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501 INTRODUCTION TO CONSTITUTIONAL LAW

Semester I, 2004-2005

Final Examination/Paper
UNM School of Law
Three Credits

Professors **Browde,**

December 9, 2004
1:30 pm – 5:30 pm

INSTRUCTIONS

1. This is a four hour exam; however, during the first half hour you may only read the examination and make notes on the examination document. You may not start writing (either in blue books or on your computer) until 2:00pm. The exam consists of two highly general questions, which will have a number of sub-parts as you construct your answers. The two questions are weighted equally, and will be graded accordingly.
2. For those of you using blue books, please number your bluebooks in consecutive order; put your exam number and the name of this course on each bluebook; write on only one side of the page in ink and skip lines; and turn in both the bluebooks and the exam.
3. For those of you using computer, number the pages, put the name of the course and your exam number on each page, use a 12pt. (or larger) type face, and double space (but not triple space) your answer. *This is automatic with Software.*
4. This is a closed book exam, except that you may bring with you and consult your outline, and a copy of the constitution which you may annotate in any way you wish. Outlines, however, are limited to those you participated in producing. No commercial outlines are allowed, nor are you permitted to bring your course materials, or the slides from the web page!
5. The questions asked are somewhat open-ended. Although the issues are not necessarily hidden, they are not labeled for you. Thus, this exam requires both identification of the issues, and reasoned analysis of those issues.

[EXAMINATION BEGINS ON PAGE 2]

QUESTION 1 (50%)

Mary Jane Schmokes is a seriously ill resident of New Mexico who uses marijuana for medical purposes on the recommendation of her doctor. Such use is legal under the New Mexico Medical Marijuana Use Act (MUA), passed by the state legislature in 2002. Schmokes grows her own medical marijuana, but because of her seriously debilitated condition she requires the assistance of others, to tend to her small crop. A cooperative and sympathetic neighbor voluntarily provides that assistance, harvesting the crop and providing it to Schmokes in the form, and dosage as directed by her doctor.

Schmokes has severe medical problems, including an inoperable brain tumor, seizure disorders, several chronic pain disorders, and life-threatening weight loss. Her doctor's affidavit asserts that Schmokes has tried all other legal alternative medications but they are ineffective or result in intolerable side effects. He further states, that the marijuana treatment substantially reduces her pain, increases her appetite, and provides a modicum of quality to her life—all of which would be lacking without it. With the treatment it is expected that she may live for some time. Without it, she is not likely to survive for very long.

Two months ago, Schmokes was visited by agents from a Cooperative Drug Task Force, made up of State Police and the federal Drug Enforcement Agency (DEA), who, pursuant to the reporting requirement under the federal Controlled Substances Act (CSA), and armed with a valid warrant directing them to search the premises if necessary to effectuate the reporting requirement and the seizure of scheduled drugs. After an amicable conversation with Schmokes, in which the agents explained that her growing and using marijuana was in violation of the CSA, the agents seized and destroyed her three cannabis plants.

Fearing future such raids and the deprivation of her medicinal marijuana, Schmokes and her assistant, who sues anonymously as John Doe, have brought the instant action against Attorney General John Ashcroft and the Administrator of the DEA seeking declaratory and injunctive relief. Plaintiffs challenge the constitutional validity of the CSA as applied to the possessing, obtaining, and using cannabis for the medical use as recommended by a licensed physician pursuant to New Mexico's MUA.

The parties have stipulated to the facts (as outlined above, and as contained in the two relevant statutes). You are the law clerk to the federal judge in the case, and she has asked that **you prepare a memorandum identifying all the federal constitutional issues which are presented, explaining how you think they should be resolved, and why. WRITE THE MEMORANDUM.** (NB: do not waste your time writing a "statement of facts" section of the memo; rather use the facts in your analysis of the issues presented.)

The relevant portions of the federal CSA and the state MUA are as follows:

CONTROLLED SUBSTANCES ACT (CSA)

Section 1. Congressional findings.

- (1) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
- (2) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
- (3) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
- (4) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.
- (5) The use of marijuana, including the second hand smoke from its use, has been medically linked to pregnancy-related medical complications, and therefore eradication of the use of marijuana throughout the United States, and without exception, is necessary to protect the constitutional rights of all women.

Section 2. Scheduling of Certain Drugs as Controlled Substances.

Marijuana is a Schedule I controlled substance because it is hereby found that:

- (1) The substance has a high potential for abuse;
- (2) The substance has no currently accepted medical use in treatment in the United States;
and
- (3) There is a lack of accepted safety standard for use of the drug or other substance under medical supervision.

Section 3. Prohibitions.

It is unlawful to knowingly or intentionally to possess, manufacture, distribute, or dispense a Schedule I controlled substance.

Section 4. Cooperative Law Enforcement and Reporting.

State and Federal agencies involved in the "War on Drugs" are obliged to investigate and report to the Administrator of the DEA, in whatever form they deem appropriate, all interdictions of drugs scheduled under this Act.

Section 5. Grants to States.

Every State that complies with the provisions of Section 4 shall receive an annual grant from the

DEA measured by the State's cost of its cooperative law enforcement efforts. The funds may be utilized by the State for any program which the Governor certifies is the "highest priority need" of the State for the next fiscal year.¹

NEW MEXICO'S MEDICAL MARIJUANA USE ACT (MUA)

Section 1. Purposes

- a. It is the policy of this State that the health and welfare of its citizens is best achieved when medical treatment decisions are left to the private doctor-patient relationship.
- b. The Medical Marijuana Use Act is intended to:
 1. Ensure that seriously ill New Mexicans have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, or any other illness for which marijuana provides relief;
 2. Ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

Section 2. Exemption

A patient who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician, is exempt from those provisions of New Mexico law that make possession or cultivation of marijuana illegal.

¹ New Mexico is a complying state, and the Governor has certified the use of the funds for the reduction of Driving While Intoxicated occurrences in the state.

QUESTION 2 (50%)

The district judge's final ruling in *Schmokes v. Ashcroft* engenders a renewed national debate about marijuana. That debate is taken up in Congress. After exhaustive hearings on the subject, and intense pressure from a bi-partisan lobby group spearheaded by the Rev. Jerry Feelwell, Democrats on Progressive Education (DOPE), Republicans for Every Effort to Forge Equal Rights (REEFER), the Libertarian Party, and the ACLU, Congress overwhelmingly passes the Drug Reform Act (DRA). That Act eliminates marijuana as a scheduled controlled substance, removes all federal prohibitions on the possession or use of marijuana, and expressly states: "Consistent with principles of federalism, substantial control of such matters shall be left to the States."

Part A of Question 2: (20%)

In the wake of Congress' action, New Mexico takes advantage of its position as a progressive leader in the field of medical uses of marijuana. The State retains its laws that criminalize the possession and sale of non-medical marijuana. Nevertheless, with respect to medical marijuana, the legislature enacts the Medical Marijuana Protection Act (MPA), which states as follows:

NEW MEXICO'S MEDICAL MARIJUANA PROTECTION ACT (MPA)

Section 1. Purpose.

- a. Inferior marijuana poses a substantial health risk to citizens of New Mexico who need to use marijuana for medical reasons. In some cases, contaminants, including toxic pesticides and herbicides, have been found on marijuana purchased in New Mexico.
- b. New Mexico does not wish to become a haven for substance abusers. Nor does New Mexico wish to attract seriously ill people from throughout the United States because such people will impose great costs on our already overburdened health care system.

Section 2. Safety Standards

- a. To insure that all Medical marijuana sold in New Mexico is cultivated in an organic manner without exposure to man-made fertilizers, pesticides, or herbicides, prior to sale the marijuana must be sent to the NM Department of Agriculture, where it will be inspected and tested.
- b. Subsection (a) does not apply to marijuana grown in New Mexico at farms pre-certified as organic by the NM Department of Agriculture, nor does subsection (a) apply to residents of New Mexico who cultivate three or fewer plants at any one time strictly for private consumption based on a medical use authorized under the Medical Marijuana Use Act.

Section 3. Other Requirements.

Any individual who wishes to obtain medical marijuana in New Mexico must:

- a. Be a resident of New Mexico, and
- b. Have been a resident of New Mexico for at least six months, unless the physician who issues the prescription to a resident certifies that an extreme medical necessity requires that the patient receive immediate access to marijuana.

You are Counsel to the Governor, Paul Pott, and he very much favors this bill, but prior to signing it, he asked for your legal opinion **identifying any federal constitutional problems with this bill, and explaining in depth the nature of those problems. WRITE THE MEORANDUM.**

Part B of Question 2: (30%)

Our proactive Governor also sees great opportunity for economic development in the Medical Marijuana market. He is particularly intrigued by the recent report from scientists at New Mexico State University explaining that the best land and microclimate for growing medical marijuana is located in the Grassley Estates & Vineyard, in the North Valley of Albuquerque. The report also concludes that a rare and delicate type of marijuana – dubbed “Albuquerque Gold” by the press – can be grown there and nowhere else in the United States. “Albuquerque Gold” requires minimal processing, and is the only marijuana with potent pain-killing attributes and none of the side effects of more conventional forms of marijuana.

To develop the supply of “Albuquerque Gold,” the Governor’s staff has developed the following plan:

1. The State would enter into a joint venture with pharmaceutical giant, Hizer, forming a private corporation called New Mexico-Hizer.
2. The State would condemn Grassley Estates, paying the owner fair market value for the land (even though we know the owner will object and fight the move). The State would then deed to the land to New Mexico-Hizer. For its part, Hizer will build a processing plant and marijuana farm on the land, which will be managed by New Mexico-Hizer. Hizer also understands that as a condition of the joint-venture arrangement, the State will require it to cancel all preexisting contracts it may have to deliver Hizer-processed marijuana to other suppliers.
3. New Mexico-Hizer will be governed by a seven member Board of Directors—three appointed by the Governor, and three appointed by Hizer, and in honor of her courageous struggle, Mary Jane Schmoke (or her offspring) will be the seventh member of the Board.

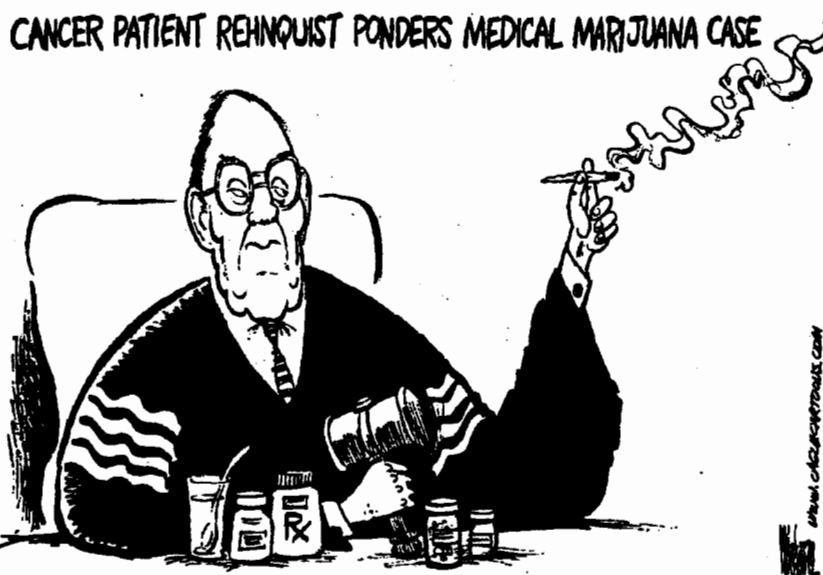
The Quality Control Officer of New Mexico-Hizer must be an employee of the New Mexico Department of Health.

4. New Mexico-Hizer's by-laws require that all employees of the corporation be members of a racial or ethnic minority. (For purposes of this exam, there are no federal or state statutes which would preclude this).

5. New Mexico-Hizer's by-laws restrict the sale of "Albuquerque Gold" to pharmacies located in New Mexico, which must then be required to sell to New Mexicans on a preferential basis. Any remaining amounts may be sold to out-of-state pharmacies on a first-come first-served basis. The State and Hizer will split any profits, with the State's share of the profits earmarked, of course, for higher education.

6. Because of the sensitivity of "Albuquerque Gold" to exhaust fumes, the State must impose a 60-month moratorium on all construction within a two-mile radius of Grassley Estates, to ensure that the plants take root. This area includes residential neighborhoods, farms, vacant lots, and several strip malls. It is hoped that after that period the economic value of adjacent property will improve, because of its proximity to a highly successful and "clean" industry.

As if you weren't busy enough, the Governor also wants a your legal opinion **identifying any federal constitutional problems with this plan, and explaining in depth the nature of those problems. WRITE THE MEORANDUM.**



[END OF HEAD TRIP, errrrrrr. . . EXAMINATION!]