CAN YOU HEAR ME NOW?[1] CELL PHONE JAMMING AND THE TENTH AMENDMENT

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[1] "Can you hear me now?" was an advertising slogan used by Verizon Wireless. Wikipedia, *Verizon Wireless*, http://en.wikipedia.org/wiki/Verizon_Wireless (last visited Jan. 3, 2013). It was also chanted during a protest over the disabling of cell phone service in the San Francisco subway. David Kravets, *Cellphone Service Stays on During San Francisco Subway Protest*, WIRED (Aug. 15, 2011, 11:44 PM), http://www.wired.com/threatlevel/2011/08/anonymous-subway-protest/.

I. INTRODUCTION

On July 3, 2011, Charles Blair Hill, a forty-five-year-old "transient,"[2] was shot to death on the Civic Center Station platform of San Francisco's Bay Area Rapid Transit (BART) by BART Police Officer[3] James Crowell.[4] Hill had reportedly thrown a liquor bottle at Crowell and then lunged at him with a knife.[5] The shooting caused significant criticism of the BART Police Department.[6] Protesters organized demonstrations on BART railway platforms, which caused delays of BART trains.[7] BART police responded with riot control tactics.[8]

More than a month after the shooting, BART police remained concerned about "surprise demonstrations" on the platforms.[9] The prolonged alert was due to a posting on a "protest website" that suggested demonstrators should "mobilize without public announcement" to take BART by surprise and prevent an organized police response.[10] On August 11, 2011, in anticipation of such a "flash mob"[11] protest, BART officials "temporarily interrupted [wireless] service" at some train stations.[12] This tactic was intended to prevent protesters' ability to coordinate via mobile communication devices and therefore lessen their disruptive efforts.[13]

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[2] *See* Kevin Fagan, *Man Killed by BART Officer Identified as Transient, 45*, S.F. CHRON., July 8, 2011, at C2; *see also* Matthai Kuruvila, *BART Releases Video of Fatal Shooting by Cop*, S.F. CHRON., July 21, 2011, at C4.

[3] BART has a police department that is separate and distinct from the San Francisco Police Department. *See BART Police*, BART, http://www.bart.gov/about/police/index.aspx (last visited Jan. 3, 2013); *see also SFPD Report System*, S.F. POLICE DEP'T, http://www.sf-police.org/index.aspx?page=778 (last visited Jan. 3, 2013).

[4] Demian Bulwa, *Officer Who Shot Transient Waiting to Join FBI*, S.F. CHRON., July 27, 2011, at C2.

[5] *Id.*

[6] Zusha Elinson & Shoshana Walter, *Latest BART Shooting Prompts New Discussion of Reforms*, NYTIMES.COM (July 16, 2011), http://www.nytimes.com/2011/07/17/us/17bcbart.html ?pagewanted=all. The Hill shooting was not the first time BART officials dealt with criticism over the use of force by one of its officers. The BART Police Department previously faced criticism when, on New Year's Day in 2009, a BART Police Officer shot and killed an unarmed man. A jury subsequently convicted the officer of involuntary manslaughter for the shooting. Jack Leonard, *Former BART Officer Convicted of Involuntary Manslaughter*, L.A. TIMES (July 8, 2010), http://articles.latimes.com/2010/jul/08/local/la-me-bart-verdict-20100709.

[7] Kelly Zito, *Shooting Protest Disrupts Service*, S.F. CHRON., July 12, 2011, at C1.

[8] *See* sources cited *supra* note 6.

[9] Demian Bulwa & Justin Berton, *BART on Alert—But No Protests*, S.F. CHRON., Aug. 12, 2011, at C4.

[10] *Id.*

[11] *See infra* text accompanying note 52 (discussing the history of the term "flash mob").

[12] *Statement on Temporary Wireless Service Interruption in Select BART Stations on Aug. 11*, BART (Aug. 12, 2011, 1:08 PM), http://www.bart.gov/news/articles/2011/news20110812.aspx.

[13] *Id.*

This tactic immediately drew harsh criticism.[14] Some commentators compared BART officials to Middle Eastern "despots."[15] Others wondered whether there was (or should be) a constitutional right to cellular telephone service.[16] Most, if not all, of the critics decried BART's actions as an unconstitutional interference with the First Amendment's guarantee of free speech.[17]

Along with the free speech implications,[18] BART's tactic raises another, less obvious but no less important (and thus far, largely overlooked) constitutional issue: federalism. Federal law prohibits, with few exceptions, interference with radio signals—a term that encompasses cellular telephone signals.[19] One exception permits agencies of the United States government to interfere with these signals.[20] Notably absent from the federal law, however, is any similar exception for state or local governments—despite the potential usefulness of such interference for state and local law enforcement. This Note examines whether prohibiting states from interfering with cellular telephone signals encroaches into the general "police power" of the states, in violation of the federalism principles embodied in the Tenth Amendment. In light of the numerous useful applications of "cell phone jamming"[21] in areas of traditional and important state law enforcement, this Note argues that it does.[22]

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[14] Will Reisman, *As Criticism Mounts, BART Stays the Course*, S.F. EXAMINER (Aug. 16, 2011, 4:00 AM), http://www.sfexaminer.com/local/2011/08/criticism-mounts-bart-stays-course.

[15] *See* Bill Palmer, *Unconstitutional: San Francisco BART Cellphone Shutdown Arrest-Worthy*, BEATWEEK MAG. (Aug. 13, 2011), http://www.beatweek.com/blog/8942-unconstitutional-san-francisco-bart-cellphone-shutdown-arrest-worthy/; *see also* Cynthia Wong, *Welcome to San Francisco—Next Stop, Cairo?*, CENTER FOR DEMOCRACY & TECH. (Aug. 23, 2011), http://www.cdt.org/blogs/cynthia-wong/238welcome-san-francisco-next-stop-cairo.

[16] John Wildermuth, *Is Cellular Service a New Right?*, FOX & HOUNDS (Aug. 19, 2011), http://www.foxandhoundsdaily.com/2011/08/9340-is-cellular-service-a-new-right/.

[17] *See* Letter from Abdi Soltani, Exec. Dir. & Alan Schlosser, Legal Dir., ACLU of N. Cal., to Kenton W. Rainey, BART Chief of Police (Aug. 15, 2011), *available at* http://www.aclunc.org/docs/aclu_letter_to_bart_chief_of_police_-_aug_15_2011.pdf; David Kravets, *San Francisco Subway Shuts Cell Service to Foil Protest; Legal Debate Ignites*, WIRED (Aug. 15, 2011, 3:55 PM), http://www.wired.com/threatlevel/2011/08/subway-internet-shuttering/; Carl Ford, *Was BART Crowded Theater Worthy of Shutting Down Cell Service?*, M2M (Aug. 17, 2011), http://m2m.tmcnet.com/topics/m2mevolution/articles/208791-bart-crowded-theater-worthy-shutting-down-cell-service.htm; Patrik Jonsson, *To Defuse "Flash" Protest, BART Cuts Riders' Cell Service. Is That Legal?*, CHRISTIAN SCI. MONITOR, Aug. 12, 2011; *contra* Steven Luo, *BART Cell Shutdown Unconstitutional? Not So Fast*, CAL. BEAT (Aug. 21, 2011), http://www.californiabeat.org/2011/08/21/bart-cell-shutdown-unconstitutional-not-so-fast.

[18] For purposes of this note, I assume that such action is constitutional as a reasonable "time, place and manner" restriction of speech. *See* Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941).

[19] *See* 47 U.S.C. § 302a(a) (2006); *see also infra* p. 262 and note 30.

[20] 47 U.S.C. § 302a(c).

[21] This Note will use the colloquial terms "jamming," for intentional interference with a signal, and "jammer," for devices or persons who intentionally interfere with a signal.

[22] This Note does not address the practical concern of whether the federal government may be able to prevent states from jamming cell phones through its other powers, such as by "buying" compliance with its spending power. *See* South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).

Section II of this Note examines the Communications Act of 1934, as amended, and its prohibition against "interference" with radio signals. The section also discusses the Federal Communication Commission's (FCC) enforcement of the prohibition. Specifically, it highlights the lack of an exemption for state and local governments and the FCC's express endorsement of the position that non-federal law enforcement entities are prohibited from jamming cellular telephone signals.

Section III of this Note examines several uses of cellular telephone jamming technology that are beneficial to law enforcement and have great potential to improve public safety. Among these are crowd and riot control (as BART's application intended); use during tactical enforcement operations, such as warrant execution and standoffs; deployment as a preventative measure by bomb squads and during "executive protection" operations; and use in prisons. This section argues that each of these applications falls squarely within areas of traditional state police power.

Section IV presents a brief summary of federalism and a review of historical and modern Tenth Amendment jurisprudence. The section concludes with an examination of the concept of the states' "general police powers" and the responsibility of the states to provide for the public safety. This section's in-depth examination is necessary to demonstrate that although the Supreme Court's interpretation of the Tenth Amendment has shifted markedly between two opposing positions, the principles that support this Note's supposition remain constant. This section provides the framework for analyzing whether the federal government has encroached on state sovereignty.

Section V presents the argument that by prohibiting states from jamming cellular telephones—even in narrow, law enforcement applications—the federal government has overstepped its authority and encroached upon powers "reserved to the States."[23] This final section also addresses and disputes some of the arguments espoused in opposition of state and local cell phone jamming. It concludes with the proposition that, in denying states an important mechanism for exercising their traditional police powers, Congress exceeded its enumerated powers and the federal law impermissibly interferes with state sovereignty in violation of the federalist principle of the Tenth Amendment.

II. THE COMMUNICATIONS ACT OF 1934

In 1934, Congress passed the Communications Act ("the Act") and President Franklin D. Roosevelt signed it into law.[24] The law created the Federal Communication Commission (FCC) and made the agency responsible for enforcement of the law.[25] The Act, codified in Title 47 of United States Code, was intended to "regulat[e] interstate . . . commerce in communication by wire

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[23] U.S. CONST. amend. X.

[24] Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–62 (2006)); *see also Communications Act of 1934*, NEXT NEW DEAL: BLOG OF THE ROOSEVELT INST. (Feb. 16, 2011), http://www.nextnewdeal.net/communications-act-1934.

[25] Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 § 1.

and radio."[26] The law also sought to make such communication "available, so far as possible, to all the people of the United States."[27] Notably, in 1937, the law was updated to reflect that a purpose of the Act was to "promot[e] safety of life and property through the use of . . . radio communication."[28]

The Telecommunications Act of 1996 amended the Act to account for the significant technological advances that had occurred during the sixty-two-year interim, particularly the advent and proliferation of mobile communication devices, i.e., "cell phones."[29] Because cell phones operate essentially as advanced radios, provisions of the Act govern them.[30]

The Act and its implementing regulations contain several provisions that are designed to prohibit interference with radio signals. First, section 301 declares that the United States maintains control "over all the channels of radio transmission."[31] To ensure that control, the law states further that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance" with the Act.[32]

Next, section 302a(b) states: "No person shall manufacture, import, sell, offer for sale, . . . ship[,] . . . or use devices, which fail to comply with regulations promulgated pursuant to this section."[33] To comply with the regulations, a device must be "authorized by the [FCC]";[34] however, the FCC maintains "[j]ammers, by definition, can never be authorized because they are designed to interfere with authorized radio communications."[35]

Finally, while sections 301 and 302a restrict access to, use of, and licensing of devices that are capable of interfering with radio signals, section 333 deals directly with interference itself. It states, "No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by [the FCC]."[36] All legitimate cell phone service providers are licensed and authorized by the FCC.[37] A violation of section 333 is punishable by fine and imprisonment.[38]

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[26] 47 U.S.C. § 151.

[27] *Id.*

[28] Pub. L. No. 97, 50 Stat. 189 (1937) (codified as amended at 47 U.S.C. §§ 151–62).

[29] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[30] *See* 47 C.F.R. § 22.99 (2011) (defining "Cellular Radiotelephone Service" and "Cellular system"). Of course, besides cell phones, the law also covers devices that use "Public Mobile Services," such as tablets and computers with wireless connectivity. *Id.*

[31] 47 U.S.C. § 301.

[32] *Id.*

[33] 47 U.S.C. § 302a(b).

[34] 47 C.F.R. § 2.803(a)(1).

[35] FCC, Enforcement Advisory No. 2011-03, Cell Jammers, GPS Jammers, and Other Jamming Devices, 26 FCC Rcd. 1327, 1327–28 (Feb. 9, 2011) [hereinafter FCC, Enforcement Advisory No. 2011-03].

[36] 47 U.S.C. § 333.

[37] *See* Petition for Writ of Mandamus at 4, 13, 14 *In re* CTIA, The Wireless Ass'n, No. 09-1004 (D.C. Cir. Jan. 7, 2009), ECF No. 2 (explaining requirements the FCC has imposed on wireless carriers); *see also FAQs—Wireless Phones*, FCC (Aug. 30, 2011), http://www.fcc.gov/encyclopedia/faqs-wireless-phones#billing (explaining that the FCC handles complaints about wireless service for cell phone customers).

[38] 47 U.S.C. § 501.

These three sections of the Act—301, 302a, and 333—form the basis of the prohibition of "jamming" cell phone signals. The law, however, contains two exceptions. The first, of course, is the exception for the United States itself. Section 302a(c) permits the use of jamming devices by "the Government of the United States or any agency thereof."[39] The other exception, which is not germane to this Note, applies to devices intended "solely for export."[40]

The FCC has actively publicized the prohibition on manufacturing, advertising, and use of cell phone jammers.[41] It has also taken enforcement action against individuals and companies who have violated the prohibition.[42] Indeed, as the technology proliferates, the FCC has increased its enforcement efforts.[43] Although these notices and enforcement actions have been directed almost exclusively at private parties,[44] the FCC has long taken the position that state and local governments are also prohibited from using cell phone jamming devices.[45] The FCC's opinion on the matter is clear: "The Communications Act

[39] 47 U.S.C. § 302a(c); 47 C.F.R. § 2.807(d) (2011).

[40] 47 U.S.C. § 302a(c). During the "Arab Spring" protests, Egyptian officials suppressed cell phone communication on a large scale. *See infra* p. 265 and note 51. While that type of suppression far exceeds what this Note advocates, it demonstrates the existence of a global market for cell phone jamming technology and explains the "export" exception. *See* Alex White, *The Impact of Cell Phone Jamming on the Egypt Conflict*, 24–7 PRESSRELEASE.COM (Feb. 9, 2011), http://www.24-7pressrelease.com/press-release-rss/the-impact-of-cell-phone-jamming-on-the-egypt-conflict-195425.php.

[41] *See* FCC, Enforcement Advisory No. 2012-02, 27 FCC Rcd. 2309 (Mar. 6, 2012) [hereinafter FCC, Enforcement Advisory No. 2012-02] ("Using or Importing Jammers is Illegal"); FCC, Enforcement Advisory No. 2011-03, *supra* note 35, at 1327 ("Marketing or Sale of Devices Designed to Block, Jam, or Interfere with Authorized Radio Communications is Strictly Prohibited in the U.S."); FCC, Public Notice, 20 FCC Rcd. 11134 (June 27, 2005) ("Sale or Use of Transmitters Designed to Prevent, Jam, or Interfere with Cell Phone Communications is Prohibited in the United States").

[42] *See* FCC, Letter to Monty Henry, 23 FCC Rcd. 8293 (May 27, 2008) [hereinafter FCC, Letter to Monty Henry]; *Jammer Enforcement*, FCC ENCYCLOPEDIA, www.fcc.gov/encyclopedia/jammer-enforcement (last visited Jan. 3, 2013).

[43] Jamie Barnett, *Solutions to Stop Use of Contraband Cell Phones by Prisoners*, OFFICIAL FCC BLOG (Jan. 3, 2011), http://www.fcc.gov/blog/solutions-stop-use-contraband-cell-phones-prisoners; FCC, Enforcement Advisory No. 2011-03, *supra* note 35, at 1327. The FCC's enforcement efforts seem to correspond to an increasing popularity of use of cell phone jammers by private citizens, annoyed with people who talk on their cell phones in public and are "too loud." Meghan Casserly, *Are Cell Phone Jammers the Next Big Thing?*, FORBES (Mar. 2, 2012, 11:35 AM), http://www.forbes.com/sites/meghancasserly/2012/03/02/are-cell-phone-jammers-the-next-big-thing/.

[44] Letter from FCC, to Paul Dubrow, Notice of Unlicensed Operation (Dec. 29, 2011), *available at* http://www.fcc.gov/document/paul-dubrow-martinsburg-wv. The sole exception was a high school in Illinois. *See* Letter from FCC, to Stanley Dostal, Johnsburg High School, Notice of Unlicensed Operation (Mar. 15, 2011), *available at* http://transition.fcc.gov/eb/FieldNotices/2003/DOC-305288A1.html. However, there were also reports that the FCC initiated an investigation into BART's disabling of cell service. Maria L. LaGanga & Lee Romney, *FCC Probing BART's Shutdown of Cellphone Service*, L.A. TIMES (Aug. 16, 2011, 7:17 AM), http://latimesblogs.latimes.com/lanow/2011/08/fcc-bart-cellphone.html.

[45] *See* FCC, Letter to Monty Henry, *supra* note 42 at 8295 ("[T]here is no similar exemption allowing the marketing or sale of unauthorized radio frequency devices to state and local law enforcement agencies."). *See also* FCC, Enforcement Advisory No. 2011-03, *supra* note 35, at 1327 ("[cell phone jammers] cannot be marketed in the United States (except in the very limited context of authorized use *by the U.S. government*)." (emphasis added)); FCC, GN Docket No. 12-52, Commission Seeks Comment on Certain Wireless Service Interrup-

does not exempt state or local government officials from the prohibition on jammers."[46]

III. Law Enforcement Uses of Cell Phone Jamming

Despite the FCC's aggressive efforts to prevent the unauthorized use of cell phone jamming equipment, there are several potential law enforcement uses of such technology. As mentioned above, these uses include: 1) crowd and riot control to limit the ability of violent or ill-intentioned protesters to coordinate their actions; 2) tactical enforcement operations, such as warrant execution and standoffs, to prevent communication between the subjects of such enforcement and outside parties; 3) deployment by bomb squads to prevent the "command detonation"[47] of cell phone-activated explosive devices during render-safe procedures; 4) use during "executive protection," also to prevent attacks by cell phone-activated explosive devices; and 5) in prisons and jails to prevent the use of contraband cell phones by inmates. Each of these is discussed in detail below.

A. Crowd Control

Although state and local authorities have dealt with unruly crowds for hundreds of years,[48] cell phones add a new dimension of uncertainty to riot control, as seen with the BART protest planning. But because that was apparently the first attempt by an American law enforcement agency to suppress cell phone signals to try to prevent the coordinated efforts of demonstrators, it remains unclear whether the tactic is effective.[49] The protest that BART hoped to thwart did not occur, but little evidence suggests that this was due to the

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tions, 27 FCC Rcd. 2177, 2178 (Apr. 30, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-311A1.pdf [hereinafter FCC, GN Docket No. 12-52] (seeking comment on deactivation of networks controlled by governmental agencies but maintaining that signal jamming is always illegal); FCC, Enforcement Advisory No. 2012-02, *supra* note 41, at 2309 (illegal to operate jammers in U.S. "[u]nless you are an authorized *federal* government user") (emphasis added).

[46] Enforcement Bureau, *GPS, Wi-Fi, and Cell Phone Jammers Frequently Asked Questions (FAQs)*, FCC, http://transition.fcc.gov/eb/jammerenforcement/jamfaq.pdf (last visited Jan. 3, 2013). In March 2012, the FCC sought public comment as it considered whether to issue "legal or policy guidance" in response to BART's disabling of cell phone service. FCC, GN Docket No. 12-52, *supra* note 45, at 2178–79. However, perhaps in light of BART's voluntary adoption of a restrictive policy regarding the tactic and the FCC's own recognition that "[t]he legal and policy issues raised by the type of wireless service interruption at issue here are significant and complex," the FCC has not taken any legal action against BART. Press Release, FCC Chairman Julius Genachowski's Statement on BART Policy Adoption, (Dec. 1, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311310A1.pdf.

[47] Command detonation refers to common law enforcement terminology for detonation by the bomber (as opposed to "victim-activated" or "timed" devices). *See, e.g.*, El Paso Cnty. Sheriff's Office, Policy and Procedure Manual 6 (2005); *see also* John Pike, *Improvised Explosive Devices (IEDs)—Iraq*, Global Security (May 7, 2011, 2:59 AM), http://www.globalsecurity.org/military/intro/ied-iraq.htm.

[48] *See* Paul A. Gilje, Rioting in America 1 (1996).

[49] Kravets, *supra* note 17.

denial of cell phone service on the BART platform.[50] Foreign governments have used telecommunication blackouts but on a scale so large as to arguably amount to tyranny, far exceeding the authority advocated in this Note, and ultimately still with questionable effectiveness.[51] Nonetheless, the relatively recent phenomena of "flash mobs" and the experiences of U.K. authorities (not just the United Kingdom but also the University of Kentucky, as explained below) show some potential usefulness in controlling such communication.

The term "flash mob" was first used in 2003 to describe a spontaneous gathering of people, coordinated by text messaging, e-mail, and Internet postings, for a frivolous purpose.[52] More recently, these gatherings have been coordinated through social media services such as Facebook and Twitter.[53] Some of the more entertaining flash mob incidents involved a choreographed dance routine in a Las Vegas casino,[54] a pillow fight in New York's Union Square (and elsewhere throughout the world),[55] a hundred "single ladies" paying homage to a Beyoncé music video in London's Piccadilly Circus,[56] and a lightsaber battle in a shopping center.[57]

Recent events, however, demonstrate that such organized gatherings are not always for innocent purposes. For instance, police in California, Illinois, Washington, D.C., Nevada, Minnesota, Pennsylvania, New York, New Jersey, Ohio, and elsewhere have responded to sudden gatherings of people engaging in theft or robbery (so called "flash robs"), assault, and vandalism or damage to

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[50] Bulwa & Berton, *supra* note 9.

[51] Dan Murphy, *Egypt Shuts Down Internet, Rounds Up Opposition Leaders as Protests Start*, CHRISTIAN SCI. MONITOR (Jan. 28, 2011), http://www.csmonitor.com/World/Backchannels/2011/0128/Egypt-shuts-down-Internet-rounds-up-opposition-leaders-as-protests-start. *See also* Anjali Mullany, *Like Iran & Tunisia, Egypt Protests Fueled by Social Sites Twitter, Facebook, YouTube Amid Censoring*, N.Y. DAILY NEWS (Jan. 28, 2011), http://articles.nydailynews.com/2011-01-28/news/27738237_1_election-protests-protest-harassment-neda-agha-soltan; Marko Papic & Sean Noonan, *Social Media as a Tool for Protest*, STRATFOR (Feb. 3, 2011, 9:54 AM), http://www.stratfor.com/weekly/20110202-social-media-tool-protest.

[52] Judith A. Nicholson, *FCJ-030 Flash! Mobs in the Age of Mobile Connectivity*, 6 FIBRECULTURE J. (Dec. 10, 2005), http://six.fibreculturejournal.org/fcj-030-flash-mobs-in-the-age-of-mobile-connectivity/.

[53] *See* Eric Tucker & Thomas Watkins, *More Flash Mobs Gather with Criminal Intent*, NBC NEWS.COM (Aug. 9, 2011, 2:54 PM), http://www.msnbc.msn.com/id/44077826/ns/technology_and_science-tech_and_gadgets/t/more-flash-mobs-gather-criminal-intent/; Rick Jervis, *"Flash Mobs" Pose Challenge to Police Tactics*, USA TODAY (AUG. 19, 2011, 9:37 AM), http://usatoday30.usatoday.com/news/nation/2011-08-18-flash-mobs-police_n.htm.

[54] Shaycarl, *Phamous Planet Hollywood Flash Mob*, YOUTUBE (Nov. 30, 2009), http://www.youtube.com/watch?v=C18p7QIbWqc.

[55] Anjali Athavaley, *Students Unleash a Pillow Fight on Manhattan*, WALL ST. J. (Apr. 15, 2008), http://online.wsj.com/article/SB120814163599712081.html.

[56] *FLASH MOB: Beyonce "Single Ladies" in Picadilly Square*, DANCING VIDEOS BLOG (Apr. 25, 2009, 10:31 PM), http://dancingvideos.wordpress.com/2009/04/25/flash-mob-beyonce-belgian-train-station-picadilly-square/.

[57] Daily Mail Reporter, *May the Force Be with You: It's Every Man for Himself as Hundreds of Star Wars Fans Stage Lightsaber Battle Flashmob*, MAIL ONLINE (Feb. 24, 2010, 6:34 PM), http://www.dailymail.co.uk/news/article-1253528/Its-man-Star-Wars-lightsaber-battle-flashmob-breaks-Bristol-town-centre.html.

property.[58] However, whether social media and mobile communication played a role in organizing these events remains uncertain.[59] Further, even assuming the participants used mobile communication to organize these gatherings, it is debatable whether cell phone jamming in a limited geographical area would have had any positive impact in preventing these actions. It seems likely that at least a large part of the organization occurred in advance of the gathering, while participants were still outside the targeted area where police would jam cell phone signals. For example, consider that the disruptive protest that BART authorities anticipated was actually suggested on a website well before the gathering was to occur.[60]

Nonetheless, when authorities know in advance about a planned gathering, it is plausible that suppressing mobile communication in those areas could enable authorities to inhibit the spread of violence and mitigate any coordinated and active resistance to police engaged in crowd control. At least, that is the opinion of many in the United Kingdom, where in August 2011, violent riots occurred in cities across the nation.[61] Social media services, particularly BlackBerry Messenger and Twitter, were blamed for helping spread the chaos.[62] Several people were even convicted for using Facebook to attempt to incite

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[58] *See Police Crack Down on Mobbing Thefts*, NBC BAYAREA (Aug. 3, 2009, 3:15 PM), http://www.nbcbayarea.com/news/local/Police-Crack-Down-On-Mobbing-Thefts-52382167.html; Annie Vaughn, *Teenage Flash Mob Robberies on the Rise*, FOXNEWS.COM (June 18, 2011), http://www.foxnews.com/us/2011/06/18/top-five-most-brazen-flash-mob-robberies/; Michael Sheridan, *100 Teens Turn Snowball Fight into Violent Flash Mob Outside Philadelphia Macy's Store*, NYDAILYNEWS.COM (Feb. 17, 2010, 11:42 AM), http://www.nydailynews.com/news/national/100-teens-turn-snowball-fight-violent-flash-mob-philadelphia-macy-store-article-1.199664; Ian Urbina, *Mobs Are Born as Word Grows by Text Message*, N.Y. TIMES (Mar. 24, 2010), http://www.nytimes.com/2010/03/25/us/25mobs.html; Ray Rivera & Colin Moynihan, *An Unwelcome Easter Custom in Times Square: Violence*, N.Y. TIMES (Apr. 5, 2010), http://www.nytimes.com/2010/04/06/nyregion/06timessq.html; Cotton Delo, *MSSO Convenes Meeting to Discuss "Flash Mob"*, S. ORANGE PATCH (Mar. 25, 2010), http://southorange.patch.com/articles/msso-convenes-meeting-to-discuss-flash-mob; Lindsay Betz, *Six Girls Arrested After 100-Person Riot at Severance Town Center in Cleveland Heights*, SUN PRESS (Feb. 18, 2010, 8:30 AM), http://blog.cleveland.com/sunpress/2010/02/six_girls_arrested_after_100-p.html.

[59] Mark Milian, *Little Evidence Links Mob Violence to Social Media*, CNN (Aug. 19, 2011), http://articles.cnn.com/2011-08-19/tech/flash.mob.violence_1_flash-mob-social-media-mob-violence?_s=PM:TECH.

[60] Bulwa & Berton, *supra* note 9.

[61] James Ball, *Two-Thirds Support Social Networking Blackout in Future Riots*, GUARDIAN (Nov. 7, 2011), http://www.guardian.co.uk/media/2011/nov/08/two-thirds-support-social-media-blackout. *See also UK Riots 2011*, GUARDIAN, http://www.guardian.co.uk/uk/london-riots (last visited Jan. 3, 2013) (providing comprehensive coverage of the London riots).

[62] *See* Josh Halliday, *London Riots: How BlackBerry Messenger Played a Key Role*, GUARDIAN (Aug. 8, 2011, 7:24 AM), http://www.guardian.co.uk/media/2011/aug/08/london-riots-facebook-twitter-blackberry?INTCMP=SRCH; William Lee Adams, *Were Twitter or BlackBerrys Used to Fan Flames of London's Riots?*, TIME (Aug. 8, 2011), http://www.time.com/time/world/article/0,8599,2087337,00.html; Josh Halliday, *David Cameron Considers Banning Suspected Rioters from Social Media*, GUARDIAN (Aug. 11, 2011, 8:01 AM), http://www.guardian.co.uk/media/2011/aug/11/david-cameron-rioters-social-media; Mathew Ingram, *Network Effects: Social Media's Role in the London Riots*, BUSINESSWEEK (Aug. 8, 2011), http://www.businessweek.com/technology/network-effects-social-medias-role-in-the-london-riots-08082011.html.

rioters.[63] The British prime minister said that the public would be "struck by how [the riots] were organised [sic] via social media" and that police and intelligence services were exploring how to prevent such misuse in the future.[64]

And consider that in the early morning hours of April 3, 2012, after the University of Kentucky won the NCAA Championship,[65] a Twitter feed reporting the Lexington Police Department's real-time, street-level response to the ensuing riots and mayhem became the most followed Twitter topic in the world.[66] While many followers may have tuned in simply for entertainment, one can envision the potential exploitation of such information by rioters intent on resisting police.

B. Warrant Execution

States have a long history of serving search warrants,[67] but no accurate statistic exists to account for the total number of search warrants that state and local authorities execute every year.[68] The figure is undoubtedly in the thousands, probably the tens of thousands.[69] Add to that the number of arrest warrants that involve forced entry into a residence and the total number of times police forcibly enter residences each year grows. Preventing advance notice to the target is a primary concern for ensuring safety and preservation of evidence during these operations.[70] In an unpublished case from the Ninth Circuit, the court held that it was not unreasonable for police to force entry into a residence after waiting only eight to ten seconds because the investigation that preceded the warrant indicated the suspects "use[d] their cellular telephones

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[63] Hugo Gye, *Judge: No Reprieve for the Two Facebook Rioters Who Used Networking Site to Incite Violence*, MAIL ONLINE (Oct. 19, 2011, 1:44 AM), http://www.dailymail.co.uk/news/article-2050455/Facebook-UK-riots-inciters-told-4-year-sentences-WERE-fair.html.

[64] *England Riots: Government Mulls Social Media Controls*, BBC NEWS (Aug. 11, 2011, 9:57 AM), http://www.bbc.co.uk/news/technology-14493497.

[65] Again! Go Cats!

[66] Chris Greenberg, *Kentucky Fans Riot: Shooting, Fires, Arrests Occur as Twitter Focuses on Lexington Police Scanner*, HUFFINGTON POST (Apr. 3, 2012, 2:30 PM), http://www.huffingtonpost.com/2012/04/03/kentucky-fans-riot-shooting-lexington-police-scanner_n_1399101.html.

[67] *See, e.g.*, Wisconsin v. Williams, 814 N.W.2d 460, 466–67 (2012) (discussing the history of search warrants in Wisconsin).

[68] *See, e.g.*, Mike Donoghue, *Oversight Virtually Absent with Warrants*, BURLINGTON FREE PRESS (Nov. 13, 2011), http://www.burlingtonfreepress.com/article/20111113/NEWS02/111130341/Oversight-virtually-absent-warrants.

[69] In 2011, Vermont authorities alone served almost 900 search warrants. *See* ACLU OF VERMONT, SEARCH WARRANTS FILED IN VERMONT CRIMINAL DIVISION CALENDAR YEAR 2011 (2011); *see also* Mike Donoghue, *Vermont Supreme Court Orders Warrant Changes*, BURLINGTON FREE PRESS (Jan. 25, 2012, 2:50 PM), http://www.burlingtonfreepress.com/article/20120125/NEWS03/120125001/Vermont-Supreme-Court-orders-warrant-changes (discussing the fact that there was no evidence in 396 of the 1,273 cases that Vermont criminal courts issued warrants for). This accounting was conducted in response to criticized lack of search warrants oversight in Vermont. *See supra* note 68.

[70] Michigan v. Summers, 452 U.S. 692, 702 (1981) ("[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence."). *See also* Franks v. Delaware, 438 U.S. 154, 169 (1978) ("The pre-search proceeding is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence.").

constantly" and led to a valid concern that the suspects could be warned of the imminent police action.[71]

Allowing police to discreetly deploy cell phone jamming equipment at a residence in advance of the execution of a warrant reduces the likelihood that someone who learned of the imminent enforcement or observed law enforcement officers gathering in the area could alert the target to their presence. The jamming would enhance the safety of the officers serving the warrant and reduce the likelihood of destruction of evidence. It would also enhance the safety of the occupants who, caught by surprise, would be less likely to resist police.

C. Standoffs

Similar to the execution of search warrants, no reliable statistics exist regarding the number of "standoffs" and hostage-takings to which state and local police respond each year. During these incidents, police typically try to limit the subject's ability to communicate with outside parties.[72] Historically, police departments worked with local telephone companies to accomplish this by disabling phone service to the building where the suspect was located and then using a dedicated "throw phone" to communicate with the suspect.[73] Cell phone technology, however, makes limiting outside communication more difficult, as a recent incident in Utah demonstrates.

On June 17, 2011, police in Ogden, Utah, attempted to arrest Jason Valdez after he failed to appear in court.[74] Instead of surrendering to police, Valdez, who was armed, barricaded himself in a hotel room, along with a female whom police described as a hostage.[75] For the next sixteen hours, Valdez held the police at bay while he used his cell phone to post updates to his Facebook profile.[76] He even changed his status to "currently in a standoff."[77] When one of Valdez's Facebook "friends" warned him that a police officer was hiding in the bushes outside the hotel, Valdez posted his gratitude for the information: "Thank you homie."[78] Valdez even used his cell phone to take a picture of himself with his hostage and post it to Facebook.[79]

This scenario exemplifies the need to be able to employ cell phone jamming technology during a standoff. When police limit a suspect's access to communication with others, they command greater control of situations. By denying violent offenders' access to information, such as police locations and planned tactics, police enhance their own safety and effectiveness. They may gain additional time to negotiate, for instance, by preventing a suicidal subject

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[71] Jama v. City of Seattle, 446 F. App'x 865, 866–67 (9th Cir. 2011).
[72] Laurence Miller, *Hostage Negotiations: Psychological Strategies for Resolving Crises*, POLICEONE.COM (May 22, 2007), http://www.policeone.com/standoff/articles/1247470-Hostage-negotiations-Psychological-strategies-for-resolving-crises/.
[73] *Id.*
[74] Jennifer Dobner, *Utah Man Used Facebook During Standoff*, ASSOC. PRESS (June 22, 2011, 9:23 AM), http://usatoday30.com/tech/news/2011-06-22-facebook-standoff_n.htm.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

from "saying goodbye" as a final act before killing himself or others. When authorities can isolate subjects, negotiators are able to use traditional psychological techniques to work towards peaceful resolutions.

D. Bomb Squads

Local police have dealt with illegal bombs since at least the late 1800s.[80] The New York Police Department created the first dedicated unit for dealing with bombs in 1903.[81] Since that time, the sophistication of bombs—and the response to them—has evolved.[82] Authorities around the world are increasingly confronted with bombs that are remotely activated by cell phone detonators.[83] Such devices present unique challenges for the officers who must respond to them, particularly when those devices are discovered intact, before detonation. The U.S. military has used cell phone jamming technology for years to counter such devices.[84] Military convoy vehicles are equipped with devices to prevent the remote detonation of roadside bombs.[85] Employing jamming signals near the bomb prevents the bomber from remotely activating it because the signal cannot reach the detonator.

Cell phone jamming technology has the same useful application for state and local bomb squads, which are responsible for responding to and safely disposing of bombs found in their jurisdictions. Reducing the likelihood of a remote detonation enhances the safety of both the bomb technician and the community. Once the risk of detonation is neutralized, explosive devices can be rendered safe, preserving potential evidence and preventing destruction of property. However, unless those squads are "deputized" by a federal agency,

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[80] *See* Territory v. Reuss, 5 P. 885, 888 (Mont. 1885) (Coburn, J., dissenting) ("[T]he sheriff . . . saw the fragments of the . . . bomb. He took charge of them, and kept them in his office."); Spies v. People (*The Anarchists' Case*), 12 N.E. 865, 869 (Ill. 1887) (defendants advocated violent overthrow of the government and suggested that "bombs should be thrown into the police stations, and the police shot . . . as they came out."); People v. Stites, 17 P. 693, 695 (Cal. 1888) (Defendant "observing that he was being followed by the officers . . . surreptitiously deposited the bomb.").

[81] Kareem Fahim, *Bomb Squad Has Hard-Won Expertise*, N.Y. TIMES (May 2, 2010), http://www.nytimes.com/2010/05/03/nyregion/03squad.html?_r=0.

[82] *Id.*

[83] *See, e.g.*, Drew Griffin & Kathleen Johnston, *Toronto Bomb Plotters Sentenced; Alleged Mastermind Gets Life*, CNN (Jan. 18, 2010), http://articles.cnn.com/2010-01-18/justice/canada.bomb.plotters_1_zakaria-amara-sentencing-hearing-terrorist-group?_s=PM:CRIME; Maria Ressa, *Philippines' Evolving Terrorism Threat*, CNN (Jan. 31, 2011), http://articles.cnn.com/2011-01-31/opinion/maria.ressa.bus.bombing_1_al-qaeda-al-khobar-bus-bombing; *Death Toll Climbs to 5 in Bus Bombing*, CNN (Jan. 26, 2011, 3:14 AM), http://www.cnn.com/2011/WORLD/asiapcf/01/26/philippines.bus.bomb/index.html; John Pike, *Madrid Train Bombing*, GLOBAL SECURITY (July 13, 2011, 12:49 PM), http://www.globalsecurity.org/security/ops/madrid.htm.

[84] Noah Shachtman, *The Secret History of Iraq's Invisible War*, WIRED (June 14, 2011, 4:00 AM), http://www.wired.com/dangerroom/2011/06/iraqs-invisible-war/.

[85] *See id.*; *see also* JAMMERALL, http://www.jammerall.com/products/VIP-Protection-High-Output-Power-Signal-Jammer-%28800W%29.html (last visited Jan. 3, 2013) (advertising a product for such use).

they cannot legally use cell phone jamming countermeasures and must simply face the potential remote detonation of the bomb.[86]

E. Executive Protection

For most people, the idea of government bodyguards immediately brings to mind the United States Secret Service. But state and local law enforcement agencies have similar, if lesser known, "executive protection" or "dignitary protection" missions. Historically, state law enforcement agencies have been responsible for ensuring the safety of governors. In Virginia, police have protected that state's governors since 1618, when the Virginia Capitol Police force was established to protect the governor from the "hostile Indian population."[87] Even the police departments of some large cities have responsibility for protecting officials and other high-profile people.[88]

Much like the application by military convoys and bomb squads, cell phone jamming devices can be deployed during protective assignments to prevent the use of remotely activated bombs targeting the person being protected.[89] Such threats are not limited to war zones. In 2011, authorities in Spokane, Washington, found a remote-controlled bomb placed along the route of a planned political march.[90] However, while federal agencies such as the Secret Service can (and do) use cell phone jamming to protect presidents or their other charges, the same technology is not legally available to state or local police with similar responsibilities.[91]

F. Prisons and Jails

Prisons and jails are other areas where cell phone jamming would be useful for state and local authorities. In the recent past, authorities have documented a huge increase in the possession of "contraband" cell phones by inmates.[92] These smuggled phones[93] are not being used only to stay in touch with loved ones. In 2007, inmates detained in a Baltimore city jail awaiting trial for one murder, used a smuggled cell phone to arrange another murder, this

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[86] *See* Spencer S. Hsu, *Local Police Want Right to Jam Wireless Signals*, WASH. POST, Feb. 1, 2009, at A02.

[87] *History*, THE DIVISION OF CAPITOL POLICE, COMMONWEALTH OF VIRGINIA, http://dcp.virginia.gov/history.htm (last visited Jan. 3, 2013).

[88] *How NYC Mayors are Protected*, CBS NEWS (Dec. 22, 2009, 3:35 PM), http://www.cbsnews.com/2100-250_162-3558935.html.

[89] David S. Bennahum, *Hope You Like Jamming, Too*, SLATE (Dec. 5, 2003, 6:34 PM), http://www.slate.com/articles/arts/gizmos/2003/12/hope_you_like_jamming_too.html. *See also* JAMMERALL, *supra* note 85 (advertising a product for such use).

[90] Jonathan Dienst, *FBI: Bomb Found on MLK March Route*, MSNBC (Jan. 18, 2011, 10:18 PM), http://www.msnbc.msn.com/id/41139894/ns/us_news-crime_and_courts/t/fbi-bomb-found-mlk-march-route/.

[91] Hsu, *supra* note 86, at A02.

[92] *See* Nat'l Inst. Just., U.S. Dep't of Justice, *Cell Phones Behind Bars*, IN SHORT: TOWARD CRIMINAL JUSTICE SOLUTIONS 1 (Dec. 2009), https://www.ncjrs.gov/pdffiles1/nij/227539.pdf; Cal. Dep't of Corrs. and Rehab., *Contraband Cell Phones in CDCR Prisons and Conservation Camps* 1 (Feb. 2012), http://www.cdcr.ca.gov/Contraband-Cell-Phones/docs/Contraband-Cell-Phone-Fact-Sheet-January-2012.pdf.

[93] Which give new meaning to the term "*cell* phone"!

time of a witness who was to testify in the initial murder case.[94] In 2008, Texas inmate Richard Tabler, who was awaiting execution after being convicted of murdering four people, used a smuggled cell phone to call Texas Senator John Whitmire and threaten the senator's daughters.[95] Tabler shared the phone with other inmates on death row, who collectively made about 2,800 calls in the preceding thirty days.[96] Even Charles Manson has been caught with a cell phone—twice![97]

Recognizing the usefulness of cell phone jamming technology in combatting the use of contraband cell phones behind prison walls,[98] some prison officials have appealed to the FCC for permission to install such devices. In 2009, the Director of the District of Columbia Department of Corrections (DCDOC) requested approval to test such technology in the D.C. Jail.[99] The FCC acknowledged the "substantial threat to public safety posed by the use of contraband mobile phones by inmates."[100] Nonetheless, the FCC maintained that DCDOC's use of cell phone jamming to combat this safety threat would be illegal and denied its request.[101]

Even some legislators—at both the state and federal levels—believe in the potential usefulness of cell phone jamming in prisons. In Tennessee, the state legislature introduced a resolution urging the FCC to permit such jamming.[102] In 2009, a congressman from Texas introduced the Safe Prisons Communications Act of 2009 to the U.S. House of Representatives.[103] The legislation would have amended the Communications Act of 1934 to permit the use of cell phone jamming technology in prisons.[104] The Safe Prisons Communications Act, however, did not become law.[105]

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[94] Press Release, U.S. Attorney, Dist. of Md., Two Defendants Sentenced in the Murder of Witness Carl Lackl (July 9, 2009), *available at* http://www.justice.gov/usao/md/PublicAffairs/press_releases/press08/TwoDefendantsSentencedintheMurderofWitnessCarlLackl.html.

[95] *Death Row Killer Threatens Texas Senator Via Cellphone*, USA TODAY (Oct. 21, 2008, 9:06 AM), http://usatoday30.usatoday.com/news/nation/2008-10-21-inmate-senator-threats_N.htm.

[96] *Id.*

[97] Michael Winter, *Charles Manson Caught Again with Cellphone in Prison*, USA TODAY (Feb. 03, 2011), http://content.usatoday.com/communities/ondeadline/post/2011/02/hello-satan-charles-manson-caught-again-with-cellphone-in-prison/1#.UHJYIkLC5UR.

[98] *See Prison*, THE SIGNAL JAMMER, http://www.thesignaljammer.com/categories/Prison/ (last visited Jan. 3, 2013) (advertising products specifically for use in prisons).

[99] FCC, Letter to Mr. Devon Brown, 24 FCC Rcd. 2060 (Feb. 18, 2009).

[100] *Id.*

[101] *Id.* at 2060–61.

[102] H.R.J. Res. 685, 106th Gen. Assemb. (Tenn. 2009).

[103] Safe Prisons Communications Act of 2009, H.R. 560, 111th Cong. (2009). For a detailed discussion and critique of the proposed law see Jane C. Christie, Comment, *Disconnected: The Safe Prisons Communications Act Fails to Address Prison Communications*, 51 JURIMETRICS J. 17 (2010).

[104] *Id.* at 17.

[105] *Bill Summary & Status*, LIBR. OF CONG., http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00560: (last visited Jan. 3, 2013).

IV. Federalism, the Tenth Amendment, and States' Police Powers

To make the argument that the Communications Act of 1934 is unconstitutional, at least to the extent that it prohibits states from jamming cell phones in the circumstances described above, it is necessary to examine how the Constitution divides power between the federal and state governments. Because this division is embodied in the Tenth Amendment, it is helpful to examine the history of Supreme Court interpretation of the amendment. Doing so reveals that, despite the uncertain nature of the Tenth Amendment itself, there is certain and inviolable, sovereign state "police" power that underlies it. From this power springs the states' inextinguishable authority to jam cell phone signals.

A. Federalism

Federalism is a central tenet of the government created by our Constitution.[106] This federalist structure, with a separation of governing powers between a central, federal government and the governments of the states, is implicit in the Constitution's assignment of power.[107] This implication flows from the supreme—but limited—powers granted by the Constitution to the federal government.[108] The Constitution leaves all other powers to the states.[109] Consequently, two distinct sovereignties were created, each with its own powers. So, while the federal government can become very powerful (and has), it can never be *all*-powerful because the states have retained an "immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government."[110]

Constitutional federalism has two basic components. The first is the limited authority of the federal government; Article I of the Constitution limits Congress's powers to those "[t]herein granted."[111] Accordingly, the federal government's authority is confined to the "enumerated powers" (such as the powers to tax, regulate commerce, and deal with foreign affairs) expressly included in the Constitution; it cannot exercise any power beyond them.[112] Yet, this limitation inherently contemplates powers of governance that do fall outside those enumerated and granted to Congress. Thus, those powers are impliedly held by the states.

The second element of federalism resides in the "supremacy clause" of Article VI, which states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[113] Where the Constitution grants power to the federal government, any law made pursuant to that power is supreme over any contrary law

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[106] Erwin Chemerinsky, Constitutional Law: Principles and Policies 3 (4th ed. 2011).
[107] *Id.*
[108] *Id.* at 3–4.
[109] *Id.* at 3.
[110] Gibbons v. Ogden, 22 U.S. 1, 203 (1824).
[111] U.S. Const. art. I, § 1.
[112] *See* U.S. Const. art. I, § 8.
[113] U.S. Const. art. VI.

passed by the states. This also implies that the states have power to create and enforce laws, though they may not conflict with the federal government's laws.

Unfortunately, this implied federalism leaves many questions unanswered. For instance, although the Constitution was clearly intended to limit the federal government's powers, it is less clear *how limited* they were intended to be. The Constitution permits the federal government to pass "all Laws which shall be necessary and proper" for executing its enumerated powers.[114] Inherently, such a broad mandate—sometimes called the "sweeping clause" for its breadth—has the potential to swallow the limitations and make them meaningless.[115] This uncertainty caused great concern and debate during the drafting of the Constitution.[116] Many feared that without an express statement of limitation, the federal government's exercise of authority would expand and eventually envelop the states, leaving them without any power at all and rendering the federalist structure moot.[117] That uncertainty prompted the inclusion of the Tenth Amendment in the Bill of Rights.[118]

B. Tenth Amendment

The Tenth Amendment states, "[t]he 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."[119] Though relatively straightforward in its language,[120] the Tenth Amendment has had a history of inconsistent interpretation, its significance—and its check on federal power—expanding and shrinking over time.[121] Two competing views, in varying degrees at different times, predominate its jurisprudential history.[122]

In *United States v. Darby*, Justice Stone succinctly and famously summed up the first view when he wrote that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."[123] Interpreted this way, the Tenth Amendment is simply an express textual statement of the federalist principle that there are powers beyond those delegated to the central government

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[114] U.S. CONST. art. I, § 8.

[115] McCulloch v. Maryland, 17 U.S. 316, 366 (1819).

[116] *See, e.g.*, THE FEDERALIST NO. 45 (James Madison); *see also* Jack N. Rakove, *American Federalism: Was There an Original Understanding?*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY 107, 108–09 (Mark R. Killenbeck ed., 2002); THOMAS B. MCAFFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 41 (2006); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 78–81 (1987).

[117] Mark R. Killenbeck, *No Harm in Such a Declaration?*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY 1, 29 (Mark R. Killenbeck ed., 2002); CHEMERINSKY, *supra* note 106, at 3; MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 41; BERGER, *supra* note 116, at 78–79.

[118] MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 41.

[119] U.S. CONST. amend. X.

[120] Indeed, the commentary of *McCulloch* suggested, "It would seem, that human language could not furnish words less liable to misconstruction." 17 U.S. at 366.

[121] Even Justice O'Connor noted that the Supreme Court's "jurisprudence in this area has traveled an unsteady path." New York v. United States, 505 U.S. 144, 160 (1992).

[122] *Id.* at 155–56.

[123] United States v. Darby, 312 U.S. 100, 124 (1941).

that, if not otherwise proscribed, may be exercised by the states;[124] the states have "retained" the powers that were not collectively "surrendered" to central government upon ratification of the Constitution.[125] This view holds that the Tenth Amendment is not an independent limitation on those powers that are granted to Congress.[126] Rather, it is simply a reminder that the powers bestowed upon Congress are limited and what remains lies with the states—it serves no affirmative limiting role beyond admonishing against overreaching.

The alternate view is that the Tenth Amendment actively guards the sovereignty of the states;[127] it creates an affirmative, protected "zone" of state power into which the federal government cannot intrude.[128] The states "reserved" this power and the federal government cannot interfere with it.[129] By this reasoning, if a federal law did encroach into this zone, even if it was an otherwise valid exercise of federal power, it would be unconstitutional for violating the Tenth Amendment.

At some level, this is a distinction without a difference, a matter of semantics.[130] Courts can protect the structure of federalism with or without invoking the Tenth Amendment. Under both views, federal laws that do not comport with the federalist structure may still be unconstitutional, although only the latter view credits the Tenth Amendment with making it so. Under the truism view espoused by Justice Stone, a federal law may violate the principle stated in the Tenth Amendment, but it would be invalid under another part of the Constitution. Conversely, under the "zone" view,[131] a federal law could be unconstitutional for breaching state sovereignty, thereby violating the affirmative protection of the Tenth Amendment itself.

For instance, suppose that under its power to regulate commerce, Congress passes a law prohibiting interference with cell phones. Theoretically, a court may find that the scope of the law (which is so expansive it incidentally interferes with the states) exceeds Congress's power to regulate commerce and is invalid for going beyond the powers delegated in Article I—as the Court has noted on multiple occasions, interfering with state sovereignty is not a power delegated to the federal government.[132] Conversely, a court could find that the law directly interferes with the sovereignty of the states, and therefore violates

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[124] MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 40.

[125] *See supra* note 116.

[126] *See supra* note 116.

[127] CHEMERINSKY, *supra* note 106, at 319.

[128] *Id.*

[129] *Id.*

[130] New York v. United States, 505 U.S. 144, 159 (1992) (Justice O'Connor noting, "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.").

[131] The "zone" view could also be called the "radiation" view, based on Justice Holmes's statement regarding "some invisible radiation from the general terms of the Tenth Amendment." Missouri v. Holland, 252 U.S. 416, 434 (1920).

[132] Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Bond v. United States, 131 S. Ct. 2355, 2366 (2011).

and is invalid under the Tenth Amendment. The result is the same even if the approach is different.

Despite this ability to protect federalism under either view of the Tenth Amendment, as the Supreme Court has shifted between the two views, so too has the extent to which the federal government has been able to interfere with state power.[133] The section below traces the historical ebbs and flows of the constitutional history of Tenth Amendment interpretation. In so doing, it reveals that, even during periods embracing the truism view—when state power has been at its weakest—the Court has always recognized and acknowledged that such state power exists. What this history has failed to do, however, is divine where the line between federal and state power lies. This Note argues that, regardless of where the divide is, the power of the states to jam cell phone signals in public safety exigencies falls well within the power undoubtedly reserved by the states and is beyond the reach of Congress.

i. Nineteenth Century

As noted above, courts can address federalism without relying on the Tenth Amendment. This has particularly been the case during periods when the "truism" view predominates and the Tenth Amendment figured less prominently in the Court's thinking. From a historical perspective, it is important to consider the development of Congress's powers, especially its "commerce" power, from which most federal authority springs today.[134] This power has been most likely to intrude into state sovereignty—indeed, it is the power upon which the Communications Act is based[135]—and it has played a part in many federalism rulings.[136] Such decisions have had a profound impact on how we understand the Tenth Amendment now.

The Court's earliest decisions implicating federalism took the "truism" view of the Tenth Amendment. In *McCulloch v. Maryland*, Chief Justice Marshall addressed the extent of the federal government's power and the states' own power to resist it.[137] He set the bar very high: states had no power to "retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by [C]ongress to carry into execution the powers vested in the general government."[138] In dismissing a Tenth Amendment argument

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[133] *Compare* Gibbons v. Ogden, 22 U.S. 1, 239–40 (1824), *and* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556–57 (1985) (finding Tenth Amendment is not a bar to federal legislation), *with* Hammer v. Dagenhart, 247 U.S. 251, 273–74 (1918), *and Nat'l League of Cities*, 426 U.S. at 852 (finding Tenth Amendment is a bar to federal legislation).

[134] MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 87 (2005).

[135] 47 U.S.C. § 151 (2006).

[136] *Nat'l League of Cities*, 426 U.S. at 880 (Brennan, J., dissenting) (noting that the decision strengthening the Tenth Amendment delivered a "catastrophic judicial body blow at Congress' power under the Commerce Clause.").

[137] McCulloch v. Maryland, 17 U.S. 316 (1819). The Court held that, although the power to create a national bank was not itself an enumerated power, it was a "necessary and proper" exercise of Congress's lawmaking power to execute several enumerated powers. *Id.* at 420–22.

[138] *Id.* at 436.

regarding state authority,[139] Marshall turned to the supremacy clause of Article VI and held that when Congress acts pursuant to its constitutional "sphere" of power, the states are powerless to resist it.[140] The Court viewed the Tenth Amendment as "merely declaratory" and not an express limitation on Congress's powers.[141] Of course, Marshall recognized that the issue of exactly how far Congress's granted powers reached "will probably continue to arise, so long as our system shall exist."[142]

In *Gibbons v. Ogden*, the Court continued to view the Tenth Amendment as merely a declaration of principle when it addressed the breadth of Congress's power to regulate commerce.[143] The Court, of course, emphasized that the federal government was one of limited powers that were carved out of powers previously held by the states.[144] Also, Marshall recognized that while the federal government's powers were limited to those granted to it by the Constitution, the states' powers consisted of everything else not surrendered.[145] Nonetheless, he again took a broad view of the implementation of Congress's powers.[146] Under *Gibbons*, where the Constitution grants a power (in that case, the power to regulate commerce—the same power that underlies the ban on cell phone jamming), it grants it in its entirety and there is virtually no limit to the extent which Congress can wield it: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[147]

Marshall dodged the idea that *the Tenth Amendment itself* was such a "limitation[ ] . . . prescribed in the constitution" by reasoning that the power to regulate commerce was a power surrendered by the states, and no "residuum" of it was left with them.[148] What *Gibbons* did not adequately resolve, however, was the conflict between the commerce power, which states had surrendered, and the raw police power, *which they had not*.[149] And so it continued throughout the nineteenth century, with the Court generally deferring to Congress's exercise of power, and the Tenth Amendment serving only as a toothless reminder to Congress not to overstep its bounds.

ii. Lochner Era

In the late nineteenth century, the Court's view of Congress's commerce power began to narrow significantly.[150] At the same time, its view of the Tenth

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[139] The state of Maryland argued that it had authority to tax the national bank. *Id.*
[140] *Id.*
[141] *Id.* at 374.
[142] *Id.* at 405.
[143] Gibbons v. Ogden, 22 U.S. 1, 239–40 (1824).
[144] *See id.* at 198–99.
[145] *Id.* at 198.
[146] *Id.* at 187–88.
[147] *Id.* at 196.
[148] *Id.* at 196, 198.
[149] Instead, Marshall supposed that the only limitations on the abuse of congressional authority were "[t]he wisdom and the discretion of Congress" itself and the influence of constituent voters. *Id.* at 197.
[150] CHEMERINSKY, *supra* note 106, at 324. This characterization perhaps generalizes too much and glosses over cases, such as Champion v. Ames (*The Lottery Case*), 188 U.S. 321,

Amendment expanded to embrace the "zone" concept of state sovereignty, using it as a means to strike down numerous laws as unconstitutionally intrusive.[151] This view continued throughout—and indeed helps define—the "*Lochner* era."

The first sign of this shift to the zone concept came in 1895 when Chief Justice Fuller, in *U.S. v. E.C. Knight Co.*, emphasized the notion that federal authority cannot extinguish a state's "police" powers:

> It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the [C]onstitution of the United States, and essentially exclusive.[152]

Though the Court did not use the Tenth Amendment openly to preserve the states' sovereign powers, commentators recognize this decision as a watershed moment in its history.[153]

In *Hammer v. Dagenhart*, Justice Day, while nodding to the Court's holding in *Gibbons* that Congress has broad power to regulate commerce,[154] nonetheless found its efforts to foist child labor laws upon the states unconstitutional.[155] "The grant of authority over [interstate commerce] was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution."[156] Put simply: Congress could not prevent the states from executing their "police" powers.[157]

iii. The New Deal

This period of vitality for the Tenth Amendment was relatively short-lived and came to an abrupt halt in 1941, with *U.S. v. Darby*.[158] In *Darby*, the Court upheld the constitutionality of the Fair Labor Standards Act (FLSA) and Con-

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363–64 (1903), which upheld far-reaching federal statutes. *See* McAffee, Bybee, & Bryant, *supra* note 116, at 137–38.

[151] Chemerinsky, *supra* note 106, at 324. *See also* McAffee, Bybee, & Bryant, *supra* note 116, at 137–38.

[152] United States v. E. C. Knight Co., 156 U.S. 1, 11 (1895) (internal citations omitted).

[153] McAffee, Bybee, & Bryant, *supra* note 116, at 134–35. Again, this may generalize too much, since the Court continued to treat the Tenth Amendment as declaratory in subsequent cases. *See id.* at 138–40 (discussing the following cases as treating the Tenth Amendment as declaratory: *Ames*, 188 U.S. 321; McCray (Oleomargerine) v. United States, 195 U.S. 27 (1904); *and* Hipolite Egg Co. v. United States, 220 U.S. 45 (1911)).

[154] Hammer v. Dagenhart, 247 U.S. 251, 269–70 (1918).

[155] *Id.* at 277.

[156] *Id.* at 274.

[157] *Id.* at 273–74. Interestingly, during periods of Tenth Amendment power, the Court has regularly turned to *Gibbons* for support of the supposition that, although the federal government has exclusive power to legislate (i.e., commerce), the state may still exercise a separate authority (a "police" power) even when these powers will impact the very thing over which Congress has "exclusive" authority. *Id.* at 274. *See also E.C. Knight Co.*, 156 U.S. at 12. While *Gibbons* acknowledged the existence of indefinite "police" powers possessed by the states, opinions that cite it in support of the protection of state sovereignty seem to overlook *Gibbons*' insistence that such laws "must yield to [the law of Congress]," in light of their supremacy. Gibbons v. Ogden, 22 U.S. 1, 211 (1824).

[158] United States v. Darby, 312 U.S. 100 (1941).

gress's authority to institute a minimum wage.[159] The Court rejected an argument that Congress violated the Tenth Amendment by interfering with the states' authority to regulate business and returned to the view of *Gibbons* that, "[t]he power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' "[160] As Justice Stone famously wrote:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[161]

Justice Stone denounced *Hammer* explicitly for besmirching *Gibbons*.[162] But just as Chief Justice Marshall failed to do in *Gibbons*, Justice Stone did not further address the obvious limitation on the states' ability "to exercise fully their reserved powers."[163] With *Darby*, the Tenth Amendment's emergence as an affirmative protection of state power was over, at least for a time, and it returned to serving as an "exclamation point" for federalism.[164] Over the next thirty-five years, the Court invoked the Tenth Amendment as a limitation on congressional power only twice.[165] The most notable of these invocations came in *National League of Cities v. Usery*.[166]

iv. National League of Cities

Interestingly, the Court dealt with the very same law as *Darby*—the FLSA—when it once again employed the Tenth Amendment as an affirmative limit on Congress's ability to intrude into state sovereignty by imposing a minimum wage on state and local governments.[167] In *National League of Cities*, the Court declared the federal law unconstitutional as impermissibly intruding into "integral operations in areas of traditional governmental functions."[168] Justice Rehnquist, writing for the Court, again nodded to *Gibbons* as establishing the notion that Congress had plenary power over commerce.[169] He noted that Congress could even exercise this authority over "purely intrastate" activities that affect interstate commerce.[170] However, this time that power clashed with the "affirmative limitation" of the Tenth Amendment.[171] Justice Rehnquist rea-

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[159] *Id.* at 125–26.
[160] *Id.* at 114 (citing *Gibbons*, 22 U.S. at 196).
[161] *Id.* at 124.
[162] *Id.* at 115–17.
[163] *Id.* at 115, 124.
[164] McAffee, Bybee, & Bryant, *supra* note 116, at 159.
[165] *Id.* at 161.
[166] Nat'l League of Cities v. Usery, 426 U.S. 833, 842–43 (1976). The other was Oregon v. Mitchell, 400 U.S. 112, 125 (1970).
[167] *Nat'l League of Cities*, 426 U.S. at 835, 842–43.
[168] *Id.* at 852.
[169] *Id.* at 840.
[170] *Id.* (quoting Fry v. United States, 421 U.S. 542, 547 (1975)).
[171] *Id.* at 841.

soned that, just as the legitimate exercise of congressional commerce power may be limited by protections of individual liberties, such as the Sixth Amendment right to a trial by a jury or the Fifth Amendment's Due Process clause, so too can it be limited by the reservation of state authority in the Tenth Amendment.[172]

Rehnquist stressed that the Court had long acknowledged there were limits to the authority of Congress to encroach on state sovereignty, even where it was acting within its plenary powers.[173] Therefore, while the FLSA's mandate of a minimum wage for private employees was a valid exercise of Congress's commerce power under *Darby* and did not intrude into state sovereignty, it was a different matter altogether when Congress attempted to aim its authority directly at the states.[174] For the Court, the crux of the matter was this: if federal laws "operate to directly displace the States' freedom to structure *integral operations in areas of traditional governmental functions*, they are not within the authority granted Congress . . . ."[175] The Court did not define what constituted a "traditional governmental function"[176] but offered a non-exhaustive list of examples, such as fire prevention and police protection.[177]

For a short while, the Tenth Amendment appeared to experience a revival of sorts.[178] Ultimately, however, the undefined concept of "traditional government functions" became *National League of Cities*' undoing. After a series of cases attempted, without success, to define what sorts of activities were impervious to congressional power, the Court, in a 5–4 decision, explicitly rejected *National League of Cities*' holding.[179]

Returning once again to the same question regarding application of the FLSA to state and local governments, the Court in *Garcia v. San Antonio Metropolitan Transit Authority* held *National League of Cities*' concept of traditional government functions to be "unsound in principle and unworkable in practice" and this time upheld the law.[180] Justice Blackmun, writing for the majority, lamented that courts could not pin down with certainty exactly which state functions were essential to sovereignty or the criteria that made them so.[181] Even though he could not define its scope, Blackmun was quick to acknowledge that "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority,' "[182] but only to the extent that they have not sur-

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[172] *Id.* at 841–42.

[173] *Id.* at 842.

[174] *Id.* at 845.

[175] *Id.* at 852 (emphasis added).

[176] Indeed, some have noted that even Rehnquist himself seemed to vacillate on what would qualify. MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 182.

[177] *Nat'l League of Cities*, 426 U.S. at 851 & n.16.

[178] *See* CHEMERINSKY, *supra* note 106, at 178; *see also* MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 178.

[179] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

[180] *Id.* at 546–47, 555–56.

[181] *Id.* at 548.

[182] *Id.* at 549 (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

rendered it.[183] The Tenth Amendment returned once again to serving only as a reminder to Congress.

v. New York and Beyond

This time, however, the dormancy was short-lived. In 1992, just seven years after Justice Blackmun abdicated judicial responsibility for enforcing federalism and left Congress to police itself, Justice O'Connor revived the Tenth Amendment in *New York v. United States*.[184] The *New York* Court expressed an "anti-commandeering" doctrine that the federal government could not "conscript state governments as its agents."[185] While this decision did not embrace and reinstate the assertive "zone" philosophy of *National League of Cities* and the *Lochner*-era cases (Justice O'Connor labeled the Amendment a "tautology")[186] and did not deal directly with the issue of police power, it nonetheless marked the quick return to the recognition that "[t]he Tenth Amendment . . . restrains the power of Congress."[187]

The Court has continued to maintain this commitment to preserving federalism in subsequent cases.[188] Two noteworthy cases are *United States v. Lopez*[189] and *United States v. Morrison*.[190] Although neither was a "Tenth Amendment case" per se, they both represent historically significant proclamations of the limits of congressional power.[191] In *Lopez*, the Court invalidated a federal law prohibiting the possession of firearms in school zones as exceeding Congress's power over interstate commerce, reasoning that to permit such a far reach would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[192] Similarly, the *Morrison* Court, relying in part on its holding in *Lopez*, struck down a law providing civil remedies to victims of gender-motivated violence as violative of the federalist structure of the Constitution and therefore beyond the limited powers

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[183] *Id.* This is consistent with Chief Justice Marshall's proclamation in *Gibbons*. Gibbons v. Ogden, 22 U.S. 1, 197 (1824). *See also supra* text accompanying note 149. Like Marshall, Blackmun believed that protection of state sovereignty was a procedural matter, best accomplished through the political process, and was not an express function of the Constitution. *Garcia*, 469 U.S. at 550–51.

[184] New York v. United States, 505 U.S. 144, 156 (1992). In light of her vigorous dissent in *Garcia*, it is not surprising she took exception to leaving Congress essentially unchecked, particularly given its "underdeveloped capacity for self-restraint." 469 U.S. at 588 (O'Connor, J., dissenting).

[185] *New York*, 505 U.S. at 178.

[186] *Id.* at 156–57.

[187] *Id.* at 156.

[188] *See* Printz v. United States, 521 U.S. 898, 902 (1997) (also an "anti-commandeering" case). *See also* Reno v. Condon, 528 U.S. 141, 149 (2000), in which the Court expressly preserved "the principles of federalism contained in the Tenth Amendment." There, however, the Court distinguished the case and upheld the law, finding that the state government had not been commandeered. *Id.* at 150.

[189] United States v. Lopez, 514 U.S. 549 (1995).

[190] United States v. Morrison, 529 U.S. 598 (2000).

[191] *See* McAffee, Bybee, & Bryant, *supra* note 116, at 199, 203–04. The cases also demonstrate a willingness to define "judicially enforceable boundaries on congressional authority." *Id.* at 205.

[192] *Lopez*, 514 U.S. at 567.

vested in Congress.[193] Notably, each of these cases emphasized that the Constitution did not imbue the federal government with general "police powers," which were instead retained by the states.[194] Those reserved police powers are central to the supposition of this Note.

One final case is worth mentioning in the discussion of the evolution of Tenth Amendment jurisprudence. Though it is still too soon to tell whether it will have any lasting impact, 2011's *Bond v. United States* represents a glimpse into the modern Court's understanding of the Tenth Amendment.[195] It shows that the Court continues to be committed to preserving federalist principles and remains willing to limit the federal government's overreaching (even if the Court is equivocal on the source of the limitation).[196]

In *Bond*, the Court considered whether individuals have standing to challenge the validity of federal laws as violative of the Tenth Amendment (as opposed to requiring states to raise their own objections). A unanimous Court held that they do.[197] While the Court did not reach the merits of Bond's arguments that Congress exceeded its own authority and intruded upon that of the Commonwealth of Pennsylvania, the Court's examination of the role of the Tenth Amendment and its embodiment of federalism is noteworthy. Justice Kennedy acknowledged the ambiguity inherent in the Tenth Amendment's power: "Whether [it] is regarded as simply a 'truism,'. . . or whether it has an independent force of its own, the result . . . is the same."[198] Explaining the Court's stance, he wrote:

> The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government . . . and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States.[199]

The Court clearly took the position that there is a limit to congressional powers when they clash with state sovereignty, even if noncommittal on the source of that limitation. This is not surprising, given Justice Kennedy's willingness to limit Congress's powers in *Lopez*.[200]

C. States' Police Powers

The one constant throughout all of the Court's decisions, regardless of whether it was during an era that embraced or one that rejected the significance of the Tenth Amendment, is the recognition that under our Constitution, the states do retain significant powers.[201] Chief among these—if not comprising

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[193] *Morrison*, 529 U.S. at 617–18, 627.
[194] *Lopez*, 514 U.S. at 566; *Morrison*, 529 U.S. at 618.
[195] Bond v. United States, 131 S. Ct. 2355, 2366 (2011).
[196] *See infra* notes 197–99.
[197] *Bond*, 131 S. Ct. at 2366–67. Subject, of course, to typical judicial requirements, such as "actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision." *Id.* at 2366.
[198] *Id.* at 2367.
[199] *Id.* at 2366.
[200] *See* United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).
[201] Gibbons v. Ogden, 22 U.S. 1, 204–05 (1824); United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895); Hammer v. Dagenhart, 247 U.S. 251, 273–74 (1918); United States v.

them entirely—is the so-called "police power."[202] It is this power that this Note argues gives states authority to jam cell phone signals, despite the lack of an exemption in the federal law. As Justice Harlan noted in his dissenting opinion in *Lochner*:

> While this court has not attempted to mark the precise boundaries of what is called the police power of the state, the existence of the power has been uniformly recognized, equally by the Federal and State Courts.
>
> All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.[203]

But despite the long-standing and central role police power plays in state authority (recall that Justice Fuller remarked over a century ago that police power is "essential to the preservation of the autonomy of the states")[204] a clear definition of what it encompasses remains elusive.[205]

This difficulty in defining police power is due largely to its expansiveness. As Justice Kennedy recently commented, "the powers reserved to the States are so broad that they remain undefined."[206] Justice Rehnquist once referred to police power succinctly as "the authority to provide for the public health, safety, and morals."[207] But this definition does little to delimit the concept, which is, in essence, the power stemming from the "residuary and inviolable sovereignty" that states did not surrender to the federal government in the Con-

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Darby, 312 U.S. 100, 114 (1941); Nat'l League of Cities v. Usery, 426 U.S. 833, 851 (1976); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985); New York v. United States, 505 U.S. 144, 162–63 (1992); *Bond*, 131 S. Ct. at 2364; Printz v. United States, 521 U.S. 898, 918–19 (1997); Reno v. Condon, 528 U.S. 141, 149 (2000). Even *McCulloch*, which was not a "Tenth Amendment case," acknowledges that "[t]he sovereignty of a state extends to everything which exists by its own authority." McCulloch v. Maryland, 17 U.S. 316, 429 (1819).

[202] The term was coined by Chief Justice John Marshall in *Brown v. Maryland* in 1827. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 745 (2007) (citing Brown v. Maryland, 25 U.S. 419, 442–43 (1827)). However, even before the term "police power" came into being, the Supreme Court recognized the States had "police" powers. *See Gibbons*, 22 U.S. at 208 ("acknowledged power of a State to regulate its police"). Contrary to today's understanding of the word "police," which is synonymous with law enforcement, the term at the time equated to "public order." Legarre, *supra*, at 760.

[203] Lochner v. New York, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting).

[204] *E.C. Knight Co.*, 156 U.S. at 13.

[205] *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 2–3 (1904); DUBBER, *supra* note 134, at xi. *See also* Slaughter-House Cases, 83 U.S. 36, 62 (1872); United States v. Comstock, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring).

[206] *Comstock*, 130 S. Ct. at 1967. *See also* FREUND, *supra* note 205, at 2.

[207] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991). This echoes the definition Justice Fuller offered in 1895: "the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals." *E.C. Knight Co.*, 156 U.S. at 11.

stitution.[208] Indeed, far from being surrendered, these are the very powers that were "reserved explicitly to the States by the Tenth Amendment."[209]

The inability to define these powers has undoubtedly contributed to the bumpy road the Tenth Amendment has traveled.[210] Justice Blackmun's decision in *Garcia*—a decision that marked a low point in the Tenth Amendment's strength—was based, in part, on the problem of discerning what constituted an unmistakable object of state power and therefore beyond federal control.[211] He found the concepts of powers as "traditional," "integral," or "necessary" uncertain in application.[212] Nor could he identify any other "organizing principle" with which to replace them.[213] Accordingly, even though he admitted that states retained unsurrendered authority,[214] in apparent exasperation he struck down *National League of Cities* as "unworkable" and left Congress to its own devices.[215] Had Justice Blackmun—or any other Justice who has ever had occasion to consider the dividing line between the power of the federal and state governments—been able to craft a "watertight, mechanical test[ ]," the Tenth Amendment's role might be clearer.[216]

Perhaps in recognition of the futility of the endeavor, the modern Supreme Court rarely tries to define or explain why certain powers are police powers—it just asserts that they are.[217] The indefiniteness of such powers does not mean that they are insignificant.[218] On the contrary, they are among the most important to society. As Justice Frankfurter noted of the authority of the states, "[w]hen clear and present danger of riot, disorder . . . or other immediate threat to public safety, peace, or order appears, the power of the [states] to prevent or punish is obvious . . . because the preservation of peace and order is one of the first duties of government."[219]

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[208] New York v. United States, 505 U.S. 144, 188 (1992) (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (C. Rossiter ed., 1961)). *See also E.C. Knight Co.*, 156 U.S. at 11 (describing such power as "originally and always belonging to the states, not surrendered by them to the general government.").

[209] *New York*, 505 U.S. at 188.

[210] *See, e.g.*, MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 133.

[211] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539–40 (1985).

[212] *Id.* at 546. *See also* MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 161 (noting that "[n]either the Tenth Amendment nor any other provision in the Constitution attempted to enumerate the reserved powers" and "[b]y instead relying on such extra-textual sources of authority as perceived traditions . . . the Court all but invited the criticism that its federalism decisions were . . . ad hoc and reactionary judicial policymaking").

[213] *Garcia*, 469 U.S. at 539; *see also* MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 185–86.

[214] MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 185–86.

[215] *Garcia*, 469 U.S. at 546–47.

[216] William E. Leuchtenburg, *The Tenth Amendment over Two Centuries: More than a Truism*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY 41, 72 (Mark R. Killenbeck ed., 2002).

[217] DUBBER, *supra* note 134, at 153.

[218] *See* MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 134.

[219] Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 316–17 (1941). *See also* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

V. CELL PHONE JAMMING BAN IMPERMISSIBLY INTERFERES WITH STATES' POLICE POWERS

It is unlikely that this Note will accomplish what 200 years of Supreme Court jurisprudence has failed to do: identify clear boundaries of state police power into which the federal government cannot intrude. Such a lofty achievement is not necessary for the premise herein, however, because there can be little serious dispute that the law enforcement functions described above[220] are well within those boundaries, wherever they may lie.[221] As the Court has acknowledged, "[t]he promotion of safety of persons and property is unquestionably at the core of the State's police power."[222] Whether preventing riots or controlling unruly crowds, serving warrants or resolving standoffs, preventing bombings, guarding its executives, or imprisoning criminals, when a state undertakes any of these, it undoubtedly acts within the scope of its police power to provide for public safety and the safety of its employees. One may dispute whether cell phone jamming is appropriate in each of these circumstances, but there can be little debate that addressing such hazards is primarily the responsibility of states and their local subdivisions.

The question then becomes whether, by preventing states from jamming cell phone signals, even within the course of carrying out their police powers in these situations, Congress has impermissibly interfered with them. Under its power over commerce, Congress almost surely has the authority to regulate cell phone signals.[223] Even when calls do not cross state lines, such intrastate calls are probably still within the ambit of *Wickard v. Filburn*'s aggregate reach.[224] Nevertheless, as Justice Kennedy recently reminded, "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government."[225] So, while regulating cell phone signals under the commerce clause may be within the federal government's enumerated powers, to the extent such regulation "impermissibly interferes" with police powers (the crux of state sovereignty),[226] the federal government has exceeded them.

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[220] *See supra* Part III.

[221] *See* THE FEDERALIST NO. 17 (Alexander Hamilton) ("ordinary administration of criminal and civil justice" are the "province of the State governments"); United States v. Lopez, 514 U.S. 549, 564 (1995) ("areas such as criminal law enforcement . . . where States historically have been sovereign."). *See also* John Choon Yoo, *Federalism and Judicial Review*, *in* THE TENTH AMENDMENT AND STATE SOVEREIGNTY 131, 164 (Mark R. Killenbeck, ed., 2002) ("states would retain primary jurisdiction over . . . judicial administration and law enforcement").

[222] Kelley v. Johnson, 425 U.S. 238, 247 (1976).

[223] *See Lopez*, 514 U.S. at 558–60.

[224] Wickard v. Filburn, 317 U.S. 111, 128, 133 (1942).

[225] Bond v. United States, 131 S. Ct. 2355, 2366 (2011). In evaluating the current view the Court takes on the ability of the Tenth Amendment to limit federal action, it is worth comparing Justice Kennedy's position with Justice O'Connor's in *New York*: "[w]hether one views the take title provision as lying outside Congress's enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." New York v. United States, 505 U.S. 144, 177 (1992).

[226] *See* United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895).

There is no doubt that the ban *interferes* with the states' ability to carry out their police powers—they are forbidden from jamming cell phones even if they choose to do so. By preventing state authorities from jamming cell phones, Congress has eliminated one viable option police would otherwise have for addressing public safety exigencies. Therefore, it has interfered with their ability to exercise fully their powers. Given that it is clear the ban is an interference, the question then becomes: Is this interference *impermissible*? I believe it is for several reasons.

First, cell phone jamming is not the type of technique otherwise prohibited by the Constitution and, because it is intrinsic to exercising police power, it was not surrendered to the federal government. The authority to use it was therefore retained by the states. Cell phone jamming is analogous to other, long-accepted law enforcement techniques, as explained below. If Congress can prevent police from jamming cell phone signals, then likely few techniques are immune from congressional interference.

Second, the balance of governmental interests weighs in favor of the states. The cell phone jamming suggested here is useful to the states' fundamental public safety function. Yet it is so limited in scope as to be unlikely to upset congressional efforts to regulate commerce. It is also unlikely to lead to the sort of negative social conditions historically blamed on strong Tenth Amendment rulings.

Finally, such a prohibition inhibits state experimentation in addressing dangerous social ills. While the state experimentation doctrine is not crucial to answering the question posed in this Note, it has long been a recognized Tenth Amendment rationale. The federal ban on state and local cell phone jamming precludes such experimentation.

Each of these is considered in greater depth below.

A. Not Prohibited by the Constitution

The states have broad discretion when deciding how to exercise their police powers.[227] The Tenth Amendment, however, expressly contemplates that there are some powers (and therefore techniques) that states cannot use; these are the powers that are "prohibited by [the Constitution] to the States."[228] Chief among the forbidden "techniques" police may not use, of course, are those that violate other provisions of the Constitution. For instance, police may not force their way into a home and search for evidence without a valid search warrant because this would violate the Fourth Amendment's protection against unreasonable search.[229] They may not beat a confession out of a suspect because this would violate that person's Fourth Amendment right to freedom from excessive force[230] and Fifth Amendment right against self-incrimination.[231] They may not disarm the civilian populace to reduce gun crime because that would violate the Second Amendment right to possess firearms.[232] While

[227] City of El Paso v. Simmons, 379 U.S. 497, 508–509 (1965).
[228] U.S. CONST. amend. X.
[229] Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).
[230] *See* Graham v. Connor, 490 U.S. 386, 396 (1989).
[231] *See* Chavez v. Martinez, 538 U.S. 760, 767 (2003).
[232] McDonald v. City of Chicago, 130 S. Ct. 3020, 3048 (2010).

all of these might[233] be very effective techniques, they are prohibited by the Constitution. Cell phone jamming in the limited circumstances considered here does not implicate such protections.

Instead, as noted above, cell phone jamming is analogous to other, long-accepted (even essential) law enforcement techniques. For instance, in any of the scenarios supposed by this Note, one could substitute police authority to jam cell phones with police authority to control pedestrian and vehicular traffic, even when that traffic includes business-related travelers[234] (which would be subject to Congress's commerce clause power). In the face of demonstrations, police can cordon off areas where citizens cannot go and generally limit free movement to minimize the risk of violence, even if members of the crowd happen to be journalists engaged in for-profit reporting.[235] If police are preparing to serve a search warrant at a residence or have surrounded the scene of a hostage-taking, they need not stand aside if at that very moment the FedEx man arrives to deliver a package from another state.[236] If a car bomb is discovered alongside an interstate highway, the police surely can stop traffic while a bomb squad addresses the device, even if that means interstate travel comes to a halt while they do.[237]

In each of these scenarios, the commercial or interstate traffic that is undoubtedly within the reach of the federal government must yield to states' imperative necessity to deal with public safety. So too should cell phone traffic yield when the demands of emergency call for it. If this is not true, then it is difficult to imagine many techniques that are beyond the reach of Congress. Consider that the dissent in *Lopez* failed the challenge to identify *any* activity

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[233] Or might not . . .

[234] *See, e.g.*, 75 PA. CONS. STAT. § 6109 (2012) (giving Pennsylvania local police authorities the right to regulate traffic); NEV. REV. STAT. § 484A.420 (2011) (same authority granted to Nevada local authorities).

[235] *See, e.g.*, Grider v. Abramson, 180 F.3d 739, 752 (6th Cir. 1999); Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 513–20 (1999) (discussing police power to regulate the conduct of a public demonstration); *see also* Robert Kientz, *We Have Reached the Breaking Point*, FIN. SENSE (Nov. 21, 2011), http://www.financialsense.com/contributors/robert-kientz/2011/10/04/we-have-arrived-at-the-great-breaking-apart (New York police, with the support of Mayor Bloomberg, arrested protesters and reporters attending the "Occupy Wall Street" movement).

[236] Perhaps because few companies would seek judicial review of police actions in situations such as this one, there are few court cases addressing police authority so exercised. *But see* Michigan v. Summers, 452 U.S. 692, 704 (1981) (police can detain unarrested suspects during the execution of search warrant; presumably then they can also keep people out). *See also* Christine Clarridge, *Seattle-area Police Train to Handle Events like Mall Shooting*, SEATTLE TIMES (Dec. 12, 2012, 8:56 PM), http://seattletimes.com/html/localnews/2019892139_rapidresponse13m.html (discussing police training to handle hostage & emergency situations, including setting up a perimeter to keep suspects in and patrons out of commercial settings).

[237] I have been unable to find a case in which a business filed a lawsuit challenging authorities for preventing the business's employees or agents from passing near a site where an explosive device was believed to be located. As a result, I am unable to cite to a case that holds such police activity as within inherent police power. Nonetheless, blocking off public access to the area surrounding such a site appears consistent with the inherent police power. *See supra* text accompanying note 219. *See also* Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381, 382–83 (1995) ("The Court traditionally has upheld health and safety measures . . . .").

that would be beyond Congress's reach under its own, unhindered interpretation of the commerce clause.[238]

Similarly, an overly weak interpretation of the Tenth Amendment would leave nothing to the states not subject to congressional approval. Could Congress prevent police from using radios all together? Could it prohibit wiretaps? Could it ban traffic stops on interstate highways? What about on all highways where commercial vehicles travel? Could Congress prohibit police from carrying firearms that have traveled in interstate commerce, or from using ammunition that has? Interstate commerce is implicated in virtually every facet of modern life. Without some meaningful limitation on Congress's ability to use its commerce clause power to control states, it would be fair to ask whether *any* powers are "reserved to the States."[239]

B. Strong Interest and Limited Scope

As noted above, the history of the Tenth Amendment has been marked by wild shifts in the relative strength of federal versus state power.[240] The circumstances considered here, however, present no reason to fear "the hobgoblin of the 10th Amendment."[241] Limited cell phone jamming by state and local law enforcement agencies would not lead to the type of gross social injustices that mark the "sordid past" of the Tenth Amendment,[242] nor would it upset the constitutional balance and cause an upending of national power.

Rather than embracing an interpretation that would permit a large-scale impact in a state—such as that of the child labor law in *Hammer* or the minimum wage in *Darby*, *National League of Cities*, and *Garcia*—this Note contemplates instances of cell phone jamming that would be narrow and limited in geographic scope to discretely targeted areas. Except in the case of prisons (where it would be confined to non-public prison grounds), its use would also generally be short in duration. Were this note to advocate for the power of a state to, say, indefinitely jam all cell phone signals everywhere within its borders, such a position would almost certainly be indefensible. But there is little likelihood that discrete instances of cell phone jamming in exigent circumstances will upset "the initiatives of the federal government to achieve social justice" that marked early Tenth Amendment decisions.[243] There are no sweeping implications of the kind that lead to the "constitutional crisis . . . in the 1930's."[244]

The Court has shown a willingness to consider the relative weight of the federal versus state interests when divining the line drawn by the Tenth Amendment.[245] This makes sense.[246] The proper criteria for weighing those

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238 *See* MCAFFEE, BYBEE, & BRYANT, *supra* note 116, at 202.
239 U.S. CONST. amend. X.
240 *See supra* Part III; *see also* BERGER, *supra* note 116, at 62 (referring to the Court's position on the commerce clause, to which the Tenth Amendment jurisprudence has been tied, as "a shuttlecock that has been the toy of shifting majorities on the Bench.").
241 Leuchtenburg, *supra* note 216, at 52 (quoting Justice Felix Frankfurter).
242 Killenbeck, *supra* note 117, at 8.
243 Leuchtenburg, *supra* note 216, at 44.
244 Nat'l League of Cities v. Usery, 426 U.S. 833, 868 (1976) (Brennan, J., dissenting).
245 *See, e.g.*, New York v. United States, 505 U.S. 144, 177–78 (1992).

interests, however, have proven elusive.[247] Here, thankfully, we are not faced with such an intractable dilemma. The balance weighs heavily in favor of states because preservation of peace and order are central to state sovereignty and the ability to jam cell phones bears directly on this capacity. At the same time, the impact of such cell phone jamming would have little impact, if any at all, on the federal government's ability to otherwise regulate commerce.

The one major argument that opponents of cellphone jamming make against it is not that it undermines the congressional regulatory scheme but that it jeopardizes public safety.[248] The FCC has repeatedly maintained that jamming cell phones can interfere with "critical public safety and other emergency communications."[249] This is likely true in instances of jamming by private citizens, but the FCC makes this argument even in the context of governmental jamming.[250] This argument is essentially policy-based and bears little on the legal basis of a state's rights. Further, it is not clear the claim is wholly valid, because the federal government's own tests have suggested that cell phone jamming can be accomplished (at least in prison settings) "without risk to Federal operations."[251]

The wireless industry argues that cell phone jamming can lead to "degraded or disrupted wireless service."[252] Indeed, dropped calls can be frustrating, and quality cell phone reception is a legitimate end for congressional regulation, but such interference would be occasional and confined to the area where police were using jamming equipment.[253] It is difficult to argue that this outweighs the public safety need of the above-described scenarios.

First, consider the inherent condescension and contradiction in the position taken by the FCC and the wireless industry. They contend that *public safety*

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[246] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946–47 (1987) (providing an in-depth discussion of balancing in Constitutional interpretation).

[247] As Justice Blackmun lamented, such decision making "invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985).

[248] *See infra* p. 288 and notes 249–51, 253.

[249] Press Release, FCC Enforcement Bureau Steps Up Education and Enforcement Efforts Against Cellphone and GPS Jamming (Feb. 9, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304575A1.pdf; FCC, Public Notice, *Commission Seeks Comment on Certain Wireless Service Interruptions*, 27 FCC Rcd. 2177 (Mar. 1, 2012) [hereinafter FCC, Public Notice].

[250] *See* Barnett, *supra* note 43; FCC, Public Notice, *supra* note 249, at 2178–79 (Inviting comment on service interruptions where a "government actor that exercises lawful control over network facilities" deactivates it, but does not invite comment on "practices expressly prohibited by statute or regulation, such as signal jamming.").

[251] *See* EDWARD F. DROCELLA, INITIAL ASSESSMENT OF THE POTENTIAL IMPACT FROM A JAMMING TRANSMITTER ON SELECTED IN-BAND AND OUT-OF-BAND RECEIVERS iii (NAT'L TELECOM-MUNS. & INFO. ADMIN. May 2010).

[252] *Statement on Press Conference in South Carolina on Cell Phones in Prison*, CTIA THE WIRELESS ASSOCIATION (Sept. 22, 2010), http://www.ctia.org/media/press/body.cfm/prid/2012. The industry also takes an almost "Chicken Little" approach to promoting the "safety risks." *See Contraband Cell Phones in Prison*, CTIA (Nov. 2010), http://files.ctia.org/pdf/110510_-_Contraband_Cell_Phones_in_Prisons.pdf. This is presumably because safety is a stronger argument than "dropped calls."

[253] *See* Hsu, *supra* note 86, at A02.

would be put at risk if *public safety agencies* were allowed to jam cell phones when those *public safety agencies* deemed the jamming necessary to protect *public safety*! Beyond that, there is a legal basis for rejecting their insistence that states should not be permitted to jam cell phones. The Court has recognized that when it comes to the "domain of the reserve power of a State [the Court] must respect the 'wide discretion [the State has] in determining what is and what is not necessary.' "[254] Essentially, the federal government should not dictate which (otherwise constitutional) techniques the states may use in exercising their powers. Given that the technology would be used primarily in matters of exigency, the determination of whether cell phone jamming is appropriate in certain circumstances should be made by those facing those exigent circumstances. Certainly one factor public safety authorities must consider when deciding whether to jam cell phone signals is the likely impact on other communications in the area—including their own communications and potential calls for emergency service.

C. Experimentation

Though not critical to this Note's argument, it is worth mentioning one other, not-yet-examined, element of Tenth Amendment jurisprudence that counsels in favor of the premise of this Note. Justice Brandeis is credited with the idea that states can serve as laboratories for social experimentation and that such experimentation is one of the goals of federalism.[255] This idea continues to have some vitality.[256] While this is not the crux of the argument advanced in this Note, the ban on cell phone jamming has directly limited state experimentation with this technology in areas of their core responsibilities, particularly as it relates to prison contexts.[257] When states have sought permission to use cell phone jamming technology to confront the real danger posed by contraband cellphones in the possession of prisoners, they have been flatly denied.[258] The federal government has undertaken experimentation of its own,[259] but if this were enough to deny the states their own chance, it would "leav[e] the States virtually at the mercy of the Federal Government," undermining "their opportunities to experiment and serve as 'laboratories.' "[260]

VI. CONCLUSION

Cell phones are ubiquitous and may at times be misused with negative impact on public safety and social order. For instance, they may be used to

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[254] City of El Paso v. Simmons, 379 U.S. 497, 508–09 (1965) (quoting East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232–33 (1945)).

[255] CHEMERINSKY, *supra* note 106, at 111 (citing New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[256] *See* Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

[257] *See supra* text accompanying notes 98–101.

[258] *See supra* text accompanying notes 98–101.

[259] *Contraband Cell Phones in Prisons Possible Wireless Technology Solutions*, NAT'L TELECOMMS. AND INFO. ADMIN. (Dec. 29, 2010), http://www.ntia.doc.gov/report/2010/contraband-cell-phones-prisons-possible-wireless-technology-solutions.

[260] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 567–68 n.13 (1985) (Powell, J., dissenting).

coordinate riots, thwart warrants, prolong standoffs, detonate bombs, or permit prisoners to organize additional crimes even while incarcerated. The state and local law enforcement agencies that bear responsibility for addressing these dangers could use cell phone jamming technology to mitigate these hazards (just as federal law enforcement agencies already have the power to do), but federal law prohibits it. This Note has argued that, to the extent the Communication Act of 1934 prohibits state governments (and their local subdivisions) from jamming cell phone signals in these narrow law enforcement applications, it unconstitutionally violates the federalism principles embodied in the Tenth Amendment. This is so because the Constitution reserves to states a "police power," which they may use to maintain order and provide for the safety of their citizens and employees.

While the Supreme Court's federalism jurisprudence has been inconsistent, the Court has consistently held that the power to protect the public and preserve order is at the core of those powers retained by the states. Recent Court decisions addressing the Tenth Amendment have demonstrated a willingness to limit the reach of federal power—even when Congress otherwise acts within its enumerated powers—if it interferes with state sovereignty. Justice Kennedy's concurring opinion in *Lopez*, a case where the Court limited the federal government's powers, could just as well have been written about the prohibition against cell phone jamming:

> While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.[261]

Because the applications of cell phone jamming described herein are directed at narrow public safety goals, they are squarely within the exercise of police power and therefore central to state sovereignty. Since it is not the type of technique prohibited by the Constitution, and since these applications are so discrete (limited in scope and, generally, duration) that they are unlikely to affect the legitimate national regulation of commerce in a significant way, the federal government may not prohibit state and local authorities from jamming cell phones.

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[261] United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).