THE PARADOX OF THE RIGHT TO CONTRACT:
NON-COMPETE AGREEMENTS AS THIRTEENTH AMENDMENT VIOLATIONS

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INTRODUCTION

There is a growing trend, in jurisdictions where employment contracts are legally enforceable, for low-wage, unskilled workers to be required to execute non-compete agreements as a condition of their hire as an at-will employee. The application of non-compete agreements in unskilled, low-wage positions is outside of the original scope and purpose of such agreements. When workers are denied the right to change employers, they are precluded from economic mobility while being exploited and oppressed. Individuals engaged in unskilled, low-wage work lack the bargaining power to secure suitable compensation and benefits. They also lack protection from being terminated without cause. Moreover, upon termination of their employment, the executed non-compete agreement can be used to legally coerce workers to not obtain similar employment with another company. These consequences violate the Thirteenth Amendment.

Non-compete agreements for low-wage, unskilled workers are a form of the Reconstruction Era’s wage contract system that was ultimately used to exploit and subjugate African Americans. Often used by former slave owners, wage contracts were notoriously regarded as documentation of white landowners’ perverse attempt to once again subject newly freed blacks to the master-slave relationship. Wage contracts accomplished this goal by including domineering and oppressive clauses within the labor contracts that extended beyond the labor requirements and controlled every aspect of the workers’ lives.

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1 See generally Neil Irwin, When the Guy Making Your Sandwich Has a Noncompete Clause, NEW YORK TIMES (Oct. 14, 2014), http://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html?_r=0&abt=0002&abg=0; see also Steven Greenhouse, Noncompete Clauses Increasingly Pop Up in Array of Jobs, NEW YORK TIMES (June 8, 2014).

The Reconstruction Era debates, subsequent legislation, as well as key judicial opinions, reveal that the Thirteenth Amendment’s prohibition against slavery, indentured servitude, and peonage were intended to prevent the wage contract’s injustices. Though Section 1 of the amendment contains only 32 words, the debates held before, during and after the ratification of the amendment provide a full illustration as to what Congress deemed to be “fair and just labor relations” in America. That original notion of “fair and just labor relations” provides timeless and substantive guidance on how to identify and rectify power imbalances in employer-employee relationships.

This paper argues that contemporary non-compete agreements between employers and unskilled, low-wage workers is a violation of the Thirteenth Amendment. Part I discusses the origin and purpose of restrictive post-employment covenants and identifies the type of non-compete agreement at issue. Part II examines the original scope and intent of the Thirteenth Amendment and related legislation. This section also discusses the types of imbalanced work conditions denounced by the Reconstruction Era Congress as “perpetuations of slavery.” It also discusses the benefits of free, or non-enslaved, labor identified by Congress while illustrating why contemporary non-compete agreements between employers and unskilled workers are outside of that original purpose. Part III discusses four relevant judicial opinions regarding non-competes to illustrate that, at one point, the judiciary correctly interpreted and applied the laws to employment-related disputes as the legislature intended. The paper concludes by arguing that courts should re-examine the Thirteenth Amendment and its historical context to render non-compete agreements for low-wage, at-will unskilled employees unconstitutional.

I. ORIGIN AND PURPOSE OF RESTRICTIVE POST-EMPLOYMENT COVENANTS

Agreements restricting individuals’ post-employment options date back in American history to the mid-19th century. Prior to their utilization in the United States, agreements that detailed the post-employment business conduct and options of apprentices were routinely used in England. Under the English system, apprenticeship cases heard during the 15th and 16th century generally involved what the courts typically deemed to be the improper and unethical motives of masters. As a result, early judicial opinions ruled unfavorably in cases related to post-employment restraints when masters sought to restrict the post-employment options of their

3 See generally Harlan M. Blake, Employee Agreements Not to Compete, 73 HARV. L. REV. 625 (1960).
apprentices.\textsuperscript{4}

Centuries later, as the terms and conditions of apprenticeship became more varied, English employers grew concerned with avoiding competition through the loss of trade secrets and customers. To address their concerns, masters began requiring the execution of post-employment agreements by their apprentices. In short, masters sought to protect their businesses from competition levied by their former apprentices. Yet, this goal was in direct conflict with the aim of an apprentice: establishing one’s self as a profitable member of a trade.

While evaluating the flood of cases that came before them, English courts applied the rule of reason to evaluate the merits of the claims. The reasonableness standard was used to fairly protect the employer’s interests while ensuring that those protections did not interfere with public interests. As a result, courts often invalidated restraints on the post-employment activity of former apprentices. The notion that an apprentice could not earn a living by working in the very trade he honed during his apprenticeship struck the courts as morally improper and outside of customary norms.\textsuperscript{5} English courts continue to disfavor the use of non-compete agreements. They tend to hold that, under the rule of reason, confidentiality clauses, non-solicitation and non-poaching agreements are valid.

\textbf{A. Restrictive Covenants in the United States}

In America, early judicial opinions adopted the common law reasonableness test used in England to decide employee restraint cases.\textsuperscript{6} Despite the close connection to those original cases where restraints on employment were disfavored, the permissible use of non-compete agreements in the majority of American jurisdictions has grown.\textsuperscript{7} Indeed, only a minority of states have found restrictive employment covenants unenforceable.\textsuperscript{8} A large majority of the states permit the use of restraints on

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\textsuperscript{4} See id. (Blake makes no comparison to the current low-income employees subject to non-compete agreements and apprentices.); see also, STANLEY, supra note 2, at 65 for a discussion about apprenticeships. The nature of a master-apprentice relationship is far different than the employer-employee relationship at issue here. The former is more than a commercial bargain and is a relationship built on “personal trust.” Therefore, the terms of apprenticeships were viewed as vitally important so as to require memorialization in writing.

\textsuperscript{5} See Blake, supra note 3 at 634.

\textsuperscript{6} See id. at 644.


\textsuperscript{8} See Cal. Bus. & Prof. Code. §§ 16600-16602.5 (exceptions include covenants attached to sale of goodwill of a business or upon dissolution of partnership or limited
\end{footnotesize}
the employment options of former employees. Generally, these restraints are deemed reasonable if the restraint: is tailored to protect a legitimate business interest; does not create an undue hardship on the employee; and, if compliance with the contract is not likely to result in injury to the public.

Non-compete agreements and other employment-related contracts were once generally restricted to high-level employees whose skill or access to proprietary information justified such agreements. Businesses and corporations have legitimate interests in protecting their trade secrets. Those interests also extend to preventing the poaching of company executives when it is likely to hurt the company’s economic value and reputation. In exchange, these professionals enter into employment contracts commonly referred to as covenants not to compete and non-compete agreements. During this process, these sophisticated employees are afforded the opportunity to negotiate the terms of their employment contracts and related non-compete agreements. These terms usually include: a definite length of employment; a set of identified circumstances under which that term would be voided; and compensation particulars including the amounts of signing bonuses, yearly bonuses, salary amounts and severance package details. By executing the non-compete agreement, the skilled professional customarily agrees to not work for any competitor of the employer within a certain geographic range for a specified period of time. In short, these professionally skilled individuals are not the typical at-will employees. The employment contracts they execute have generally been enforceable in jurisdictions where such contracts are legally recognized.


The majority of states permit some use of non-compete agreements and the relevant common law findings and statutory basis originate from the reasonable standard. Though there is a great deal of variety in what those jurisdictions allow, the purpose of this article is not to address the nuances of each jurisdiction. Instead, the goal here is to identify the unfair and improper use of restrictive covenants on the post-employment options of low-wage, unskilled workers. See generally Viva R. Moffat, Making Non-Competes Unenforceable, 54 ARIZ. L. REV. 939 (2012) (Moffat discusses the range of permissible restrictions on non-competes.).


Consider the nineteen or twenty-something young woman who has never been employed. This individual has a high school diploma, or its equivalency, but no other job
generally require that employees agree to not work for one to two years for any competitors. Many, but not all, of the agreements impose some geographical parameters requiring former employers to not work for competitors within a specified number of miles. The contracts may also specify an amount of liquidated damages purportedly agreed upon by the parties at the outset. Agreements that contain both time and space restrictions are usually upheld by courts in jurisdictions where restrictive post-employment covenants are allowed. Even when agreements lack those key components, some jurisdictions allow judges to revise portions of the agreement to ensure that it complies with the applicable law instead of voiding the agreement in its entirety.  

The use of non-compete agreements for employees who only earn a training or employable skills. After submitting an application for employment with a fast-food sandwich chain in her neighborhood, the individual is hired to work part-time for minimum wage and without any benefits. As a condition of her at-will employment, this young woman is required to sign an agreement that prohibits her from working for another food-service business for a period of two years after her current employment terminates. The agreement prohibits her from working at any food-service company for which 10% of the menu is comprised of sandwiches within a three mile radius of her current employment. It also prohibits her from working at any other franchise location within the company for a period of one year after the termination of her current employment. In the event of a breach by the employee, the agreement provides for liquidated damages in the amount of $10,000. Unfortunately, the prohibition against this young woman’s subsequent employment is not dependent upon whether or not she voluntarily ceases to work for her current employer. In fact, it also does not take into account whether or not the initial employer has a viable business that can continue to maintain its workforce without the need to downsize or shutter its doors all together. Under either circumstance, should our hypothetical worker find herself in need of a new job, the one position that she is presumably now qualified to hold is only available to her if she is willing to pay the amount of liquidated damages mandated by the non-compete agreement. See, e.g., Employee Confidentiality and Non-Competition Agreement, available at http://big.assets.huffingtonpost.com/FACEHExhibitA.pdf.

Some jurisdictions empower jurists to modify non-compete agreements instead of voiding them entirely. This process is commonly referred to as blue-penciling the agreement so as to make it reasonable. See, e.g., Jon P. McClanahan & Kimberly M. Burke, Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina, 90 N.C. L. REV. 1931, 1933 (2012) ("[T]he acceptance of covenants not to compete in contract law is a relatively recent phenomenon. Initially at common law, such covenants were disallowed because they represented invalid restraints on trade. Courts were wary that restrictive covenants would negatively impact competition, encourage monopolies, and drive up prices."); see also Raimonde v. Van Vlerah, 325 N.E.2d 544, 546-47 (1975) ("In practice, however, the [blue pencil] test has not worked well. Because it precludes modification or amendment of contracts, the entire contract fails if offending provisions cannot be stricken . . . . Thus, many courts have abandoned the ‘blue pencil’ test in favor of a rule of ‘reasonableness,’ which permits courts to determine, on the basis of all available evidence, what restrictions would be reasonable between the parties.").
paltry wage, and for whom no advanced skill is required, fails to comport with the established rule of reason. As a threshold matter, individuals earning minimum wage are presumably not granted access to any trade secrets or legitimate business interests. The employer in such instances can likely make no plausible claim that the job responsibilities delegated to the workers at issue result in the entrustment of legitimate business interests worthy of legal protection.

Additionally, restraints on the employment opportunities for low and minimum wage employees only exacerbate their existing economic hardships. Individuals earning such wages through full-time employment must learn to survive while living at or near the federal poverty income guidelines.

Finally, binding workers to these agreements post-employment causes numerous and lasting injury to the public. Society as a whole suffers when individuals who are willing and able to work are precluded from securing subsequent employment, using their established job experience, to earn a living.

Though restrictions on post-employment activity for employees have customarily been drafted to comply with the reasonableness test and its progeny, non-compete agreements executed between employers and low-wage workers are far different from traditional non-compete agreements. Instead, the plight of these workers is eerily akin to that of the destitute working class seeking employment immediately after slavery in America.

II. PURPOSE OF THIRTEENTH AMENDMENT AND SUBSEQUENT LEGISLATION

Issues regarding race, class and labor were heavily considered by post-colonial American leaders. Reconciling the nation’s moral proclivities regarding personal autonomy and freedom with what had become the national custom of subjugating a race of people to receive extremely inexpensive labor was not a simple task. After years of dedicated activism from abolitionists and labor reformists, the 39th Congress, under the leadership of President Lincoln, tackled the issues of slavery and economic mobility. The Thirteenth Amendment, the Civil Rights Act of 1866, and the Peonage Abolition Act of 1867 were enacted to specifically address

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13 Even if trade secrets are divulged with a low-wage employee in the routine course of their job responsibilities, a non-compete agreement is not the appropriate contractual device to protect a company’s business interests. Non-disclosure and confidentiality agreements adequately serve that purpose.

14 Any loss of customer patronage following the separation of an employee could simply be the result of poor customer service from the employer instead of the alleged nefarious action of the former employee.
these issues. Though some congressmen believed it improper and impractical to abolish slavery, a majority of the legislators recognized that simultaneously addressing labor concerns while eradicating the practice of owning other human beings as property was the best approach. As a result, the legislation enacted by Congress was designed to address the needs of both black and working class Americans of all races.

A. Rising Tension between the Right to Contract and Free Labor

An individual’s inability to actively participate in binding contracts was a tell-tale sign of his or her status as a slave. The institution of slavery in America was premised on the inability of African Americans to control any aspect of their lives. Of particular importance, enslaved African Americans were not permitted to enter into contracts. Indeed, “slavery constituted ‘an obligation to labour for the benefit of the master, without the contract or consent of the servant.’” In contrast, working class whites and free blacks in the north often entered into wage contracts to receive payment for their labor. Unless the length of the employment relationship was expected to last for one year or more, it was customary for these contracts to be unwritten.

The traditional and fundamental notions of contracts were seen as the antithesis of slavery and were used by abolitionists in their quest to eradicate slavery. Successfully attaining the right of blacks to receive wages in exchange for their labor was seen by abolitionists as a true symbol of freedom. Labor reformists, however, were not persuaded.

Advocates for labor reform and abolitionists profoundly disagreed about the fundamental nature and ultimate effect of wage contracts. Labor reformists often compared the plight of the poor working class whites with that of slave labor. According to reformists, although wage contracts purportedly separated slavery from freedom, this quasi-freedom was a fallacy because of the absence of essential contractual elements. Those elements included voluntary consent and an equivalent exchange of goods or wages in return for labor.

Labor reformists contended that spending the majority of one’s life

17 See generally STANLEY, supra note 2 at 19 (1998).
18 See id. at 9.
working for the benefit of another’s financial gain was the equivalent of enslavement. The nature of the wage contracts and the expectation of the landowner required laborers to relinquish their personal autonomy and economic independence. Instead of becoming an equal party to the contract with laborers, employers continued to exploit the laborers in a manner that led to subjugation and domination. For this reason, the purported parties to wage contracts were not on equal footing. Labor reformist countered that employers continued to operate as masters while laborers remained in bondage.

In contrast, Northern abolitionists considered these contracts to be progress towards freedom for slaves. They believed the labor movement’s attack against what the reformists referred to as “wage slavery” for whites undermined abolitionist efforts to highlight the genuine horrors of chattel slavery. William Garrison and his close followers, while making the distinction between chattel slaves and wage laborers, often equated the treatment of slaves with that of the treatment given to domestic animals. In contrast, wage laborers were viewed as “free agents” who could move independently, at their own pleasure while earning income for their labor. The aim was to utilize the concept of wage labor to lend credibility to the abolitionist movement. Northerners worked to firmly create wage labor a reality for blacks in the south immediately after emancipation.

Legislators in Congress continued to seek resolutions to America’s antebellum labor issue. Congressional debates illustrate that one purpose of the Thirteenth Amendment was to end “inequitable labor practices.” As comprehensively detailed by Alexander Tsesis, the debates from 1864-1865 support the assertion that proponents of the amendment were committed “to protecting civil liberties” and abolishing slavery. Abolishing slavery became Congress’s only viable solution to rectifying the unfair leverage slave owners had when bargaining over the labor rates of white workers. The inherently inexpensive nature of slave labor left white workers seeking employment little or no room to negotiate for livable wages. Indeed, the debates reveal that Congress aimed to provide “civil

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19 See id. at 13 for a discussion of Adam Smith’s theory on the commerce, the market and contract principles.

20 See id. at 20-21.

21 See id.


23 See id. at 5.

24 See id. at 19-20; 42-43 (in spite of the similarity of circumstance between poor whites and slaves, poor whites failed to use the similarity to their advantage and instead opted to generally favor slavery with the aim of maintaining their status racial superiority.).
freedoms” to all races.  

In spite of the freedoms conferred to working class Americans through the Thirteenth Amendment, attempts to implement those freedoms were fraught with missteps and shortcomings. The Bureau of Refugees, Freedmen and Abandoned Lands was instituted to assist with the transition of former slaves into their new freedom. One professed goal of the Bureau was to benefit blacks by securing wages and stable employment. The use of wage contracts to achieve that goal was undermined by the inherently racist beliefs of pro-abolitionists and former slave holders, alike. General Oliver O. Howard, Commissioner of the Bureau, shamelessly promoted wage contracts with the repulsive notion that “if [former slaves] can be induced to enter into contracts, they are taught that there are duties as well as privileges of freedom.” This seemingly paternalistic aim failed to recognize what could have been the true benefit of post-emancipation wage contracts; preventing white landowners from using threats and violence to obtain uncompensated labor from blacks.

Despite the admonition of the Thirteenth Amendment against slavery and involuntary servitude, the Freedmen’s Bureau often forced former slaves into wage contracts and blacks were again subjected to harsh working conditions and compensation terms that largely benefited white landowners. Blacks sought to avoid entering into written contracts for their labor as they were keenly aware that the contracts revoked their recently acquired freedom. Those recently emancipated by legal decree understood that true freedom existed only when they were able to own and work their own land. Southern landowners, convinced of their racial and legal superiority, were also displeased with executing contracts with “niggers.” As a result, the contracts often created by white landowners captured their self-perceived position of authority in writing. Nevertheless, Freedmen Bureau agents were successful in expanding the use of written wage contracts by “partly persuading and partly threatening” blacks into signing the agreements.

The contracts contained clauses that rendered wage labor identical to

25 See id. at 45.
26 See Freedmen’s Bureau Act of 1865, ch. 90, 13 Stat. 507; see also ERIC FONER, RECONSTRUCTION AMERICA’S UNFINISHED REVOLUTION 1863 – 1877 56 (1988).
28 See STANLEY, supra note 2 at 36.
29 See FONER, supra note 26 at 166.
30 See STANLEY, supra note 2 at 40.
31 See id. at 41.
32 See id.
33 See id. at 36.
slavery with “tyrannical provisions” that went far beyond the terms for labor to be performed and sought to control every aspect of the workers’ lives. The Bureau permitted, in some instances, free blacks to sign contracts with forfeiture clauses that allowed the employer to exercise discretion on when a worker’s conduct merited the full forfeiture of wages. This clause was often a pretext that allowed the employer to receive free labor. In essence, the laborers received no benefit of the bargain and continued to be subjected to exploitation and domination. The goal of written contracts to establish freedmen “rights in the market” had been perversely used to take away those rights.

B. Legislative Enforcement of Free Labor

Finding a solution to the labor problem in America continued to pose a great challenge for the country’s leaders. Congress passed the Civil Rights Act of 1866 to give federal authority to the concept of freedom through the right to contract. Senator Trumbull, author of the Civil Rights Act, sought to turn the “abstract truths” of the Thirteenth Amendment into “practical freedom” with the Act delineating “where freedom ceases and slavery begins.” On a quest to “obliterate the last lingering vestiges of the slave system,” Congress also enacted the Peonage Abolition Act of 1867. The anti-peonage legislation provided federal protection to free labor against infringement for both private individuals and state action. Early wage contracts challenges utilized both the Thirteenth Amendment and the Peonage Abolition Act to challenge the unjust employment covenants. Those cases reveal that, similar to the practical implications of contemporary non-compete agreements at issue in this paper, the penalties workers faced for not meeting the terms of the contracts amounted to specific performance.

34 See id. at 41-42.
35 See CIMBALA, supra note 27 at 157-158.
36 See STANLEY, supra note 2 at 56.
37 See id. at 55.
38 See CONG. GLOBE, 39TH CONG., 1ST SESS. 1622 (1886) (quoting Senator Henry Wilson.).
40 See id. at 1632. The stakes were enormously high in the early wage contract cases. The former employees were routinely subjected to lengthy prison terms as a penalty of quitting a job prior to the end of the contract term. State governments elevated what should have been simple breach of contract cases into criminal violations by making it prima facie evidence of an employee’s intent to defraud an employer when the employee failed to complete the job over the dictated time period and/or failed to return any pay advances given at the time of executing the contract. See also Bailey v. Alabama, 219 U.S. 219
Nearly twenty years after the Emancipation Proclamation the question of how to obtain and maintain free labor in the United States persisted. In 1883, Congress conducted an investigation into the problems and stagnated progress of establishing a free labor system. The aim of the study was to examine the “whole question of relations between labor and capital and the troubles between them.”\textsuperscript{41} The hearings revealed that the free contract system created an unanticipated conflict at the end of slavery.\textsuperscript{42} Though wage labor was not equivalent to chattel slavery, elements of dominion and subjugation persisted for white workers such that “[t]he working people feel they are under a system of forced slavery.”\textsuperscript{43} A subsequent Congressional investigation found that peonage was a pervasive problem as it existed in every American state except for Connecticut and Oklahoma.\textsuperscript{44}

\textbf{C. Judicial Enforcement of Thirteenth Amendment}

Earlier judicial interpretation of the Thirteenth Amendment and the Peonage Abolition Act provides insightful guidance to courts now tasked with adjudicating the legality of non-compete agreements for low-wage workers. All employment relationships should comply with the spirit\textsuperscript{45} of the Thirteenth Amendment. Principles gleaned from a quartet of cases are important when evaluating the constitutionality of post-employment restrictive covenants. The principles are that: (1) peonage exists when indebted workers are compelled to perform service to satisfy that debt; (2) free labor is not possible when workers are subjected to involuntary servitude; (3) excessive penalties for breach of contract actions are unconstitutional when those penalties give rise to slavery or peonage; and, (4) employees must maintain the right to change employers.

1. Compulsion to Perform Service to Pay Debt is Peonage

The Supreme Court granted certiorai in \textit{Clyatt v. United States}\textsuperscript{46} to decide two relevant questions: (1) how peonage is defined and (2) if Congress had authority to enact the Peonage Abolition Act. Samuel Clyatt appealed his conviction in federal court for returning two African American men, Will Gordon and Mose Ridley, to peonage to work off a debt owed to Clyatt and his business partners.\textsuperscript{47} The court defined peonage as

\footnotesize{(1911) (United States Supreme Court case that overturned the peonage laws of Alabama.).}

\textsuperscript{41} \textit{See} STANLEY, \textit{supra} note 2 at 70-71.
\textsuperscript{42} \textit{Id.} at 71.
\textsuperscript{43} \textit{Id.} at 84.
\textsuperscript{44} \textit{See generally} Pollock v. Williams, 322 U.S. 4, 20 (1944).
\textsuperscript{45} Shaw v. Fisher 113 S.C. 287 (1920).
\textsuperscript{46} \textit{Clyatt v. United States}, 197 U.S. 207 (1905) at 215.
\textsuperscript{47} \textit{Id.} at 208.
“compulsory service, involuntary servitude” without regard for whether or not the debtor voluntarily entered into the contract in question.\textsuperscript{48} As to the second question, the court found that the enactment of the Thirteenth Amendment granted Congress the authority to enforce that amendment with legislation, including the Peonage Abolition Act in order to achieve the constitutional goal of establishing universal freedom.\textsuperscript{49} The court also denounced involuntary servitude and peonage regardless of whether it arises between private individuals or between an individual and the state.\textsuperscript{50}

2. Involuntary Servitude conflicts with the Establishment of Free Labor

The issue of wage contracts and the Thirteenth Amendment reached the Supreme Court again six years later in \textit{Bailey v. State of Alabama}.\textsuperscript{51} Alonzo Bailey asserted that the criminalization of his failure to comply with the terms of a contract for his labor violated the Thirteenth and Fourteenth Amendments.\textsuperscript{52} Mr. Bailey entered into a year-long contract to work as a farm hand. At the time of being hired, the employer provided Bailey with a $15 advance that was to be deducted in increments of $1.25 from his monthly salary. After working for a little over one month, Mr. Bailey stopped working\textsuperscript{53} for the landowner and did not refund the remaining $13.75 of the advance. Mr. Bailey was indicted and subsequently found guilty of violating Alabama’s criminal statute. He was ordered to pay damages in the amount of $15 as well as a $30 fine plus costs. In lieu of paying the monetary judgment, Mr. Bailey was sentenced to 20 days of hard labor in lieu of the fine and 116 days in jail instead of court costs.

While a major issue in the case centered on the criminal statute used to imprison Mr. Bailey, the court stated that protecting free labor is of the utmost importance.\textsuperscript{54} The court also expounded upon the significance and breadth of involuntary servitude by defining the aim of the Thirteenth Amendment to “abolish slavery of whatever name…and all its badges and

\textsuperscript{48} Id. at 215.
\textsuperscript{49} Id. at 216-217.
\textsuperscript{50} Id. at 217.
\textsuperscript{51} Bailey v. Alabama, 219 U.S. 219 (1911).
\textsuperscript{52} See id.
\textsuperscript{53} See id. at 236 (The opinion is silent as to why Mr. Bailey ceased working for the landowner. Though the court makes it a point to not its refusal to consider the fact that Mr. Bailey was a black man, the court does reference the inability of Mr. Bailey to offer his own testimony at trial. The court emphasizes the untenable position the appellant was placed in because he was precluded from testifying in Alabama due to his race coupled with the statutory presumption that he intended to defraud the employer prevented Mr. Bailey from proving his intent.).
\textsuperscript{54} See id. at 245.
incidents, to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit.”

3. Breach of Contracts Penalties Cannot Amount to Slavery or Peonage

The Supreme Court of South Carolina affirmed an employee’s right to change employers in Shaw v. Fisher. John Shaw, a landowner, sued A.D. Fisher for interfering with his employment contract with an employee, Mr. Carver. Mr. Shaw alleged that Mr. Fisher knew about his existing one year written contract with Mr. Carver. Mr. Carver testified that he worked for approximately three months before deciding to switch employers. The change was motivated by greater flexibility allowing Mr. Carver to work for Fisher while also allowing him time to work for others. Mr. Carver also testified about the exploitative treatment he suffered while working for Shaw.

The court in Shaw found that the South Carolina statute that authorized the action initiated by Shaw conflicted with the spirit and intent of the Thirteenth Amendment. Citing Bailey, the court also found that volition at the start of the contractual relationship is not germane to the analysis when determining if the compulsion to serve as payment for a debt exists. The court also found that a debtor can only be legally required to pay actual damages suffered by the employer. Finally, the court discussed the practical realities that would arise should employees be coerced into choosing whether to work for onerous employers or starvation. The court explained that the prohibition against slavery applied to both direct and indirect actions that lead to slave-like conditions. Legal consequences for breach of contract are constitutional provided they do not amount to slavery or peonage.

4. Right to Change Employers Provides Essential Power to Employees

More than thirty years after Bailey, the Supreme Court considered the constitutionality of wage contracts in Pollock v. Williams. The facts in Pollock revealed that Emanuel Pollock received a $5 advance from a

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55 See id. at 241. Emphasis added.
56 Fisher, 113 S.C.
57 See id. at 326.
58 See id.
59 See id. at 327.
60 See id.
61 Williams, 322 U.S. 4.
corporation at the start of his employment and failed to repay the advance after failing to perform according to the terms of the contract.\(^\text{62}\) After pleading guilty to the criminal charge against him, Mr. Pollock was sentenced to 60 days in jail in lieu of paying a $100 fine. A writ of habeas corpus asserted that the conviction violated the Thirteenth Amendment, the Peonage Abolition Act and the Fourteenth Amendment.\(^\text{63}\) In its opinion, the Supreme Court described the Thirteenth Amendment and the Peonage Abolition Act as a “shield and sword” against forced labor caused by debt.\(^\text{64}\)

The Pollock court also held that the central purpose of the Thirteenth Amendment and Peonage Abolition Act was to create and “maintain a system of completely free and voluntary labor.”\(^\text{65}\) The court explained that free labor only exists when employees have power to control their employment conditions, thereby incentivizing employers to refrain from exploiting employees.\(^\text{66}\) One way to confer power to employees is to afford them the right to change employers.\(^\text{67}\) The court further explained that providing employees with the right to change employers not only benefits the individual worker but also benefits society as a whole by stimulating healthy competition among employers in the marketplace.\(^\text{68}\)

Finally, the court in Pollock detailed the financial burden endured by the employee as a result of receiving a $5 advance.\(^\text{69}\) In exchange for failing to repay such a paltry sum of money, Mr. Pollock was required to post $500 bond “quite regularly”\(^\text{70}\) as he appealed his case to the Supreme Court. The court also recognized his $100 fine was the equivalent of charging the employee $20 for each dollar he received as an advance.\(^\text{71}\) And notably, the court acknowledged that judicial relief from this constitutional violation would not have been possible for Mr. Pollock without the assistance of legal counsel.\(^\text{72}\)

Employers of low-wage workers are strikingly similar to southern landowners who assumed virtually no risk when engaging in contracts with workers. Like contemporary workers bound by non-compete agreements, workers in the 19\(^{\text{th}}\) and early 20\(^{\text{th}}\) centuries assumed all of the risk when entering into restrictive employment covenants: they often worked without

\(^{\text{62}}\) Id. at 5.
\(^{\text{63}}\) Id.
\(^{\text{64}}\) Id. at 8.
\(^{\text{65}}\) Id. at 17.
\(^{\text{66}}\) Id.
\(^{\text{67}}\) Id.
\(^{\text{68}}\) Id.
\(^{\text{69}}\) Id. at 15.
\(^{\text{70}}\) Id.
\(^{\text{71}}\) Id.
\(^{\text{72}}\) Id. at 16.
pay for extended periods of time; they were bound by contracts that forced them to work for specified periods of time or risk losing their income entirely; and, they were subjected to harsh penalties if they failed to adhere to the contracts.

The presence and analysis of criminal statutes in many of the aforementioned cases should not detract from their applicability to contemporary non-compete agreements between employers and low-wage workers. The “badges and incidents of slavery” persist when these agreements exist. While states no longer use criminal law to sanction the exploitation and oppression of the poor working class, providing judicial approval of the same results through civil judgments is nonetheless a constitutional violation.

III. LOW-WAGE NON-COMPETE AGREEMENTS VIOLATE THE THIRTEENTH AMENDMENT

Proponents of restrictive employment covenants place undue significance on an employee’s voluntary execution of the agreement. However, the Supreme Court has repeatedly found that the volition of the employee at the time of signing is not germane to the constitutional analysis.

Non-compete agreements are designed to prohibit employees the right to change employers. As detailed in Pollock73, free and voluntary labor can only exist when employers have an incentive to avoid exploiting employees because the employees have control over their job conditions. Employees who earn low-wages are generally viewed as dispensable. Millions are in need of jobs and opportunities for employment are relatively few. Employees and employers alike recognize the precarious situation the employees have been placed in: comply with the demands and expectations of an employer, no matter how oppressive or be replaced. To avoid this level of exploitation, employees must be afforded the right to change employers.

The alternative reduces what began as an at-will employment relationship into involuntary servitude. They agree to work at the pleasure of the employer as these agreements and jobs are at-will. To contractually bind individuals, who desire to switch employers, requires them to provide service for the employer, solely for the employer’s benefit. The Bailey court specifically found such employment dynamics to be a violation of the

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The Thirteenth Amendment prohibition against involuntary servitude. Most importantly, should the employee choose to seek better employment utilizing their job history and experience, they will likely violate the terms of the agreement.

Additionally, the penalties low-wage employees are confronted with if they are found to breach an executed non-compete agreement amount to peonage and in some instances, slavery. The financial burden imposed on an individual who chooses to change employers in the form of purported damages is substantial considering her classification as a low-wage earner. This burden does not even begin to account for the costs associated with defending her interests against a civil action for breach of contract. An employer who elects to enforce the agreement has the option to saddle former employees with an enormous amount of debt that the individual will be coerced into working off; the definition of a peonage. Consequently, the non-compete agreements at issue expose employees to improper legal coercion. The execution of the agreement places the employee in the position of choosing to continue to work in undesirable conditions or having no income at all.

**Conclusion**

Free and voluntary labor was the primary goal of the 39th Congress. Agreements have been created by individual employers, and sanctioned by some states, to undercut any progress the federal government has taken to achieve that goal. As once recognized by the United States Supreme Court, the Thirteenth Amendment conferred on the federal government the authority to eliminate the use of non-compete agreements between employers and low-wage employees. It is necessary for Congress to exercise that authority to complete its goal of establishing a free labor market in America. Unless it does so, attempts by the poor, working class to achieve economic mobility and freedom will continue to be thwarted.