

MANDATORY MEDIATION AND CONCILIATION IN CALIFORNIA

INTRODUCTION

The purpose of this Comment is to explain the history, objective, and constitutionality of California Labor Code, sections 1164 through 1164.13, known as the Contract Dispute Resolution Amendment¹ (hereinafter “Amendment”). The addition of this Amendment, passed in 2002, is the culmination of the California Legislature’s attempt to provide the California farm worker with the ability to organize in labor unions and achieve collective bargaining agreements with the agricultural industry.

In this introduction, I will discuss how the California Legislature attempted to accomplish this goal with the passage of the Agricultural Labor Relations Act;² (hereinafter “ALRA”) and how the real world of adversity, long-time animosity between the agricultural industry and the farm workers, and the shifting sands of political appointments frustrated the Legislative intent of the ALRA.

In section one, I will explain the Amendment’s procedure and function in the collective bargaining setting. In section two, I will discuss the forces that created the need for the Amendment. In response to the difficulty of farm workers achieving collective bargaining agreements, the Legislature exercised its power in the field of labor to confront the conditions stalling labor negotiations in the agricultural industry. The result is a statute requiring mandatory mediation when there is a refusal to bargain or a failure to reach an agreement.³

In section three, I will discuss the constitutional challenges to the Amendment and why it will sustain such challenges.

¹ Cal. Labor Code Div. 2 Employment Regulation and Supervision, Part 3.5 Agricultural Labor Relations, Chapter 6.5 Contract Dispute Resolution (Deering 2004).

² Cal. Labor Code § 1140 (Deering 2004) Title of part. This part shall be known and may be referred to as the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975 (hereinafter ALRA).

³ Cal. Labor Code § 1164 (a)(1) and (2) (Deering 2004).

On September 30, 2002, California Governor, Gray Davis, signed into law Senate Bill 1156 and Assembly Bill 2596.⁴ This legislation known as the Mandatory Mediation and Conciliation Act,⁵ is anything but conciliatory. The legislation was conceived in a whirlwind of political adversity driven by the historical animosity between two of California's essential economic groups - the farmer and the farm laborer.⁶

The original legislation introduced by Senate President John Burton, D-San Francisco, Senate Bill 1736,⁷ called for mandatory binding arbitration when there was a refusal to bargain in good faith or when the parties negotiated to impasse. The bill would have required the Agricultural Labor Relations Board (hereinafter "ALRB"), if it found reasonable cause, to submit the matter to binding arbitration and appoint a neutral arbitrator. The arbitrator would have the authority to conduct binding arbitration proceedings between the employer and the labor organization and decide the dispute.⁸ The Senate passed the bill on August 5, 2002, concurred with the Assembly amendments on August 8, 2002, and sent the bill to the Governor on August 26, 2002.⁹

⁴ Jake Henshaw, *Davis Signs Farm Bill, Farm Workers Jubilant Over Mediation Law, Growers threaten to take legal action*, (Oct. 1, 2002) available at <http://www.californiaonline.com/news/stories/20021001/topstories/195128.html> (on file with San Joaquin Agriculture Law Review).

⁵ The actual amendment is named Contract Dispute Resolution.

⁶ Delegates at the United Farm Workers' Sixteenth Constitutional Convention over the Labor Day weekend in Fresno voted unanimously to permanently maintain the union's vigil with farm workers on the steps of the state Capitol until Gov. Gray Davis signs historic legislation that would help them win union contracts when growers drag out negotiations. The Capitol vigil, which came down Friday, will resume at 12 noon on Wednesday, Sept. 4, and be maintained "permanently" until the farm worker legislation is signed--no matter how long that takes, according to union leaders. Agribusiness claims growers--particularly small farmers--would go out of business if United Farm Workers-sponsored legislation is enacted allowing farm workers to use mediation to resolve contract disputes when employers drag out negotiations. Press Release, United Farm Workers, *How Would the UFW's Farm Worker Contract Legislation Impact California Agriculture?* (Sept. 6, 2002) (on file with San Joaquin Agriculture Law Review).

⁷ S.B. 1736, February 21, 2002 Leg., num Sess. (Cal. 2002).

⁸ See S.B. 1736, *supra* note 7.

⁹ COMPLETE BILL HISTORY

BILL NUMBER : S.B. No. 1736 AUTHOR: Burton

TOPIC: Agricultural employer-employee collective bargaining, mediation, and arbitration.

Nov. 30 Died on file.

Oct. 1 In Senate. To unfinished business. (Veto)

Sept. 30 Vetoed by Governor.

Aug. 26 Enrolled. To Governor at 9 a.m.

With an impending gubernatorial election, Governor Davis was wedged between the glacial pressures of the United Farm Workers Union and the powerful agricultural industry. The Senate and Governor's staff continued negotiations to find a compromise the Governor would sign. The result was a bill that replaced mandatory arbitration with the more flexible mandatory mediation and contained other significant compromises.¹⁰ Finally, on September 30, 2002, the alternative bills AB 2596 and SB 1156 were signed into law to the delight of the UFW and the angry despair of the agriculture industry.¹¹

With the passing of the legislation, the agriculture industry filed a law suit in Sacramento Superior Court alleging the Mandatory Mediation and Conciliation Act, (hereinafter "Contract Dispute Resolution Amendment"), was unconstitutional. The Western Growers and the California Farm Bureau argued that the new amendments to the Labor Code allowed the government to dictate contract terms to private parties in violation of their freedom to contract. They also argued the law only targeted the farmer, which violated the Equal Protection Clause, and that the forcing of contract terms on the parties resulted in a taking of their property.¹²

I. THE CONTRACT DISPUTE RESOLUTION ACT

The California Labor Code sections 1164 through 1164.13 now provides a procedure for a certified union representative of farm workers and agricultural employers to petition the Board in the event there is a failure to reach a collective bargaining agreement. Either party can initiate a declaration and make a request to the ALRB for mandatory mediation.¹³ Once the ALRB (herein the "Board") finds the criteria¹⁴ have

Aug. 8 Senate concurs in Assembly amendments. (Ayes 22. Noes 10. Page 5299)
To enrollment *available at* http://info.sen.ca.gov/pub/01-02/bill/sen/sb_1701-1750/sb_1736_cfa_20020409_122814_sen_.

¹⁰ Dion Nissenbaum, *United States Farm Workers Offer David a Compromise*, MERCURY NEWS SACRAMENTO BUREAU (Aug. 29, 2002) (in a bid to head off a veto by Gov. Gray Davis, the United Farm Workers offered Wednesday to abandon a controversial bill that would have given the union the right to force recalcitrant growers into binding arbitration in favor of a new measure that would instead rely on mediators to work out labor disputes) (on file with San Joaquin Agricultural Law Review).

¹¹ Henshaw, *supra* note 4.

¹² Pacific Legal Foundation, *available at* http://www.pacificlegal.org/view_SearchDetail.asp?tid=Commentary&sField=CommentaryID.

¹³ Cal Lab Code § 1164 (Deering 2004) Request for mediation.

(a) An agricultural employer or a labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees may file with the board, at any time following (1) 90 days after a renewed demand to bargain by an agricultural employer or a labor organization certified prior to January 1, 2003,

been met for going to mediation, the Board will request a list of mediators from the California State Mediation and Conciliation Service, the American Arbitration Association, or the Federal Mediation Service.¹⁵

A party can oppose the declaration by filing an answer with the Board, challenging its truthfulness and accuracy based on supporting evidence.¹⁶ The Board will then investigate the dispute and either dismiss the declaration, refer the parties to mediation, or order an expedited evidentiary

which meets the conditions specified in Section 1164.11 or (2) 180 days after an initial request to bargain by an agricultural employer or a labor organization certified after January 1, 2003, a declaration that the parties have failed to reach a collective bargaining agreement and a request that the board issue an order directing the parties to mandatory mediation and conciliation of their issues.

¹⁴ Cal Lab Code § 1164.11 (Deering 2004) § 1164.11

Criteria for demand under § 1164(a)(1) A demand made pursuant to paragraph (1) of subdivision (a) of Section 1164 may be made only in cases which meet all of the following criteria: (a) the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain, (b) the employer has committed an unfair labor practice, and (c) the parties have not previously had a binding contract between them.

Also see, Title 8, Cal. Code Regs., sec. 20400 (Barclays 2004).

¹⁵ Cal. Labor Code § 1164 (c) (2004):

(b) Upon receipt of a declaration pursuant to subdivision (a), the board shall immediately issue an order directing the parties to mandatory mediation and conciliation of their issues. The board shall request from the California State Mediation and Conciliation Service a list of nine mediators who have experience in labor mediation. The California State Mediation and Conciliation Service may include names chosen from its own mediators, or from a list of names supplied by the American Arbitration Association or the Federal Mediation Service. The parties shall select a mediator from the list within seven days of receipt of the list. If the parties cannot agree on a mediator, they shall strike names from the list until a mediator is chosen by process of elimination. If a party refuses to participate in selecting a mediator, the other party may choose a mediator from the list. The costs of mediation and conciliation shall be borne equally by the parties.

¹⁶ Title 8, Cal. Code Regs., sec. 20401 (Barclays 2004):

(a) Within three (3) days of service of a declaration, the other party to the collective bargaining relationship (or alleged bargaining relationship) may file an answer to the declaration. The answer shall be served and filed in accordance with sections 20160, 20164, 20166, and 20168. The answer shall be signed under penalty of perjury by an authorized representative of the filing party, and shall identify any statements in the declaration that are disputed. In addition, the answer shall be accompanied by any documentary or other supporting evidence. If it is claimed that the employer has not engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of the declaration seeking referral to mandatory mediation, payroll records sufficient to support the claim shall be submitted with the answer. Payroll records shall be submitted in electronic form if kept in that form in the normal course of business. (b) All statements in a declaration that are not expressly denied in the answer shall be deemed admitted.

hearing to further explore the challenge to mediate.¹⁷ If mediation is ordered, the parties must pick a mediator within seven days. The mediator then will schedule the time and place of mediation. The mediation period will not run longer than thirty days, but with agreement of the parties, may be extended an additional thirty days.¹⁸

¹⁷ Title 8, Cal. Code Regs., sec. 20402 (Barclays 2004) stating in pertinent part:

(b) If no answer to, the declaration is timely filed, or if the answer admits the truth of all factual prerequisites to the validity of the declaration, the Board shall immediately issue an order directing the parties to mandatory mediation and conciliation and request a list of mediators from the California State Mediation and Conciliation Service, in accordance with Labor Code section 1164, subdivision (b).

(c) Where a timely filed answer disputes the existence of any of the prerequisites for referral to mediation, the Board shall attempt to resolve the dispute on the basis of the parties' filing and/or upon investigation. The Board shall issue a decision within 5 days of receipt of the answer either (1) dismissing the petition, or (2) referring the matter to mediation, or (3) scheduling an expedited evidentiary hearing to resolve any factual issues material to the question of the existence of any of the prerequisites.

(d) Where an evidentiary hearing is ordered by the Board pursuant to subdivision (c) above, the hearing shall be in accordance with the following procedures:

(1) Notice of hearing shall be served in the manner required by Section 20164.

(2) Parties shall have the right to appear in person at the hearing, or by counsel or other representative, to call, examine and cross-examine witnesses, and to introduce all relevant and material evidence. All testimony shall be given under oath.

(3) The hearings shall be reported by any appropriate means designated by the Board.

(4) The hearing shall be conducted by a member(s) of the Board, or by an assigned Administrative Law Judge, under the rules of evidence, so far as practicable; while conducting a hearing the Board member(s) or Administrative Law Judges shall have all pertinent powers specified in Section 20262.

(5) Requests for discovery and the issuance and enforcement of subpoenas shall be governed by the provisions of section 20406 of these regulations, with the exception that references to notice of mediation "shall mean notice of hearing, mediator" shall mean the Board member(s) or assigned Administrative Law Judges who will conduct the hearing, references to mediation "shall mean the expedited evidentiary hearing provided for in this section."

(6) The assigned Administrative Law Judge or member(s) of Board who conducted the hearing shall file a decision with the Executive Secretary within ten (10) days from receipt of all the transcripts or records of the proceedings. The decision shall contain findings of fact adequate to support any conclusions of law necessary to decide the matter. If the hearing was conducted by the full Board, the decision shall constitute that of the Board.

¹⁸ Cal. Labor Code § 1164(c) (Deering 2004). Mediation shall proceed for a period of 30 days. Upon expiration of the 30-day period, if the parties do not resolve the issues to their mutual satisfaction, the mediator shall certify that the mediation process has been exhausted. Upon mutual agreement of the parties, the mediator may extend the mediation period for an additional 30 days.

During mediation, the parties are required to submit to the mediator a detailed rationale for each contract proposal on the issues that are in dispute and provide supporting evidence to justify those proposals.¹⁹ If the parties have not reached an agreement, the mediator will declare the mediation process exhausted. The mediator will then file a report to the Board that resolves all of the issues between the parties and establishes the final terms of the collective bargaining agreement.²⁰ The mediator, in resolving the issues in dispute, will consider factors such as: 1) what the parties have already stipulated; 2) the financial health of the employer if the employer pleads financial inability; 3) a comparison of similar farm operations with similar labor requirements, including a comparison of corresponding wages and benefits; 4) terms and conditions of employment in comparable firms or industries; and 5) the Consumer Price Index and the overall cost of living in the area where the work is performed.²¹

Within seven days of the mediator filing the report, either party may petition the Board for review of the report. The party must make a prima facie case that:

- (1) a provision of the collective bargaining agreement set forth in the mediator's report is unrelated to wages, hours, or other conditions of employment

¹⁹ Title 8, Cal. Code Regs., sec. 20407 (a) (Barclays 2004).

²⁰ Cal. Labor Code § 1164 (d) (2004). Within 21 days, the mediator shall file a report with the board that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement, including all issues subject to mediation and all issues resolved by the parties prior to the certification of the exhaustion of the mediation process. With respect to any issues in dispute between the parties, the report shall include the basis for the mediator's determination. The mediator's determination shall be supported by the record.

²¹ Title 8, Cal. Code Regs., sec. 20407 (b) (Barclays 2004).

(b) In determining the issues in dispute, the mediator may consider those factors commonly applied in similar proceedings, such as, but not limited to:

- (1) The stipulations of the parties.
- (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer makes a plea of inability to meet the union's wage and benefit demands.
- (3) Comparison of corresponding wages, benefits, and terms and conditions of employment in collective bargaining agreements covering similar agricultural operations with similar labor requirements.
- (4) Comparison of corresponding wages, benefits, and terms and conditions of employment in comparable firms or industries in geographical areas with similar economic conditions, considering the size of the employer, the skills, experience, and training required of the employees, as well as the difficulty and nature of the work.
- (5) The average consumer prices for goods and services, commonly known as the Consumer Price Index, and the overall cost of living in the area where the work is performed.

within the meaning of Section 1155.2, or (2) a provision of the collective bargaining agreement set forth in the mediator's report is based on a clearly erroneous finding of material fact, or (3) a provision of the collective bargaining agreement set forth in the mediator's report is arbitrary or capricious in light of the mediator's findings of fact.²²

If the Board finds a party has made a showing for review and a violation by the mediator is found, the Board will order the mediator to modify the terms of the collective bargaining agreement. This will require another thirty-day session of mediation.²³ A second report will be filed by the mediator fixing the terms of the collective bargaining agreement if the parties are unable to come to an agreement. The Board will review the report, if necessary, but if a challenging party fails to make its case for a second review,²⁴ the report will become a final order of the Board and the terms and agreement of a collective bargaining contract will be enforced through a superior court with proper jurisdiction.²⁵ Either party has the opportunity to petition for a writ of review of the final order of the Board with the Court of Appeal or the California Supreme Court.²⁶

The agricultural industry claims that the new law is unconstitutional because it violates growers' freedom to contract and their equal protec-

²² Cal. Labor Code § 1164.3 (a) (1), (2), & (3) (Deering 2004).

²³ Cal. Labor Code § 1164.3 (c) (Deering 2004).

²⁴ Cal. Labor Code § 1164.3 (d) & (e) (Deering 2004).

(d) Either party, within seven days of the filing of the mediator's second report, may petition the board for a review of the mediator's second report pursuant to the procedures specified in subdivision (a). If no petition is filed, the mediator's report shall take immediate effect as a final order of the board. If a petition is filed, the board shall issue an order confirming the mediator's report and order it into immediate effect, unless it finds that the report is subject to review for any of the grounds specified in subdivision (a), in which case the board shall determine the issues and shall issue a final order of the board.

(e) Either party, within seven days of the filing of the report by the mediator, may petition the board to set aside the report if a prima facie case is established that any of the following have occurred: (1) the mediator's report was procured by corruption, fraud, or other undue means, (2) there was corruption in the mediator, or (3) the rights of the petitioning party were substantially prejudiced by the misconduct of the mediator. For the sole purpose of interpreting the terms of paragraphs (1), (2), and (3), case law that interprets similar terms used in Section 1286.2 of the Code of Civil Procedure shall apply. If the board finds that any of these grounds exist, the board shall within 10 days vacate the report of the mediator and shall order the selection and appointment of a new mediator, and an additional mediation period of 30 days, pursuant to Section 1164.

²⁵ Cal. Labor Code § 1164.3 (f) (Deering 2004).

²⁶ Cal. Labor Code § 1164.5 (a) (Deering 2004).

tion rights by denying growers the opportunity to reach voluntary collective bargaining agreements.²⁷

II. THE FAILURE OF THE AGRICULTURE LABOR RELATIONS ACT TO EFFECTIVELY ADDRESS THE REFUSAL TO BARGAIN

In 1975, the California Legislature passed the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act. This is now known as the ALRA, which created the regulatory board, the Agricultural Labor Relations Board. The purpose of the Act is stated in California Labor Code section 1140.2:

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.²⁸

The farm workers of California were finally recognized as workers worthy of the right to organize, something that was granted their industrial counterparts many years ago.²⁹ The following sections examine how the two acts, the National Labor Relations Act (hereinafter "NLRA") and the California Agricultural Labor Relations Act, and the two corresponding administrative Boards, have decided to deal with employers who fail to bargain in good faith or refuse to bargain at all with the representative union. There are many similarities between the ALRA and the NLRA,³⁰ but more importantly there are crucial differences.³¹

²⁷ Henshaw, *supra* note 4.

²⁸ Cal. Labor Code § 1140.2 (Deering 2004).

²⁹ Wagner Act passed in 1935. The Act created the National Labor Relations Board which administrated the labor laws in the industrial sector of the economy. A deal was made with western senators to exempt farm workers from the NLRA to get their vote. Herman M. Levy, *Collective Bargaining for Farmworkers - Should There be Federal Legislation?*, 21 Santa Clara L. Rev. 333, 334 (1981).

³⁰ See Cal. Labor Code § 1148 (Deering 2004). Federal statutes as precedent. The board shall follow applicable precedents of the National Labor Relations Act, as amended. *See also* Kaplan's Fruit & Produce Co. v. Superior Court & UFW, 26 C3d. 60, 65 (1979) "Since the National Labor Relations Act (29 U.S.C. § 151 et seq.), served as the model for the ALRA, decisions interpreting the national act are persuasive in construing the California law."

³¹ ALRB v. Superior Court of Tulare County 16 Cal.3d 392, 412 (Cal. 1976).

A. *The “Make-Whole Remedy” in the National Labor Relations Act and the Agricultural Labor Relations Act*

In attempting to understand the California Legislature’s passage of the Contract Dispute Resolution amendment to the Labor Code, it is necessary to look at how the National Labor Relations Board (hereinafter “NLRB”) interpreted its scope of statutory authority to fashion compensatory remedies in response to an unfair labor practice of refusal to bargain, and how forty years later, the California Legislature passed the ALRA in response to the NLRB’s position.

In *Ex-Cell-O Corporation v. International Union* 185 NLRB 107 (1970), the NLRB was confronted with an employer refusing to bargain with a duly elected union. The Trial Examiner, after a full hearing on all the evidence, recommended the standard remedy, that an order to cease and desist be issued to Ex-Cell-O to stop its illegal action of refusal to bargain. The Trial Examiner also ordered the company to compensate its employees for their monetary losses during the time it refused to bargain with the union.³² This remedy was to make-whole the employees, that is, it was to grant the employees their expectancy damages, what they might have received through a negotiated contract with Ex-Cell-O in higher wages and benefits but for Ex-Cell-O’s illegal refusal to bargain.³³

The NLRB acknowledged that its traditional order to the employer to cease and desist was an inadequate remedy.³⁴ Yet, the NLRB would not award a make-whole remedy to the union, believing such an order was beyond the scope of its statutory powers.³⁵ Though the Board agreed with the findings of the Trial Examiner, and acknowledged a recent Court of Appeal decision that the NLRA did indeed extend the powers of the NLRB to order such a remedy,³⁶ the Board refused to grant a make-whole remedy.³⁷

The Board stated:

“[W]e observe that section 1148 directs the board to be guided by the ‘applicable’ precedents of the NLRA, not merely the ‘precedents’ thereof. From this language the board could fairly have inferred that the Legislature intended it to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California agricultural scene.”

³² *Id.* at 108.

³³ *Id.* at 110.

³⁴ *Id.* at 108.

³⁵ *Id.*

³⁶ *Id.* See also, *IUERM Workers, AFL-CIO v. Tidee Products*, 426 F.2d 1243, 1248 (D.C. 1970).

³⁷ *Id.*

that such a remedy *exceeds the Board's general statutory powers*. In addition, the Board contended, that it could not be granted because the amount of the employees' loss, if any, is *so speculative* that an order to make employees whole would amount to the imposition of a penalty. And the position is advanced that the *adoption of this remedy would amount to the writing of a contract for the parties*, which is prohibited by Section 8(d). (emphasis added).³⁸

The Board felt it could not fashion the make-whole remedy because it would be too speculative, possibly punitive, and contrary to Section 8 (d), which stated that parties in collective bargaining who reach impasse cannot be forced to accept terms of the bargain.³⁹

This majority decision was met with a strong dissent by Board members McCulloch and Brown, who argued that U.S. Appellate Courts had previously interpreted the NLRA as allowing the Board to fashion a make-whole remedy to restore the employees to their rightful position.⁴⁰ The dissent reminded the majority of the basic principle of remedies stated by the U.S. Supreme Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251(1947), that the burden of uncertainty in fashioning a remedy falls upon the wrongdoer.⁴¹

When reaffirming this principle of remedy doctrine, the United States Supreme Court referred to the ruling in *F. W. Woolworth Company v. N.L.R.B.*, 121 F.2d 658 (2d Cir. 1941).⁴² There, the Court of Appeals enforced the Board's back pay order even though, because of the employer's conduct, it could not be determined which employees were discriminatorily discharged. The Appellate Court stated:

In this striving to restore the *status quo*, the Board was forced to use hypothesis and assumption instead of proven fact. But its order is not invalid on that account; for Petitioner, by its unlawful conduct, has made it impossible to do more than to approximate the conditions which would have prevailed in the absence of discrimination Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasonable conclusion.⁴³

³⁸ See *Ex-Cell-O*, *supra* note 32, at 108.

³⁹ The National Labor Relations Act, 29 U. S. C. S. _ 158 (d) states in pertinent part: "... such obligation [to collectively bargain] does not compel either party to agree to a proposal or require the making of concession"

⁴⁰ See *supra* note 32 at 107, 108, 111.

⁴¹ *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1947).

⁴² *Id.* at 265.

⁴³ *F. W. Woolworth Co. v. NLRB* 121 F.2d 658, 663 (2d Cir. 1941).

B. *The California Legislature Responds to NLRA*

Ex-Cell-O was decided five years prior to the ALRA being signed into law. When the California Legislature created the ALRA it considered the difficulties the NLRB had remedying a refusal to bargain.⁴⁴ The Legislature fashioned the Act specifically authorizing the make-whole remedy in California Labor Code, section 1160.3, which states in pertinent part:

If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without back pay, and *making employees whole*, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part (emphasis added).⁴⁵

In hearings before the Senate committee reviewing the ALRA, then - Secretary of Agriculture and Services, Chief Justice Rose Elizabeth Bird, one of the authors of the legislation, stated:

[the] language was just placed in because there had been a good deal of discussion with the National Labor Relations Act that it ought to be amended to allow the 'make-whole' remedy, and this is something that people who have looked at this Act carefully believe is a progressive step and should be taken. And we decided since we were starting anew here in California, that we would take that progressive step.⁴⁶

The authors of the ALRA were well aware of the harmful effects a long delay could have on a newly formed union, especially a union of migrant workers who would be leaving the fields where they organized to follow the harvest into other states. Professor Archibald Cox explained, "The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating psychological blow to have the employer shut the office door in the union's face."⁴⁷

⁴⁴ Mary Lynne Thaxter, *Make-Whole Relief Under the California Agricultural Labor Relations Act: The Ex-Cell-O Doctrine Revisited*, 21 Santa Clara L. Rev. 1069, 1073 (1981).

⁴⁵ Cal. Labor Code § 1160.3 (Deering 2004) (emphasis added).

⁴⁶ *J. R. Norton v. Agricultural Labor Relations Board*, 26 Cal.3d 1, 38 (Cal. 1979).

⁴⁷ Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1408 (1958).

In addressing the problems with the NLRA, Professor Cox, taking part in a panel, advised the Senate Committee on Labor and Public Welfare, that, "... a major weakness in labor-management relations law is the long delay between the point at which a union seeks recognition of its majority status and the day when the employees' right to bargain through their chosen representative is vindicated by enforcement of a bargaining order." The Panel went on and posed the question: "If an employer refused to bargain collectively on June 3, 1959, how much good will be done by an order to bargain entered December 1, 1961? ... [A] remedy granted more than two years after the event will bear little relation to the human situation which gave rise to the need for Governmental intervention."⁴⁸

The California Legislature broke away from the precedent of the NLRA, recognizing the need of a remedy to deter the agricultural employer from needlessly delaying the process of bargaining with newly formed unions of immigrant, migrating workers. Initially, the make-whole remedy was applied successfully by the ALRB.⁴⁹ The Board, in exercising its power, developed a blanket make-whole remedy for any employer who refused to bargain with a certified represented union.⁵⁰ This blanket rule was challenged and overruled by the California Supreme Court.⁵¹ The Court ruled the Board, in fashioning a blanket rule for applying a make-whole remedy to any refusal to bargain charge, had overreached the meaning of the remedy. The Court agreed that the Board had the power to fashion a make-whole remedy but only on a case-by-case basis and only when it found the refusal to bargain to be a frivolous, dilatory, stalling tactic.⁵²

As the political climate in the state changed and the California Supreme Court realigned to a more conservative court,⁵³ further judicial restrictions were imposed on the ability of the Board to exercise its discretion in issuing the make-whole remedy. In *UFW v. ALRB*, 16 Cal.App. 4th 1629 (Cal.Ct.App. 1993), the Appellate Court ruled that the charge of a refusal to bargain brought and proven against an employer

⁴⁸ Ex-Cell-O, *supra* note 32, at 118. ("Pages" 2 and 10 of report pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1960) as quoted in the dissenting opinion).

⁴⁹ Adams Dairy 4 ALRB No. 24 (1978).

⁵⁰ Norton, *supra* note 47, at 28 (1979).

⁵¹ *Id.* at 29.

⁵² *Id.* at 9.

⁵³ In 1986, Chief Justice Rose Bird and Associate Justices Joe Grodin and Cruz Reynoso were subjected to the first and only recall of justices from the state's high court. The reason for all this opposition was Bird's position on the death penalty. Harold Meyerson, *Remembering Rose*, LA Weekly, (Dec. 10-16, 1999) available at <http://www.laweekly.com/ink/printme.php?eid=10936> (on file with San Joaquin Agricultural Law Review).

may be rebutted by the employer. The employer needed to show that there existed another legitimate reason for not reaching an agreement despite the unfair conduct of the employer's refusal to bargain.⁵⁴ The employer's refusal to bargain could not be considered by the Board when deciding if the employer met his burden of proof. If the reason put forth in relevant evidence by the employer was judged, standing alone, to be a legitimate reason for not reaching an agreement, then the charge of an unfair labor practice of refusing to bargain with the represented union could not stand.⁵⁵

This decision heavily favored the employer and was in opposition to the ALRA's intent to deter unfair practices that impede collective bargaining. Allowing the employer to escape accountability for violating its duty to bargain in good faith took away a powerful tool of the ALRB to bring the employer to the bargaining table.

1. Limiting the Ability of the ALRB to Order a Make-whole Remedy Led to Furthering the Pattern of Refusing to Bargain with the Farm Workers Union

If an employer challenged the election results that were conducted and supervised by the ALRB, he had the opportunity for review of the election by the executive secretary of the ALRB.⁵⁶ If this decision did not satisfy the employer, he could petition the Board for a hearing on the matter.⁵⁷ The examiner of the Board would then review the findings of the executive secretary and report his own conclusion after a hearing. If this decision did not satisfy the employer, he could petition the Board for a full review of the examiner's findings.⁵⁸ If this decision was not satisfactory, the employer could refuse to bargain and force the union to file a complaint of an unfair labor practice for refusing to bargain in good faith.⁵⁹

The Board then would hold a hearing evaluating the unfair labor charge and issue an order to either the union or the employer to bargain or not to bargain. The employer could then petition a writ of review of the Board's order with the appellate court that has proper jurisdiction.⁶⁰ This appellate decision could then be challenged by a writ to the Califor-

⁵⁴ *Id.* at 1639.

⁵⁵ *Id.* at 1640.

⁵⁶ Cal. Labor Code § 1156.3 (Deering 2004) and Title 8, Cal. Code Regs. § 20365 (Barclays 2004).

⁵⁷ Title 8, Cal. Code Regs. § 20365 (f) & § 20393 (Barclays 2004).

⁵⁸ Title 8, Cal. Code Regs. § 20370 (Barclays 2004).

⁵⁹ Cal. Labor Code § 1153 (e) (Deering 2004).

⁶⁰ Cal. Labor Code § 1160.8 (Deering 2004).

nia Supreme Court. If the Court remanded the case back to the ALRB, the Board's decision could work its way through the appellate court again and go back to the California Supreme Court. This convoluted system of reviews and review of reviews is subject to abuse by an employer who does not want to bargain, but instead wants to weaken the resolve of a newly elected union.⁶¹

This is exactly what happened in *Arakelian Farms v. United Farm Workers of America*, 49 Cal.3d 1279 (Cal. 1989). The saga of *Arakelian* started in 1976 with the election of the UFW union. The votes for the union were 139 and against the union were 12.⁶² The employer filed a petition with the ALRB, objecting to the election and asking the Board to set aside the results.⁶³ The Board rejected the election challenge and "certified the union as the employees' exclusive bargaining representative."⁶⁴ The employer still asserted the election was unfair and sought judicial review of the Board's certification of the union by refusing to bargain. The union brought an unfair labor practice charge against the employer and the Board ruled that the employer had committed a violation by refusing to bargain and ordered a make-whole remedy to be assessed. The employer then challenged the make-whole remedy to the appellate court.⁶⁵ The Court of Appeal remanded the case back to the Board to assess the make-whole remedy under new standards set out by the California Supreme Court.⁶⁶ The Board re-evaluated the order under the new standards and re-affirmed its order to assess a make-whole remedy.⁶⁷

The employer again challenged the Board's order and the Court of Appeal granted review for the second time. This time it was the union

⁶¹ Ex-Cell-O, *supra* note 32, at 115 (quoting the dissent):

"With the exception of a handful of cases which required Supreme Court action prior to closing, the longer the litigation the less likely was the prospect of the signing of a first contract. Only about half (approximately 57 percent) of all cases closed after a Board order resulted in such contracts and less than 36 percent of the cases closed after circuit court enforcement ended up with agreements.

The explanation for these results which comes most readily to mind is the factor of time. The long, drawn out process of administrative investigation, hearing and findings and, ultimately adjudication, bring two, three or four years of delay and a weakening of the charging union through the effects of the unexpunged unfair labor practices upon the employees"

⁶² *Id.* at 1286.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1287.

⁶⁷ *Id.*

that petitioned for review to the California Supreme Court.⁶⁸ The Court found in favor of the union, found the employer acted in bad faith in challenging the election and ordered a decree to enforce the Board's order for a make-whole relief.⁶⁹ Unfortunately, the matter did not end there.

The employer petitioned the Board to reopen its case so the Board could apply a new test for determining causation of a refusal to bargain charge decided by a recent appellate decision.⁷⁰ The Board refused to reopen the case and the employer petitioned the appellate court to review the Board's refusal.⁷¹ The Court of Appeal granted review and ruled in favor of the employer and ordered the Board to reopen the case. The union then petitioned the California Supreme Court to review the Court of Appeal's decision.⁷² The California Supreme Court finally issued its last decision on December 28, 1989, reversing the Court of Appeal's decision and re-affirming its original decree.⁷³ After thirteen years of litigation, the union had never engaged in collective bargaining.

The *Arakelian* court questioned the rules for procedural review of the ALRA that allowed such delay through procedural reviews and re-reviews of decisions. The Court stated:

One of the Legislature's purposes in enacting the Agricultural Labor Relations Act was to effect a speedy resolution of agricultural disputes. The shortened period of the time for seeking judicial review of the Board's orders as well as the abbreviated enforcement procedures in the superior court manifest a legislative intent to avoid undue litigious delay. A procedural system that encourages successive reviews by appellate courts of questions that were previously decided affects this legislative purpose and burdens the statutory rights and interests of agricultural workers, the class for whose benefit the law was adopted. We recognize there are occasional instances in which, to prevent injustice, the Board may reopen a case after a decision by an appellate court because of a change in the controlling rule of law; but we again caution that such cases will arise infrequently and observe that this is not such a case. (cites omitted).⁷⁴

The agricultural industry's refusal to engage in meaningful collective bargaining and the adoption of the *Dal Porto* judicial rule for dealing

⁶⁸ *Id.*

⁶⁹ *See supra* note 64, at 1287.

⁷⁰ *Dal Porto v. ALRB* 191 Cal. App.3d 1195, 1207 (Cal.Ct.App. 1987). Here the court allowed the employer to defeat a charge of refusal to bargain if the employer could show another reason why the parties could not reach an agreement, other than the refusal to bargain.

⁷¹ *Arakelian, supra* note 52, at 1288.

⁷² *Id.* at 1289.

⁷³ *Id.* at 1295.

⁷⁴ *Arakelian, supra* note 64, at 1295.

with the problem of multiple causation in a charge of refusal to bargain has worked contrary to the intent of the Legislature. The purpose behind the ALRA was to promote speedy resolution of agricultural labor disputes⁷⁵ and grant the ALRB the power to effectuate the policies of the ALRA⁷⁶ by fashioning a make-whole remedy to deter conduct that delays negotiations for collective bargaining agreements.

The Legislature and farm workers became frustrated with the inefficiency of the ALRA to accomplish its intent of encouraging and protecting the rights of the agricultural employees to freedom of association, self-organization, and designation of representatives of their own choosing for the *purpose of collective bargaining* (emphasis added).⁷⁷

The stalling tactics used by employers to reach collective bargaining agreements resulted in the dismal showing of the few collective bargaining agreements reached, compared to the number of unions. Of the 428 companies where farm workers voted for the United Farm Workers in secret elections since 1975, only 185 had signed union contracts.⁷⁸ This failure to reach collective bargaining agreements was the motive for enacting the Contract Dispute Resolution amendment to the Labor Code.⁷⁹ It is hoped that this alternative dispute resolution tool will help resolve the absence of negotiated contracts for the farm workers, many of whom have waited years for an agreement.

III. MANDATORY MEDIATION THAT RESULTS IN BINDING THE CONTRACTUAL TERMS OF THE PARTIES IS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE NOR IS IT A VIOLATION OF A FUNDAMENTAL RIGHT

The charge of unconstitutionality quickly rang out once the governor signed the bills.⁸⁰ A lawsuit was filed by the libertarian group, The Pa-

⁷⁵ *Id.*

⁷⁶ Cal. Labor Code, § 1160.3 (Deering 2004).

⁷⁷ Cal. Lab. Code § 1140.2 (2004), states in full

It is hereby stated to be the policy of the State of California to encourage and protect the right of the agricultural employee to full freedom of association, self-organization, and designation of representatives of their own choosing, to *negotiate terms and conditions of their employment*, and to be free from interference, restraint or coercion of employers of labor, on their agents in designation of such representatives or in self-organization or in other concerted activities for the *purpose of collective bargaining* or other mutual aid or protection. For this purpose this part is adopted to provide for *collective-bargaining rights for agricultural employees*. (emphasis added.)

⁷⁸ H.R. 2596, 2003 Gen. Assem., Spec. Sess., (Cal. 2003) (enacted).

⁷⁹ *Id.*

⁸⁰ Henshaw, *supra*, note 4.

cific Legal Foundation, on behalf of the Western Growers Association, the California Farm Bureau Federation, other organizations, and individual parties.⁸¹ The suit filed in the Superior Court of Sacramento County alleges violations of the Equal Protection Clause and the right to negotiate a private contract. The Pacific Legal Foundation asserts that the new statute for mandatory mediation is unconstitutional because it allows the “state government to abrogate the long-recognized right of employers and its employees’ union to bargain for the purpose of reaching a contract. This forced contract scheme strips private parties of their fundamental right to collectively bargain without government interference.”⁸²

A. *Lochner Redux*

There has been an increase in libertarian and conservative legal commentators arguing for the revival of the Contract Clause⁸³ found in Article I, section 10 of the Constitution. The Contract Clause states in pertinent part, “No State shall ... pass any ... Law impairing the Obligation of Contracts....”⁸⁴ The debate over the jurisprudence of *Lochner* and economic substantive due process has been thoroughly written about and will not be argued here.⁸⁵ The *Lochner* Court’s two-step approach to state legislation was to limit the permissible ends a state could pursue in the area of economic rights “... to the safety, health, morals, and general welfare of the public...”⁸⁶ and to apply a strict review to the state’s interest asserted, requiring a tight fit between the means used and the ends

⁸¹ See <http://www.pacificlegal.org> (Feb. 24, 2003)(on file with San Joaquin Agricultural Law Review).

⁸² See, *supra*, note 63, The Pacific Legal Foundation commentary.

⁸³ See, Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703 (1984); see also, James L. Kainen, *The Historical Framework For Reviving Constitutional Protection For Property and Contract Rights*, 79 Cornell L. Rev. 87 (1993).

⁸⁴ U.S. CONST. art. I, § 10, cl. 1. The full clause reads:

No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

⁸⁵ See, Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873 for an excellent review of the constitutional issues arising from *Lochner* (1987); see also, Samuel R. Olken, *Charles Evans Hughes and the Blaisdel Decision: A Historical Study of Contract Clause Jurisprudence*, 72 Or. L. Rev. 513 (1993).

⁸⁶ *Lochner v. New York*, 198 U. S. 45, 53 (1905).

“[The] general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”

intended.⁸⁷ Justice Peckham, writing for the Court in *Lochner*, stated, “[t]he mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid.”⁸⁸

The constitutional battles that overturned *Lochner* occurred between the Court and the Roosevelt administration during the New Deal and are well documented.⁸⁹ It is enough to say that the U.S. Supreme Court has ruled on numerous occasions that the standard of review for a constitutional challenge to a state statute dealing with economic rights within the state is the rational basis standard.⁹⁰

The Court rejected the *Lochner* analysis of economic due process in *Nebbia v. New York*, 291 U.S. 502 (1934), stating:

[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.⁹¹

Lochner's methodology and substantive analysis of economic due process incorporated and protected the common law rules of property and contract.⁹² *Nebbia's* rejection created a critical theoretical shift from a laissez-faire protection of the status quo to a deference to the legislature's judgment to intervene on the citizen's behalf which was seen as the embodiment of the majority's opinion in law.⁹³

The U.S. Supreme Court has long held that the right to contract must yield to what the state considers public interest.⁹⁴ In *West Coast Hotel v. Parrish*, 300 U. S. 379 (1937),⁹⁵ Chief Justice Hughes clearly rejected the freedom to contract stating, “What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits

⁸⁷ Sunstein, *supra* at 877.

⁸⁸ See note 89, at 57.

⁸⁹ See, John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.3 (4th ed. 1991).

⁹⁰ *Nebbia v. New York*, 291 U. S. 502, 537 (1934).

⁹¹ *Id.* at 537.

⁹² Kainen, *supra* note 65, at 91.

⁹³ See note 89, (Justice Holmes dissenting) at 75

⁹⁴ *Country-Wide Insurance v. Harnett* 426 F. Supp. 1030, 1035 (1977). “The law accomplishes a legitimate public goal and any contract right must yield to it.”

⁹⁵ *West Coast Hotel Co. v. Parrish et al.*, 300 U. S. 379 (1937).

the deprivation of liberty without due process.”⁹⁶ The *Parrish* opinion goes on to affirm a thorough rejection of *Lochner’s* economic substantive due process, in favor of deference to the elected government’s wisdom. The Chief Justice stated, “[f]reedom of contract is a *qualified and not an absolute right*. There is no absolute freedom to do as one wills or to contract as one chooses. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community.”⁹⁷

California’s Legislature enacted the ALRA to promote and protect the rights of the farm worker and to achieve peace and stability in the agricultural fields of the state. The state has a strong public interest in the agricultural industries within its borders and has heavily regulated the industry’s business.⁹⁸

The Contract Dispute Resolution Statute is a constitutional exercise of the state’s police power to regulate the industry that is crucial to the state’s economy. It is neither arbitrary nor unreasonable, but is directed to alleviate a continuous frustration of the collective bargaining process.⁹⁹

B. The Contract Dispute Resolution Statute Does Not Violate the Equal Protection Clause and Due Process Clause of the 14th Amendment

The Equal Protection Clause found in the 14th Amendment states in pertinent part, “... [N]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁰ The U.S. Supreme Court has adopted three standards of review when deciding an equal protection challenge. The three standards differ in the amount of independent judi-

⁹⁶ *Id.* at 391.

⁹⁷ *Id.* at 392.

⁹⁸ *See generally* Cal. Water Code §100, 1001 et seq. (2004); California Seed Law, Cal. Food & Agri. Code § 52251 (2004); The California Marketing Act of 1937, Cal Food & Agri. Code § 58601 (2004); Milk and Dairy Food Safety Branch, Cal. Food & Agri. Code § 32501.5 (2004); Protect California Air Act, Cal. Health & Safety Code § 42500 et seq.; Protect California Air Act; Public Res. Code § 10200 et seq.; California Farmland Conservancy Program Act.

⁹⁹ *Parrish*, *supra* note 98, at 398:

“We again declared that if such laws ‘have legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.’”

¹⁰⁰ U.S. Const. amend. XIV, § 1, states in full:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

cial review given to the legislative classification in question.¹⁰¹ “The Court’s institutional decision as to the degree of unique judicial function and the amount of deference that should be paid to the legislative policy decisions in equal protection issues has mirrored that made in terms of substantive due process.”¹⁰²

The charge by the agricultural industry against the Contract Dispute Resolution statute is that they are denied equal protection of the law.¹⁰³ This violation means the state has either classified a group viewed as a “suspect class” in some harmful way or the state has passed a law that impairs a person from exercising a fundamental right. The U.S. Supreme Court has stated, “The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a “suspect class,” or that impinge upon the exercise of a “fundamental right.”¹⁰⁴ A “suspect class” has been defined

¹⁰¹ Nowak, *supra* note 92, at § 14.3.

¹⁰² *Id.* at § 14.3, p. 574; *See also* Catlin v. Sobol, 881 F.Supp. 789, 798. (N.D.N.Y.1995), stating:

With most forms of state action, courts will analyze the facts and laws to determine whether the classification at issue bears some rational relationship to a legitimate public purpose. E.g., *Heller v. Doe*, U.S., 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257 (1993). However, when a classification disadvantages a “suspect class” or the individual interest at stake involves the exercise of a “fundamental right,” courts strictly scrutinize the classification to determine if it is “precisely tailored to serve a compelling governmental interest.” *Plyler v. Doe*, 457 U.S. 202, 216-17, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1981); *see generally* *City of New York v. United States Dep’t of Commerce*, 34 F.3d 1114, 1128 (2d Cir. 1994) (describing different degrees of scrutiny utilized by Supreme Court). Further, because certain classifications give rise to recurring constitutional difficulties even though no suspect class or fundamental right is involved, the Supreme Court has developed an intermediate level of scrutiny through which courts review the classification to determine whether it is “substantially related to furthering an important governmental purpose.” *See* *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976) (gender classifications); *Lalli v. Lalli*, 439 U.S. 259, 58 L. Ed. 2d 503, 99 S. Ct. 518 (1978) (classifications based on illegitimacy).

¹⁰³ Jack Henshaw, *Farm groups challenge new labor law*, *Visalia Times-Delta*, Feb. 25, 2003 p 2, available at <http://www.visaliatimesdelta.com/news/stories/200302225/localnews/1055719.html> (on file with San Joaquin Agricultural Law Review).

¹⁰⁴ *Plyler v. Doe*, 457 U. S. 202, 218 (1982), where the Court held a Texas statute unconstitutional which prohibited children of parents that were illegal aliens from obtaining a free public education; *See also* *U. S. v. Carolene Products*, 304 U. S. 144, 153:

Nor need we enquire whether similar considerations enter into the review of statutes directed at ... prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

as “classifications [that] are more likely than others to reflect a deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. ... [C]ertain groups ... have historically been ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’ ”¹⁰⁵

The agricultural industry in California would not fall into the category of a “suspect class.” This industry is well represented politically and well financed.¹⁰⁶ In the absence of a statute forming a suspect class or limiting the exercise of a fundamental right, the United States Supreme Court has applied rational basis scrutiny to an equal protection challenge.¹⁰⁷

The second area of state action viewed as violating the Equal Protection Clause is a statute that impairs the exercise of a fundamental right.¹⁰⁸ The U.S. Supreme Court has found under the Equal Protection Clause violations of the fundamental right to vote,¹⁰⁹ the fundamental right of interstate travel,¹¹⁰ and the right (though not labeled fundamental) to have access to the courts.¹¹¹ The agricultural industry and the Pacific Legal Foundation have asserted that the right to collectively bargain without interference by the state is a fundamental right.¹¹²

The U.S. Supreme Court has recognized fundamental rights under the Due Process Clause stating:

In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1

¹⁰⁵ Plyler, *supra* note 107, at 218, fn. 14.

¹⁰⁶ Rene Sanchez, *Farm Worker Pacts Stir Cal. Conflict*, *Washington Post*, September 23, 2002, at A03.

¹⁰⁷ *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976):

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

¹⁰⁸ *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973), stating that: “Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.”

¹⁰⁹ *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

¹¹⁰ *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972).

¹¹¹ *Griffen v. Illinois*, 351 U.S. 12, 19 (1956).

¹¹² Press Release, Pacific Legal Foundation, *State-Imposed Labor Contracts Between Growers and Unions Unconstitutional: Pacific Legal Foundation Sues State Over “Forced Contract” Scheme* (Feb. 24, 2003) (on file with *San Joaquin Agricultural Law Review*).

(1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S. at 278-279.¹¹³

The Court has held that a fundamental right is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed ... and a careful description of the asserted fundamental liberty interest" is required.¹¹⁴ The Court has not found a fundamental right to collective bargaining under the Equal Protection Clause or under the Due Process Clause.

The claim by the Pacific Legal Foundation and the agricultural industry that there is a fundamental liberty interest in the right to contract fails. Not since the late 19th century has the United States Supreme Court ruled that the Contract Clause gave rise to a fundamental right.¹¹⁵ The Court in *Wolff Packing v. Kansas*,¹¹⁶ invalidated the Industrial Court Act of Kansas which was created to avoid shortages and hardships that occurred to citizens during World War I. The Court of Industrial Relations had the power to step in and fix the terms of a contract, including wages and hours worked, when business and workers could not reach an agreement. The state argued it had the necessary power to regulate the industries under the Act because such industries were effected with the public interest.¹¹⁷ The U.S. Supreme Court, in attempting to reign in the state's expanding power under the doctrine of "industries effected with a public interest," asserted that the right to contract was part of normal daily life and any restriction on this right could only occur under exceptional cir-

¹¹³ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

¹¹⁴ *Id.* at 721.

¹¹⁵ *See Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) stating: The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

¹¹⁶ *Wolff Packing v. Kansas*, 267 U. S. 552 (1925).

¹¹⁷ *Id.* at 566.

cumstances. “While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances.”¹¹⁸ Sixteen years after *Wolff*, the Court in *West Coast v. Parrish*,¹¹⁹ ruled in favor of a chamber maid who brought suit against her employer for his refusal to pay the minimum wage set by the state of Washington.¹²⁰ Chief Justice Hughes rejected the right to a freedom to contract stating:

But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.¹²¹

The Court has been very specific in delineating what are fundamental rights.¹²² The Court made clear, that economic rights are not fundamental, and will only be reviewed under a rational basis standard:

At least since the demise of the concept of “substantive due process” in the area of economic regulation, this Court has recognized that, “[legislative] bodies have broad scope to experiment with economic problems” *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). States may, through general ordinances, restrict the commercial use of property, see *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and the geographical location of commercial enterprises, see *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). Moreover, “[certain] kinds of business may be prohibited; and the right to

¹¹⁸ *Id.* The Court quoting from *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 534 (1923); See also, Robert C. Post, *LECTURE: DEFENDING THE LIFE WORLD: SUBSTANTIVE DUE PROCESS IN THE TAFT COURT ERA*, 78 B.U.L. Rev 1489, 1490-1491 (1998), stating:

Although most of the wartime measures and agencies established by the Wilson Administration had long since been dissolved by the time Harding assumed office in March 1921, there was nevertheless a brooding sense of ideological rupture. Wartime mobilization had actualized hitherto unthinkable forms of state intervention, and the question looming over the dawning decade of the twenties was whether these new possibilities would remain within the potential repertoire of domestic state regulation during times of peace. Striving for normalcy meant, in essence, working to restore the country to a more natural balance between unmanaged individual initiative and the prerogatives of public order.

¹¹⁹ *Parrish*, *supra* note 98.

¹²⁰ *Id.* at 388.

¹²¹ *Id.* at 392.

¹²² See *supra* notes 112-114; Glucksberg, *supra* note 116.

conduct a business, or to pursue a calling, may be conditioned. . . . [Statutes] prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency." *Nebbia v. New York*, 291 U.S. 502, 528 (1934).¹²³

The agricultural industry's Equal Protection and Due Process claims will both be reviewed under the rational basis test. As long as the statute is not arbitrary or unreasonable, the presumption of constitutionality is given to the actions of the Legislature.

The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549, 567. Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract.¹²⁴

It is within the power of the state to remedy a conflict within the agricultural industry through the best judgment of the Legislature.

IV. CONCLUSION

The Contract Dispute Resolution amendment to the Labor Code provides a means for either the agriculture employer or the farm worker to request assistance from the ALRB when the parties are unable to reach an agreement under collective bargaining. The amendment provides the party with the opportunity to pick a mediator of their choice, to present factual evidence through the process of discovery, in support of their contentions, and to be represented by counsel. The parties are able, upon a proper showing, to challenge the request for mediation. At the mediation proceeding the parties are entitled to be heard, present evidence and cross-examine witnesses.

The decision of the mediator is subject to review by the ALRB through petition of the Board. The Board's decision is subject to review by the Court of Appeal or the California Supreme Court by way of writ.

The purpose of the Contract Dispute Resolution amendment is to bring about collective bargaining agreements. The California Legislature has determined that farm workers, in its vast agricultural fields, would be far better off under the protection of a labor contract. This large group of mainly Hispanic families, most living below the poverty level, most un-

¹²³ *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978).

¹²⁴ *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931).

educated, have few resources to participate in the political process, exception through the union.

The attempt to revive the constitutional argument of fundamental economic rights through the Contract Clause is difficult, at best, in light of the long history of case law rejecting the *Lochner*-like substantive due process. Though the revisionist arguments are reasonable and persuasive, the reversal of law they propose would be unsettling. It would allow a minority of business owners to overturn the decisions of a majority-elected legislature, the basis of representative democracy.

THOMAS CASA