Individual Rights Final Exam Grading Notation Key
Prof. McDonald

Issue
I1 = Correct issue statement
I2 = Incomplete issue statement
I3 = Incorrect issue statement

Rule
R1 = Correct statement of governing legal principles
R2 = Incomplete statement of same
R3 = Incorrect statement of same

Analysis
A1 = Correct factual analysis
A2 = Incomplete factual analysis
A3 = Incorrect factual analysis

Conclusion
C1 = Correct conclusion
C2 = Incomplete conclusion
C3 = Incorrect conclusion

Other Specific Notations:
D = Did not follow instructions provided on front of exam or as part of question (e.g., what rule to apply).
G = Good point or analysis.
ORG = Recommend better organization of issues and analysis, and/or not mixing together different issues within the same discussion.
Y = "Yes!" (as in "righto!")

1)

This is an exam for Con Law.

Question 1

1. Raul's Claims against the State of Arizona

Generally to have a constitutional violation, you must have state action. Here, State of Arizone is the one passing the act, so there is state action in all of the claims against the State of Arizona.

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Does parts 1-3 of the Act violate Raul's privileges and immunities rights under Article IV of Section 2 of the Original Body of the Constitituion?

The citizens of each state shall be entitled ot the privileges and immiunities of the citizens of the several states. WHen there is a discrmimination between residents and non-residents, a hypbrid review between Intermediate Scrutiny and sstrict scrutiny will be applied. First, there has to be a fundamental right of citizenship being burdened. Then the question must be asked

whether tthere is substantial governmental interest, and if the law is necessary to achiveve the purpose of the government without any alternatives.

In this case the right being asserted by Raul is the right to engage in day labor. A fundamental right of state citizenship does not necessarily need to only be a fundamental right, but it can be the pursuance of trade or an imporatant econoic opportunity in other states. Raul's right to engage in day labor would fall under the category of trade and thus would be a fundamental right of state citizenship. Is there a substantial government interest? Here the government asserts the reasons to be to allow the state to identigy workers vulnerable to expolitation, monitor their work condidtions to ensure thay are safe, and to defray the expensees of this program and to protect the citizens of Arizona from crime that may be committed by such workers with criminal records. The safety of the workers and the want to preotect hte citizens of Arizona from crime is a substantial governemntal interest. The problem will come in the ends analysis, for there are other less restrictive alternatives to acheiveing this government purpose such as to pass minimumm wage laws as well as instittute laws that regulate conditions of wroking. Also the law on criminal conviction is overinclusive as people like Raul will be included for traffic offenses and this does not further the purpose of the government which is trying to prevent crime against citizens of Arizona.

Thus because the Act is overinclusive and there are less restrictive means, Raul will prevail on an Article IV Privileges and Immunities case.

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Does the Classification of Hispanics from the Act violate the Equal Protection Clause of the 14th Amendment?

The 14th Amendment states that No state shall make or enforce any law which shall.... deny to any person within its jurisdiction the equal protection of the laws. This clause guarantees that people who are similarly situated will be treated similarly. it is designed to protect against illegitimate classifications. The first question to ask is if the law on its face or via enforcement has created a classification based on a suspect class. If there is a disparate impact, the intentional discirmination need to be found. here the court is interpreting the Protected worker definition s the people vovered by it consititng almost exclusively of the Hispanic Citizens. Thus there is a classification based on national origin, which is a suspect class.

Once a suspect class if found, strict scrutiny will be applied in which there needs to be a compelling overnmental interest and the classification needs to be narrowly tailored to acheive this interest without less restrictive alternatives. In this case, there is still compelling interest for protecting vulnerable groups and watching out to protect crime against citizens. As said above in the meands prong of the Article IV, there is not sufficient narrowly tailoring especially since this only prevents alleged crimes from Hispanics and not any other racial./ethnic/national origin. If this Act was passed it would perpetuate an unfounded fear against hispanics and stereotype them as criminals. This is exactly the type of invidious discrimination the court wants to smoek out byu the use of strict scrutiny.

Thus, the Equal Protection claim will also prevail and will be the strongest for Raul as it puts the highest burden on the State via strict srutiny.

Does the Act unduly burden the fundamental right of Raul to pursue a day job?

As was held in Lochner, there is no fudnamental right to economic activity and thus rational basis review follows in which there needs to be a legitimate governmental interest and the law needs to be reasonably related to achieving that interest. Here there is a legitimate claim in worker safety and protection of citizens against crime. It can be argued that there is a plausible relationship on the criminal inspections because it does target crime. The court will be deferential towards the law, and analysis can be seen under Juan's claim. Thus the best claim to bring is teh Equal Protection claim based on classification of a suspect class, followed by an Article IV claim.

2. Juan's Claims

Does the Act draw a classification which burdens the right to travel?

Under the 14th Amendment Equal protection Clause, if there is a classification that burdens a fundamental right the law will be subjected to strict scrutiny regardles sof the characteristics of the people who are burdened. The right to travel has been deemed a fundamental right. The classification here discriminates between newly arrived residents, such as Juan and residents who have resided longer than a year. The law would make Juan pay 1,000

dollars, which he can't afford, and he wouldn't be able to work even if he could afford that as a result of his traffic violations. This would put a substantial deterrence in him traveling tot he state for he would not be able to make a living, just like in Shapiro where there was a durational residency requirement on who could receive welfare. Since this is a burden on a fudnamental right, strict scrutiny will follow.

Is the governmenal interest compelling? As said above there is a compelling interest in making sure workers are sage, and not vulnerable to exploitation. Again, the narrowly tailored prong will fail here because the means is overly inclusive for it doesn't protect citizens from other criminals other than residents, and they can have minimum wage and conditions passed through the legislature. Thus because the means end fails strict scrutiny, Juan will prevail in striking down the Act.

Does the Classification of Hispanics from the Act violate the Equal Proection Clause of the 14th Amendment

Again, Juan will be able to assert the same claim as Raul and will win because the Act promotes invidivious discrimination.

As well, Juan, like Rual will probably fail if arguing that there is a undue burden on his fundamental right to engage in a day job as post -LOchner, the court will apply a deferential rational basis review lookign for a plausible purpose and a plausible relationship between the interest and the law that is suppose to achive that interest. There could be a plausible relationship

because by making the payment of 1000 defrays the programs costs and criminal record checks could plausibly protect citizens from crimes from workers. Thus the strongest clamm to bring is either the Equal protection claim that the Act burdens the fundamental right to travel, or that the Classification of Hispanics for unequal treatment, is invidiious discirmiantoin. A2

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3. Claims by Raul and Juan

Does Section 4 infringe on Raul and Juan's 1st Amenmdent right to speech

Under teh 1st Amendemnt, Congress shall make no law abridging the freedom of speech or of the press. In analysing a 1st Amendemnt freedom of speech issue, teh court will look first to see if there is a regulation of that burdens human expression. In this case the human expression was job advertising.

If so, is the regulation burdening speech or conduct? In this case it targets advertising which is a form of speech.

Then it is asked in what capacity the government is regulating. Here it seems to be like a property owner. In this case the government was saying that no speech could be allowed on the sidewalks, Sidewalks have historically and traditionall been open for accesss to the public, and thus they would be a Traditional Public Forum. Also by regulating the speech on only certain designated public parks, which are historically and traditionall been open tot he public, the forum is still a Traditional Public Forum. Since tis is a Traditional Public forum, Regular speech rules

apply.

Thus the next question to ask is if the speech is fully protected or a lesser form of speech. If it is a lesser form of speech, ad hoc rules apply. In this case this is commercial advertising which is a form of lesser protected speech. The Central Hudson case is then applied whichi is a squishy form of intermediate scrutiny. The test is 1) is the expression protected by the 1st Amendment? 2) is the governmental interest substantial? 3) If yes, does the regulation direclty advance the government interest aserted? and 4) Is it not more extensive than necessary to seve that subsantial interest.

In this case, the speech is lawful and truthful, and thus we go to the second prong. The substantial interest could be argued that the hiring takes palce under safe conditions that do not present traffic obstacles or distractions ont he streets and that is a substantial interest for it is protecting the safety of people. The regulation seems to be a fairly close fit for a park allows the governmental interest in safety to be furthered by offering a public park which will allow for safe procedures. Where it might fail is that public parks can still have traffic problems and since it is an open space not monitored by the police there is still worry for safety. BUt the other option of having on a side walk presents more safety risks so there is probably a close fit.

The governemnt Act is probably no more extensive than necessary to serve that substantial interest for it is still allowing a broad place for workers to congregate. Thus most likely, because there seems to be substantial safety concerns and there is a close fit, Raul and Juan will lose.

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Raul and Juan will also lose on the fundamental right to engage in ones trade as the legitimate purpsoe is in safety, and there is plausible relationsip by having all workers be in a public par,

4) Ajax's claims

Does the Section 5 present a substantial and unreasoable burden on Ajax's existing contracts with Raul and Juan and other THANM workers.

Under Article I section 10 no state shall pass any law impariing the obligations of contract. Thus applies only to state and local government regulations and also only to the infringement of existing contract rights.The rule is 3 part: 1) is there a substantial impairmtnet on the existing contracts? 2) Does the alleged impariment serve an important public purpopse? 3) Is the impariment both reasonable and necessary to achieve the governemnt's purpose?

Here there is a subtantial impairment in that Ajax will be subjected to an addition 30% of taxes based on its existing contract with THANM. The purose of the impairment is that it is designed to ensure that Arizona tax payer sare fairly compensated for commercial uses of the Staes roads. This is not a substantial purpose as Ajax has to pay over and above any ordinary payable taxes, thus this actually conferring a benefit on the residents. But the only proablem, is that since there are two private parties the court reads the second prong as looking for hte broad remedying of a broad social or economic harm. Thus, to ensure the compensation of Arizona tax payers is fin. Also, the last prong will fail as it is not reasonable to pay over and above ordinary

taxes for the ordinary taxes are how the citizens are paid. But again this prong is deerential and there would be some sort of defemtial RB review. It could still be argued that this is not a reasonable way to make Ajax pay 30% over the ordinary taxees and thus it looks way too discriminatory based on who Ajax is transporting. But since this case does not seem like the Allied Steel, the court iwll probably be deferential.

Y

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Takings claim: taking the money for public use without just compensation. Ajaz would win here as well.

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Procedural DP calim: there was a congizable interest int he contract right, there was an intentional deprivation by passing this law, and there has been no hearing pre or post deprivation, so Ajax would win on this claim too.

I3
A3

Q1: Good Job!

1)

Under the 14th Amendment, no state shall deny to any person wihtin its jurisdiction the equal protection of the laws. Laws do not have to treat people exactly the same. This would be impossible. Laws just cannot distinguish between people or classes of people on illegitimate grounds. To determine if there is a legitimat ebasis for distinguishing between people in a law, a three step analysis is required.

First, to have a viable Equal Protection Clause (EPC) claim, the govt must be treating people in an unequal manner. The discrimination be either be present on the face of the statute, or the statute could be neutral on its face but discriminatory in enforcement or discriminatory in its impact and its motive.

Here, Juan (J) and Raul (R) will claim that the Sections 1, 2, and 3 make many classifications against them. First, they will want to argue that Section 3 makes classifications based on national origin. If J and R can establish this, then strict scrutiny will apply to the provisions. They will argue that defining a "Protected Worker" as any person in Arizon who is a U.S. citizen but "regularly offers his or her personal services for employment on a day-to-day basis only, and who: (A) is a resident of another State who enters Arizona to obtain work with no intent of establishing permanent residency; or (B) has established apermanent residence in Arizona and has resided in the State for less than one year" is targeting Hispanics. The State will likely argue that this is not discriminatory, because the statute does not specifically say it only applies to

Hispanics, and it would apply to anyone wanting to come to work in Arizona in the condition describted above.

Y R & J, however, will argue that the provision is facially discriminatory because everyone that meets the Protected Worker classifications are Hispanic. Even if it is not facially discriminatory, it is discriminatory in its impact. After all, the people covered by by this provision consist "almost exclusively of" Hispanic citizens. However, discriminatory impact is not enough. The plaintiffs must also show that the state had a discriminatory motive. See Washington v. Davis. Only requiring discriminatory impact would open the floodgates to any classification in any law. Under Village of Arlington Heights, discriminatory motive can be shown through direct OR circumstantial evidence. J and R will argue that while there might not be direct evidence here suggesting that prejudice was a motive, there is circumstantial evidence by the fact that Arizonans are upset that these people with little education come in and take their jobs. This is not A2 evidence of discriminatory intent, however. The state will argue that the state purposes of the act are (1) to allow the STate to ID workers who are particularly vulnerable to exploitation, monitor their work conditions to ensure they are safe, and to defray the expenses of this program, and (2) protect the citizens of Arizona from crime that may be committed by such workers with criminal C3 records. As such, this likely is not going to be enough to show discrimination on the basis of race.

If the Court does determine there has been a classification on the basis of national origin, strict scrutiny applies because it is an inherently suspect class. See Japanese Curfew Cases. The state has the burden of showing that the statute was narrowly tailored to serve a compelling state

interest, and that interest was actually the one motivating the enaction of the statute. Here, certainly the stated purposes are compelling--protecting workers and ensuring safety, as well as protecting Arizona residents from criminals. However, J and R will likely argue this is not the state's actual interest in passing the law. To the contrary, the state wanted to pass the law because the unemployment rates are rising because of uneducated Hispanics crossing the border to take low paying jobs. IT really is an economic protectionist provision, designed to exclude Hispanics. This would likely not be a compelling state interest, and as such, this provision (because it is the one classifying on the basis of race and triggering strict scrutiny) should be struck down. Assuming, however, that the stated purposes are the actual purposes and that they are compelling, is not clear how the first or third provision is narrowly tailored to meeting that end. Under strict scrutiny, it must be the least restrictive means of achieving that end (necessary). Here, protecting ARizona from people with criminal records is not served by limiting the criminal background check to people from out of state/Hispanics. Moreover, Arizona classifies traffic violations as criminal convictions, so people with a traffic violation cannot work under this statute. That really is not narrowly tailored to benefit the safety of the citizens of California. Finally, it is unclear how a requirement to get a license will really ensure that working conditions for the Hispanics are safe. Again, this does not seem narrowly tailored to meet the govt's stated purpose. Thus, this provision will likely be struck down unless the Court finds that it is NOT a classification based on national orign (no discriminatory motive).

If this is not a classification on national origin, J will likely argue that 3(b) violates the EPC bc the classification burdens the exercise of fundamental rights: the right to move to another state.

There are four paradigms in which these types of restrictions can be classified. Under paradigm 1, J will argue that this is deterring him (out of state resident) from moving to the state like the plaintiff claimed in Shapiro v. Thompson, because he has to pay 1,000 to work there until he has lived there for a year or somehow gets his record expunged (assuming he does have a traffic record--it is unclear from the facts). If a regulation substantially infringes the right to travel/migrate, it is subject to strict scrutiny and likely will fail under the EPC. The state will argue again that the safety of the workers and their citizens constitutes a compelling state interest, but J will argue that is not the actual purpose behind the law. Economic protectionism is likely not a compelling state interest (ie, defraying expenses of this program, another interest asserted by the legislature), as protecting the state's finances wasn't in Shapiro. Thus, the restriction would likely be struck down if the Court determines it is substantially infringing on the right to migrate.

If J doesn't win on that theory, he may want to argue that the restriction is discriminating between residents of the state based on residence like in Zobel v. Williams. If so, that is a quasi-suspect classification, subject to rational basis review with teeth. This means that the interest asserted must be the actual purpose behind the statute, and it must be rationally related to that legitimate public purpose (same wording as rational basis, but applied with more force). J would argue that the purpose asserted is not the actual purpose, however the state would argue that even defraying costs for its own taxpayers would be a legitimate public purpose. J would fair better if this was analyzed under paradigm 1.

The state will likely want to argue for paradigm three, at least against R, which says that if a state has a legitimate concern that people are moving to a state just to get a particular benefit with no tintentnion of staying in th estate, the Court will apply a deferential rational basis review. R wanted to just move for 6 months, reap the benefits of employment there, and then leave. He does not plan to stay in Arizona. This paradigm usually applies more to out of state residents wanting to move in to obtain a discount on something, but it possibly could be applied here to a desire to obtain employment for a limited period of time. If so, then the Court would apply deferential rational basis review. There just needs to be some valid, conceivable legitimate purpose, and the statute must be rationally related to it. That's not too hard to show here. The state has an interest in defraying the cost to its citizens of having out of state residents working for very little cost, and the statute, while not narrowly tailored, is at least rationally related to those ends (at least the licensing requirement), by requiring that all protected workers pay $1,000 for a permit.

J and R both may want to argue that this should be analyzed under paradigm four which is the 14th Amendment privileges & immunities clause. This was the approach used in Saenz. Any different treatment between residents of the same state based on length of residence is subject to strict scrutiny under the 14th P&I. The same strict scrutiny analysis laid out above would apply, and the restriction would likely be struck down.

J & R might try to argue that the classification is based on wealth. They cannot move to the state because they do not have the money to pay for the permit which would allow them to work.

Classifications based on poverty level, however, are not suspect classes as seen in the Rodriguez case. A suspect class is one based on an immutable characteristic or designed to help a politically powerless group. Poverty is not an immutable characteristic (it may be changed), and they are not politically powerless (at least not to the Rodriguez court). Thus, rational basis review dould apply to such classifications, and it would likely be upehld (see rational basis analysis discussed above).
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J&R may also try to argue that this is a classification based on their criminal records. This likely is not a suspect class. It is not based on an immutable characteristic (not born with a criminal record, could get things expunged, etc.), so it likely is not a suspect class. As a result, rational basis would apply and this classification would probably be reasonably related to protecting citizens of Arizona. However, J&R should argue that prohibitng those who have traffic records from working in the state is not really protecting the safety of Arizona citizens.

I 3

Thus, J & R's best bet under the EPC is to try to convince the court this is a racial classification motivated by discriminatory factors. Otherwise, they should try to argue that the restriction is substantially infringing on their right to migrate or that it violates the 14th Amendment privilege and immunities clause.

R may also attempt to characterize this as an ARticle 4 P&I problem because it is burdening his right to travel (not to move to Arizona permanently). The Citizens of each STate shall be entitled to all Privileges and Immunities of Citizens in the several states under Art. 4 P&I. After all, he

I 1

only wants to stay in the state for 6 months. If he can characterize it in this fashion, a two part test applies under Cornfield (means-ends review--intermediate): Is the reason sufficiently important for discriminating between non-residents, and if so, does the way in which the state is going about achieving that end comprot with constitutional restrictions? Here, the state will argue again that it had a strong interest in knowing who was coming into the state so it could monitor working conditions, defray costs of having them come in, and to protect citizens. These would all probably be considered "important" interests (at least the first and last). R will argue that there are non-discriminatory alternatives that the state could have used instead, by only fashioning a regulation that regulated the conditions under which they were working (here nothign suggested this provision would actually help that situation). Again, J & R would be better off arguing something that would get the restriction under strict scrutiny. Besides, living in the state for 6 months isn't really traveling--it's more like moving, so the EPC likely applies instead of Art. 4.

J&R might try to argue that this is violating their 14th Amendment substantive due process rights.

Under the due process clauses of the 5th and 14th Amendments, a person cannot be deprived of life, liberty, or property withou due process of law. This Calsue has been interpreted to guarantee both substantive and procedureal DP. In Lochner, the Court held that if a state passed laws for the health, safety, morals, or welfare of the public, and was a fair, reasonable, and appropriate

exercise of the police power of the state, the law would be upheld as valid under substantive due process. For the next 30 years, mayn state economic regulatsion weer struck down as invalid use of the state's police powers under this reasoning. In post-Lochner era, however, thigns changed. There now is a presumptiion of constitutionality of state lasunder substantive due process. See Nebbia. The first question tio ask under substantive due process is whether there is a fundamental right violated. Though there is a split on the current Court, Kennedy's vote will likely control. As seen in Lawrence, he looks to see if right is deeply rooted in our nation's history, if it can be found in precedent, and then if there is an emerging societal awareness of the right.

As seen in the post-Lochner cases, economic regulations such as the one in this case will rarely be struck down under the substantive due process clause. There must just be a plasuble, proper purpose for an economic regulation, even if it is clear it wasn't the basis for passing the law. That law must just be rationally related to that plausible purpose. J & R may argue that they are a politically powerless group, so under CArolene Products footnote 4, their right to pursue a trade should be considered fundamental. The law in this area is pretty firm, though, and the Court will likely not find that a fundamental right exists. As such, the provisions will likely pass rational basis review (see analysis above).

Free Speech

Under the First Amendment, Congress shall make no law abridging the freedom of speech, or the press. This amendment has since been applied against the states. See Palko. Here, the regulation restricts expressive activity, by requiring all employees to promote their services in certain designated public parks, not on streets and sidewalks. This is expressive activity. However, this is commercial speech, and as recognized in Central Hudson, it is subject to special free speech rules.

REgulations of commercial speech are subject to intermediate scrutiny. Though intermediate, courts have applied the test fairly rigorously, especially when the court feels that the state i sbeing patneralistic. There is f our part test to determine if a regulation of commercial speech violates the First Amendment

1. IT must concern lawful activity and not be misleading. Nothing here suggests advertising their services would be misleading.

2. The asserted govt interest is substantial. Here, the state asserts that it does not want have traffic obstacles or distractions on the streets. This is an important/substantial public interest.

3. The regulation must directly advance the govt interest asserted. It does serve that purpose by getting people off of the streets.

4. The regulation is not more extensive than is necessary to serve that interest. Though it doesn't have to be the least restrictive, this is where we have problems. It regulates much more speech than necessary because it is possible that a content-neutral time, place, and manner restriction would be more effective. It isn't evident that all ads for services would be disruptive--why not just control their manner? The state would likely lose on this prong, so the provision will be struck down (will need to be more narrowly tailored). C1/A2

9

Ajax is going to argue that the state violated the Contracts Clause. Under Art. 1, Sec. 10 of the Constitution, no state can pass any law impairing the obligation of Ks. This caluse just regulates action of state and local govts, and it only prohibits the impairment of current Ks. Here, the govt was not a party to a K, so the test in Allied Structural Steel applies with more deference. Ajax will argue there is a substantial impariment of existing K obligations, but the state will argue that this was foreseeable because employment law is replete with regulation, and because it was foreseeable, as in Energey Reserves, it was not a substantial impairment. The govt has a strong argument on this point and will probably win.

C1 A3

'However, if it is considered a substantial impairment, it must serve an important public purpose and be both (1) reasonable and (2) necessary. Here, the purpose is to help pay for road damage caused by increase traffic of bringing people over from NM. This may be an important interest, but it's unclear that it is really necessary. Why take a percentage of their profits? Couldn't they

just pay a toll on the road? Also, why 30%? Nothing in the facts explain how the govt reached that figure. As such, the govt will likely fail the second two prongs (unless it wins on the first one in which case it will never reach those two).

7

This is a content based restriction, because it only applies to protected workers who want to advertise their services (would have to look to content to see what they are advertising). Content based restrictions must be

Q1: Good job!

Seco