

The Ninth and the Tenth of It

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When Attorney General Jeff Sessions rescinded the Obama Administration enforcement guidelines regarding the states that have legalized (in their 29 different ways) marijuana, last week, supporters of freedom expressed some worry.



But we had to admit, one excuse for Sessions's nixing of the mostly hands-off policy seemed to make sense on purely legal grounds. If we want to liberalize drug laws, then our Cowardly Congress should do it.

Definitely not the Executive Branch.

And yet, over at the *Volokh Conspiracy*, Will

The Tenth Amendment declares that states possess powers not given to the federal government.

Baude argues that “the rule of law” does not require “renewed enforcement of the Controlled Substances Act.”

If anything, he argues, it “requires the opposite.”

Baude mostly rests his case on the Constitution's Commerce Clause, which does not authorize regulation of *intra*-state trade. An issue on which the AG *does* possess a duty to weigh in.*

This rubs against FDR-Era constitutional

theory, of course, which treats *all* commerce as regulate-able *interstate* trade. But this makes no sense. The Tenth Amendment declares that states possess powers not given to the federal government. An interpretation of the Constitution cannot be justified if it effectively nullifies *other* parts of the Constitution. (If all trade is “inter” state, what's left for the states? Powers to do what? And how could there be any constraints on federal power?)

And then there is the Ninth Amendment, which states that *the people* retain rights *not* listed in the Constitution.

When citizens assert rights — such as the option to cultivate, sell, buy or ingest a common and quite hardy plant — in their states (largely through ballot initiatives), the federal government should butt out.

This is Common Sense. I'm Paul Jacob.

* “Members of the executive branch have their own obligation to interpret the Constitution,” Baude writes, “and if a federal law is unconstitutional in part then the executive branch, no less than the courts, should say so. It is the Constitution, not the Court, that is the ultimate rule of law in our system.”