

Griswold v. Connecticut, 381 U.S. 479 (1965). No longer Madison's strict rule of construction, the Ninth Amendment became the adversary of the Tenth Amendment and repurposed as a federal check on state power. Contrary to its adoption by a people desirous to keep federal power limited and checked, *Griswold* used the Ninth Amendment precisely as the Founders feared: a vehicle for the federal government to suppress the democratic processes in the states and turn federalism on its head.¹⁴

The principles of federalism have suffered greatly at the hands of activist courts which have sought to expand federal power based on *Griswold's* transformed notion of the Ninth Amendment and a subservient view of the Tenth Amendment. On many occasions, members of this Court have attempted to reign in that power and reposition the Tenth Amendment as a source of rights and powers that constrains the federal government:

[T]he Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. 'That those limits may not be mistaken, or forgotten, the constitution is written.'

¹⁴ Had the Founders been able to envision "penumbras formed by emanations" or "zones of privacy," they would have likely retained Roger Sherman's draft of the Ninth Amendment which spoke more directly to the autonomy of the states. The Founding Fathers thought Sherman's language was unnecessary in light of the clearly articulated principles of federalism in the Amendments. See Lash, "Lost Meaning," at 365-66.

Accordingly, the Federal Government may act only where the Constitution authorizes it to do so.

Printz v. United States, 521 U.S. 898, 936-37 (1997) (Thomas, J. concurring) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803) (internal citations omitted)).

The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

Alden v. Maine, 527 U.S. 706, 713-14 (1999) (internal citations omitted).

[T]he Court’s approach intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to