The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations

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INTRODUCTION

Employers in a variety of fields are increasingly imposing noncompete agreements on their workers as a condition of the workers' at-will employment.[1] These employees are working at or near minimum wage, in positions that require little or no advanced technical skills. Major news sources have highlighted this issue while covering recent employment litigation between Jimmy Johns and a pair of its former employees.[2] In this litigation, two plaintiffs filed suit in federal court seeking injunctive relief and declaratory judgment invalidating the noncompete and confidentiality agreements that they signed with the sandwich maker.[3] Granting defendant's motion to dismiss, the Illinois District Court held that the plaintiffs lacked standing because they failed to allege any injury.[4] This issue is not limited to one fast food chain. In jurisdictions where employment contracts are legally enforceable, there is a growing trend among employers to require low-wage, unskilled workers to execute noncompete agreements as a condition of their at-will employment.

The use of noncompete agreements for such positions is outside of the original scope and purpose of post-employment restrictive covenants.

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1. *See* Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html; Neil Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, N.Y. 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.

2. *See* David Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST (Oct. 13, 2014, 4:03 PM), http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html; *see also* Joe Patrice, *Jimmy John's Serves Up Sandwiches and Oppressive Non-Compete Agreements*, ABOVE THE LAW (Oct. 14, 2014, 1:30 PM), http://abovethelaw.com/2014/10/jimmy-johns-serves-up-sandwiches-and-oppressive-non-competete-agreements/.

3. *See, e.g.*, Employee Confidentiality and Non-Competition Agreement (Exhibit A), Brunner v. Jimmy John's Enterprises, Inc., No. 1:14-cv-05509 (2014) [hereinafter Agreement], *available at* http://big.assets.huffingtonpost.com/FACExhibitA.pdf.

4. *Id.*

Noncompete agreements and other related employment covenants were traditionally executed between companies and skilled professionals.[5] The general aim of these contracts was to prevent unfair competition by protecting legitimate business interests such as trade secrets.[6]

This Article argues that the extension of post-employment restrictive covenants, specifically noncompete agreements, to workers earning low wages and performing unskilled work, improperly infringes on the workers' constitutional right to seek better employment opportunities. When low-wage workers are denied the right to change employers, they are precluded from economic mobility while being exploited and oppressed.[7] These particular individuals lack the bargaining power to secure suitable compensation and benefits. The reality of their at-will employment leaves them with no protection from their employers terminating them without cause. Moreover, upon termination of their workers' employment, employers can use the executed noncompete agreement to legally coerce their former employees not to obtain similar employment with another company. These consequences, such as the threat of legal coercion and infringement on the nation's free labor system, should render the application of post-employment restrictive covenants in this context a violation of the Thirteenth Amendment.

Noncompete agreements for low-wage, unskilled labor are reminiscent of the Reconstruction Era's wage-contract system that former slave owners used to exploit and subjugate African Americans. Often, the goal of former slave owners was to use wage contracts to once again subject newly-freed Blacks to the master-slave relationship. These binding agreements accomplished this goal through their domineering and oppressive clauses that extended beyond the labor requirements and controlled every aspect of the workers' lives.[8]

The Reconstruction Era debates, subsequent legislation, and key judicial opinions reveal that the Thirteenth Amendment's prohibition against slavery, indentured servitude, and peonage were intended to prevent injustices in wage contracts. Though Section 1 of the Amendment

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5. *See* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1166 (2001).

6. *Id.* at 1165.

7. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 464 (1989) (for discussion on one lawmaker's view that the absence of free labor degraded the worker); *see also* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1532 (2010) (discussing *Shaw v. Fisher*, 102 S.E. 325 (S.C. 1920), and the right to change employers).

8. *See generally* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).

contains only thirty-two words,[9] 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."[10] The stated goal and related discussions around the establishment of "fair and just labor relations" provide a useful framework for how to identify *and* rectify power imbalances in employer-employee relationships.[11]

This Article argues that contemporary noncompete agreements between employers and workers earning low wages while performing unskilled labor are a violation of the Thirteenth Amendment. Part I discusses the origin and purpose of restrictive post-employment covenants and identifies the type of noncompete agreement at issue. Part II examines the original scope and intent of the Thirteenth Amendment and related legislation. This Part also discusses the types of imbalanced work conditions denounced by the Reconstruction Era Congress as "perpetuations of slavery."[12] It also discusses the benefits of free, or non-enslaved, labor identified by Congress while illustrating why contemporary noncompete agreements between employers and unskilled workers are outside of that original purpose. Part III discusses four relevant judicial opinions regarding noncompete agreements to illustrate that, at one point, the judiciary correctly interpreted and applied the laws to employment-related disputes as Congress intended. The Article concludes by arguing that courts should re-examine the Thirteenth Amendment and its historical context to hold unconstitutional noncompete agreements for low-wage, at-will, and unskilled employees.

I. ORIGIN AND PURPOSE OF RESTRICTIVE POST-EMPLOYMENT COVENANTS

A. Early Use of Restrictive Covenants in England

Agreements restricting individuals' post-employment options date back in American history to the mid-nineteenth century. Prior to post-

9. U.S. CONST. amend. XIII, §§ 1–2 reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation." See VanderVelde, *supra* note 7, at 448–49 for a discussion regarding the expansive nature of the congressional debates during Reconstruction in identifying the "values and objectives of the thirteenth amendment" while devoting little attention to the text itself. VanderVelde asserts that the text of the Amendment does not exhaust the intentions of Congress and argues that the debates as recorded illustrate Congress's goal of improving the status of all workers by: 1) "recognizing the dignity of labor"; 2) "guaranteeing workers a wide range of opportunities for advancement"; and 3) "raising the floor of legal rights accorded all work[ers]." *Id.*

10. VanderVelde, *supra* note 7, at 437.

11. *Id.* at 438.

12. *Id.* at 452.

employment agreement utilization in the United States, employers in England routinely used agreements that detailed the post-employment business conduct and options of apprentices.[13] Under the English system, apprenticeship cases heard during the fifteenth and sixteenth centuries generally involved what the courts deemed the improper and unethical motives of masters.[14] As a result, early judicial opinions disfavored post-employment restraints when masters sought to restrict the post-employment options of their apprentices.[15]

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.[16] In short, masters sought to protect their businesses from competition levied by their former apprentices. Yet, this goal directly conflicted with the aim of an apprentice: establishing oneself 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.[17] The rule of reason 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. English courts considered the notion that an apprentice could not earn a living by working in the very trade that he honed during his apprenticeship to be morally improper and outside of customary norms.[18] Those courts continue to disfavor the use of noncompete agreements, although they tend to hold that confidentiality clauses, and non-solicitation and non-poaching agreements are valid under the reasonable standard.

B. Original Purpose of Restrictive Covenants in the United States

Courts in early American judicial opinions adopted the common law reasonableness test used in England to decide employee-restraint

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13. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 630 (1960).

14. *See generally id.*

15. *Id.*; *see also* STANLEY, *supra* note 8, at 65 (discussing 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.

16. *See* Blake, *supra* note 13, at 638.

17. *Id.* at 643.

18. *See id.* at 634.

cases.[19] American courts typically voided the agreements during the early 1850s.[20] Later court decisions began to erode that precedent.[21] And by the late nineteenth century, courts no longer disfavored restraints on employment agreements. Instead, the permissible use of noncompete agreements in the majority of American jurisdictions has grown.[22] Only a minority of state governments has outlawed restrictive employment covenants.[23] A large majority of states permit the use of restraints on the employment options of former employees.[24] 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 is not likely to result in injury to the public if the terms of the contract are enforced.[25]

Throughout most of the twentieth century, courts generally restricted noncompete agreements and other employment-related contracts to high-level employees whose skill or access to proprietary information justified such agreements.[26] Businesses and corporations have legitimate interests in protecting their trade secrets. Those interests also extend to preventing company executives from being poached when it is likely to hurt the company's economic value and reputation. In exchange, these professionals enter into employment contracts and noncompete agreements. Sophisticated employees may negotiate the terms of their employment contracts and related noncompete agreements.[27] These terms usually include the following: 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, as well as severance package details. By

19. *Id.* at 643–44.

20. *Id.* at 644.

21. *Id.*

22. *Id.*; *see also* Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 876 (2010).

23. *See* CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2015) (exceptions include covenants attached to sale of goodwill of a business or upon dissolution of partnership or limited liability corporation); *see also* COLO. REV. STAT. § 8-2-113 (1982); HAW. REV. STAT. § 480-4(c) (1993); LA. REV. STAT. ANN. 23:921 (2015); MONT. CODE §§ 28-2-703, 704 (2015); N.D. CENT. CODE § 9-08-06 (1987); OKLA. STAT. tit. 15, § 217 (1998).

24. The majority of states permit some use of noncompete agreements and the relevant common law findings and statutory basis originate from the reasonableness 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. For a discussion regarding the range of permissible restrictions on noncompetes, see generally Moffat, *supra* note 22.

25. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

26. *See* Blake, *supra* note 13, at 687; *see also* Moffat, *supra* note 22, at 900–02.

27. *See* Arnow-Richman, *supra* note 5, at 1213 n.174.

executing the noncompete agreement, the skilled professional customarily agrees not to work for any competitor of the employer within a certain geographic range for a specified period of time. The employment contracts that these parties execute have generally been enforceable in jurisdictions where courts recognize such contracts.[28]

By contrast, the typical at-will employees discussed in this Article earn minimum wage and are 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 employees at issue result in the entrustment of legitimate business interests worthy of legal protection. 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 post-employment agreements 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 by using their established job experience to earn a living.

Although it is not the focus of this Article, there is a strong argument that the use of noncompete agreements for employees who only earn a paltry wage, and for whom no advanced skill is required, fails to comport with the established rule of reason.[29]

C. Extended Use of Noncompete Agreements in the United States for Low-Wage, Low-Skilled Labor

Despite the troubling nature of subjecting low-wage workers to the restrictions of noncompete agreements, the types of jobs that now require them include seasonal workers at neighborhood summer camps, sandwich makers at Jimmy Johns, hair stylists, yoga instructors, and low-wage home health aide workers.[30] These agreements generally require that employees agree not to work for one to two years for any competitors. Many, but not all, of the agreements impose some geographical parameters that do not allow former employees to 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

28. *See* sources cited *supra* note 22.

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

30. *See*, *e.g.*, Agreement, *supra* note 3; Greenhouse, *supra* note 1.

the outset. In jurisdictions where restrictive post-employment covenants are allowed, courts usually allow agreements that contain both time and geographic restrictions to stand.[31] 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 entire agreement.[32]

Consider the following post-employment covenant that resulted in litigation. A young woman, Anita Walsh,[33] was employed as a home health aide by a locally owned home health agency. Her job duties involved assisting one client with their activities of daily living: bathing, dressing, taking medications, light cleaning, and cooking. For this work, she earned approximately $10,100 per year. Ms. Walsh is the sole caregiver responsible for rearing her young teenage child. Although she did not receive her high school diploma, Ms. Walsh successfully obtained her GED.

After being employed by the agency for several weeks, Ms. Walsh went to pick up her paycheck as she had done on prior paydays. On this particular occasion, an office assistant handed her a set of documents that she was asked to sign before her paycheck would be released. Although the assistant was the one presenting the documents to be signed, she made it clear that she was not able to answer any questions about the content and meaning of those documents. Ms. Walsh was simply told to sign the papers in exchange for her paycheck. Without a lawyer or human resources personnel to provide guidance, Anita signed the documents and left with her paycheck.

Several more months passed and, though it was difficult to make ends meet financially, Ms. Walsh continued to work diligently for her

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31. *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, 1934 (2012).

32. Some jurisdictions empower jurists to modify noncompete agreements instead of voiding them entirely. This process is commonly referred to as "blue-penciling" the agreement so as to make it reasonable. *Id.* at 1933. ("[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 (Ohio 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.").

33. The name and certain nonessential details related to the individual's case have been changed in the interest of protecting his or her identity. The individual is a former client of the author. Factual details regarding the type of contracts executed along with their terms essential to this Article have not been changed.

client with the hope that a better job with the potential of earning more money would eventually present itself. After recovering from a non-work-related injury that kept her out of work at the employer's request, she eagerly called the agency and requested to return to work once she was well. To her surprise, Ms. Walsh was told she would need to complete the lengthy application process again before she could be "re-hired."

Fortunately, another local home health agency was hiring immediately. This company had a better reputation among customers. In fact, the one client Ms. Walsh serviced was now receiving care from this more reputable agency. Additionally, aides reported earning more money and being treated far better. Most importantly, the other agency had an immediate opening. In a matter of two days, Ms. Walsh was hired.

Nearly nine months after being constructively terminated by the initial agency, Ms. Walsh received a certified letter in the mail. She later discovered it was a summons and complaint filed on behalf of her former employer. They were suing her for breach of contract and breach of a nonsolicitation agreement. The documents Anita had signed in exchange for her paycheck all those months ago were related to post-employment restrictions for which her signature indicated her assent to pay liquidated damages in the amount of $10,000—roughly her entire pay for the year. The former agency essentially sought repayment of Ms. Walsh's full salary in the form of damages for the alleged breach.

Without money to afford an attorney, Ms. Walsh reached out to her local Legal Aid Office for legal assistance. Legal Aid was able to successfully make a referral to outside counsel for legal help on a pro bono basis. The Answer and Affirmative Defenses filed on behalf of Ms. Walsh pointed to the unconscionable and unconstitutional nature of the contracts the agency sought to enforce. Counsel for the agency quickly sought to resolve the matter outside of court. Though the case was favorably resolved for Ms. Walsh, other former employees of this agency had default judgments levied against them after they were unable to obtain legal counsel.

Also consider the nineteen- or twenty-year old young woman who has never been employed. She has a high school diploma, or its equivalency, but no other job training or employable skills. After submitting an application for employment with a fast food sandwich chain in her neighborhood, she is hired to work part-time for minimum wage and without any benefits. As a condition of her at-will employment, the 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.[34] The agreement prohibits her from working at any food service company where 10% of the menu is comprised of sandwiches within a three-mile radius of her current employment.[35] 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.[36] Unfortunately, the prohibition against the 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 altogether. 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 available to her only if she is willing to pay the amount of liquidated damages mandated by the noncompete agreement. As is discussed in the next Part, her situation is precisely what the Reconstruction Era Congress intended to outlaw with the ratification of the Thirteenth Amendment.

II. PURPOSE OF THIRTEENTH AMENDMENT AND SUBSEQUENT LEGISLATION

A. Congress Acts to Establish Free Labor in America

Issues regarding race, class, and labor were heavily considered by post-colonial American leaders.[37] Reconciling the nation's moral proclivities regarding personal autonomy and freedom with what had become the national custom of subjugating a race of people in exchange for extremely inexpensive or free labor was not a simple task.[38] After years of dedicated activism from abolitionists and labor reformists, the Reconstruction Congress, under the leadership of President Lincoln, tackled the issues of slavery and economic mobility. The Thirteenth Amendment, the Civil Rights Act of 1866,[39] and the Peonage Abolition Act of 1867[40]

34. Agreement, *supra* note 3.

35. *Id.*

36. *Id.*

37. *See* VanderVelde, *supra* note 7, at 438 (discussing the congressional debates that occurred some twenty years prior to Reconstruction).

38. *See* STANLEY, *supra* note 8, at 60–96. *See generally* DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991).

39. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (2012)). For a detailed account of The Civil Rights Act of 1866, the President's veto messages, and the votes in the Congress to override, see E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 74–81 (1880).

40. Peonage Abolition Act of 1867, ch. 187, 14 Stat. 546 (codified at 42 U.S.C. § 1994 (2012)).

were enacted to specifically address 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 another human being as property was the best approach.[41] As a result, the legislation enacted by Congress was designed to address the needs of both black and working-class Americans of all races.

The congressional debates before and after the passage of the Reconstruction Amendments support the position that the Thirteenth Amendment accomplishes more than simply abolishing chattel slavery and indentured servitude. A close analysis of the debates illuminates a less recognized goal of the Amendment: to establish a national standard for labor rights in America.[42] Inclusion of the phrase "involuntary servitude" was a nod to pro-labor sentiments of American voters while also appeasing legislators who sought to pass legislation not solely focused on Blacks.[43] In short, while the pronouncement against slave labor boldly rejected ownership of human beings, that pronouncement was closely intertwined with an overarching desire to set the tone and expectation of labor reform generally. For that reason, the text of the debates includes more than discussions concerning the enslavement of Blacks and the indentured service of the poor. There are instances in the text where proponents of the Thirteenth Amendment affirmatively disavow any allegiance to or concern for Blacks. While debating the extent of rights conferred upon the freedmen, Senator Yates sought to qualify his support for equality across races by proclaiming, "I never had 'negro on the brain.'"[44] Essential to the point of this Article is the fact that the legislators engaged in detailed discussions about the need to establish free labor across the land—including the nonslaveholding states in the North.

Judicial interpretation and application of the Thirteenth Amendment further establish that the Amendment was passed to go beyond the abolishment of chattel slavery and indentured servitude. Indeed, the United States Supreme Court has held that, in addition to abolishing the explicitly identified practices, the Thirteenth Amendment also eradicates all "badges and incidents" of slavery.[45] Additionally, and specifically related to this argument, the nation's high court has found the threat of

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41. Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1636 (2012).

42. VanderVelde, *supra* note 7, at 438–39.

43. *Id.* at 450 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (remarks of Sen. Dolittle and Sen. Sumner)).

44. CONG. GLOBE, 39th Cong., 1st Sess. app. 105 (1866).

45. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

legal coercion to be an infringement on the protections provided by the Thirteenth Amendment.[46]

B. Post-Civil War Tension Between the Right to Contract and Free Labor

An individual's inability to execute binding contracts was a telltale sign of his or her status as a slave.[47] 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.'"[48] In contrast, working class whites and free blacks in the North often entered into what are known as "wage contracts" to receive payment for their labor.[49] 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. Abolitionists saw successfully attaining the right to receive wages in exchange for former slave labor 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,[50] this quasi-freedom was a fallacy because essential contractual elements were absent. These 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 working for the benefit of another's financial gain was the equivalent of enslavement.[51] The nature of the wage contracts and the expectation of the landowner-employers 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

46. United States v. Kozminski, 487 U.S. 931, 944 (1988).

47. STANLEY, *supra* note 8, at 19.

48. *Id.* at 9 (quoting WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 150 (1850)).

49. *Id.* at 65.

50. *Id.* at 9.

51. *Id.* at 20.

laborers in a manner that led to subjugation and domination. For this reason, the purported parties to wage contracts were not on equal footing.[52] Labor reformists argued that employers continued to operate as masters while laborers remained in bondage.

In contrast, Northern abolitionists considered these contracts to be progress toward 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.[53] 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.[54] In contrast, he viewed wage laborers as "free agents" who could move independently at their own pleasure while earning income for their labor.[55] The aim was to utilize the concept of wage labor to lend credibility to the abolitionist movement. Northerners worked to firmly create a system by which Blacks in the South could earn wages for their labor immediately following 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."[56] 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.[57] 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.[58] The inherently inexpensive nature of slave labor left white workers seeking employment little or no room to negotiate for livable wages. The debates reveal that Congress aimed to provide "civil freedoms" to *all* races.[59] The Amendment passed the Senate on April 8, 1864, with only six senators voting against the measure.[60] The House of

52. *Id.* at 13 (discussing Adam Smith's theory on commerce, the market and contract principles).

53. *Id.* at 20–21.

54. *Id.* at 21.

55. *Id.*

56. *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 40 (2004).

57. *Id.* at 5.

58. *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 of racial superiority).

59. *Id.* at 45.

60. *See 13th Amendment to the U.S. Constitution*, LIBR. CONG., http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html (last update Nov. 30, 2015).

Representatives bill, passed on January 31, 1865, had a closer margin of 119 to 56.[61]

Notwithstanding the freedoms conferred on 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 former slaves with the transition into their new freedom.[62] One professed goal of the Bureau was to benefit Blacks by securing wages and stable employment.[63] The use of wage contracts to achieve that goal was undermined by the inherently racist beliefs of pro-abolitionists and former slaveholders alike. General Oliver O. Howard, Commissioner of the Bureau, shamelessly promoted wage contracts with the myopic notion that "'[i]f [former slaves] can be induced to enter into contracts, they are taught that there are duties as well as privileges of freedom.'"[64] 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 unrecompensed 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, once again subjecting Blacks to harsh working conditions and compensation terms that largely benefited white landowners.[65] Blacks sought to avoid entering into written contracts for their labor, as they were keenly aware that the contracts revoked their recently acquired freedom.[66] Those recently emancipated by legal decree understood that true freedom existed only when they were able to own and work their own land.[67] Southern landowners, convinced of their racial and legal superiority, were also displeased with executing contracts with "niggers."[68] As a result, the contracts often created by white landowners captured their self-perceived position of authority in writing.[69] For instance, wage contracts often included language that reinforced the subservient status of black workers in a way that demeaned their status as

61. *Id.*

62. *See* Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507; *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 56 (1988).

63. *See* PAUL A. CIMBALA, THE FREEDMEN'S BUREAU: RECONSTRUCTING THE AMERICAN SOUTH AFTER THE CIVIL WAR 11 (2005).

64. STANLEY, *supra* note 8, at 36.

65. FONER, *supra* note 62, at 166.

66. STANLEY, *supra* note 8, at 40.

67. *Id.* at 41.

68. *Id.*

69. *Id.* at 41–42.

free and provided the landowner with authority over the personal lives and off-duty activities of their employees.[70]

The contracts contained clauses that rendered wage labor identical to 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.[71] 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.[72] 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 freedmens' "rights in the market"[73] had been perversely used to take away those rights. In spite of the explicitly oppressive clauses contained in the contracts, Freedmen Bureau agents successfully expanded the use of written wage contracts by "partly persuading and partly threatening" Blacks into signing the agreements.[74]

Landowners also created agreements among themselves to undercut the autonomy of employees to create their own financial security.[75] As detailed in the 1866 Congressional debates, a group of farmers in Turkey Island, Virginia, created the James River Farmers Compact to establish classes of workers and associated wage rates for all employers in the region.[76] The agreement also dictated such details as the number of days each worker had to work per month (allowing them only four days off out of a thirty-day month); the requirement that all workers tend to animals on Sundays as well as holidays; the frequency with which workers were to be paid; and a prohibition against a new employer hiring an employee previously fired for what was loosely defined as misconduct and/or contract violations.[77] This resolution clearly protected landowners from competing with each other[78] for employees as there was no risk of a worker leaving one employer for another for better wages and benefits; they were uniform throughout the area. Of equal importance was the effect the resolution had on the workers. They were essentially relegated to their previous subservient status as servants. Indeed, the James River Farmers Compact explicitly equated the work to be performed with slav-

70. *Id.*
71. *Id.*
72. CIMBALA, *supra* note 63, at 157–58.
73. STANLEY, *supra* note 8, at 56.
74. *Id.* at 36 (internal quotation marks omitted).
75. *See* CONG. GLOBE, 39th Cong., 1st Sess. 517 (1866).
76. *Id.*
77. *Id.*
78. VanderVelde, *supra* note 7, at 491.

ery by stating: "All of the hands will be required to submit to such rules, and work in such [a] way and at such times, either night or day, as was formerly customary in this section of the country."[79]

This ownership dynamic of the post-emancipation employment relationship permeated areas outside of Turkey Island, Virginia. Both criminal and civil laws were enacted to prevent employers from "enticing" away their laborers.[80] The text from congressional sessions at the time reveals senators' objections to such actions deemed to treat employees as property while creating conditions that "continued degradation and oppression."[81] The ultimate goal of the Reconstruction Congress, before and after the passage of Thirteenth Amendment, was to avoid the nullification of rights intended to be conferred by the Amendment.[82]

C. 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."[83] On a quest to "obliterate the last lingering vestiges of the slave system,"[84] Congress also enacted the Peonage Abolition Act of 1867. The anti-peonage legislation provided federal protection to free labor against infringement by both private individuals and state action.[85] As described below, early wage-contract challenges utilized both the Thirteenth Amendment and the Peonage Abolition Act to challenge the unjust employment covenants. These cases reveal that, similar to the practical implications of contemporary noncompete agreements at issue in this Article, the penalties workers faced for not meeting the terms of the contracts amounted to specific performance.[86] The stakes were enormously high in the early wage-contract

79. *See* CONG. GLOBE, 39th Cong., 1st Sess. 517 (1866).

80. *See* Shaw v. Fisher, 102 S.E. 325 (S.C. 1920) (discussing civil action in South Carolina between private individuals regarding the alleged illegal enticement of a laborer from a former employer); CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865) (recitation of law in Mississippi criminalizing an employer's enticement of a laborer from another employer, along with Sen. Wilson's remarks regarding similar legislation pending in Georgia).

81. CONG. GLOBE, 39th Cong., 1st Sess. 589 (1866).

82. VanderVelde, *supra* note 7, at 453–54.

83. STANLEY, *supra* note 8, at 55.

84. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (quoting Sen. Henry Wilson).

85. Soifer, *supra* note 41, at 1617–18.

86. *Id.* at 1632; *see also* Bailey v. Alabama, 219 U.S. 219 (1911) (overturning the peonage laws of Alabama).

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.[87] 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.[88]

Nearly twenty years after the Emancipation Proclamation, the question of how to create and maintain free labor in the United States persisted. In 1883, Congress conducted an investigation into the problems and stagnate progress of establishing a free labor system.[89] The study's aim was to examine the "whole question of the relations between labor and capital and the troubles between them."[90] The hearings revealed that the free contract system created an unanticipated conflict once slavery ended.[91] Though wage labor was not equivalent to chattel slavery, elements of dominion and subjugation persisted for white workers such that "[t]he working people fe[lt] they [were] under a system of forced slavery."[92] A subsequent congressional investigation found that peonage was a pervasive problem, as it existed in every American state except for Connecticut and Oklahoma.[93]

D. Judicial Enforcement of Thirteenth Amendment

Early judicial interpretation of the Thirteenth Amendment and the Peonage Abolition Act provides insightful guidance to courts now tasked with adjudicating the legality of noncompete agreements for low-wage workers. Recognizing that all employment relationships should comply with the "spirit and intent"[94] of the Thirteenth Amendment, principles gleaned from a quartet of cases are important when evaluating the constitutionality of post-employment restrictive covenants. These principles include: (1) identifying the existence of peonage when indebted workers are compelled to perform service to satisfy that debt; (2) acknowledging that free labor is not possible when workers are subjected to involuntary servitude; (3) declaring excessive penalties for breach of contract actions

87. *See, e.g.*, *Bailey*, 219 U.S. at 231.

88. *See id.* at 228.

89. STANLEY, *supra* note 8, at 70–71.

90. *Id.*

91. *Id.* at 71.

92. *Id.* at 84.

93. *See* Pollock v. Williams, 322 U.S. 4, 20 (1944).

94. Shaw v. Fisher, 102 S.E. 325, 326 (S.C. 1920) (explaining that the state laws, both statutory and those derived from common law, which fail to comport with the Thirteenth and Fourteenth Amendments to the United States Constitution are to be declared invalid).

unconstitutional when those penalties give rise to slavery or peonage; and, (4) protecting the right of employees to change employers. These four key principles are violated when low-wage workers enter into non-compete agreements, whether or not the initial execution of the agreement was voluntary.

1. Performance of Service to Pay Debt Is Peonage—Regardless of Volition

The Supreme Court granted certiorari in *Clyatt v. United States* to decide two relevant questions: (1) how peonage is defined and (2) if Congress had authority to enact the Peonage Abolition Act.[95] Samuel Clyatt appealed his conviction in federal court for returning two African-American men, Will Gordon and Mose Ridley, to peonage in order to work off a debt owed to Clyatt and his business partners.[96] The Court defined peonage as both "compulsory service [and] involuntary servitude" without regard to whether or not the debtor voluntarily entered into the contract in question.[97] Though the definition of peonage was not as important to the essential issue before the Court—whether Clyatt was properly convicted of "returning" Gordon and Ridley to a state of peonage—the Court went to considerable lengths to make it clear that the improper state of peonage could exist even if the debtor voluntarily agreed to exchange his or her labor as payment of the debt.[98] In short, the distinction of voluntary or involuntary peonage identifies only how the agreement came about; it does nothing to justify the condition of peonage itself.

As to the second question, the Court found that the ratification 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 for all citizens.[99] The Court also denounced involuntary servitude and peonage regardless of whether it arises between private individuals or between an individual and the state.[100]

95. Clyatt v. United States, 197 U.S. 207, 215 (1905).
96. *Id.* at 208.
97. *Id.* at 215.
98. *Id.* at 219-22.
99. *Id.* at 216–17.
100. *Id.* at 217.

2. Involuntary Servitude Undermines the Establishment of Free Labor

The issue of wage contracts and the Thirteenth Amendment reached the Supreme Court again six years later in *Bailey v. Alabama*.[101] 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.[102] Mr. Bailey entered into a yearlong contract to work as a farm hand.[103] At the time of being hired, the employer provided Bailey with a fifteen-dollar 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[104] 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 fifteen dollars as well as a thirty-dollar fine plus costs.[105] Mr. Bailey was then sentenced to twenty 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 "[t]here is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."[106] 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 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*."[107] The Court's opinion in *Bailey* not only recognized the need to protect each citizen's right to free labor, but also explicitly identified indentured servitude as a threat to the same.

3. Breach of Contract Penalties Must Not Amount to Slavery or Peonage

In 1920, the Supreme Court of South Carolina affirmed an employee's right to change employers in *Shaw v. Fisher*.[108] John Shaw, a land-

101. 219 U.S. 219 (1911).

102. *See id.* at 227.

103. *Id.* at 229.

104. *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 note 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; that, coupled with the statutory presumption that he intended to defraud the employer, prevented Mr. Bailey from proving his intent.

105. *Id.* at 231.

106. *Id.* at 245.

107. *Id.* at 241 (emphasis added).

108. *See* Shaw v. Fisher, 102 S.E. 325 (S.C. 1920).

owner, 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.[109] Mr. Carver testified that he worked for approximately three months before deciding to switch employers.[110] 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 authorizing the action initiated by Shaw conflicted with the spirit and intent of the Thirteenth Amendment.[111] 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.[112] The court also found that a debtor could be legally required to pay only actual damages suffered by the employer.[113] Finally, the court discussed the practical realities that would arise should employees be coerced into choosing between working for oppressive employers and starvation.[114] 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

In 1944, more than thirty years after *Bailey*, the Supreme Court considered the constitutionality of wage contracts in *Pollock v. Williams*.[115] Emanuel Pollock received a five-dollar advance from a corporation at the start of his employment and failed to repay the advance after failing to perform according to the terms of the contract.[116] After pleading guilty to the criminal charge against him, Mr. Pollock was sentenced to sixty 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.[117] In its opinion, the Supreme Court described the Thirteenth Amendment and the Peon-

109. *Id.* at 326.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 327.
114. *Id.*
115. Pollock v. Williams, 322 U.S. 4 (1944).
116. *Id.* at 5.
117. *Id.*

age Abolition Act as a "shield and a sword" against forced labor caused by debt.[118]

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."[119] The Court explained that free labor exists only when employees have power to control their employment conditions, thereby incentivizing employers to refrain from exploiting employees.[120] One way to confer power to employees is to afford them the right to change employers.[121] 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.[122]

Finally, the Court in *Pollock* detailed the financial burden endured by the employee as a result of receiving a five-dollar advance.[123] In exchange for failing to repay such a paltry sum of money, Mr. Pollock was required to post a $500 bond "quite regularly"[124] as he appealed his case to the Supreme Court. The Court also recognized his $100 fine was the equivalent of charging the employee twenty dollars for each dollar he received as an advance.[125] 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.[126]

The presence and analysis of criminal statutes in many of the aforementioned cases should not detract from their applicability to contemporary noncompete agreements between employers and low-wage workers. The absence of criminal penalties in the current context of these agreements does not negate the exploitation and oppression endured by members of the poor working class subjected to them. State-sanctioned government approval through judicial approval of the same (via civil judgments), and even mere legal coercion by individual employers, nonetheless amount to a constitutional violation.

118. *Id.* at 8.
119. *Id.* at 17.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 15.
124. *Id.*
125. *Id.*
126. *Id.* at 16.

III. CONTEMPORARY LOW-WAGE NONCOMPETE AGREEMENTS VIOLATE THE THIRTEENTH AMENDMENT

Employers of low-wage workers enjoy authority and stature strikingly similar to southern landowners. By virtue of their positions and the terms of employment agreements, employers from both eras bear virtually no burden or risk in their respective contractual arrangements. Like workers in the nineteenth and early twentieth centuries, contemporary workers bound by noncompete agreements assume all of the risk when entering into restrictive employment covenants. Specifically, they can be terminated without cause at the whim of their employer. They are bound to contracts that limit their ability to seek higher wages and/or better working conditions with a nearby, similarly situated employer. And, they are subjected to harsh penalties, such as forfeiting virtually all of their income or more in the form of judgments for specious damages should they fail to adhere to their contracts. In short, noncompete agreements unconstitutionally thwart the ability of workers earning low wages for unskilled labor to explore the benefits of working in a free labor society. Improper constraints on free labor persist when these agreements exist.

Reliance on the doctrine of assent regarding the voluntary nature of an employee signature on restrictive post-employment covenants is misguided.[127] The Supreme Court has found that the volition of the employee at the time of signing is not germane to the constitutional analysis.[128] When the circumstances rise to indentured servitude or peonage, the nation's legislative and judicial branches have unequivocally espoused an appropriate level of paternalism in protecting individuals from being subjected to those unbalanced positions of power.[129]

As seen in the instance of Ms. Walsh, individuals may sign an employment covenant without any physical coercion. However, the mere presence of her signature should not be interpreted as voluntarily agreeing to the terms of the document. Unfortunately, there is a great risk that employees earning low wages for unskilled labor are not afforded the time or resources to ascertain what they are agreeing to. And in the event that workers do fully understand the terms of the agreement, the choice between earning some money rather no money is not really a choice at all.

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127. *See* Rachel S. Arnow-Richman, *Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law*, 10 TEX. WESLEYAN L. REV 155, 166 (2003).

128. *See* United States v. Kozminski, 487 U.S. 931, 950 (1988); Bailey v. Alabama, 219 U.S. 219, 242 (1911); Clyatt v. United States, 197 U.S. 207, 215 (1905).

129. Soifer, *supra* note 41, at 1610, 1618.

Moreover, involuntary servitude, including the performance of service through legal coercion,[130] is counterproductive to the establishment of free labor. Assuming arguendo that Ms. Walsh was fully aware of the terms of the agreement, being forced to remain employed with the first agency under the threat of legal action renders her service involuntary. Such predicaments are precisely those contemplated and prohibited by the Thirteenth Amendment.[131]

Additionally, the penalties low-wage employees are confronted with if a court finds them in breach of an executed noncompete agreement amount to involuntary servitude and, in some instances, peonage. 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. In the case of Ms. Walsh, the liquidated damage clause of the post-employment restrictive covenants amounted to more than her net yearly salary. As recognized by the *Pollock* Court, this burden does not even begin to account for the costs associated with defending her interests against a civil action for breach of contract had she not secured free legal representation. 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, thus subjecting them to peonage. Consequently, the noncompete 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.

Noncompete agreements are designed to deny employees the right to change employers. As detailed in *Pollock*, free and voluntary labor can exist only when employers have an incentive to avoid exploiting employees because the employees have control over their job conditions.[132] 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 these 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 freely.

The alternative reduces what began as an at-will employment relationship to involuntary servitude. Employees agree to work at the pleas-

130. *Kozminski*, 487 U.S. at 944.

131. Pope, *supra* note 7, at 1531.

132. *Id.* at 1532 (discussing what he describes as the "power below," "incentive above" principle from *Pollock*).

ure of the employer as these agreements state that these 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 Thirteenth Amendment prohibition against involuntary servitude.[133] Most importantly, should employees choose to seek better employment utilizing their job history and experience, they will likely violate the terms of the agreement.

CONCLUSION

In jurisdictions where post-employment restrictions are permitted, local courts must strike down agreements that infringe on the constitutional rights of workers. 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. This is especially true in the context of post-employment restrictive covenants for low-wage, unskilled labor. The use of noncompete agreements in that context falls outside of the original purpose of the contracts: to protect a legitimate business interest of the employer. Preventing low-wage employees from seeking better job opportunities is not a legitimate business interest. To the contrary, post-employment restrictive covenants prevent economic mobility for the lowest wage earners in America. Indeed, the mere insertion of these contracts into the employment relationship can have a chilling effect on the employee's motivation to seek opportunities for advancement. And when employers seek to enforce the agreements, courts must recognize that the agreements violate low-wage workers' constitutional rights conferred by the Thirteenth Amendment. However, sole reliance on judicial remedies will likely lead to a patchwork of inconsistent rulings, precisely what our nation's leaders sought to avoid when establishing citizens' labor rights during Reconstruction. To that end, Congress also has the power and responsibility to address this issue.

Free and voluntary labor was the primary goal of the Reconstruction Era Congress.[134] As such, the Thirteenth Amendment conferred on the federal government the authority to assert federal principles and goals on an issue previously regulated on a state-by-state basis.[135] As a result, Congress has the authority to eliminate the use of noncompete agree-

133. *Bailey*, 219 U.S. at 244–45.

134. VanderVelde, *supra* note 7, at 494.

135. *Id.* at 443; *see also* TSESIS, *supra* note 56, at 34 (discussing how the ratification of the Thirteenth Amendment demonstrates the United States' commitment to enforcing freedoms on a national level, specifically the "constitutional obligation to preserve and further liberty rights").

ments between employers and low-wage employees.[136] To the extent individual states continue to permit the enforcement of noncompete agreements between employers and low-wage workers, Congress should not hesitate to exercise the authority conferred upon it by the Thirteenth Amendment to attain its goal of establishing a free labor market in America. Unless this practice is eradicated, attempts by the poor working class to shed the "vestiges of slavery and involuntary servitude"[137] by achieving economic mobility and freedom will continue to be thwarted.

136. The Mobility Opportunity for Vulnerable Employees Act is currently pending before Congress. The bill was introduced on June 4, 2015 by Senator Christopher Murphy. *See* S. 1504, 114th Cong. (2015). Similar legislation, the Limiting Ability to Demand Detrimental Employment Restrictions Act, was introduced to the House of Representatives on June 24, 2015 by Representative Joseph Crowley. *See* H.R. 2873, 114 Congress (2015).

137. VanderVelde, *supra* note 7, at 498.