforcing contracts); *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) (permitting individual liability under § 1981); *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 753 (7th Cir. 1985); *Hicks v. IBM*, 44 F. Supp. 2d 593, 597 (S.D.N.Y. 1999) (permitting supervisors involved in the discriminatory activity to be held individually liable under § 1981); see also *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (permitting, without discussion, individual liability under § 1981).

²⁴¹ See *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998) (no individual liability under Title VII); *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996) (same); *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995) (same); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995) (same); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995) (same); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995) (same).

against an employee.²⁴² This is so because, under traditional agency principles, an employer is held responsible for the acts of its agents undertaken within the scope of employment or when aided by the agency relation. When a supervisor refuses to hire, demotes, or fires an employee on the basis of race, he is acting as the employer's agent and therefore rendering him liable. The same approach is generally taken under § 1981.

One difference between Title VII and § 1981 may relate to the liability of state and local governments for racially discriminatory employment actions. The Civil Rights Act of 1991 has muddled this area somewhat. Prior to 1991, the Supreme Court had severely limited the liability of state and local governments under § 1981. In *Jett v. Dallas Independent School District*,²⁴³ the Court held, drawing on its prior interpretation of § 1983, that a plaintiff must show that a § 1981 violation was undertaken pursuant to an official custom or policy of the governmental entity being sued.²⁴⁴ This heightened showing made governmental liability more elusive. But in 1991, Congress added a provision to § 1981, making

²⁴² See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70-71 (1986) ("courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions"); *Burlington Indus.*, 524 U.S. at 760 (holding employer automatically liable for tangible employment actions). This holding almost certainly applies to race. See, e.g., EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* at 4 (Jun. 21, 1999), available at <http://www.eeoc.gov/docs/harassment.html> (last visited Nov. 9, 2001) (noting that employer liability rules set forth in *Burlington Indus.* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), apply to discrimination on all protected bases); *Richardson v. N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426 (2d Cir. 1999) (holding that rules of liability apply to racial harassment); *Allen v. Mich. Dep't of Corr.*, 165 F.3d 405 (6th Cir. 1999) (same). A different rule of liability applies to harassment (racial or otherwise) that does not result in a tangible employment action. There, the employer's liability is subject to an affirmative defense based on efforts to prevent and correct harm and based on the victim's use of available grievance procedures. See *Faragher*, 524 U.S. 775 (1998).

²⁴³ 491 U.S. 701 (1989).

²⁴⁴ Arguably, this case also meant that states could not be sued directly, since that is the case under § 1983. This contention comes from the Supreme Court's suggestion that a § 1981 plaintiff must meet all § 1983 procedural requirements in order to maintain a suit against a state or local governmental actor. Under § 1983, the state is not itself an actor that can be sued. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989); see also LEWIS & NORMAN, *supra* note 12, at 337-39.

clear that it prohibited both "nongovernmental discrimination and impairment under color of state law"²⁴⁵

Court interpretations of the Civil Rights Act's effect on *Jett* have been varied. Some have held that all of *Jett*'s limitations on liability survived the 1991 Act.²⁴⁶ Others have held that while states can be sued directly under § 1981, plaintiffs must still prove the existence of an official policy or custom of discrimination.²⁴⁷

B. *Some Empirical Evidence about the Use of § 1981*

There is only one systematic study comparing the use of § 1981 with Title VII.²⁴⁸ In that study, which was conducted before Congress authorized damage awards under Title VII and before *Patterson* desiccated and Congress restored the statute's power, § 1981 played a significant role in challenging employment discrimination.²⁴⁹ The study evaluated every § 1981 case filed in fiscal year 1980-81 in three federal districts²⁵⁰ and found that § 1981 was invoked the third most often, behind Title VII and § 1983,²⁵¹ in civil rights cases. Other federal civil rights statutes, like Title VI, which prohibits race discrimination in federally assisted programs, and Title IX, which prohibits sex discrimination in education, were far behind § 1981.²⁵² The study, however, found no significant differences in outcome or procedural progress between § 1981 and Title VII. Success rates, litigation burden, and settlement rate were roughly comparable under both statutes.²⁵³ The study also showed that nearly half of the plaintiffs filing race-based Title VII claims also made a § 1981 claim.²⁵⁴ The authors had trouble specifically explaining the

²⁴⁵ See 42 U.S.C. § 1981(c) (1994).

²⁴⁶ See, e.g., *Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000).

²⁴⁷ See, e.g., *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1205 (9th Cir. 1996); see also LEWIS & NORMAN, *supra* note 12, at 340-41.

²⁴⁸ See Eisenberg & Schwab, *supra* note 204, at 596.

²⁴⁹ *Id.* at 603.

²⁵⁰ *Id.* at 598.

²⁵¹ 42 U.S.C. § 1983 is a federal statute that permits plaintiffs to seek money damages for violations of federal constitutional and some statutory rights.

²⁵² Eisenberg & Schwab, *supra* note 204, at 599.

²⁵³ *Id.* at 600.

²⁵⁴ *Id.* at 603.

nine percent of the race discrimination cases that raised a § 1981 claim but not a Title VII claim, although the size of employer may have been relevant.

The study also showed that, despite published opinions suggesting a widespread use in general contracting cases, § 1981 was used primarily in the employment context.²⁵⁵ Nearly eighty percent of cases filed raised claims of employment discrimination.²⁵⁶

But now that Title VII has been strengthened by the availability of compensatory and punitive damages, and § 1981 has been restored to its pre-*Patterson* vitality, does § 1981 continue to be important? My own brief examination of recent § 1981 cases suggests that it does.

Based on a review of all district court decisions within the Second Circuit in 1999 and 2000, in which a § 1981 claim is raised, I conclude that § 1981 continues to be actively invoked by plaintiffs complaining of race discrimination.²⁵⁷ It appears to be most important in the employment context. More than eighty-five percent of the cases involved claims of workplace discrimination, most often discriminatory discharge (31%), racial harassment (12%), and discriminatory failure to hire or promote (11%).²⁵⁸ The remaining § 1981 claims were raised in the context of education or government contracting.²⁵⁹ Section 1981 plaintiffs tend to be African-American (52%), Hispanic (9%), and Asian-American (7%), in that order.²⁶⁰ Sixty percent

²⁵⁵ Published opinions suggest that § 1981 was used to challenge school segregation, racially exclusive private clubs, and discrimination in general contracting. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976) (schools); *Sullivan*, 396 U.S. 229 (private clubs); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973) (private clubs).

²⁵⁶ Eisenberg & Schwab, *supra* note 204, at 601.

²⁵⁷ See Grossman Study (data on file with author). The usefulness of a study based solely on published opinions is often questionable because such a significant proportion of cases filed never reach that stage. But the purpose of this study is only to attain a profile of § 1981 plaintiffs and cases, as a basis for drawing some preliminary conclusions about its continuing importance in an age when civil rights plaintiffs have other avenues of relief. In this context, the deficiencies normally attributable to this type of study are not particularly relevant.

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ See *id.* The race of the plaintiff cannot be determined in twenty-five percent of these cases.

of these plaintiffs work for private employers, twenty-nine percent for public ones.²⁶¹

Section 1981 appears to be used concurrently with rather than to the exclusion of other federal civil rights remedies.²⁶² Sixty-nine percent of the cases including a § 1981 claim also included a Title VII claim. Section 1981 claims were also coupled with § 1983 claims (31%), § 1985 claims (18%), and related state law claims (29%).²⁶³ Although very few cases provide information about the size of the defendant-employer, the cases in which Title VII claims are also brought (69%) presumptively involve employers with at least the statutory minimum number of employees—fifteen.

Where plaintiffs are protected by both Title VII and § 1981, the latter may be used to hold the individual discriminator liable. At least a third of the § 1981 claims included a claim against the individual supervisor responsible for the alleged discrimination.

This data also proves the importance of the primary question addressed in this article: whether § 1981 should apply to at-will employees. Although very few cases explicitly characterize the relationship between the plaintiff and the employer as at-will or otherwise, most claims appear to be brought by at-will employees.

CONCLUSION

The real story of § 1981 and at-will employment is that four federal appellate courts have reached the right conclusion—that at-will employees benefit from the same protection against racial discrimination as employees working for a contractual term of employment—for the wrong reasons. Jackie Lauture does not have a viable case under § 1981 just because New York law defines her relationship with her employer as contractual in nature. She has a viable claim because under basic common law principles, both state and federal, at-will employment is treated as a contract.

²⁶¹ See *id.*

²⁶² See Grossman Study, *supra* note 257.

²⁶³ See *id.*

Each of the five appellate courts that addressed the applicability of § 1981 to at-will employment rested its decision expressly on the law of the state in which the suit was brought. The one court to break ranks with the majority did so because Illinois law dictated that result. What is interesting about these cases is that not one court considered whether state law is the appropriate source of law for answering the question posed.

The question of whether federal or state law should be used to define the term "contract" in § 1981 is not uncomplicated. One approach is to look to a long line of cases that say federal statutes must be interpreted according to federal standards, to be drawn from federal common law. With this approach, Congress is presumed to have intended a nationwide, uniform rule, a goal that would be subverted by allowing the rule to differ state-by-state based solely on the origin of the lawsuit. State law may be used, however, as the rule of decision where uniformity is not paramount, or where other considerations make it appropriate. In any event, it may be looked to in fashioning a uniform, federal rule. Under this approach, § 1981 should be interpreted to require a uniform federal rule that recognizes at-will employment as contractual.

A second approach is to incorporate § 1988 into the analysis. Although there is an argument that § 1988 does not apply because an undefined substantive term is not clearly "deficient," within the meaning of the statute, even if it does apply, it may also dictate the use of federal rather than state law. Although with § 1988 there appears to be a presumption that state law should be used to fill in gaps in federal civil rights legislation, that presumption can be rebutted where the use of state law would jeopardize the need for nationwide uniformity or would be otherwise inconsistent with federal law or policy. The application of § 1981 to at-will employees may present a case where that presumption can be rebutted.

Under either approach, federal common law appears to be the appropriate source of law to define "contract" as used in § 1981. Section 1981, enacted to stem rampant discrimination against black Americans by states themselves as well as their citizens, presents a perfect case for the application of a uniform, federal law. But state law, as well as treatises and general principles, all inform the substantive analysis of the

questions whether at-will employment is sufficiently contractual to come under § 1981. Whether one looks at the relationship as a unilateral contract, where the employer offers to pay in exchange for the employee's completed services, or as a bilateral contract of indefinite duration, under conventional principles of contract law, the relationship is a valid contract. That is sufficient to make § 1981, and its protections against race discrimination, applicable.

Resolution of this issue is important, as § 1981 continues to be invoked today. It is used primarily to redress employment discrimination, and, despite some overlap, provides some advantages over Title VII, including a longer statute of limitations, uncapped money damages, and a larger pool of defendants. But perhaps the most important advantage of § 1981 is that twenty percent of the American workforce does not benefit from Title VII's protections because they work for small businesses. For them, many of whom work at-will, § 1981 provides the only federal statutory protection against race discrimination. The conclusion reached by the four circuits in the majority is thus important—and correct.