A HIGH PRICE FOR FREEDOM: TRANSFORMING FARMOWNERS' EMPLOYMENT RIGHTS INTO DUE PROCESS PROTECTION

I. INTRODUCTION

While labor organizations are less prevalent now in various industries than in prior decades, they are neither obsolete nor unnecessary to many blue-collared laborers who rely on them to negotiate reasonable wages, benefits, and hours with their employers.[1] This reality stands true in California's agricultural sector, home to over 400,000 annual farmworkers, and over 77,500 farms. [2]

Nonetheless, the powerful influence of labor organizations is now under revised constitutional scrutiny.[3] The United States Supreme Court's ruling in *Janus v. AFSCME*, 585 U.S. (2018), now prohibits elected labor unions in the public sector from imposing fees on non-member employees, ruling those fee requirements to violate the fundamental free speech rights of non-

---

[1] Armstrong, Doree. JAKE ROSENFELD EXPLORES THE SHARP DECLINE OF UNION MEMBERSHIP, INFLUENCE | OFFICE OF MINORITY AFFAIRS DIVERSITY (2014), http://www.washington.edu/news/2014/02/12/jake-rosenfeld-explores-the-sharp-decline-of-union-membership-influence/ (briefly discussing how American businesses implemented sets of strategies to stifle union membership and influence, which led to union decline over recent years).

[2] Snibbe, Kurt. CALIFORNIA FARMS PRODUCE A LOT OF FOOD – BUT WHAT AND HOW MUCH MIGHT SURPRISE YOU, ORANGE COUNTY REGISTER (2017), https://www.ocregister.com/2017/07/27/california-farms-produce-a-lot-of-food-but-what-and-how-much-might-surprise-you/ (stating that California is home to over 77,500 farms); See also Employment Development Department, AGRICULTURAL EMPLOYMENT IN CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, https://www.labormarketinfo.edd.ca.gov/data/ca-agriculture.html (last visited Jan 20, 2019) ("400,000 annual farmworkers" figure was derived from the California Employment section, Annual Average Employment Data Excel Spreadsheet 1990-2017).

[3] *See* Janus v. AFSCME, 585 U.S. (2018) (overruled *Abood v. DBE*, 431 U.S. 209 (1977), holding nonmember union fees permissible to enforce without violating the Federal Constitution).

member employees.[4] *Janus* also overruled the United States Supreme Court's earlier decision in *Abood v. DBE*, 431 U.S. 209 (1977), which originally held that nonmember union fees are enforceable.[5] Due to the recent shifts in constitutional law as-applied to labor unions, many more labor regulations could foreseeably fall under an updated lens of constitutional scrutiny in future United States Supreme Court rulings.[6]

More recently, *Gerawan Farming, Inc. v. Agricultural Labor Relations Board,* (2018) 139 S. Ct. 60. cert denied (U.S. Oct. 1, 2018) (No 17-1375), levied a substantive due process challenge against sections 1164 to 1164.13 (the "Contract Dispute Resolution Act," or "CDRA") of California's Agricultural Labor Relations Act ("ALRA").[7] These CDRA provisions establish a crucial tool of leverage for unionized farmworkers to exercise while negotiating collective bargaining agreements.[8] Namely, the *Gerawan* case urged the United States Supreme Court to consider whether an employer's liberty to freely contract over the terms and parameters of his employee's job (a.k.a. "liberty of contract" "or "freedom of contract")[9] is a fundamental right[10] under the Federal Constitution's Fourteenth Amendment Due Process Clause.[11] A finding of that right would consequentially invalidate the crucial CDRA provisions that provide vital safeguards for unionized farmworkers.[12]

---

[4] *Id*.
[5] *See* Abood v. DBE, 431 U.S. 209 (1977) (overruled by Janus, 585 U.S.)
[6] *See* Janus, 585 U.S.; *See also* Abood, 431 U.S. 209.
[7] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375); *See also* Cal. Lab. Code § 1164, et. seq. (2019) (also known as the "Contract Dispute Resolution Act" [hereinafter "CDRA provisions"]). The importance of the CDRA provisions is explained in detail under Section II of this comment.
[8] *See* CDRA provisions, *supra*, footnote 7. The importance of the CDRA provisions is explained in detail under Section II of this comment.
[9] The reader must note that this comment may refer to the "liberty of contract" and the "freedom of contract" as interchangeable terms—there is no fundamental difference between these two terms for the purposes of this comment.
[10] A fundamental right is defined as "a group of rights . . . recognized by the Supreme Court as requiring a high degree of protection from government encroachment" and "must pass strict scrutiny to be . . . constitutional." *See* FUNDAMENTAL RIGHT, Wex Legal Dictionary, https://www.law.cornell.edu/wex/fundamental_right (last visited Jan 13, 2019).
[11] *See* Brief for Petitioner, Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375) [hereinafter "Brief for Petitioner"], at 21.
[12] *See* Brief for Petitioner, *supra*, footnote 11.

Although Gerawan Farming, Inc.'s petition for review[13] was denied on October 1, 2018, the substantive due process challenge raised in the *Gerawan* case could upend modern labor laws if similar cases arise before the United States Supreme Court's future case docket.[14] This future scenario is entirely plausible, since the recent *Janus* decision indicates that the United States Supreme Court still considers constitutional issues involving labor unions important enough for continued review and reform.[15] For that reason, this comment will assess whether an employer's "liberty of contract" over the terms of his employee's job warrants protection as a fundamental right under the Due Process Clause.[16] If that fundamental right exists, it is necessary to assess the extent to which a judicial ruling would invalidate pre-existing labor laws beyond the ALRA, and restrict future union-centric labor legislation designed to protect farmworkers.[17]

In Part I, this comment will summarize the history on the Agricultural Labor Relations Act of 1975, as well as the Contract Dispute Resolution Act, amended into the ALRA in 2002.[18] In Part II, this comment will discuss facts of the *Gerawan* case that raise the substantive due process issues.[19] In Part III, most importantly, this comment will enunciate the legal framework of substantive due process doctrine through landmark United States Supreme Court jurisprudence.[20] In Part IV, the substantive due process framework will be applied to the facts of the *Gerawan* case to determine whether an employer's "liberty of contract" is a recognizable fundamental right under the Fourteenth Amendment of the United States Constitution, which may potentially invalidate the CDRA portions of the ALRA.[21] Finally, this comment will conclude with a recommendation discussion for the United

---

[13] *Certiorari,* BLACK'S LAW DICTIONARY (10th ed. 2014). A "petition for review" is also known as a *Petition for Writ of Certiorari.* Certiorari is defined as "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review."

[14] *See generally* Brief for Petitioner, *supra* footnote 11.

[15] Janus v. AFSCME, 585 U.S. (2018); *See also* U.S. Const. Am. I.; Abood, 431 U.S. 209 (overruled by Janus, 585 U.S.).

[16] *See generally* Brief for Petitioner, *supra* footnote 11.

[17] *Id*.

[18] *See also* CDRA provisions; *See also* 29 U.S.C. § 151, et. seq., (2019) ([hereinafter "National Labor Relations Act" or "NLRA"]).

[19] *See generally* Brief for Petitioner, *supra* footnote 11.

[20] *See* Washington v. Glucksberg, 521 U.S. 702; *See* Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833; *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[21] *See generally* Brief for Petitioner, *supra* footnote 11.

States Supreme Court to utilize if they ever review a similar case like this one in the future, and the author's conclusions.

II. A HISTORY OF THE AGRICULTURAL LABOR RELATIONS ACT & THE CONTRACT DISPUTE RESOLUTION ACT

A contentious relationship has fermented between unionized employees and employers ever since the American Labor Movement proliferated in the Nineteenth Century.[22] Specifically, this tension pitted unionized employees seeking improved job conditions, usually taking collective action[23] to do so, against employers seeking to freely negotiate employment contracts with their employees absent the influences of regulatory mandates and third party labor organizations.[24] Employers did not want to be held liable for choosing not to impose the types of wages, hours, and work conditions that were expected of them by others and society.[25] Nonetheless, the need for these laborer-centric benefits became recognized through different state legislatures, but remained unprotected on the federal level until the National Labor Relations Act (NLRA) passed in 1935, where unionization and collective bargaining efforts in the private sector became legally protected methods of securing more favorable employment contracts for employees.[26] However, farmworkers were excluded from the NLRA's protections.[27]

California then enacted the ALRA in 1975 to resolve the NLRA's failure to protect the collective bargaining rights of agricultural farmworkers.[28] Unlike the NLRA, California's ALRA enabled farmworkers to unionize and

---

[22] FINK, LEON, WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS, xii-xiii (1983) (discussing how tensions between labor unions and employers created a "national debate").

[23] "*Collective action*" refers to certain activities that unionized employees engage in together to pressure employers into provide them better benefits, wages, hours, and safer work environments. These activities include strikes, walk-outs, and lock-outs.

[24] *See* WORKINGMEN'S DEMOCRACY, *supra,* footnote 22. This comment discusses the history of the labor movement within the context of substantive due process analysis throughout section IV, B, below.

[25] *Id*.

[26] *See* NLRA (2019).

[27] *See* NLRA § 152(3). The definition of a protected "employee" within the meaning of the NLRA expressly refuses to cover "any individual employed as an agricultural laborer."

[28] *See* Cal. Lab. Code §§ 1140 et. seq. (2019) ([referred to hereinafter as "Agricultural Labor Relations Act" or "ALRA"]).

collectively bargain for better wages, hours, and benefits without fear of employer retaliation.[29] However, because numerous elected unions and farmowners failed to execute and certify collective bargaining agreements due to negotiation impasses,[30] the contract formation process became indefinitely stalled and farmworkers could not obtain the necessary ALRA protections.[31] By 2001, less than 250 collective bargaining agreements were executed and certified, despite there being 25,000 active agricultural businesses with employees that were qualified for ALRA coverage.[32] These negotiation impasses not only precluded essential ALRA protections for farmworkers, but also undermined the ALRA's viability as a useful law unless labor unions were granted greater leverage during a negotiations impasse scenario.[33]

In 2002, California amended the ALRA to include the landmark CDRA provisions, creating a method to compel the creation of collective bargaining agreements even if a negotiation impasse threatened to stall the process.[34] Essentially, when certain collective bargaining agreement terms are disputed during the negotiations stage, a negotiation impasse occurs, where either the elected union representatives or the employer may elect an arbitrator to resolve the dispute and move beyond the impasse.[35] Both parties may mutually vote on a presiding arbitrator to oversee the dispute for a thirty-day period.[36]

If no resolution occurs after thirty days, the appointed arbitrator will declare the process "exhausted," and submit a proposed recommendation report to the Agricultural Labor Relations Board ("ALRB")[37] within twenty-one days that resolves those disputed terms in the tentative collective bargaining agreement.[38] When drafting that report, the arbitrator must consider: (1) the parties' mutual stipulations; (2) the employer's financial

---

[29] *See* ALRA; *See also* NLRA.
[30] A "*negotiation impasse*" occurs when an elected labor organization and an employer are unable to mutually agree upon each and every term of a collective bargaining agreement before submitting it to the ALRB.
[31] Gerawan Farming, Inc. v. ALRB, 3 Cal. 5th 1118, 1132 (2017).
[32] *Id.*
[33] *Id.*
[34] *See* CDRA provisions.
[35] *Id.*; *See also* Gerawan Farming, Inc. v. ALRB, 3 Cal. 5th 1118, 1147-48.
[36] *See* CDRA provisions, § 1164(b).
[37] The ALRB is the administrative agency that governs disputes between unions and employers involving breaches of a mutually agreed-upon collective bargaining agreement. *See also* ALRA.
[38] *See* CDRA provisions, § 1164(e)(1)-(5).

condition and their ability to satisfy the costs when they are unable to satisfy the union's demands; (3) the corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements; (4) the corresponding wages, benefits, terms, and conditions of employment prevailing in comparable firms or industries located in geographical areas with similar economic conditions, considering the employer's size, compared to the employee's experience, skills, required training, and the difficult nature of the work performed; (5) the average consumer prices for goods and services based on the local Consumer Price Index, plus the overall cost of living in the area where the work is performed.[39]

Once the arbitrator's recommendation report is submitted to the ALRB, either party has seven days to challenge it.[40] If a party challenges the arbitrator's report, they must successfully prove that each challenged provision is either: (1) "unrelated to wages, hours, or other conditions of employment within the meaning of [s]ection 1155.2[;]" or (2) "based on a clearly erroneous finding of material fact[;]" or (3) "arbitrary or capricious in light of the mediator's finding[s] of fact."[41]

If the ALRB rules that the mediator has improperly rendered his report based on any of the factors outlined above, it will order another thirty days of mediation.[42] If no resolution occurs between the parties after this period, the arbitrator will declare the session "exhausted" once again, and submit a second report to the ALRB to resolve the disputed terms.[43] Either party may challenge the arbitrator's second report with the ALRB, so long as the challenger can show either: "(1) the mediator's report was procured by corruption, fraud, or other undue means, [or] (2) there was corruption in the mediator, or (3) the rights of the petitioning party were substantially prejudiced by the misconduct of the mediator."[44] If the challenger satisfies their burden of proof as to at least one of those prongs, then a new mediator is appointed to rehear the case.[45] However, if the challenger fails to meet their burden of proof, the arbitrator's report is final and binding.[46] After this,

---

[39] *Id.*
[40] *Id.*, § 1164.3.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

the ALRB will adopt the arbitrator's recommendations into the final collective bargaining agreement.[47]

The CDRA provisions sparked much criticism after enactment, as well as one previous constitutional challenge.[48] Some critics allege that the mandatory mediation scheme imposed by the CDRA provisions during negotiation impasses failed to ensure that the interests of unionized employees were adequately voiced during the arbitration process, especially since the popular opinion of farmworkers was not factored into the CDRA's guidelines given to the arbitrator.[49] Other critics chastised the CDRA's mandatory mediation scheme as an unduly expensive and coercive system that delegates excessive resolution capacity away from the parties-in-interest.[50] Though some of these concerns serve as valid policy criticisms of the CDRA, not all of them are relevant when discussing whether the CDRA provisions implicate a fundamental right or violate substantive due process.[51]

III. A NEW CHALLENGER APPROACHES: THE FACTS BEHIND *GERAWAN FARMING, INC. V. ALRB*

Gerawan Farming, Inc. is a California farming corporation that operates in the respective counties of Fresno and Madera, which are located in California's San Joaquin Valley.[52] Operating since 1938, Gerawan Farming, Inc. claims to be the largest grower of plums, peaches, and nectarines in the

---

[47] *Id.*

[48] Hamparzoomian, Brandon. A Crucial Inadequacy of California's Mandatory Mediation and Conciliation Provision and What Can Be Done About It, 43 Lincoln L. Rev. 58, 71-77 (2016); *See also* Hess Collection Winery v. ALRB, 140 Cal. App. 4th 1584 (2006). This case also concerned a substantive due process and equal protection challenge against the same CDRA provisions at issue in this comment.

[49] *See* A Crucial Inadequacy of California's Mandatory Mediation and Conciliation Provision, *supra*, footnote 48, 71-77; *See also* CDRA provisions, *supra*, footnote 7, § 1164(e).

[50] Molina, Jesse. Broken Promises, Broken Process: Repairing the Mandatory Mediation Conciliation Process in Agricultural Labor Disputes, 21 San Joaquin Agric. L. Rev. 179, 186-89 (2012) (stating "[t]he entangling of mediation and arbitration disables parties from exercising the right of voluntariness and the power of self-determination").

[51] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).

[52] *SEE* GERAWAN FARMING, INC.'S WEBSITE, HTTPS://PRIMA.COM/ (LAST VISITED DEC 5, 2018).

nation, which their farmworkers routinely harvest.[53] Around 5,000 employees are employed by Gerawan Farming, Inc.[54]

United Farmworkers of America (UFW) was elected as the union representative of Gerawan Farming, Inc.'s workers in 1990, and was ALRB certified in 1992.[55] Despite UFW's attempts negotiate a collective bargaining agreement in good faith with Gerawan Farming, Inc. in 1994, no collective bargaining agreement was ever finalized or signed.[56] Neither party made any attempts to revive negotiations and create a new collective bargaining agreement, until 2011; seventeen years after the previous failed attempt.[57]

In 2011, UFW approached Gerawan Farming, Inc., indicating their renewed intent to negotiate a collective bargaining agreement.[58] From 2012-2013, UFW and Gerawan Farming, Inc. engaged in many negotiations in an attempt to create a new collective bargaining agreement.[59] After ten failed attempts to reach a conclusive deal, UFW invoked the CDRA provisions of the ALRA, and an arbitrator was appointed to resolve the disputed terms of the collective bargaining agreement.[60] When UFW and Gerawan Farming, Inc. were unable to reach a settlement after thirty days, the arbitrator declared the proceedings "exhausted," and drafted a recommendation report to resolve the disputed terms of the agreement himself.[61] The arbitrator relied on the aforementioned ministerial guidelines in the CDRA provisions, and submitted his first report to the ALRB.[62] The arbitrator's report provided farmworkers with "wage increases, fringe benefits, and other improvements in working conditions, as well as a[n] [internal] grievance and arbitration

---

[53] *SEE* GERAWAN FARMING, INC.'S WEBSITE, *SUPRA*, FOOTNOTE 52; *SEE ALSO* GERAWAN FARMING, INC'S LINKEDIN PAGE, HTTPS://WWW.LINKEDIN.COM/COMPANY/GERAWAN-FARMING/ (LAST VISITED DEC 17, 2018).

[54] *See* Brief for Petitioner, *supra,* footnote 11, at 9.

[55] *See* Brief for Respondent, ALRB, Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375), at 6.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.; *See also* Gerawan Farming, Inc. v. ALRB, *supra*, footnote 31; *See also* CDRA provisions, *supra*, footnote 7.

[61] *See* Brief for Petitioner, *supra* footnote 11, at 11.

[62] *See* Brief for Respondent, ALRB, *supra,* footnote 55, 6-7; *See also* Gerawan Farming, Inc. v. ALRB, *supra*, footnote 31.

procedure to protect them from unfair treatment."[63] Further, the collective bargaining contract would only last for three years, from 2013-2016, requiring the parties to renegotiate a new contract at the end of this period.[64]

Gerawan Farming, Inc. administratively challenged six provisions of the arbitrator's first report.[65] The ALRB remanded those provisions back to the mediator for reconsideration, and another thirty-day mediation period commenced.[66] After no conclusive resolution between the parties, the arbitrator submitted a second report deriving how those disputed terms should be resolved.[67] Because neither party objected to that second report, it became the ALRB's final order, and was incorporated into the final collective bargaining agreement on November 19, 2013.[68]

Despite not challenging the arbitrator's second report, petitioner Gerawan Farming, Inc. sought a writ of mandate to invalidate the collective bargaining agreement by attacking the CDRA provisions on constitutional grounds.[69] Specifically, Gerawan Farming, Inc. alleged those provisions as so coercive that they violated their employer-based liberty rights under substantive due process, in addition to other theories of constitutional rights that are irrelevant to this comment's discussion.[70] After losing at the trial level, petitioner Gerawan Farming, Inc. appealed their writ of mandate case to the Fifth District Court of Appeal, which held the CDRA provisions violated Gerawan Farming, Inc.'s constitutional rights, reversing the trial court's decision.[71] On review, the California Supreme Court reversed the appellate

---

[63] *See* Brief for Respondent, UFW, Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375), at 5.

[64] *See* Brief for Respondent, UFW, *supra*, footnote 63, at 5, 21-22 (describing that the CDRA order requires increased wage rates; displaces Petitioner's internal grievance process; and disturbs a seniority system designed to help seasonal workers).

[65] *See* Brief for Petitioner, *supra,* footnote 11, at 16.

[66] *See* Brief for Respondent, ALRB, *supra,* footnote 55, at 7.

[67] *Id*.

[68] *Id*.

[69] *See* Gerawan Farming, Inc. v. ALRB, *supra*, footnote 31 (overruled Gerawan Farming, Inc. v. ALRB, 187 Cal. Rptr. 3d 261 (2015)); *See also* CDRA provisions, *supra*, footnote 7.

[70] *See* Brief for Petitioner, *supra,* footnote 11, at 25.

[71] *See also* CDRA provisions, *supra*, footnote 7; *See generally* Gerawan Farming, Inc. v. ALRB, 187 Cal. Rptr. 3d 261 (2015) (judgment reversed by Gerawan Farming, Inc. v. ALRB, 3 Cal. 5th 1118). The reader should note that California's Fifth District Court of Appeals oddly struck down the CDRA on equal protection grounds, but did not expressly rule on Gerawan Farming, Inc's substantive due

court and affirmed the trial court's ruling, holding that the CDRA provisions were constitutionally valid, since Gerawan Farming, Inc. possessed no fundamental freedom of contract right within the domain of labor relations, nor any other constitutional violation.[72]

Despite their loss in the California Supreme Court, Gerawan Farming, Inc. continued fighting the finalized collective bargaining contract as they appealed their case into the United States Supreme Court.[73] On March 28, 2018, petitioner Gerawan Farming, Inc. filed their petition for review in the United States Supreme Court, reaffirming their substantive due process arguments that sought to strike the CDRA provisions, as well as other theories involving constitutional law.[74] Respondents ALRB and UFW filed their opposition briefs against Gerawan Farming, Inc. on June 15, 2018.[75] Review was denied on October 1, 2018, and the United States Supreme Court missed an ideal opportunity to clarify whether an employer's alleged "liberty of contract" interest should be a fundamental right under substantive due process.[76] This comment answers that question and assists the United States Supreme Court in resolving this issue in any similar future case, while using sound constitutional legal principles entrenched in authoritative jurisprudence.[77]

---

process challenge. However, Gerawan Farming, Inc. reaffirmed their substantive due process challenge at the California Supreme Court, and that court ruled against said challenge.

[72] Gerawan Farming, Inc. v. ALRB, *supra*, footnote 31, at 1160.

[73] *See generally* Brief for Petitioner, footnote 11.

[74] *Id*.

[75] *See generally* Brief for Respondent, UFW, *supra*, footnote 63; *See also* Brief for Respondent, ALRB, *supra*, footnote 55.

[76] *See* Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).

[77] Namely, this comment will rely on three chief cases to show how the substantive due process applies to the *Gerawan* case: (1) Washington v. Glucksberg, 521 U.S. 702 (1992); (2) Obergefell v. Hodges, 135 S. Ct. 2584 (2015); and (3) Hess Collection Winery, 140 Cal. App. 4th 1584.

IV. LEGAL STANDARD & ANALYSIS

A. Setting the Due Process Standard: Express and Implied Constitutional Rights

The doctrine of substantive due process and fundamental rights arises out of the Due Process Clause, in the Fourteenth Amendment of the Federal Constitution.[78] According to the Fourteenth Amendment's Due Process Clause, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[79] Based on the United States Supreme Court's interpretation of the Fourteenth Amendment, the Due Process Clause has a substantive due process component and a procedural due process component.[80] Further, pursuant to substantive due process jurisprudence, all laws are subject to the highest standard of review, known as strict scrutiny, if those laws infringe on fundamental rights derived from the Federal Constitution.[81] In fact, the strict scrutiny standard is so demanding that almost no law that violates a fundamental right under substantive due process is capable of passing its muster; by successfully arguing that substantive due process is violated and strict scrutiny applies, Gerawan Farming, Inc, can invalidate the CDRA on constitutional grounds.[82] On the other hand, laws that trigger no constitutional violation only require a rational relationship to a legitimate government purpose, which is a much lower standard of review to meet than strict scrutiny.[83] The rational basis review standard—a much lower

---

[78] *See* U.S. Const. Am. 14 ([hereinafter referred to as the "Fourteenth Amendment"]).
[79] *See* Fourteenth Amendment, *supra*, footnote 78.
[80] *See* Fourteenth Amendment, *supra*, footnote 78. This comment will only discuss the substantive due process doctrine of the Fourteenth Amendment, and not the procedural due process doctrine derived from the Fourteenth Amendment.
[81] Strict scrutiny will invalidate any law that infringes on a fundamental right unless that law serves a "compelling state interest" and is "narrowly drawn" to serve that interest. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (discussing the strict scrutiny standard of review imposed when fundamental rights are violated).
[82] *See generally* Wade, *supra*, footnote 81; *See generally* Brief for Petitioner, *supra*, footnote 11, at 14, 26-31 (Gerawan Farming, Inc. repeatedly states that the CDRA provisions violate substantive due process, permitting a reasonable inference that they want the CDRA provisions reviewed under strict scrutiny).
[83] *See* Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (holding "this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.").

standard of review than strict scrutiny—upholds almost any law as valid, and would thereby uphold the CDRA provisions as valid if it is applicable.[84]

Some fundamental rights are expressly enumerated in the Federal Constitution, whereas many other fundamental rights are only recognized through a judicial interpretation of the Federal Constitution.[85] For example, the rights to free speech, a free press, and the right to bear arms, are all expressly enumerated in the Bill of Rights.[86] On the other hand, the United States Supreme Court has interpreted the Ninth Amendment in conjunction with the Due Process Clause to expose the existence of an unidentified number of unenumerated (or "implied") fundamental rights not expressed in the Federal Constitution.[87] Based on the express text of the Ninth Amendment, certain enumerated rights "[can]not deny or disparage other [rights] retained by the people."[88] For that reason, the United States Supreme Court held that "the full scope of [protected] liberty [interests] . . . cannot be . . . limited by the . . . specific guarantees found in the Constitution."[89] The reality of unenumerated constitutional rights is also shown by the United States Supreme Court's past jurisprudence that indicates a number of fundamental rights not included in the Bill of Rights—including the right to marry, the right to interstate travel, and the right to parent one's children, among other rights.[90]

However, the substantive due process legal standard used to identify unenumerated fundamental rights has been rife with ambiguity throughout the history of the Court's jurisprudence, and subject to ongoing debate

---

[84] *See* Griswold, 381 U.S. at 497.
[85] *See generally* U.S. Const. Am. 1-24
[86] *See* U.S. Const. Am. 1, 2, 15.
[87] *See* Casey, 505 U.S. at 848 (discussing the Ninth Amendment in conjunction with substantive due process); The Ninth Amendment also states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *See* U.S. Const. Am. 9 ([hereinafter referred to as the "Ninth Amendment"]).
[88] *See* Ninth Amendment, *supra*, footnote 87 (indicating that "[t]he enumeration of certain rights, shall not be construed to deny or disparage other […][rights] retained by the people.").
[89] *See also* Casey, 505 U.S. 833.
[90] *Id*. at 848-49; *See also* Poe v. Ullman, 367 U.S. 497, 543 (1961) (opinion dissenting from dismissal on jurisdictional grounds); Further, the United States Supreme Court admitted that "[i]t is tempting . . . to suppose that liberty encompasses […][exclusively] those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. . . . [b]ut of course this Court has never accepted that view." Casey, 505 U.S. at 847.

amongst legal scholars and jurists.[91] Some of this confusion stems from the United States Supreme Court's articulation of this standard very differently in older cases as opposed to modern cases.[92] Even the United States Supreme Court acknowledged these ambiguities, admitting that the legal evolution of the substantive due process standard is one that has been "never fully clarified, to be sure, and perhaps not capable of being fully clarified."[93]

Despite this perceived confusion, the substantive due process standard clearly incorporates a three-step process that Gerawan Farming, Inc. must argue.[94] First, Gerawan Farming, Inc.'s alleged liberty interest must be "careful[ly] descri[bed]" to appropriately tailor the scope of the alleged protections.[95] Second, the liberty interest must be "implicit in the concept of ordered liberty" to qualify as a fundamental freedom, meaning that it must be significantly important to the American public.[96] Third, the interest must be "deeply rooted in history and tradition" in that a substantial number of jurisdictions have not historically regulated that liberty interest at stake, raising the presumption that courts historically and impliedly recognized that interest as a fundamental right.[97] Based on this legal standard, one can conclude whether Gerawan Farming, Inc.'s alleged liberty interest is a fundamental right.[98]

Additionally, if a fundamental right is implicated in the CDRA provisions, then those CDRA provisions must be struck down unless they pass muster under strict scrutiny.[99] However, if Gerawan Farming, Inc. fails to meet this substantive due process standard, then no fundamental right is at stake, and

---

[91] Fallon, Jr., Richard H. *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 Colombia L. Rev. at 309 (1993) (stating that the "[d]ue process doctrine subsists in confusion").
[92] Harrison, John. *Substantive Due Process and the Constitutional Text*, 83 Virginia L. Rev. 493, 493-97 (1997).
[93] Washington v. Glucksberg, 521 U.S. 702, 722 (1992).
[94] Casey, 505 U.S. 950-952 (discussing how unenumerated fundamental rights must be "implicit in the concept of ordered liberty" and "deeply rooted in history and tradition").
[95] *Id*. at 721.
[96] *Id.*; *See* Casey, 505 U.S. 950-52.
[97] *See* Glucksberg, 521 U.S. at 722; *See* Casey, 505 U.S. 950-52.
[98] *See* Glucksberg, 521 U.S. at 721-22; *See* Casey, 505 U.S. 951-52.
[99] *See* Glucksberg, 521 U.S. at 721; *See* Casey, 505 U.S. 950-52; *See* Brief for Petitioner, *supra*, footnote 11, at 21; *See also* CDRA provisions.

the CDRA provisions only require a rational basis to pass constitutional muster.[100]

1. The Court Should Refrain From Adjudicating the Case Because Gerawan Farming, Inc. Failed to Descriptively Identify the Liberty Interest at Stake

Any disputed liberty interest must be appropriately framed to determine the scope of protectable rights under the Due Process Clause.[101] Whenever the judiciary is requested to review a law's validity, courts must exercise "judicial restraint"[102] due to the risk of infringing on the policymaking rights of the legislature.[103] Also, there is a danger of judicial overreach when invalidating any law, a litigant challenger must provide a "careful description" of the specific liberty interest at stake to encourage the "exercise of utmost care" in helping the Court adjudicate the case, especially when the Court "break[s] new ground in [the] field [of fundamental rights]."[104] Moreover, because the "guideposts for responsible decision-

---

[100] *See* Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (holding "this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose."); *See also* CDRA provisions.

[101] *See* Glucksberg, Glucksberg, 521 U.S. at 721; Reno v. Flores, 507 U.S. 292, 307 (1993) (describing the Court's duty of care and judicial restraint with regard to new substantive due process findings); Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (describing the Court's duty of care and judicial restraint with regard to new substantive due process findings).

[102] "The term *judicial restraint* refers to a belief that judges should limit the use of their power to strike down laws, or to declare them unfair or unconstitutional, unless there is a clear conflict with the Constitution." See Judicial Restraint - Definition, Examples, Cases, Legal Dictionary (2017), https://legaldictionary.net/judicial-restraint/ (last visited Dec 17, 2018).

[103] *See* Thomas, Evan. Reagan's Mr. Right, TIME MAGAZINE, Jun. 30, 1986. Moreover, "judicial restraint" is the antithesis of "judicial activism," since it enforces deference to legislative authority and encourages court-reluctance against invalidating laws unless they violate the Federal Constitution and fail to meet the heightened scrutiny standards.

[104] *See See* Glucksberg, 521 U.S. at 721 (describing the "careful description" requirement); Flores, 507 U.S. at 307 (describing the Court's duty of care and judicial restraint with regard to new substantive due process findings); Collins, 503 U.S. at 125 (describing the Court's duty of care and judicial restraint with regard to new substantive due process findings).

making are scarce and open-ended," a specific articulation of the liberty interest at stake is crucial.[105] Otherwise, the Court risks inadvertently protecting unintended rights through an issued declaration that is overly broad in its protections.[106]

2. Legal Application to Gerawan's Facts

In the *Gerawan* case, Gerawan Farming, Inc. failed to identify the specific liberty interest at stake in its petition for review.[107] Instead of identifying the employer-based liberty interests that the CDRA provisions allegedly infringe, petitioner Gerawan Farming, Inc. generally alleged that "the [CDRA] process implicate[d] the liberty and property of both farmworkers and owners," without carefully describing the scope and limitations of that interest.[108] Although Gerawan Farming, Inc. asserted that an employer and employee "have the right to decide [certain] matters between themselves by bargaining," they failed to articulate what those specific matters are, and how those rights are subject to the liberty interest at stake.[109] Thus, Gerawan Farming, Inc. laid out no abstract guideposts to frame and tailor the discussion.[110] For those reasons alone, the Court correctly denied review, but should have ruled against Gerawan Farming, Inc. had review been granted, because their failure to articulate its interest at stake justifies the Court's judicial restraint against ruling on this issue.[111] However, for the sake of continuing this discussion, this comment will infer that Gerawan Farming, Inc. sought to protect its "liberty of contract" interest, discussed above, since that interest was also litigated at the state court level.[112]

A.

---

[105] *See* Glucksberg, 521 U.S. at 721.
[106] *Id.*
[107] *See generally* Brief for Petitioner, *supra,* footnote 11, 21-25.
[108] *Id.* at 21.
[109] *Id*.
[110] *Id.* at 23.
[111] *See* Glucksberg, 521 U.S. at 721-722 (holding "we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest").
[112] *See generally* Brief for Petitioner, *supra* footnote 11.

B. An Employer's "Liberty of Contract" is not a Fundamental Right under the Due Process Clause because it is Not "Implicit in the Concept of Ordered Liberty."

The United States Supreme Court articulated two separate ways in which a challenger can establish whether a liberty interest is within the concept of "ordered liberty" pursuant to the Due Process Clause, which are separately outlined in *Washington v. Glucksberg,* 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), respectively.[113] The first way to prove whether the "liberty of contract" interest is implied in the concept of ordered liberty is if American society holds that right to be a significantly important cornerstone of their liberties and freedoms, which Gerawan Farming, Inc. can prove through substantial state statutes or voter initiatives that show a present-day, nation-wide consensus on that issue.[114]

In *Glucksberg*, a physician challenged a Washington state statute banning physician-assisted suicide, seeking the Court's declaration that the "right to die" was a protected liberty interest.[115] When deciding whether Americans would consider the "right to die" a significantly important right, the *Glucksberg* majority looked to numerous state statutes as a reflection of the current-day American attitudes toward physician-assisted suicide.[116] To the peritioner's dismay, the *Glucksberg* Court found numerous regulatory examples where those state laws did not indicate that Americans held such a right to be significantly important to protect under the Due Process Clause.[117]

First, Washington's Natural Death Act of 1979 passed to statutorily protect the "withholding or withdrawal of life-sustaining treatment" as a form of non-suicide.[118] Second, in 1991, Washington voters denied a ballot initiative permitting physician-assisted suicide.[119] Third, in 1993, California voters also denied a physician-assisted suicide ballot initiative similar to the one in Washington.[120] Fourth, although Oregon passed a physician-assisted suicide law through a voter-referendum, many state-based efforts around the country failed to follow suit.[121] In fact, many proposed reforms in this regard

---

[113] *See generally* Glucksberg, 521 U.S. 702.
[114] *Id*.
[115] *Id.* 707-09.
[116] *Id*. at 730.
[117] *Id.* 716-719.
[118] *Id.* 716-17.
[119] *Id.* at 717.
[120] *Id.*
[121] *Id.* (describing the "Death with Dignity Act").

struggled to be enacted after such proposed legislation was introduced.[122] It was not a surprise that an "overwhelming majority" of states retained laws criminalizing physician-assisted suicide, with Iowa and Rhode Island recently joining the state majority at that time.[123] These regulations reflected an American belief that "suicide [as] a serious public-health problem" and most states were "interest[ed] in the preservation of human life."[124]

Although certain "[s]tates currently engaged in serious thoughtful examinations of physician-assisted suicide," the lack of state-wide consensus through sweeping legislative reform indicated that American society was unready to embrace physician-assisted suicide as a fundamental right.[125] For those reasons, no substantive due process right was found within the right to suicide.[126] Therefore, in the *Gerawan* case, Gerawan Farming, Inc. must show substantial state regulations or voter initiatives showing Americans are deeply concerned about the "liberty of contract" rights of employers over their employees.[127]

Interestingly, many of Gerawan Farming, Inc.'s "liberty of contract" concerns have been resolved in *Hess Collection Winery v. ALRB*, 140 Cal. App. 4th 1584 (2006), coincidentally also concerning a substantive due process challenge against the CDRA.[128] The facts of *Hess* are similar to the facts in the *Gerawan* case.[129] Although the *Hess* court did not apply the substantive due process standard outlined above, its theories as to the first prong of the substantive due process standard are importable into the "ordered liberty" discussion.[130]

Similar to what the United States Supreme Court did in *Glucksberg*, the *Hess* court looked to various statutory and state constitutional laws.[131] These laws reflected an American recognition of power imbalances in the workplace, and a normative desire to put both employers on equal footing at the negotiations table.[132] First, the California Constitution requires that the

---

[122] *Id.* 717-18.
[123] *Id*.
[124] *Id.* at 703.
[125] *Id*.
[126] *Id*.
[127] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).
[128] *See generally* Hess v. ALRB, 140 Cal. App. 4th 1584 (2006).
[129] *Id*. 1594-96; *See generally* Gerawan Farming, Inc. v. Agricultural Labor Relations Board, *supra*, footnote 7.
[130] *See* Hess, 140 Cal. App. 4th at 1598-1604.
[131] *See* Glucksberg, 521 U.S. 702.
[132] *See* Hess, 140 Cal. App. 4th 1584*; See* Glucksberg, 521 U.S. at 716-719.

legislature and state agencies "provide for minimum wages and for the general welfare of employees."[133] Article XIV of the California Constitution, entitled "Labor Relations," contains five sections that comprehensively outlines various actions that the California legislature is empowered to enforce within the domain of labor relations.[134] Those actions include fair compensation for extraordinary work circumstances, mandatory minimum wage and hour laws, safe work conditions for laborers, and rights of action for workplace injuries, among other interests.[135] In many Article XIV clauses, the California Constitution grants "plenary power" to the legislature to effectuate these laws, meaning that the state has virtually unrestricted power to enact labor laws.[136] Based on those constitutional mandates, the ALRA's CDRA provisions fairly "equalize the bargaining power of [agricultural] employees with that of employers through the collective bargaining process."[137]

Second, numerous federal labor laws mandate various requirements on employers, such as minimum wages, hours, and labor organization relations.[138] These rights are derived from the Fair Labor Standards Act (FLSA), Taft-Hartley Act, Wagner Act, and others, which are discussed in greater detail below.[139] Further, these federal laws have survived previous constitutional challenges, and are still in effect almost a century later.[140] Additionally, almost every state in the union has labor laws and labor commission agencies designed to protect employees against unlawful discrimination, wage theft, and employer retaliation.[141] Therefore, Gerawan Farming, Inc. may struggle to prove that there is a nationwide consensus

---

[133] *See* Hess, 140 Cal. App. 4th 1584; *See* Cal. Const. Art. XIV, § 1
[134] *See* Cal. Const. Art. XIV, § 1-5.
[135] *See* Cal. Const. Art. XIV, § 1-5
[136] *See* Cal. Const. Art. XIV, § 1-5.
[137] *See* CDRA provisions; *See* ALRA*, supra*, footnote 48.
[138] These statutes are discussed in detail in the following section of this article.
[139] *See also* 29 U.S.C. §§ 201, et. seq [hereinafter "Fair Labor Standards Act"]; *See* 29 U.S.C. §§ 101, et. seq [hereinafter "Norris LaGuardia Act"]. These statutes are discussed in detail in the following section of this comment.
[140] *See* NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 31-32 (1937) (generally upheld the NLRA under Congressional commerce clause powers because the industrial labor it regulates have an "effect upon commerce.").
[141] Wage and Hour Division (WHD), UNITED STATES DEPARTMENT OF LABOR, https://www.dol.gov/whd/contacts/state_of.htm (last visited Dec 17, 2018) [hereinafter, "WHD, Listing"] (this is a listing of all the labor commission offices of each state).

through various state laws indicating that the "liberty of contract" is "implied in the concept of ordered liberty."[142]

An alternate way Gerawan Farming, Inc. can prove that the "liberty of contract" is "implied in the concept of ordered liberty" is if "neither liberty nor justice would exist if [that interest was] sacrificed," meaning that a hypothetical deprivation of the "liberty of contract" would pose substantial harm upon the affected parties that it would be unconscionable to enforce.[143] This 'substantial harm' consideration was a central concern in the "right to same sex marriage" issue under *Obergefell v. Hodges*.[144] In *Obergefell*, James Obergefell and his same-sex partner, John Arthur, married in Maryland and then settled in their home state of Ohio.[145] After John Arthur died of terminal illness, Ohio refused to include James Obergefell as a surviving spouse on John Arthur's death certificate, precluding Obergefell from inheriting marital property through probate proceedings.[146] After suing state officials at the trial level, the case was appealed and consolidated with other similarly situated plaintiffs who also remained unrecognized as legally married couples based on their respective state laws.[147]

On appeal in the United States Supreme Court, the *Obergefell* majority found that the right to marry amongst same-sex couples was a fundamental right and implicit in the concept of ordered liberty, based on the societal benefits promoted by such a right, as well as the substantial harm that would occur if states denied that right.[148] First, because the right to marry promotes nuclear family stability and healthy child upbringing as "keystone[s] of […][American] social order," American society would consider the right to marriage, even among same sex-couples with children, as crucially important for maintaining societal stability.[149] Second, and most importantly, if nuclear families with same sex spouses were deprived of the same rights of heterosexual couples, including tax benefits, child support rights, and probate rights, then that deprivation would significantly disadvantage the child offspring, causing mass destabilization of many such nuclear families across the nation.[150] For those reasons, the United States Supreme Court found a fundamental right in the right to marry between same sex couples under

---

[142] *See* Glucksberg, 521 U.S. at 730.
[143] *See* Obergefell, *supra*, footnote 20.
[144] *Id*.
[145] *Id.* 2593-95.
[146] *Id*.
[147] *Id*.
[148] *Id.* at 2589.
[149] *Id.* at 2590.
[150] *Id.* at 2601.

substantive due process.[151] Thus, Gerawan Farming, Inc. must argue that a denial of the employer's "liberty of contract" would impose a substantial harm and undue burden upon employers across the nation.[152]

1. Legal Application to Gerawan's Facts

In the present case, ample evidence shows that the "liberty of contract" is not implicit in the concept of ordered liberty and thus not a fundamental right.[153] Numerous state laws and federal statutes show that Americans do not consider the liberty of contract of any significant importance whatsoever.[154] First, Article XIV of the California Constitution gives plenary power to the legislature to enact laws to protect workers by enacting laws around minimum wages, hours, and safe workplace conditions.[155] Second, federal laws such as the Fair Labor Standards Act (FLSA), Taft-Hartley Act, the NLRA, and others, indicate that the "liberty of contract" is also not recognized on a national scale, since those laws interfere with many employer liberties by requiring them to abide by various rules when employing workers.[156] Lastly, almost every state has labor commission agencies that punishes or fines other employers who do not abide by labor laws.[157] For those reasons, the "liberty of contract" cannot be implicit in the concept of ordered liberty.

Additionally, Gerawan Farming, Inc. provided no evidence showing that substantial harm will be inflicted upon employers if the "liberty of contract" is denied as a fundamental right.[158] Although Gerawan Farming, Inc. alleges that the CDRA provisions imposes non-consensual terms on employers, which negatively impacts the property interests of the employer, these allegations fail to show harm for two pertinent reasons.[159] First, whereas the *Obergefell* plaintiffs demonstrated the risk of substantial harm through the destabilization of the nuclear family if no fundamental right was found,

---

[151] *Id*.
[152] *Id*.
[153] See footnotes 154-63, *infra*.
[154] See footnote 157, *infra*.
[155] *See* Cal. Const. Art. XIV, *supra*, footnote 133.
[156] *See* NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (upheld the NLRA under Congressional commerce clause powers); *See also* NLRA; *See also* Fair Labor Standards Act; *See also* 29 U.S.C. §§ 101, et. seq. These statutes are discussed in detail in the following section of this article.
[157] See WHD, Listing, *supra*, footnote 141.
[158] *See* Brief for Petitioner, *supra,* footnote 11.
[159] *Id.*; *See also* CDRA provisions.

Gerawan Farming, Inc. did not provide examples of any actual property loss that can result if no "liberty of contract" is found, nor did it specify how the nature of that hypothetical property loss will greatly injure employers.[160] Second, the CDRA provisions cannot be harmfully coercive because it does not trigger until a negotiations impasse occurs, giving both parties the opportunity to negotiate in good faith beforehand.[161] Further, the CDRA is not harmfully coercive even during the interest arbitration process, because both parties have two separate appeals to challenge the recommendation reports of the arbitrator, and additional right to seek a writ of mandate in state court to challenge denials of appeal.[162] For these reasons, Gerawan Farming, Inc. failed to argue that the CDRA provisions were harmfully coercive and whether they imposed substantial harm to the property interests of employers.[163]

C. The Post-New Deal Era Permanently Purged Any Notion that the "Liberty of Contract" was Deeply Rooted in History and Tradition.

The third step of the substantive due process framework assesses whether "liberty of contract" is "deeply rooted" in America's' "history, legal traditions, and practices."[164] Specifically, this inquiry assesses whether a substantial number of jurisdictions throughout the United States historically regulated the "freedom of contract."[165] If the right was not regulated in a substantial number of jurisdictions, then liberty interest and the law must survive the strict scrutiny standard of review.[166] However, if the liberty interest was regulated by a substantial number of jurisdictions in the past, then no such fundamental right exists, and the law must be justified under a rational basis standard.[167] Thus, petitioner Gerawan Farming, Inc. must evidence that the "liberty of contract" right was not historically regulated by

---

[160] *See* Brief for Petitioner, *supra,* footnote 11, 21-25; *See* Obergefell, 135 S. Ct. 2584.
[161] *See* Brief for Petitioner, *supra,* footnote 11; *See also* CDRA provisions.
[162] *See* Brief for Petitioner, *supra,* footnote 11; *See also* CDRA provisions, § 1164.3(a)-(e).
[163] *See* Brief for Petitioner, *supra,* footnote 11, at 21-25; *See also* CDRA provisions.
[164] *See* Washington v. Glucksberg, 521 U.S. 702, 710 (1992) [this comment will refer to this legal concept as "deeply rooted in history and tradition" hereinafter].
[165] *See id*.
[166] *Id*.
[167] *Id*. at 787-89.

a substantial number of jurisdictions to apply strict scrutiny and potentially invalidate the CDRA.[168]

The "deeply rooted in history and tradition" prong of the substantive due process analysis permits the Court to holistically survey past regulations and case law stretching back into the original heyday of the United States, up until the present-day.[169] In the "right to die" issue in *Glucksberg*, the Court looked to an extensive history of regulations and court cases to show that assisted-suicide was not rooted in history and tradition, since numerous cases historically prohibited it.[170] First, all original thirteen states admitted into the union had laws that criminalized assisted-suicide as a type of homicide, which was inspired by similar laws existing throughout the colonial era.[171] Second, during westward expansion, all newly admitted states introduced similar laws against assisted suicide.[172] Third, those anti-suicide laws persisted throughout the Eighteenth and Nineteenth Centuries, indicating that such state-based prohibitions against assisted-suicide indicated that no "right to die" was ever recognized throughout American history.[173] Therefore, no substantive due process right to die existed.[174] Thus, Gerawan Farming, Inc. should prove that a substantial number of states did not historically regulate the freedom of contract in the past.[175]

Nonetheless, the United States Supreme Court has found fundamental rights under substantive due process even when those rights are not "deeply rooted in history and tradition."[176] In the *Obergefell* same-sex marriage case, the majority neglected assessing whether the right to same sex marriage was "deeply rooted in history and tradition" after confirming that it was "implied in the concept of ordered liberty."[177] Minority dissenter Justice Alito not only pointed out the majority's failure to rule on that particular step of the substantive due process analysis, but also asserted that same sex marriage was not deeply rooted in history and tradition, since many states did not

---

[168] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).
[169] *See* Glucksberg, 521 U.S. 702.
[170] *See id.* at 713-14.
[171] *Id*.
[172] *Id*. at 714-16.
[173] *Id*. at 728 (holding that "the law's treatment of assisted suicide in this country . . . continues to be . . . reject[ed] […] [in] nearly all efforts to permit it.").
[174] *Id*. at 734.
[175] *Id*.; Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).
[176] Obergefell, 135 S. Ct. at 2584.
[177] *Id*. at 2640-41 (J. Alito, dissenting).

recognize such marriages within the legal definitions of their marriage laws.[178] In fact, no state in the union allowed same-sex marriage until the Massachusetts Supreme Court constitutionally invalidated a state law that banned same-sex marriage in 2003.[179] For those reasons, the *Obergefell* decision permits a finding of fundamental rights when the liberty interest at issue is "implied in the concept of ordered liberty," even if it is not "deeply rooted in history and tradition."[180] Therefore, although Gerawan Farming, Inc. may only need to prove that the "liberty of contract" is "implied in the concept of ordered liberty," and not "deeply rooted in history and tradition," the extent of these depends upon the majority vote of the Court.[181]

Arguably, an employer's "liberty of contract" right was implicitly recognized during most of the Nineteenth Century.[182] Early Nineteenth Century history shows that there were virtually no laws regulating mandatory wages, hours, workplace conditions, or extraordinary compensation circumstances in the United States, indicating that states did not historically regulate the employer-employee relationship.[183] Although very few labor unions demanded those benefits on a private level, they remained legally unprotected and even criminalized for their collective bargaining activities.[184]

Originally, labor unions were seen as criminal conspiracies.[185] In *Commonwealth v. Pullis*, 3 Doc. Hist. 59 (1806), a group of Philadephia shoemakers created the Journeymen Codwainers Union to strike for higher

---

[178] *Id*. at 2640.
[179] *See id*.; *Factbox: List of states that legalized gay marriage*, REUTERS (2013), https://www.reuters.com/article/us-usa-court-gaymarriage-states-idUSBRE95P07A20130626 (last visited Dec 6, 2018).
[180] *See* Obergefell, 135 S. Ct. at 2584.
[181] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375); even if the United States Supreme Court may not require the foregoing analysis to render their judgment, this comment will proceed to discuss the "deeply rooted in history and tradition" prong of the analysis for a more comprehensive and thorough discussion.
[182] *See* Commonwealth v. Pullis, 3 Doc. Hist. 59 (1806); See also Commonwealth v. Hunt, 45 Mass. 111 (1842).
[183] *See* A HISTORY OF LABOR UNIONS FROM COLONIAL TIMES TO 2009 | MORGAN O. REYNOLDS MISES INSTITUTE (2009), https://mises.org/library/history-labor-unions-colonial-times-2009 (last visited Nov 12, 2018)
[184] Worker strikes were a known occurrence during the colonial period, although there were no specific documented cases pertaining to that era. *See* A HISTORY OF LABOR UNIONS FROM COLONIAL TIMES TO 2009, *SUPRA*, FOOTNOTE 184 (Specific examples of union criminalization will be given in the discussion of the Pullis and Hunt cases below).
[185] *See generally* Pullis, 3 Doc. Hist. 59.

wages from their employers.[186] Although the Codwainers union received moderate wage increases through coordinated striking, their organization collapsed once the union leaders were charged and convicted with conspiracy to unlawfully raise their wages.[187] In that case, the *Pullis* court held labor unions as unlawful criminal conspiracies, and saw them as ploys to increase wages through striking, which economically damaged the employer.[188] Based on *Pullis*, early Nineteenth Century legal institutions not only disfavored labor unions and perceived them as criminal actors, but also did so because they recognized an implicit liberty of contract interest vested within employers.[189]

Nonetheless, labor unions were decriminalized in the mid-Nineteenth Century, when *Commonwealth v. Hunt*, 45 Mass. 111 (1842), reversed the *Pullis* decision.[190] In *Hunt*, Bostonian bootmakers from the Journeymen Bootmaker Society, demanded progressively higher increases throughout the 1830s.[191] Their employer refused to pay their requested wages, and filed a criminal complaint for conspiracy against the union after the union's members threatened the employer with a walkout.[192] On appeal, the *Hunt* court ruled the union's actions were valid, and that labor unions were not "criminal conspiracies" so long as they were created for a lawful purpose and used lawful means to effectuate their interests.[193] Thus, the *Hunt* court held that the Bootmaker Society's desire to negotiate livable employee wages was a lawful means of effectuating agreed-upon wages for their union members, and reversed the *Pullis* decision, which criminalized unions in the first half of the Nineteenth century.[194]

Although the *Hunt* decision alone did not entirely purge an employer's "liberty of contract" right, it helped trigger the onset of labor rights' acceptance on a nationwide scale where many states would begin passing their own laws.[195] Arguably, the "liberty of contract" right was not purged until a substantial number of states began introducing laws to mandate minimum wages, benefits, hours, and standard workplace conditions.[196] This

---

[186] *See id*.
[187] *See id.* at 63.
[188] *See id.* 384-5.
[189] *See id*.
[190] Hunt, 45 Mass. 111.
[191] *Id.* at 121-4.
[192] *Id.*
[193] *See id*, at 124-5.
[194] *Id*. at 129.
[195] *Id*. at 111.
[196] *See* Workingmen's Democracy, *supra*, footnote 22, xii-xiii.

phenomenon happened during the subsequent Nineteenth Century, when labor organizations such as the Knights of Labor and American Federation of Labor lobbied many state legislatures to pass such laws, and successfully did so in many states by the turn of the Twentieth Century[197] [198] Nonetheless, the labor movement's victories on the state level would come into head-to-head with the United States Supreme Court at the turn of the Twentieth Century, as various laws were struck down on substantive due process grounds in favor of employers.[199]

1. Pre-New Deal Era: The Lochner Era (1905-1937)

The nation-wide battle for labor reform soon locked swords with an ideological United States Supreme Court in *Lochner v. New York*, 198 U.S. 45 (1905).[200] In *Lochner*, the New York legislature passed a statute (referred to herein as the "Bakeshop Act") which limited bakers' working hours to a maximum of ten hours per day.[201] Joseph Lochner, a bakeshop employer, challenged the Bakeshop Act after being criminally convicted of violating it on two counts.[202] On appeal, the *Lochner* majority by a 5-4 vote held the statute as a violation of the employer's fundamental right to freely negotiate employment contracts with their employees, violating the "freedom of contract" right under substantive due process.[203] This began a short-lived judicial legacy known as the *Lochner* doctrine (a.k.a. "economic due process doctrine"), where the United States Supreme Court struck down various state laws designed to enhance workers' rights as an unconstitutional interference with the employer's "liberty of contract" rights under substantive due process.[204]

Despite the *Lochner*'s decision, the United States Supreme Court predicated its ruling on very flawed justifications.[205] First, the Bakeshop Act was an unconstitutional exercise of power that violated the economic due process rights of employers to freely negotiate employment contracts with

---

[197] *Id*.
[198] *See generally* Lochner v. New York, 198 U.S. 45 (1905) (abrogated by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).
[199] *See* Workingmen's Democracy, *supra*, footnote 22, xii-xiii.
[200] *See* Lochner, 198 U.S. 45.
[201] *Id*. at 52
[202] *Id*. at 47
[203] *Id*. at 60
[204] *Id*.
[205] *See id*.

their employees.[206] Initially, the majority held the "freedom of contract" as not unlimited, and could be curtailed by the state's police powers if a regulation was rationally related to the protection a worker's health, safety, and/or welfare. But, despite that clear rule, the *Lochner* majority held the Bakeshop Act as invalid under New York's police powers because baking was a type of profession that "is not . . . unhealthy . . . to that degree which […] authorize[s] the legislature to interfere with the right to labor."[207] Although the bakeshop trade was not "as healthy as some other trades," the Court held it was "vastly more healthy" than other professions, and struck down the statute without giving any concrete guidelines or examples of those unhealthy professions.[208]

In reaction to this flawed reasoning, minority dissenter Justice Oliver Wendell Holmes famously critiqued the *Lochner* majority in his dissenting opinion.[209] Holmes criticized the majority's decision as erroneously dependent "upon an economic theory […][that] a large part of the country does not entertain," referring to a lack of societal acceptance of the "freedom of contract."[210] In addition, Justice Holmes critiqued the majority for ruling based on their personal ideologies that sided with employers over employees, rather than interpreting the Federal Constitution in a neutral and detached manner.[211] In fact, many scholars believe that Justice Holmes referred to the majority's biases toward principles of *laissez-faire economics*—a libertarian ideology that encourages less government intervention in economic relations and free trade.[212] Further, Justice Holmes asserted that because the Federal

---

[206] *Id*. The reader should note that the *Lochner* majority articulated the substantive due process standard in a wholly different manner that the United States Supreme Court does modernly. This comment will analyze pursuant to the modern approach to substantive due process and not the old approach indicated to in *Lochner*.

[207] *Id*. at 59

[208] *Id*. at 59.

[209] *Id*. at 75 (J. Holmes, dissenting); SCHWARTZ, BERNARD. A HISTORY OF THE SUPREME COURT, at 195 (2014) (stating "Lochner is remembered today for its now classic dissent by Justice Holmes, celebrated for its oft-quoted aphorisms."); David E. Bernstein, Rehabilitating Lochner: Defending individual rights against Progressive Reform, at 45 (2012) (stating "Holmes' dissent is widely regarded even today as extraordinarily well-written and rhetorically powerful").

[210] Lochner, 198 U.S. at 75 (J. Holmes, dissenting).

[211] Critics of the *Lochner* decision—beyond Justice Holmes—allege that the *Lochner* majority justices were influenced by libertarian ideologies that promoted limited legislative power by the government, also known as *minarchism*. This comment will not discuss *minarchism* since it is not directly related to the substantive issues herein.

[212] A HISTORY OF THE SUPREME COURT, *supra*, footnote 212, 198-99 (stating "[t]he Lochner Court struck down the statute as unreasonable because a majority of the

Constitution "is not intended to embody a[ny] particular economic theory," the *Lochner* majority erred when fusing economic rights with substantive due process rights.[213] Last, no "freedom of contract" right could hold muster under the Due Process Clause, since the pre-existence of anti-usury laws and proscriptions against Sunday Sabbath trading were "ancient examples" showing that legal history and tradition never recognized any "liberty of contract" right within the law.[214] Justice Holmes' scathing dissent evidenced how poorly conceived the reasoning was in the *Lochner* decision.[215]

Despite the Court's split on the "freedom of contract," the justices continued invalidating numerous Labor Movement laws to reaffirm "the freedom of contract" for another three decades, despite sweeping labor reform across the nation.[216] In *Adair v. United States*, 208 U.S. 161 (1908), the United States Supreme Court majority struck down section 10 of the Erdman Act of 1898 as a violation of the freedom of contract under substantive due process.[217] In that case, Congress passed section 10 of the Erdman Act to prohibit the enforcement of yellow-dog contracts, defined as "illegal contract[s]" that forbid employees from joining labor unions.[218] According to majority leader Justice Harlan, if laborers had the right to sell their labor "upon such terms as […][they] deem proper," then the "purchaser of labor [is right] to prescribe the conditions upon which he will accept such labor."[219] Further, the majority held that "the employer and employee have equality of [the] right [of contract]" as per the previous *Lochner* decision, and no laws can interfere with the mutuality of rights and obligations involved in those pre-employment negotiations, including laws restricting an employer's ability to limit employee membership in labor unions.[220]

Despite *Adair*'s majority's ruling, Justice McKenna mounted a well-versed opposition against the "freedom of contract" theory in his dissent.[221] First, Justice McKenna asserted that Congress had broad powers to regulate

---

Justices disagreed with the economic theory on which the state legislature had acted.").

[213] Lochner, 198 U.S. at 71 (J. Holmes, dissenting).

[214] *Id.*

[215] *Id.*

[216] A HISTORY OF THE SUPREME COURT *supra*, footnote 212, 235-45.

[217] *See* Adair v. United States, 208 U.S. 161 (1908).

[218] *See id*. at 166-68. (abrogated by the Norris LaGuardia Act of 1932, 29 U.S.C. §§ 101, et. seq.); *See also* YELLOW-DOG CONTRACT definition, Black's Law Dictionary (10th ed. 2014).

[219] Adair, 208 U.S. at 174.

[220] *See id*. at 175.

[221] *See id*. at 181-90 (J. McKenna, dissenting).

yellow-dog contracts under the interstate commerce clause, regardless of whether the broad scope of that commerce power inhibited the employer's pre-employment negotiation abilities.[222] Second, Justice McKenna cautioned the majority's insistence to maintain their *Lochner*-inspired "freedom of contract" stance, stating that "[l]iberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition," indicating that the majority's decision was more focused on partisan ideology favoring employers, similar to Justice Holmes's criticisms in his *Lochner* dissent, rather than fairness and equity.[223]

Unsurprisingly, Gerawan Farming, Inc. relies on cases stemming from the *Lochner*-era that link economic rights with the Due Process Clause.[224] In *Charles Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 552 (1923) ("*Wolff I*"), Kansas state legislators passed the Industrial Relations Act of 1920—establishing an administrative agency called the Court of Industrial Relations ("CIR") to fix hours and wages in certain state industries that affected the "public interest," including garment manufacturers, slaughterhouses, common carriers, and fuel manufacturers.[225] The CIR could arbitrate issues pertaining to wages and hours in those industries—either on its own, or through the demand of either party in an applicable industry.[226] Once the issue is conclusively litigated, the CIR would enter an initial order that fixes wages or hours as it deems appropriate.[227] Either party could request a readjustment order from the CIR after sixty days, which would continue "for such a reasonable time as the court shall fix, or until changed by the agreement of the parties."[228] CIR orders were appealable in the state Supreme Court level.[229]

An elected union representative for the employees of Charles Wolff Packing Company in Kansas—a meat packing employer that fell under the "public interest" category pursuant to the Industrial Relations Act—filed a CIR complaint to dispute the insufficient wages given to employee union

---

[222] *Id.* at 182-84.
[223] *See id*. at 186.
[224] *See* also Charles Wolff Packing Co. v. Court of Ind. Relations, 262 U.S. 522 (1923) ["Wolff I" hereinafter]; *See* Charles Wolff Packing Co. v. Court of Ind. Relations, 267 U.S. 552 (1925) ["Wolff II" hereinafter]; *See* Dorchy v. Kansas, 264 U.S. 286 (1924).
[225] *See* Wolff I, 262 U.S. at 533-34.
[226] *See id*. at 534.
[227] *See id*. at 524.
[228] *See id*.
[229] *See id*.

members.[230] After some administrative litigation, the CIR entered an order that increased employee wages and opportunities for overtime hours.[231] After exhausting their administrative appeals, the employer challenged the Act on substantive due process grounds and won in the United States Supreme Court.[232] First, the *Wolff I* Court ruled that there was no rational relationship between Kansas' police powers and the maintenance of the health and safety of Kansas citizens through the meat packing industry.[233] Second, the *Wolff* Court also ruled that the Act violated the Fourteenth Amendment by "depriv[ing] […][the employer] of its property and 'liberty of contract' without due process of law," without giving any explanation as to why or how the Act did this.[234] Therefore, the *Wolff I* Court reversed the lower court's decision to mandate higher wages for the employees.[235]

The second *Lochner*-era case Gerawan Farming, Inc. relies on is *Dorchy v. Kansas*, 264 U.S. 286 (1924).[236] In *Dorchy*, a union official of a coal mine operation was criminally convicted in violation of section 19 of the Kansas Industrial Relations Act by calling for a strike without having the authority to do so.[237] Because the entirety of the Act was considered an unconstitutional violation of the liberty of contract due to its "system of compulsory arbitration," the Court reversed the union official's conviction to let the state of Kansas extricate the portions of the statute which may be constitutional.[238] In the third *Lochner*-era case, *Charles Wolff Packing Co. v. Court of Ind. Relations*, 267 U.S. 552 (1925) ("*Wolff II*"), the Court struck down another portion of the same Act with regard to its ability to regulate hours, holding that the statute "shows very plainly that its purpose is not to regulate wages or hours of labor either generally or in particular classes of businesses," and instead "is intended to compel . . . the owner and employees to continue the business on terms which are not of their making."[239] Nonetheless, the *Hess* court has affirmed that these cases "were rendered during the bygone era of substantive due process," where "the Due Process Clause was used by [the Supreme] Court to strike down laws which were . . . incompatible with some

---

[230] *See id*.
[231] *See id*. at 534.
[232] *See id*. at 525.
[233] *See id.* at 538-40.
[234] *See id.* at 544.
[235] *See id.* at 522.
[236] *See* Dorchy, 264 U.S. 286.
[237] *See id*. at 289.
[238] *See id*.
[239] Charles Wolff Packing Co. v. Court of Ind. Relations, 267 U.S. 552, 565, 569 (1925) [hereinafter "Wolff II"].

particular economic or social philosophy."[240] In fact, the preceding cases discussed below and ensuing New Deal regulations of the 1930s will show that the *Lochner* standard is no longer respected by the Court.

2. Enter the 1930s and Beyond: The New Deal to the Present

The New Deal-era not only demonstrated broad acceptance of the labor reform efforts, but also proved that the *Lochner*-era jurisprudence was an anomaly that was not representative of a substantial number of jurisdictions.[241] After heavy lobbying by labor interest groups, Congress passed a series of New Deal regulations giving American workers important rights. First, the National Labor Relations Act of 1935 was passed, allowing workers to collectively organize and encourage employers to negotiate for appropriate wages, benefits, hours, and conditions, while also protecting employees and employers against unfair labor practices.[242] Second, the Fair Labor Standards Act ("FLSA") of 1938 imposed a mandatory minimum wage amount, forty hour work weeks, eight hour work days, extra pay for overtime hours, and prohibitions against child employment in hazardous work environments.[243] Third, the Norris LaGuardia Act of 1932 permanently outlawed all yellow-dog contracts, which overruled *Adair* and curtailed the judiciary's injunctive powers to limit union activities designed to further collective bargaining efforts, including strikes, boycotts, and picketing.[244] These national reform efforts were motivated by widespread economic hardships that all Americans suffered during the Great Depression.[245]

Once states followed with their own series of labor regulations during this period, a majority of justices on the United States Supreme Court refused to follow *Lochner*'s precedent.[246] In fact, the United States Supreme Court upheld numerous employee-centric regulations as within the scope of the states' police powers, ruling that such regulations rationally related them to the "health" and "safety" of American workers.[247] Specifically, *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937), illustrated that the Court no longer recognized the "freedom of contract" as a fundamental right, and

---

[240] Hess, 140 Cal. App. 4th at 1599.
[241] *See* Fair Labor Standards Act; *See* Norris LaGuardia Act; *See* NLRA.
[242] *See* NLRA.
[243] *See* Fair Labor Standards Act.
[244] *See* Norris LaGuardia Act.
[245] *See* WORKINGMEN'S DEMOCRACY, *supra*, footnote 22, xii-xiii.
[246] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruled Lochner, 198 U.S. 45).
[247] Parrish, 300 U.S. 379.

entirely abrogated the economic due process principles touted in *Lochner* and its progeny.[248]

In *Parrish*, the State of Washington enacted a law imposing mandatory minimum wage amounts for employed females and minors.[249] Elsie Parrish, a maid at West Coast Hotel Co., sued to recover backpay owed to her pursuant to the law, and West Coast Hotel Co. challenged the act on constitutional grounds.[250] The United States Supreme Court finally contravened the "freedom of contract" theory that pervaded its substantive due process jurisprudence for three decades, which effectively overruled *Lochner* and its progeny.[251]

The *Parrish* Court acknowledged the rights of workers, holding that "[t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power, rendering them defenseless against the denial of a living wage.[252] This imbalance of power in the employer-employee relationship is not only detrimental to an employee's health and well-being.[253] In fact, the *Parrish* Court ruled the "[l]egislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where . . . the evil [is hit] where it is most felt.'"[254] Effectively, the *Parrish* majority finally gave all states the power to regulate laborers' rights under a rational basis standard of review.[255] This decision marked a major historical shift in judicial attitudes toward labor regulation—namely, a judicial attitude embracing equality of bargaining power in the employer-employee relationship, rather than an attitude predicated on ideological partisanship toward promoting the interests of employers and corporations.[256]

Post-1937, the United States Supreme Court's holistically different judicial attitude toward economic and labor regulations, echoed in *Parrish*, has some consensus in not only being "firmly ingrained in […][the nation's] public law," but also "entirely consistent with the role of the judiciary in a representative democracy."[257] Instead of consistently striking down laws the Court ideologically disagreed with, it gave legislatures the power to decide

---

[248] See *id.* at 399; Lochner, 198 U.S. at 60.
[249] *See* Parrish, 300 U.S. at 399.
[250] *See id*.
[251] *Id.* at 400.
[252] *Id*.
[253] *Id.* at 399.
[254] *Id.* at 400.
[255] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), at 400.
[256] *See id.*
[257] A HISTORY OF THE SUPREME COURT, *supra*, footnote 212, at 245; *See also* Parrish, 300 U.S. at 399.

the propriety of those laws, and the lower courts the opportunity to adjudicate matters pertaining to those laws.[258] The final end for the "freedom of contract" theory was confirmed in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), where the United States Supreme Court affirmed that all state laws designed to regulate business practices are only subject to rational basis review.[259] While refusing to review an Oklahoma statute that regulated unlicensed optometry practices as a "freedom of contract" violation, Justice Douglas laid the *Lochner* doctrine to rest when he ruled that "[t]he day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[260]

3. Legal Application to Gerawan's Facts

When applying these legal principles to *Gerawan*, the Court must be aware of the early Nineteenth Century history.[261] On the one hand, Gerawan Farming, Inc. could argue that an implied "freedom to contract" existed during much of the earlier half Nineteenth Century, since labor regulations from 1787 to the mid-Nineteenth Century were mostly non-existent.[262] This was evidenced by cases such as the *Pullis* decision, which criminalized labor unions as conspiracies, as well as a general lack of statutes that regulated labor relations amongst employers and employees.[263] Thus, because laborers virtually had no leverage or negotiation power during pre-New Deal era, Gerawan Farming, Inc. could have argued that an employer's liberty to contract over his employee is deeply rooted American tradition.[264]

However, this argument should have failed once the Court looks to mid-Nineteenth Century history into the New Deal era and beyond, which shows that the "liberty of contract" right was purged.[265] First, the Labor Movement inspired the passage of many state laws that regulated labor relations,

---

[258] A HISTORY OF THE SUPREME COURT, *supra*, footnote 212, at 245.
[259] *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
[260] *See id*. at 488.
[261] *See supra* notes 183-200 and accompanying text.
[262] *See supra* notes 183-200 and accompanying text.
[263] *See* Common Wealth v. Pullis, 3 Doc. Hist. 59 (1806).
[264] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).
[265] *See* Fair Labor Standards Act; *See* Norris LaGuardia Act; *See also* Hunt, 45 Mass. 111.

minimum wages, hours, and workplace safety.[266] Second, the New Deal reforms showed a general acceptance of labor reform on a nationwide scale, and provided the legal infrastructure that unions needed to resolve disputes on behalf of their employees.[267] Third, although the *Lochne*r-era spanned a period of three decades wherein a "liberty of contract" right was recognized under substantive due process, the Court should not consider this under their analysis, because *Parrish* overruled *Lochner* and its progeny, and because numerous federal statutes after the New Deal indicate that the "liberty of contract" theory was finally purged from the Court's legal consciousness.[268] Further, the Court in *Williamson*, refused to acknowledge any "liberty of contract" theory in its subsequent cases, affirming it to be an ideological stance more-so than a respectable legal doctrine.[269] Thus, federal labor regulations during the New Deal, as well as sweeping state labor regulations throughout the Twentieth Century indicate that the employer's liberty to contract over his employer's job was not deeply rooted in history and tradition, and thus the "freedom of contract" is not a fundamental right.[270]

Nonetheless, Gerawan Farming, Inc. erroneously focused on the holdings of *Wolff I*, *Dorchy*, and *Wolff II*, which are *Lochner*-era cases.[271] First, because these cases "were rendered during the bygone era of substantive due process," and were abrogated by *Parrish*, the Court need not follow their holdings as authority.[272] Although the Court has never directly overruled the *Wolff* cases, it has expressly overruled the "freedom of contract" theory that those cases are based on, in the *Parrish* case.[273] Second, even if the *Wolff* cases ruled against "compulsory arbitration" as an unconstitutionally coercive scheme for the employer, the CDRA provisions under the ALRA is not coercive like the Industrial Relations Act arbitration scheme was.[274] In fact, the CDRA provisions provide two administrative appeals that either party can exercise if they contest the arbitrator's final report.[275] In addition,

---

[266] *See* Fair Labor Standards Act; *See* Norris LaGuardia Act.
[267] *See* Fair Labor Standards Act; *See* Norris LaGuardia Act.
[268] *See* Lochner v. New York, 198 U.S. 45 (1905); *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[269] *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
[270] *See* Fair Labor Standards Act; *See* Norris LaGuardia Act.
[271] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375), 1-2.
[272] *See* Hess Collection Winery v. Agricultural Labor Relations Board, 140 Cal. App. 4th 1584 (2006), at 1599; *See also* Parrish, 300 U.S. 379.
[273] *See* Brief for Petitioner, *supra,* footnote 11, at 30.
[274] *See id*.
[275] *See also* CDRA provisions, § 1164.3(a)-(e).

both parties have voting power to appoint an arbitrator to preside over a negotiation impasse.[276] Thus, Gerawan Farming, Inc, failed to propound any evidence to show that the CDRA provisions are as "analogous[ly]" coercive as the Industrial Relations Act discussed in those older cases.[277] Further, the appointed arbitrator must abide by the ministerial factors in section 1164 when making his report to the ALRB.[278] Because the arbitrator lacks absolute discretion when creating his reports, this ensures that the disputed terms will conform to the parties' intent.[279] Last, although Gerawan Farming, Inc. is not required to prove that the "liberty of contract" right must be "deeply rooted in history and tradition" as per the *Obergefell* case, Gerawan Farming, Inc.'s challenge still fails, since the "liberty of contract" is also not "implicit in the concept of ordered liberty."[280] For those reasons, there is no fundamental right at stake, and thus the CDRA provisions must survive rational basis review to be considered valid.

D. A Test of Survival: Rational Basis Review

All laws that do not violate any fundamental rights must be valid under a rational basis.[281] This standard requires the law to serve a legitimate government interest, and be rationally related to serve that interest.[282] Most laws are justified based on this standard of review, and the CDRA provisions must meet this standard as well.[283]

1. Legal Application to Gerawan's Facts

First, as *Hess* already pointed out, the contractual relationship between an employer and employee is so one-sided and imbalanced that it raises the

---

[276] *See also* CDRA provisions, § 1164.3(a)-(e).
[277] *See* Brief for Petitioner, *supra,* footnote 11, at 1.
[278] *See also* CDRA provisions.
[279] *See also* CDRA provisions.
[280] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[281] *See* Griswold v. Connecticut, 381 U.S. 479 (1965), at 497 (holding "this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose."). Therefore, it follows that laws that do not violate any fundamental right are justifiable under a rational basis standard.
[282] *See* Griswold, 381 U.S. at 497.
[283] *See also* CDRA provisions.

potential for unfair and oppressive terms to be imposed on workers.[284] For this reason, the CDRA provisions serve a legitimate government purpose, because they compel the production of signed collective bargaining agreements by motivating employers and union representatives negotiate in good faith or else go through a compulsory arbitration process that can be very expensive.[285] This is preferable to having no contract for a long-term period after a negotiation impasse occurs.[286] Thus, the CDRA provisions serves the legitimate purpose of ensuring that collective bargaining agreements are signed, even if Gerawan Farming, Inc. argued that process as "coercive" in its methods.[287]

Second, the CDRA provisions are rationally related to ensuring that collective bargaining agreements are signed because its compulsory interest arbitration scheme not only ensures that finalized contracts are also produced, but does so in a manner that fairly incorporates both parties' interests.[288] As stated above, the arbitrator must abide by the ministerial factors outlined in section 1164 in order to conform to the parties' intent to the best of his ability when making his report, which prevent him from exercising absolute discretion.[289] The CDRA is also appropriately tailored to meet its goal because it allows for an internal appeals process if either party is not satisfied with the arbitrator's report, permitting two separate appeals for the challenger to exercise when disputing the report with the ALRB.[290] For those reasons, CDRA is rationally tailored to help execute collective bargaining agreements that are fair, reasonable, and representative of both parties' interests, thus surviving rational basis review.[291]

V. RECOMMENDATIONS

The CDRA provisions cannot be invalidated since the "liberty of contract" is not a fundamental right under the Fourteenth Amendment's Due Process Clause.[292] If the United States Supreme Court must ever decide whether the "liberty of contract" is a fundamental right, it should rule in the negative, since a careful analysis reveals that the interest is neither implicit in ordered

---

[284] *See* Griswold, 381 U.S. at 497.
[285] *See also* CDRA provisions.
[286] *See id*.
[287] *See id*.
[288] *See id*.
[289] *See id*.
[290] *See id*, § 1164.3.
[291] *See id*.
[292] *See* U.S. Const. Am. 14.

liberty, nor is it deeply rooted in America's history and legal tradition.[293] Because an employer's "liberty of contract" is not a fundamental right, the CDRA provisions must survive under rational basis review, which they can accomplish.[294] Therefore, the CDRA provisions are a valid exercise of California's power to effectuate executed collective bargaining agreements during a negotiation impasse, regardless of how "coercive" Gerawan Farming, Inc. thought they are.[295] Thus, Gerawan Farming, Inc's writ of mandate action should have failed insofar as its substantive due process claims are concerned, had the United States Supreme Court granted Gerawan Farming, Inc's petition for review.[296]

VI. CONCLUSION

The CDRA provisions do not trigger any fundamental rights violation as alleged in *Gerawan Farming, Inc. v. Agricultural Labor Relations Board,* (2018) 139 S. Ct. 60. cert denied (U.S. Oct. 1, 2018) (No 17-1375).[297] First, because Gerawan Farming, Inc. failed to articulate the specific liberty interest at stake, the Court was right to deny review of the case, since a ruling on the case may have resulted in a decree that is overly broad and violative of the California legislature's rights.[298] Second, assuming that the Court proceeded to discuss the "liberty of contract" right enunciated in the lower court cases, Gerawan Farming, Inc.'s arguments would still fail since that right is neither implicit in the concept of ordered liberty, nor is it deeply rooted in history and tradition.[299]

Specifically, the "freedom of contract" is not implicit in the concept of ordered liberty because Gerawan Farming, Inc. cannot prove that American society respects that right as a significantly important one. This is because many state and federal regulations regulate the employer-employee relationship to a heavy extent, and because Gerawan Farming, Inc. fails to assert what substantial harm could occur if the Court does not protect the right.[300] Further, the "liberty of contract" is also not deeply rooted in history and tradition, because although many jurisdictions did not regulate the

---

[293] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.*

employer-employee relationship in the early Nineteenth Century, such regulations arose during the later Nineteenth Century and Twentieth Century with the New Deal.[301] Although the *Lochner*-era cases of the early Twentieth Century indicate an express recognition of the "freedom of contract," the Court has repudiated this theory in its later cases, and expressly refuses to follow it.[302] Finally, the CDRA provisions survive rational basis review because they serve the legitimate purpose of effectuating collective bargaining agreements even when there is an impasse at the negotiations table, and because they fairly ensure that the appointed arbitrator decides the dispute in accordance with the parties' intent.[303]

ALI M. HUDA[304]

---

[301] *Id.*
[302] See Lochner v. New York, 198 U.S. 45 (1905), at 60.
[303] Gerawan Farming, Inc. v. Agricultural Labor Relations Board, (2018) 139 S. Ct. 60. cert denied __ U.S. __ (U.S. Oct. 1, 2018) (No. 17-1375).
[304] Juris Doctor Candidate, San Joaquin College of Law, 2019.