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## BAY AREA RAPID TRANSIT ACTIONS OF AUGUST 11, 2011: HOW EMERGING DIGITAL TECHNOLOGIES INTERSECT WITH FIRST AMENDMENT RIGHTS

Erika J. Pitzel\*

### INTRODUCTION

Recently, people have used digital technologies to organize actions aimed at their governments, and governments have countered by using technology to address these popular movements. The Chinese government has blocked access to social media<sup>1</sup> and the use of other personal communication devices to stop protest movements.<sup>2</sup> When

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1. Social media is defined as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).” *Social Media Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Mar. 15, 2013). Some examples of social media include: blogs; social networking sites, such as Facebook and Twitter; photo and video sharing platforms; and communication via text messages. Samantha Murphy, *Social Media: Huge, and Here to Stay*, TECHNEWSDAILY (July 27, 2010, 11:59 AM), <http://www.technewsdaily.com/834-social-media-huge-and-here-to-stay.html>. Social media can be accessed through a computer or with mobile communication devices, including smartphones. Antone Gonsalves, *Social Network Use by Smartphones Jumps*, INFORMATIONWEEK (Mar. 4, 2010, 10:19 AM), <http://www.informationweek.com/hardware/handheld/social-network-use-by-smartphones-jumps/223101506>. A smartphone is “a cell phone that includes additional software functions (as e-mail or an Internet browser).” *Smartphone Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/smart%20phone> (last visited Mar. 15, 2013).

2. In May 2011, the Chinese government shut down social media sites in response to protests by students and citizens of Inner Mongolia. See Steven Jiang, *Activists: Inner Mongolia Protests Continue*, CNN (May 31, 2011), [http://articles.cnn.com/2011-05-31/world/china.mongolia.protest\\_1\\_martial-law-protest-turnout-protests-spread?\\_s=PM:WORLD](http://articles.cnn.com/2011-05-31/world/china.mongolia.protest_1_martial-law-protest-turnout-protests-spread?_s=PM:WORLD). In response to riots in Xinjiang in July 2009, Chinese authorities disabled social networks, blocked Twitter and cell phone service, and censored the internet in an effort to stop further demonstrations. See Michael Wines, *In Latest Upheaval, China Applies New Strategies to Control Flow of Information*, N.Y. TIMES (July 7, 2009), <http://www.nytimes.com/2009/07/08/world/asia/08beijing.html?scp=3&sq=Uighurs%20china%20social%20media%20shut%20down&st=cse>. In 2009, the Chinese government shut down Twitter, Flickr, Hotmail, and Live.com in anticipation of the anniversary of Tiananmen Square protests. See Michael Wines & Andrew Jacobs, *To Shut Off Tiananmen Talk, China Disrupts Sites*, N.Y. TIMES (June 2, 2009), <http://www.nytimes.com/2009/06/03/world/asia/03china.html>.

Iranian protestors used Twitter<sup>3</sup> and other social media to mobilize and plan rallies protesting the results of the Iranian national presidential election in 2009, Iran's government responded by blocking cell phone service, disrupting internet satellite service, and filtering websites.<sup>4</sup> In February 2011, protestors in Iran, Bahrain, and Yemen also used social media to arrange "solidarity demonstrations," and again, governments responded by blocking these sites.<sup>5</sup> In 2011, Egypt and Syria also blocked access to cell phones and other communication technologies to disrupt protests.<sup>6</sup> In August 2011, even Great Britain contemplated restricting social media to disrupt rioting that was coordinated using these emerging communication methods.<sup>7</sup>

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3. "Twitter is a real-time information network" that can be used to "quickly share information with people," and can be used by anyone who has a mobile phone. *About*, TWITTER, <http://twitter.com/about> (last visited Feb. 3, 2013).

4. The Iranian government cut cell phone and mobile text messaging services and filtered internet and social media sites, such as Twitter and Facebook. David Folkenflik, *Social Media Allows Reports Despite Tehran's Curbs*, NPR (June 16, 2009), <http://www.npr.org/templates/story/story.php?storyId=105490051>. During this 2009 event, Twitter was one of the major social media sites used by protesters to communicate plans for additional demonstrations. *See id.*; *Twitter Emerges as News Source During Iran Media Crackdown*, CBC NEWS (June 16, 2009, 1:02 PM), <http://www.cbc.ca/news/technology/story/2009/06/15/iran-twitter-election-protest.html>.

5. Martha Raddatz, *Social Media Fuels Protests in Iran, Bahrain and Yemen*, ABC NEWS (Feb. 15, 2011), <http://abcnews.go.com/International/social-media-fuels-protests-iran-bahrain-yemen/story?id=12926081> (describing how protestors used cell phones, smartphones, and Facebook to encourage participation in the demonstrations).

6. In January 2011, the Egyptian government instituted an almost complete shutdown of internet and cell phone service. Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, N.Y. TIMES (Jan. 28, 2011), <http://www.nytimes.com/2011/01/29/technology/internet/29cutoff.html>. Protestors had used these methods of communication "to organize and to spread their message." *Id.* Cell phone providers were ordered to "suspend services in selected areas." *Id.* In June 2011, the Syrian government shut down a large portion of internet services, Skype, Twitter, phone service, and Syria's entire 3G mobile network. Liam Stack & Katherine Zoepf, *Mourning a Boy, Crowds in Syria Defy Crackdown*, N.Y. TIMES, June 3, 2011, at A1, available at 2011 WLNR 11167542. Anti-government protestors used communication tools to communicate and track ongoing demonstrations. *Id.*

7. Josh Halliday, *David Cameron Considers Banning Suspected Rioters from Social Media*, GUARDIAN (Aug. 11, 2011, 8:01 EDT), <http://www.guardian.co.uk/media/2011/aug/11/david-cameron-rioters-social-media?INTCMP=ILCNETTX3487>. The government, believing rioters were organized through the use of social media, including BlackBerry Messenger, Twitter, and Facebook, contemplated a ban on these services. *Id.* David Cameron, the British Prime Minister, said, "Police were facing a new circumstance where rioters were using the BlackBerry Messenger Service, a closed network, to organise riots . . ." *Id.* (internal quotation marks omitted). He further stated, "So we are working with the police, the intelligence services and industry to look at whether it would be right to stop people communicating via these websites and services when we know they are plotting violence, disorder and criminality." *Id.* (internal quotation marks omitted). Great Britain's proposed actions were surprising because Great Britain, unlike China, Iran, and Egypt, purports to respect free speech principles, and Great Britain's

In the summer of 2011, violent flash mobs<sup>8</sup> developed in Chicago, Philadelphia, Cleveland, and Milwaukee and organized largely through the use of Twitter and Facebook.<sup>9</sup> Authorities in each city responded by instituting curfews but did not block access to social media or the use of mobile communication devices.<sup>10</sup> However, when San Francisco Bay Area Rapid Transit System (BART) officials learned of a planned protest at its stations set for the evening of August 11, 2011, they decided to shut down cellular and WiFi Rail<sup>11</sup> service to disrupt the protest.<sup>12</sup> This event was significant: It marked the first time a government entity in the United States disrupted a

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Prime Minister had recently criticized similar governmental actions in Egypt. David D. Kirkpatrick & Heba Afify, *For Egyptians, British Riots Are a Mix of Familiar and Peculiar*, N.Y. TIMES, Aug. 13, 2011, at A9, available at 2011 WLNR 16044914; see also U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA 24 (2010), available at <http://www.state.gov/documents/organization/160451.pdf> (stating that China's "law provides for freedom of speech and of the press, although the government generally did not respect these rights in practice"); U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT 12 (2010), available at <http://www.state.gov/documents/organization/160456.pdf> ("[E]gypt's constitution provides for freedom of speech and of the press; however, the government partially restricted these rights in practice . . ."); U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAN 28 (2010), available at <http://www.state.gov/documents/organization/160461.pdf> ("[T]he [Iranian] government severely restricted freedom of speech and of the press. There were no basic legal safeguards for freedom of expression . . ."); U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: UNITED KINGDOM 10 (2010), available at <http://www.state.gov/documents/organization/160218.pdf> (stating that the United Kingdom has respected its laws providing for freedom of speech and the press "in almost all cases").

8. *Wis. State Fair Latest Target of Violent Flash Mobs*, NPR (Aug. 13, 2011, 8:00 AM), <http://www.npr.org/2011/08/13/139600667/wis-state-fair-latest-target-of-violent-flash-mobs> (defining flash mobs as "an instantly organized crowd, usually teenagers, bent on mayhem").

9. See Paul Elias, *Cutting off Wireless Service Seen as One Way to Stop Violent Mobs*, GLOBE & MAIL (Toronto), Aug. 16, 2011, at A13 available at 2011 WLNR 16182809 (describing the flash mobs in these cities as violent, inflicting both physical harm and property damage). The purpose of the mobs has "taken a criminal bent." *Chicago Flash Mobs Apparently Robbed, Attacked Four Men Over Weekend*, HUFFPOST CHI. (June 6, 2011), [http://www.huffingtonpost.com/2011/06/06/chicago-flash-mobs-appare\\_n\\_871924.html](http://www.huffingtonpost.com/2011/06/06/chicago-flash-mobs-appare_n_871924.html).

10. See Elias, *supra* note 9. Philadelphia reportedly tightened youth curfews. *Id.* The Cleveland City Council passed a bill that made it "illegal to use social media to organize a violent mob." *Id.* The mayor vetoed the bill. *Id.*

11. WiFi Rail is the wireless internet access that is provided at select BART locations. *Wireless Connections*, BART, <http://www.bart.gov/guide/wireless.aspx> (last visited Feb. 3, 2013). A third-party contractor manages this infrastructure. *Id.*

12. See Bob Franklin & Sherwood Wakeman, *A Letter from BART to Our Customers*, BART (Aug. 20, 2011), <http://www.bart.gov/news/articles/2011/news20110820.aspx> (detailing BART's interpretation of the August 11, 2011 event). See generally *BART President: Mobile Hotspots Can Circumvent Shutdown*, SEATTLE POST-INTELLIGENCER, Aug. 17, 2011, available at 2011 WLNR 16413392 (discussing the technology involved in the August 11, 2011 BART event).

political protest by blocking access to cell service—a tool usually associated with nations without free-speech protections.<sup>13</sup>

Digital communication technology<sup>14</sup> is an emerging mode of speech that is eclipsing traditional printing press media.<sup>15</sup> This new “digital speech” is widespread, almost instantaneous, and mobile—quickly spreading ideas to a wide audience,<sup>16</sup> and the emergence of this new mode of speech has the potential to impact the First Amendment landscape.<sup>17</sup> Although digital speech has provided new means, locations, and tools for those who wish to express themselves, the way freedom of speech applies to this emerging technology has yet to be determined.

This Note examines whether BART officials violated the First Amendment by shutting down mobile and WiFi Rail services to disrupt a planned protest on August 11, 2011. Part I of this Note reviews the events leading up to the planned protest, details the actions of the protestors and BART officials on August 11, 2011, and discusses the state of First Amendment law as it relates to digital speech.<sup>18</sup> Part II analyzes the Supreme Court’s relevant freedom of speech precedents and applies them to the events of August 11, 2011,

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13. See Patrik Jonsson, *To Defuse ‘Flash’ Protest, BART Cuts Riders’ Cell Service. Is that Legal?*, CHRISTIAN SCI. MONITOR, Aug. 12, 2011, available at 2011 WLNR 16026693 (citing a television interview discussing the lack of prior incidents of this nature).

14. For purposes of this Note, digital communication technologies include various social media sites, websites, and text messages available through electronic transmissions capable of being viewed or heard on a smartphone, mobile phone, or other mobile electronic device.

15. See generally *Newspapers Face a Challenging Calculus*, PEW RES. CENTER (Feb. 26, 2009), <http://pewresearch.org/pubs/1133/decline-print-newspapers-increased-online-news> (attributing the decline in print newspapers to the use of the internet).

16. “Social media is a natural sweet spot for mobile since mobile devices are at the center of how people communicate with their circle of friends, whether by phone, text, email, or, increasingly, accessing social networking sites via a mobile browser.” Gonsalves, *supra* note 1 (internal quotation marks omitted). In 2010, over “two-thirds of the [United States] population [was] connected on cell phones.” Chilton Tippin, *Cell Phone Usage Statistics 2010*, SIGNAL NEWS (Sept. 23, 2010), <http://signalnews.com/cell-phone-usage-statistics-2010>. In 2010, there were 223 million mobile phone users over the age of thirteen in the United States and 16.7 million mobile Web users. *Id.* Eighteen percent of mobile devices were smartphones. *Id.* Cell service has “call setup success rates that are today beyond 98% and call setup times of less than 7 seconds . . . .” Martin Sauter, *Call Setup Time Competition and LTE*, WIRELESS MOVES (Nov. 21, 2010), [http://mobilesociety.typepad.com/mobile\\_life/2010/11/call-setup-time-competition-and-lte.html](http://mobilesociety.typepad.com/mobile_life/2010/11/call-setup-time-competition-and-lte.html).

17. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

18. See discussion *infra* Part I.

to determine if BART's actions were constitutional.<sup>19</sup> In so doing, Part II examines whether the protestors' actions were a protected class of speech, whether BART's actions amounted to content discrimination, and whether the BART stations could be considered public forums.<sup>20</sup> Part III asserts that current Supreme Court case law is inadequate to address this and similar situations, suggests that the Court evaluate digital speech based on its unique attributes, and proposes alternate and proactive means of potential protections for digital speech should constitutional protections fall short.<sup>21</sup>

## I. THE BART CONTROVERSY

### A. BART Police Actions Spur July 11, 2011 Demonstration

On July 3, 2011, BART police officers allegedly shot and killed a transient, Charles B. Hill, who BART officials claim was armed with a knife and bottle.<sup>22</sup> This shooting was the latest in a series of actions

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19. See discussion *infra* Part II.

20. See discussion *infra* Part II.

21. See discussion *infra* Part III. Other scholars have proposed addressing the First Amendment concerns associated with the BART incident, flash mobs, and social media. Some authors propose amending Supreme Court jurisprudence (remedial) while others propose legislative solutions addressing either a larger digital subset (the internet and social media) or targeting different actors (flash mobs). For a discussion of these other proposals, see Stephen R. Elzinga, Note, *Retaliatory Forum Closure*, 54 ARIZ. L. REV. 497, 539 (2012) (proposing to merge "speech-retaliation and public-forum doctrines into an action for retaliatory forum closure"); Jacob G. Fleming, Note, *The Case for a Modern Public Forum: How the Bay Area Rapid Transit System's Wireless Shutdown Strangled Free Speech Rights*, 51 WASHBURN L.J. 631, 652–61 (2012) (proposing a modern public forum); W. Danny Green, Comment, *The First Amendment and Cell Phones: Governmental Control over Cell Phone Use on Publicly Owned Lands*, 44 ARIZ. ST. L.J. 1355 (2012) (analyzing the First Amendment issues presented in the BART incident); Rachel Lackert, Note, *BART Cell Phone Service Shutdown: Time for a Virtual Forum?*, 64 FED. COMM. L.J. 577, 596–98 (2012) (proposing a virtual forum); Alexandra Paslawsky, Note, *The Growth of Social Media Norms and Governments' Attempts at Regulation*, 35 FORDHAM INT'L L.J. 1485, 1491–92 (2012) (proposing that governments take internet norms into account when crafting social media policy); Hannah Steinblatt, Note, *E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 793 (2012) (suggesting lawmakers draft ordinances that "directly target and penalize those who start [flash] mobs that actually result in criminal activity" to control flash mobs); Brandon Wiebe, Comment, *BART's Unconstitutional Speech Restriction: Adapting Free Speech Principles to Absolute Wireless Censorship*, 47 U.S.F. L. REV. 195, 217 (2012) (arguing for a modification of the designated public forum to include government-provided Internet access).

22. See *BART Officer Suffers Cuts, Bruises Following Officer Involved Shooting*, BART (July 4, 2011), <http://www.bart.gov/news/articles/2011/news20110704.aspx>; Kristin J. Bender, *Rowdy Protest Shuts Down Three BART Stations and Causes Major Delays Throughout System*, OAKLAND TRIB., July

by BART police that prompted action by the protest group “No Justice No BART,” whose self-described mission is to raise awareness of what it sees as police brutality by BART officials and to ultimately disband that police force.<sup>23</sup> No Justice No BART has organized several demonstrations at BART stations since 2009<sup>24</sup> and has described its protest strategy:

[T]o exercise our freedom of assembly in such a way as to *disrupt* the “business as usual” status quo, and to continue organizing such events until our demands [are] met. We will maintain lines of communication with riders and the media, to let people know of the potential for disruptions in service during upcoming demonstrations, to explain our demands, and to encourage people to join us in pressuring the BART board and elected officials.<sup>25</sup>

On July 11, 2011, approximately one hundred demonstrators organized by No Justice No BART protested at three BART stations.<sup>26</sup> The protest was initially quiet and calm, with some protestors handing out flyers describing their group and mission, but the protest grew loud when some of the protestors “began screaming

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11, 2011, available at 2011 WLNR 13763192 (discussing the reasons for the July 11, 2011 No Justice No BART protest); Franklin & Wakeman, *supra* note 12; Vivian Ho, *BART: Next Protests to Face ‘Zero Tolerance,’* S.F. CHRON., July 13, 2011, at C7, available at 2011 WLNR 13814149 (discussing the genesis of July 11, 2011 protest at BART stations).

23. The group organized in January 2009 following the shooting death of Oscar Grant by a former BART police officer at a BART station on January 1, 2009. James Fang, *STATEMENT: By BART Board President James Fang*, BART (July 8, 2010), <http://www.bart.gov/news/articles/2010/news20100708.aspx>; *What is “No Justice No BART”?*, NO JUST. NO BART, <http://nojusticenobart.blogspot.com/2009/01/what-is-no-justice-no-bart.html> (last visited Feb. 4, 2013). No Justice No BART demands that “BART disband its murderous, inept, corrupt police department.” *Id.*

24. According to a spokesperson for No Justice No BART, the group has held approximately twenty to thirty demonstrations at BART stations since January 2009. E-mail from No Justice No BART to author (Oct. 12, 2011, 18:24 EST) (on file with *Georgia State University Law Review*). See generally *What is No Justice No BART?*, *supra* note 23 (discussing the history of No Justice No BART).

25. *Our Strategy*, NO JUST. NO BART, <http://nojusticenobart.blogspot.com/2009/01/our-strategy.html> (last visited Feb. 4, 2013) (emphasis added).

26. The protest began at the Civic Center station (located near some of San Francisco’s major tourist attractions) and then spread to the nearby Powell Street station and the 16th Street station (located near the San Francisco Mission). See Bender, *supra* note 22 (discussing the July 11, 2011 No Justice No BART protest); *Station List*, BART, <http://www.bart.gov/stations/index.aspx> (last visited Feb. 4, 2013) (listing station locations).

‘cops, pigs, murderers’ and ‘no justice, no peace, disband the BART police,’ [while standing] on the platform.”<sup>27</sup> Some protestors then blocked train doors, and one man climbed on top of a train.<sup>28</sup> BART closed the station within thirty minutes.<sup>29</sup> Some protestors then rode trains to two other stations forcing BART officials to close those stations as well.<sup>30</sup> However, the demonstrations did not result in any injuries or arrests.<sup>31</sup>

A No Justice No BART organizer viewed the protest as a success since it was “disruptive but peaceful.”<sup>32</sup> The event, which occurred during the evening rush hour, affected transit schedules for three hours;<sup>33</sup> however, the average train delay during the protest was seven minutes.<sup>34</sup> BART closed the Civic Center station for thirty minutes and locked turnstiles at the Powell Street station for twenty minutes.<sup>35</sup> BART officials responded to the July 11 protest by increasing the visible police presence at the stations, temporarily closing affected stations, and moving crowds away from the trains.<sup>36</sup> BART officials, irritated by the system-wide delays and safety hazards caused by protestors on crowded platforms near high-speed trains, stated that there would be “zero tolerance” for these kinds of protests in the future.<sup>37</sup>

### *B. August 11, 2011 Protest*

On August 11, 2011, No Justice No BART again planned to protest at BART stations during the evening commute.<sup>38</sup> According to official statements, BART personnel learned of the planned protest

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27. Bender, *supra* note 22 (discussing the No Justice No BART protests on July 11, 2011).

28. *Id.*

29. *Id.*

30. Ho, *supra* note 22.

31. Bender, *supra* note 22.

32. Ho, *supra* note 22 (reporting what a protest organizer thought of the demonstrations).

33. Bender, *supra* note 22. BART “carries 190,000 passengers during the morning and evening commutes every day.” *Protests in San Francisco Go on Without New Wireless Shutdowns*, HONOLULU STAR-ADVERTISER, Aug. 16, 2011, available at 2011 WLNR 16356150.

34. Ho, *supra* note 22.

35. Bender, *supra* note 22.

36. *Id.*

37. See Ho, *supra* note 22.

38. See Jonsson, *supra* note 13.

on the organizer's website, which publicly posted the organization's plans to hold a protest at one of the stations beginning at 4:30 p.m.<sup>39</sup> The website stated the organizers planned to use cell phones once on BART property to further coordinate the protest.<sup>40</sup> In response, BART officials decided to cut cell phone and WiFi Rail service at the potentially affected subway stations just prior to the time of the planned protest.<sup>41</sup> BART officially stated that it used these tactics to "ensure the safety of everyone on the platform."<sup>42</sup> However, internal BART communications suggest that BART officials' decision to shut down cell service was hastily planned with little discussion of the consequences.<sup>43</sup> No Justice No BART also questioned BART's motives, suggesting BART's tactics were not aimed at safety but at disrupting their protest message.<sup>44</sup> BART's strategy was successful, and the protest never materialized.<sup>45</sup> BART restored cell service by 7:00 p.m.<sup>46</sup>

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39. *BART Protest Could Impact Evening Commute*, NBC BAY AREA (Aug. 11, 2011, 3:18 PM), <http://www.nbcbayarea.com/news/local/BART-Protest-Could-Impact-Evening-Commute-127554708.html>; Franklin & Wakeman, *supra* note 12.

40. Franklin & Wakeman, *supra* note 12 (stating that the protestors planned to communicate while at different stations and text the location of BART authorities to each other).

41. *Id.*; *Statement on Temporary Wireless Service Interruption in Select BART Stations on Aug. 11*, BART (Aug. 12, 2011), <http://www.bart.gov/news/articles/2011/news20110812.aspx> [hereinafter *Statement*]; see also *BART President: Mobile Hotspots Can Circumvent Shutdown*, *supra* note 12 (describing plans to shut down the WiFi Rail system).

42. *Statement*, *supra* note 41. BART officials cited safety concerns regarding potential falls from overcrowded platforms onto the trackway that contains an electrified third rail and is located five feet below the platforms. Franklin & Wakeman, *supra* note 12. BART's deputy police chief, Benson Fairrow, stated that "he decided to switch off the service out of concern that protesters on station platforms could clash with commuters, create panicked surges of passengers, and put themselves or others in the way of speeding trains or the high-voltage third rails. 'It was a recipe for disaster' . . ." Michael Cabanatuan, *BART Admits Halting Cell Service to Stop Protests*, S.F. CHRON. (Sept. 28, 2012), <http://www.sfgate.com/default/article/BART-admits-halting-cell-service-to-stop-protests-2335114.php>; see also Fleming, *supra* note 21, at 635 n.24.

43. Zusha Elinson, *BART Cut Cell Service on Spur of the Moment, Emails Show*, BAY CITIZEN (S.F.) (Oct. 11, 2011), <http://www.baycitizen.org/bart-protests/story/bart-cut-cell-service-spur-moment-emails/> ("The discussion of the idea lasted between 15 and 30 minutes."); see also Jennifer Spencer, Note, *No Service: Free Speech, the Communications Act, and BART's Cell Phone Network Shutdown*, 27 BERKELEY TECH. L.J. 767, 769, 771 (2012) (discussing BART's internal communications regarding the cell phone shutdown).

44. See *Response to BART's Illegal Blackout of Phone Service*, NO JUST. NO BART, <http://nojusticenobart.blogspot.com/2011/08/our-statement-on-network-blackout-on.html> (last visited Feb. 5, 2013).

45. Elias, *supra* note 9; Jonsson, *supra* note 13.

46. Franklin & Wakeman, *supra* note 12.

BART accomplished the cell phone shutdown by cutting power to the station's underground nodes that relay cell service to above ground transmitters.<sup>47</sup> The subterranean platform levels and some of the concourse levels of the affected stations lost cell service.<sup>48</sup> BART owns the underground nodes and rents them to various cellular providers.<sup>49</sup> BART notified the cell providers prior to cutting the power.<sup>50</sup>

### *C. Jurisdiction And Governing Laws*

BART is a California “public agency” that was chartered by the California legislature in 1957 and is governed by California’s Public Utility Code.<sup>51</sup> BART has an anti-demonstration policy: “No person

47. Robert Barnes, *A First Amendment Collision on the San Francisco Subway*, WASH. POST, Aug. 29, 2011, at A13, available at 2011 WLNR 17064798; see also Elias, *supra* note 9; Franklin & Wakeman, *supra* note 12.

48. Passengers at street level and aboveground stations continued to have cell reception because outside signals could reach those areas. See Franklin & Wakeman, *supra* note 12.

49. See Barnes, *supra* note 47. BART began providing cell phone coverage at their stations through a contract with local wireless carriers in 2005. See generally Michael Cabanatuan, *Underground, but Not Unconnected—BART Offers Wireless Service to Riders*, S.F. CHRON. (Nov. 19, 2005, 4:00 AM), <http://www.sfgate.com/bayarea/article/Underground-but-not-unconnected-BART-offers-2594271.php> (discussing BART’s wireless coverage); *Wireless Connections*, *supra* note 11 (describing mobile technologies at BART stations).

50. Franklin & Wakeman, *supra* note 12. Linton Johnson, a BART spokesman, said shutting off underground cell service is “allowable under an agreement with several major phone service providers that pay rent to BART.” Rachel Gordon et al., *Protests Shut BART Stations in S.F.—This Time the Cell Phones Stay on*, S.F. CHRON., Aug. 16, 2011, at A1, available at 2011 WLNR 16177189. BART cut power to the nodes rather than jamming the signal. Jonsson, *supra* note 13. “A jammer can block all radio communications on any device that operates on radio frequencies within its range (*i.e.*, within a certain radius of the jammer) by emitting radio frequency waves that prevent the targeted device from establishing or maintaining a connection.” *GPS, Wi-Fi, and Cell Phone Jammers: Frequently Asked Questions (FAQs)*, FCC.GOV, <http://transition.fcc.gov/eb/jammerenforcement/jamfaq.pdf> (last visited Feb. 5, 2013). Jamming cell phone signals is illegal under the Telecommunications Act of 1996 because it transmits radio waves that interfere with authorized radio communications. 47 U.S.C. § 333 (2006) (“No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or operated by the United States Government.”).

51. See CAL. PUB. UTIL. CODE §§ 28509, 28600 (West 2011); *A History of BART: The Concept Is Born*, BART, <http://www.bart.gov/about/history/index.aspx> (last visited Feb. 5, 2013). Section 28600 of the California Utility Code created the San Francisco Bay Area Rapid Transit District. PUB. UTIL. § 28600. The Code defines “district” as “a transit district formed under this part.” *Id.* § 24503. BART is also considered a “public agency.” See *id.* §§ 207, 24503, 28509. A “[p]ublic agency” includes a city, city and county, a county, the State of California, or any public district organized under the laws of the State of California or any agency or authority of any thereof.” *Id.* § 24509. The state code also authorizes the creation of BART’s police department and defines their power and authority under the

shall conduct or participate in assemblies or demonstrations or engage in other expressive activities in the paid areas of BART stations, including BART cars and trains and BART station platforms.”<sup>52</sup> However, “expressive activities” are allowed in certain designated areas.<sup>53</sup> California regulations also allow the transit authority to impose a penalty for “[w]illfully disturbing others on or in a system facility or vehicle by engaging in boisterous or unruly behavior . . . ; [and] willfully blocking the free movement of another person in a system facility or vehicle.”<sup>54</sup> Even if BART officials complied with BART and state policies and regulations when shutting down cell service, their actions still may have resulted in a violation of First Amendment rights.

#### *D. First Amendment History*

The First Amendment provides for “freedom of speech.”<sup>55</sup> In its decisions during the past century, the Supreme Court has attempted to delineate the limits of free speech<sup>56</sup> but, in the process, has created

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state’s Penal Code. *Id.* § 28767.5.

52. *Statement, supra* note 41.

53. *Id.*

54. PUB. UTIL. § 99580.

55. U.S. CONST. amend. I. There are five clauses in the First Amendment, each with their own line of Supreme Court interpretation, but this Note focuses only on freedom of speech issues.

56. In 1925, the Supreme Court held that the First Amendment can be applied to the states through application of the Fourteenth Amendment; however, few Supreme Court decisions regarding free speech issues further defined the doctrine until World War I. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); DANIEL A. FARBER, *THE FIRST AMENDMENT* 11 (3d ed. 2010); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 763 (17th ed. 2010). Around that time, the Court generally heard political speech cases related to socialism, overthrowing the government, or resisting the war. *See generally* *Whitney v. California*, 274 U.S. 357, 371 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (discussing whether the Syndicalism Act violated the right of freedom of speech); *Gitlow*, 268 U.S. at 670 (discussing whether a statute prohibiting criminal anarchy violated defendant’s right to freedom of speech); *Schaefer v. United States*, 251 U.S. 466, 474 (1920) (discussing whether a person’s conviction under the Espionage Act violated his right to freedom of speech); *Abrams v. United States*, 250 U.S. 616, 619 (1919) (discussing whether the Espionage Act is unconstitutional because it is in conflict with the First Amendment). During the 1950s and 1960s, the Court began expanding the definition of what constitutes protected speech. *See generally* *Miller v. California*, 413 U.S. 15 (1973) (providing a new test of what constitutes obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (holding that Ohio’s Criminal Syndicalism Act violated the First Amendment and articulating a new standard for incitement); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (expanding upon what First

“an endless maze” of tests and definitions to assess what constitutes protected speech.<sup>57</sup> Although First Amendment doctrine expanded in the twentieth century,<sup>58</sup> there is little Supreme Court case law regarding free speech rights relating to digital communications and no precedent regarding termination of cell service to disrupt the organization of a protest.<sup>59</sup> Communication methods have evolved over time from the printing press to the digital age, but First Amendment jurisprudence has not kept pace. Therefore, the events of August 11, 2011 must be analyzed under existing First Amendment tests.<sup>60</sup>

### *E. Implicated First Amendment Principles*

#### *1. Protected Classes of Speech*

The initial inquiry in First Amendment analysis is to determine whether the speech is protected speech or is unprotected, “low value” speech.<sup>61</sup> In *Chaplinsky v. New Hampshire*,<sup>62</sup> the Supreme Court said

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Amendment protections are afforded to libelous speech); FARBER, *supra*, at 12.

57. David L. Hudson, Jr., *The Secondary Effects Doctrine: “The Evisceration of First Amendment Freedoms,”* 37 WASHBURN L.J. 55, 55 (1997) (“First Amendment jurisprudence has been described as ‘an endless maze’ with ‘no general framework.’”); *see also* FARBER, *supra* note 56, at 11–12;

58. *See* cases cited *supra* note 56.

59. Only a few cases regarding regulation of internet content have reached the Supreme Court. Some of these include: *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) (holding the Child Online Protection Act violated the First Amendment by burdening adults’ access to some protected speech); *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 220 (2003) (holding the Children’s Internet Protection Act did not violate freedom of speech); *Reno v. ACLU*, 521 U.S. 844 (1997) (holding the Communications Decency Act was a content-based speech restriction and was facially overbroad in violation of the First Amendment).

60. *See* Hudson, *supra* note 57, at 57 (discussing the three primary First Amendment principles: categorization of the type of speech involved; determination of the type of forum; and analysis of content discrimination). It has been suggested that the public forum doctrine is the only applicable First Amendment test to apply to the BART situation. *See* Fleming, *supra* note 21, at 648–49. However, this Note argues that the emergence and unique characteristics of digital technology, particularly as applied to the BART incident, make the analysis of each of the three primary First Amendment principles relevant.

61. FARBER, *supra* note 56, at 14 (stating the first step in a First Amendment analysis is determining if the speech is within an “unprotected category of speech”); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1984) (opining that defining the type of speech is an important first inquiry in a content-based analysis because “low” value speech is “deserving of only limited constitutional protection”).

62. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

freedom of speech is not an absolute right.<sup>63</sup> There are some classes of speech that are not constitutionally protected<sup>64</sup> because the benefits of the speech are “clearly outweighed by the social interest in order and morality.”<sup>65</sup>

One type of unprotected speech is speech that incites a breach of the peace.<sup>66</sup> In *Schenck v. United States*,<sup>67</sup> the Court clarified that to be lawfully censored, inciting speech must pose a “clear and present” danger to society.<sup>68</sup> In *Brandenburg v. Ohio*,<sup>69</sup> the Court redefined the clear and present danger test to its modern form—the *Brandenburg* test: a clear and present danger is posed, justifying suppression of speech, when the speech advocating “use of force or of law violation . . . is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>70</sup>

63. *Id.* (“[T]he right of free speech is not absolute at all times and under all circumstances.”).

64. *Id.* at 571–72. The Supreme Court stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.* Through case law, the Court has expanded what constitutes unprotected, low value classes of speech to include: incitement, obscenity, fraud, defamation, fighting words, child pornography, speech integral to criminal conduct, commercial speech, and true threats. *See* *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (commercial speech); *Watts v. United States*, 394 U.S. 705, 707 (1969) (true threats); *Chaplinsky*, 315 U.S. at 565 (fighting words).

65. *Chaplinsky*, 315 U.S. at 572.

66. *Id.*

67. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

68. *Id.* at 52 (stating that when determining if speech is unprotected, “proximity and degree,” and whether the speech is “used in such circumstances and . . . such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent” are the critical inquiries). The Court in *Dennis v. United States*, 341 U.S. 494, 513–14 (1951), applied a refined version of the clear and present danger test in upholding the Smith Act. The Court’s revised test was “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” *Id.* at 510.

69. *Brandenburg v. Ohio*, 395 U.S. 444, (1969) (evaluating the conviction of a Ku Klux Klan leader who violated an Ohio Criminal Syndicalism Statute).

70. *Id.* at 447–49 (holding a statute was unconstitutional because it did not distinguish between “mere advocacy” and “incitement to imminent lawless action”). Since *Brandenburg*, there have been few Supreme Court decisions expanding upon the meaning of the *Brandenburg* test. *See* Marc Rohr, *Grand Illusion?*, 38 WILLAMETTE L. REV. 1, 10 (2002) (discussing the lack of Supreme Court decisions clarifying the *Brandenburg* test). However, in one such case, *Hess v. Indiana*, the Supreme Court emphasized that it was not enough that speech had a “tendency to lead to violence” but required that the speech be “intended to produce, and likely to produce, imminent disorder.” *Hess v. Indiana*, 414 U.S.

Although *Chaplinsky* articulated the general principle that certain categories of unprotected speech were outside the scope of First Amendment protection, the Supreme Court later held that low value speech may receive protection in certain circumstances.<sup>71</sup> In *R.A.V. v. City of St. Paul*,<sup>72</sup> the Court stated that even restrictions on low value speech must not be based on content-based distinctions.<sup>73</sup>

## 2. Content-Based Discrimination

Another increasingly important freedom of speech consideration is whether the government action or regulation is content-based or content-neutral.<sup>74</sup> This is a crucial inquiry<sup>75</sup> because there is a strong presumption that a content-based law is invalid.<sup>76</sup> “[A]bove all else,

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105, 108–09 (1973) (overturning the conviction since his words “amounted to nothing more than advocacy of illegal action at some indefinite future time”). In *Hess*, an anti-war demonstrator was convicted of disorderly conduct. *Id.* at 105–07. During the demonstration, the police ordered the crowd of approximately one hundred demonstrators to clear the street. *Id.* at 106. When the police passed Hess, he exclaimed, “We’ll take the fucking street later,” or “We’ll take the fucking street again.” *Id.* at 107.

71. See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CAL. L. REV. 49, 62 (2000) (stating that content-based restrictions on unprotected categories of speech receive strict scrutiny and are the exception to the general rule that unprotected speech receives rational basis review).

72. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

73. *Id.* at 383–84 (stating that unprotected speech can be “regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution”).

74. See Chemerinsky, *supra* note 71, at 53 (“Today, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws.”); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987) (“[T]he Court almost invariably reaches the same result—content-based restrictions of ‘high value’ speech are unconstitutional.”); Stone, *supra* note 61, at 196 (stating that but for a few exceptions, “the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century”).

75. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Deciding whether a particular regulation is content based or content neutral is not always a simple task.”).

76. *R.A.V.*, 505 U.S. at 382 (holding “content-based regulations are presumptively invalid”). However, there are some instances dealing with public forum issues where the Court has upheld government regulations. See *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 538–39 (1980) (discussing *Greer v. Spock* and *Lehman v. City of Shaker Heights*); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (holding that the government may regulate speech at a military base if that speech would disrupt the property’s legitimate governmental purpose); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (holding that a public transit system that rented out advertising space on its buses did not have to accept partisan political advertising). Another exception to the general principle that content-based laws are presumptively invalid is described by the secondary effects doctrine: a regulation that appears on its face to discriminate based on content is not deemed to be content-based if the regulation is targeted towards the “secondary effects” of that speech. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 47, 60 n.4 (1986) (discussing the secondary effects of an adult theater

the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>77</sup> A government law is generally deemed content-based if it is restricted because of its subject matter or viewpoint.<sup>78</sup> Content-neutral laws are those made “without reference to the content of the regulated speech.”<sup>79</sup> If a government restriction is content-based, it receives strict scrutiny: the government action must be narrowly tailored to meet a compelling state interest.<sup>80</sup> In contrast,<sup>81</sup> content-neutral laws are generally subject to intermediate scrutiny.<sup>82</sup>

The government may place reasonable<sup>83</sup> time, place, and manner restrictions on speech, so long as the regulations are content-

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location, such as increased crime, and stating that under the secondary effects doctrine, the level of scrutiny is the same as that for content-neutral laws: the restriction must be narrowly tailored, designed to serve a substantial governmental interest, and allow for reasonable alternative avenues of communication); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (stating that if picketing regulations had been justified by concerns about congestion, interference with ingress or egress, visual clutter, or security, the secondary effects doctrine may have applied).

77. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating the “bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

78. *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (declaring that subject matter regulation is content-based discrimination); *Turner Broad. Sys.*, 512 U.S. at 643 (stating that content-based laws make distinctions based on the ideas or views expressed); *Consol. Edison Co.*, 447 U.S. at 537 (stating that restrictions against “public discussion of an entire topic” as well as viewpoint constitute content-based discrimination); see also *Mosley*, 408 U.S. at 93, 95, 99 (overturning a Chicago ordinance that prohibited picketing within 100 feet of a school but had an exception for peaceful picketing in connection with a labor dispute because the ordinance described permissible picketing in terms of its subject matter).

79. See *Playtime Theatres*, 475 U.S. at 48.

80. For a discussion of the level of scrutiny applied to content-based restrictions of speech, see *Consol. Edison Co.*, 447 U.S. at 543–44 (“Mere speculation of harm does not constitute a compelling state interest.”); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011); *R.A.V.*, 505 U.S. at 395–96 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 123 (1991).

81. For a discussion of one theory explaining why there are different standards for content-based and content-neutral laws, see Stone, *supra* note 74, at 54.

82. *Turner Broad. Sys.*, 512 U.S. at 642; see also *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (“[A] content-neutral regulation will be sustained . . . if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).

83. See *Grayned v. City of Rockford*, 408 U.S. 104, 116–17 (1972) (commenting that reasonableness is based on “[t]he nature of a place, [and] the pattern of its normal activities,” and the essential inquiry is “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”).

neutral.<sup>84</sup> These restrictions must be based on legitimate government interests, such as regulating traffic and securing public order.<sup>85</sup> Reasonable time, place, and manner restrictions must also be justified without reference to the content of the regulated speech, be narrowly tailored<sup>86</sup> to serve a substantial governmental interest,<sup>87</sup> and leave open ample channels for communication of information.<sup>88</sup>

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84. *See Consol. Edison Co.*, 447 U.S. at 536 (“Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.”); *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977) (“[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“We have often approved [time, place, and manner] restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.”).

85. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (holding time, place, and manner restrictions placed on a parade license were constitutional because they were based on the city’s legitimate interests in regulating traffic and securing public order); *see also Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949) (stating the government has a legitimate interest in the “comfort and convenience” of its citizens). Other examples of time, place, and manner restrictions include *Grayned*, where the Court upheld a noise ordinance because it advanced the city’s “interest in having an undisrupted school session conducive to the students’ learning.” *Grayned*, 408 U.S. at 119. In *Cox v. Louisiana*, the Court upheld a ban on street demonstrations during rush hour since they “might put an intolerable burden on the essential flow of traffic.” *Id.* at 115–16 (citing *Cox v. Louisiana*, 379 U.S. 536, 554 (1965)). In *Kovacs*, the Court held the government could regulate over-amplified loudspeakers. *Kovacs*, 336 U.S. at 88–89. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court stated the city could regulate signs on utility poles when it is trying to improve aesthetics and is not suppressing ideas. *Id.* at 805, 807.

86. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 162–63 (1939) (declaring unconstitutional an ordinance restricting hand billing on the basis that discarded leaflets would cause litter because there were alternative means, other than restricting speech, to prevent littering—such as punishing those who actually threw the leaflets into the street); *see also Hill v. Colorado*, 530 U.S. 703, 726 (2000) (“[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.”). *But see Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (“A complete ban can be narrowly tailored but only if each activity within the proscription’s scope is an appropriately targeted evil.”) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493, 515–16 (1981) (invalidating San Diego’s billboard ordinance saying it was not an appropriate time, place, and manner restriction because it allowed for some signs, but the prohibited signs were “banned everywhere and at all times”).

87. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (“As a general matter, it is clear that a State’s interest in protecting the ‘safety and convenience’ of persons using a public forum is a valid governmental objective.”). In *Heffron*, the Court says the significance of the governmental interest should be assessed by considering the nature and function of the particular forum. *Id.* at 651. Since the small fairgrounds drew large crowds, “the State’s interest in the orderly movement and control of such an assembly of persons is a substantial consideration.” *Id.* at 650.

88. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (holding the city’s ordinance which prohibited homeowners from displaying most types of yard signs was unconstitutional because it did not “leave open ample alternative channels for communication”). The City of Ladue argued that there were other means

### 3. Public Forum Doctrine

Another important analysis involves government action taken as a proprietor or patron.<sup>89</sup> There is a three-part framework for analyzing First Amendment issues involving government-owned property.<sup>90</sup> The Supreme Court categorizes government property in three ways: (1) as a public forum; (2) as a designated public forum; or (3) as a non-public forum and applies a different standard of review to each forum.<sup>91</sup>

A public forum is government property that has been traditionally open to expression.<sup>92</sup> Parks and streets are examples of traditional public forums.<sup>93</sup> Speech restrictions in these forums are reviewed

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available for homeowners to express themselves, including bumper stickers, flyers, etc.; however, the Court disagreed because yard signs were “venerable” and had “long been an important and distinct medium of expression,” and therefore, there were no “adequate substitutes . . . for the important medium of speech that *Ladue* has closed off.” *Id.* at 54–56.

89. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (“But it is also well settled that the government need not permit all forms of speech on property that it owns and controls.”); *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (“It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when ‘the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . .’” (alteration in original) (citation omitted)).

90. *Kokinda*, 497 U.S. at 726 (announcing a “tripartite framework” for analyzing First Amendment issues involving government property).

91. See *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678–79; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (identifying the types of public forums); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–46 (1983) (stating different standards should be applied based on the type of property involved). *But see* *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981) (noting that being government property does not automatically open that property to the public).

92. See *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678; *Perry*, 460 U.S. at 45; *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (stating that public spaces that have “immemorially been held in trust for the use of the public and, time out of mind, [and] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions” are considered traditional public forums).

93. *Cornelius*, 473 U.S. at 803–04. Letter boxes and military bases have been excluded from the list of traditional public forums. See *Greenburgh*, 453 U.S. at 133 (holding that letter boxes were not public forums); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (discussing military bases). In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Court did not reach the question of whether an airport is a public forum; however, in *International Society for Krishna Consciousness, Inc.*, the Court held that an airport is not a public forum because “the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity,” and there was no evidence “that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity . . . .” *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 680. Furthermore, the Court stated that “[a]s commercial enterprises, airports must provide services attractive to the marketplace. . . . [And therefore,] an airport terminal [does not have] as a principal purpose promoting the free exchange of ideas.” *Id.* at 682 (citation omitted) (internal quotation marks omitted).

using “the highest scrutiny.”<sup>94</sup> For content-based exclusions of speech, the government “must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>95</sup> Content-neutral restrictions must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>96</sup>

The second type of forum is a designated public forum.<sup>97</sup> The government creates these forums by intentionally<sup>98</sup> designating a place or means of communication as a public forum through policy or practice.<sup>99</sup> Further, the government must grant general access to these forums.<sup>100</sup> Like traditional public forums, designated public forums are subject to strict scrutiny.<sup>101</sup> “Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”<sup>102</sup>

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The Court cautioned, however, that one should not automatically equate airports with other “transportation nodes.” *Id.* at 681–82 (“To blithely equate airports with other transportation centers, therefore, would be a mistake.”).

94. See *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678.

95. *Perry*, 460 U.S. at 45; see also *Cornelius*, 473 U.S. at 800.

96. *Perry*, 460 U.S. at 45; see also *Cornelius*, 473 U.S. at 800; *Greenburgh*, 453 U.S. at 132.

97. See *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678; *Cornelius*, 473 U.S. at 803; *Perry*, 460 U.S. at 45.

98. See *Cornelius*, 473 U.S. at 802 (“The government does not create a public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse.”). “The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government’s intent.” *Id.*

99. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (discussing how a state university created a designated public forum by allowing student groups to use the university’s meeting facilities). *But see Perry*, 460 U.S. at 45 (finding a school’s internal mail system was not a designated public forum because the school board did not grant general access to this system). In *Perry*, the school’s mail system was used by outside groups; however, those groups had to first secure permission from the school principal, and there was no evidence the system was open for use by the public. *Id.* at 47. The Court further stated, “If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created.” *Id.* However, even when the state is not required to open the forum, if it does it must adhere to “the same standards as apply in a traditional public forum.” *Id.* at 46.

100. *Perry*, 460 U.S. at 45–47.

101. See *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678 (“Regulation of [a designated forum] is subject to the same limitations as that governing a traditional public forum.”); *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990) (“Regulation of speech on property that the Government has expressly dedicated to speech activity is also examined under strict scrutiny.”); *Cornelius*, 473 U.S. at 800 (“[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.”).

102. *Perry*, 460 U.S. at 46.

The third type of forum is the non-public forum.<sup>103</sup> All other types of public property are categorized as a non-public forum,<sup>104</sup> where the government is allowed to regulate speech.<sup>105</sup> “In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>106</sup>

Taken together, categorizing the type of speech involved, determining the type of forum at issue, and analyzing whether the government action is content-based comprise the heart of First Amendment analysis.<sup>107</sup>

## II. DID BART VIOLATE COMMUTERS’ RIGHT OF FREEDOM OF SPEECH?

### A. *The BART Shutdown And Protected Forms Of Speech*

To determine if BART’s action of disabling cell service was constitutional, the first inquiry<sup>108</sup> is whether No Justice No BART’s speech is an unprotected form of speech, and the only category of unprotected speech it might qualify as is speech that constitutes incitement.<sup>109</sup> The *Brandenburg* test controls the analysis for incitement cases,<sup>110</sup> and it puts forth three requirements: (1) express advocacy of law violation, (2) an immediate call for law violation, and (3) a likelihood that the violation will occur.<sup>111</sup>

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103. See *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678–79.

104. See *id.*

105. See *id.* at 679 (“Limitations on expressive activity conducted on this last category of property must survive only a much more limited review.”); *Kokinda*, 497 U.S. at 727 (stating that in non-public forums, government action is “examined only for reasonableness”).

106. *Perry*, 460 U.S. at 46.

107. See *Hudson*, *supra* note 57, at 57.

108. See *FARBER*, *supra* note 56, at 14.

109. The incitement standard is derived from *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

110. *Id.* at 447 (“[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

111. *Rohr*, *supra* note 70, at 14 (citing Bernard Schwartz’s take on the *Brandenburg* test in *Holmes*

The first *Brandenburg* element asks whether No Justice No BART expressly advocated violation of the law.<sup>112</sup> California Penal Code section 640 makes willfully disturbing or willfully blocking others within a public transportation system an infraction subject to an administrative penalty, a fine, imprisonment, or both fine and imprisonment,<sup>113</sup> and California Penal Code section 407 defines unlawful assembly as two or more persons assembled “to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.”<sup>114</sup> Other related illegal acts include riots and routs.<sup>115</sup> No Justice No BART probably was not advocating for the degree of force or violence necessary for a violation of the riot or rout statutes<sup>116</sup> because the group’s policy statement says the organization promotes peaceful, albeit disruptive protests,<sup>117</sup> and its recent prior

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*Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240 (1994)).

112. See *Brandenburg*, 395 U.S. at 447 (emphasis added) (describing the standard for incitement as “use of force or of law violation . . . directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); Rohr, *supra* note 70, at 14.

113. CAL. PENAL CODE § 640 (West, Westlaw through 2012 Reg. Sess.). The statute states:  
Any of the acts described in subdivision (d) shall be punishable by a fine . . . by imprisonment . . . or by both . . . .

. . . .  
(d)(1) Willfully disturbing others on or in a system facility or vehicle by engaging in boisterous or unruly behavior.

. . . .  
(4) Willfully blocking the free movement of another person in a system facility or vehicle. This paragraph shall not be interpreted to affect any lawful activities permitted or First Amendment rights protected under the laws of this state or applicable federal law . . . .

. . . .  
(e) Notwithstanding subdivision (a), a public transportation agency . . . may enact and enforce an ordinance providing that a person who [willfully disturbed or blocked others] . . . be afforded an opportunity to complete an administrative process that imposes only an administrative penalty enforced in a civil proceeding.

*Id.*

114. *Id.* § 407.

115. *Id.* § 408 (“Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.”) A riot is an imminent threat to use force or violence by two or more persons and is punishable by fine, imprisonment or both. *Id.* §§ 404–05. A rout is an advance to commit a riot and is considered a misdemeanor. *Id.* §§ 406 (“Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.”).

116. Threat of force or violence is necessary to violate California’s riot or rout statutes. *Id.* §§ 404, 406.

117. See Ho, *supra* note 22 (reporting that a No Justice No BART protest organizer viewed prior BART protests to be a success because they were “disruptive but peaceful”); *Our Strategy*, *supra* note

protest did not result in this type of violent behavior.<sup>118</sup> If the group was asking protestors to physically disrupt train service,<sup>119</sup> this would be advocating a willful disturbance and an illegal assembly in violation of California Penal Code sections 407 and 640.<sup>120</sup>

It is unclear whether *Brandenburg*'s "lawless action" standard<sup>121</sup> includes non-violent misdemeanor conduct. In *Terminiello v. City of Chicago*,<sup>122</sup> a fighting words case, the Court stated that "freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises *far above public inconvenience, annoyance, or unrest*."<sup>123</sup> In *Hess v. Indiana*,<sup>124</sup> the Court stated that "words could not be punished by the State on the ground that they had 'a tendency to *lead to violence*.'"<sup>125</sup> However, because *Terminiello* concerned fighting words<sup>126</sup> while *Hess* focused on imminence,<sup>127</sup> the nature of "lawless activity" remains unclear.

Assuming, *arguendo*, the speech in the planned BART action advocated lawless activity, the next step is to determine if the lawless action was imminent.<sup>128</sup> The protest was reportedly planned to begin at 4:30 p.m. on August 11, 2011.<sup>129</sup> Unlike *Hess*, where the protestor

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118. Bender, *supra* note 22 (reporting no injuries or arrests at the July 2011 protest).

119. No Justice No BART protestors engaged in this type of protest on July 3, 2011 when they physically blocked train doors so train service would be interrupted. See Franklin & Wakeman, *supra* note 12. No protestors were arrested at this event. Bender, *supra* note 22.

120. PENAL §§ 407, 640.

121. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (describing the standard for speech inducing incitement as "use of force or of law violation . . . directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

122. *Terminiello v. City of Chi.*, 337 U.S. 1 (1949).

123. *Id.* at 4 (emphasis added) (citations omitted).

124. *Hess v. Indiana*, 414 U.S. 105 (1973).

125. *Id.* at 105, 109 (emphasis added) (discussing the case of a protestor who was convicted of disorderly conduct but primarily focusing on the issue of imminence rather than the nature of the lawless activity).

126. *Terminiello*, 337 U.S. at 3.

127. *Hess*, 414 U.S. at 105, 109.

128. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added) (describing the standard for speech inducing incitement as "advocacy of the use of force or of law violation . . . directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action"); Rohr, *supra* note 70, at 14 (stating that the second element in the *Brandenburg* test is to determine if the advocacy calls for immediate law violation).

129. *BART Protest Could Impact Evening Commute*, *supra* note 39.

threatened to conduct his activity at an ambiguous “later” time,<sup>130</sup> No Justice No BART’s actions were planned for a specific time.<sup>131</sup> When BART took action to shut off cell service just before 4:30 p.m., BART believed that a protest was imminent, and based on past experience with this particular group, they anticipated lawless action.<sup>132</sup>

However, when BART made the decision to cut the cell service, the protestors had not arrived at the stations nor had they begun to communicate about the planned protest.<sup>133</sup> BART shut off cell service preemptively, before protestors even began using their cell phones to advocate for potential lawless activity at the station.<sup>134</sup> There was prior speech on No Justice No BART’s website advocating for the protest, and the protest may have been imminent;<sup>135</sup> however, the website was not targeted by BART, but rather, BART officials targeted future potentially inciting speech.<sup>136</sup>

The last *Brandenburg* element is whether lawless activity was likely to occur.<sup>137</sup> The protest organizers had engaged in prior protests at BART stations, including one that occurred the previous month.<sup>138</sup> In that July protest, No Justice No BART participants did not engage in violence but were disruptive by screaming, blocking train doors, climbing on top of a train, and protesting in restricted areas.<sup>139</sup> Yet, not all protestors were disruptive; some protestors peacefully handed out flyers.<sup>140</sup> BART reasonably<sup>141</sup> thought the

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130. *Hess*, 414 U.S. at 105, 107–09.

131. *BART Protest Could Impact Evening Commute*, *supra* note 39.

132. Franklin & Wakeman, *supra* note 12 (stating that BART turned off phone service at 4:00 p.m. just prior to the time they believed protestors would arrive at the stations).

133. Elias, *supra* note 9; Franklin & Wakeman, *supra* note 12; Jonsson, *supra* note 13.

134. Franklin & Wakeman, *supra* note 12.

135. *See BART Protest Could Impact Evening Commute*, *supra* note 39.

136. For a discussion of how the Prior Restraints doctrine could potentially apply to this BART incident, see Spencer, *supra* note 43, at 780–88. Spencer evaluates several Supreme Court and appellate cases and suggests that “[t]he government presumptively violates the First Amendment if it prevents free speech activities prior to any illegal action by demonstrators or before a demonstration poses a clear and present danger.” *Id.* at 782.

137. *See supra* note 128.

138. *See Bender*, *supra* note 22 (discussing the No Justice No BART protests on July 11, 2011).

139. *Id.*

140. *Id.*

141. The Supreme Court’s opinion in *Gitlow v. New York* presents an early formulation of the clear and present danger test:

upcoming protest would resemble No Justice No BART's prior demonstration. In the prior demonstration, where BART deployed an increased security presence, BART did not arrest anyone,<sup>142</sup> suggesting it did not perceive the threat to be serious. BART officials, however, commented negatively on the disruption, saying that in the future there would be "zero tolerance" for those types of disruptive activities.<sup>143</sup>

In anticipation of the protest action, BART completely cut cell service to its stations, impacting potential protestors as well as all other passengers in the affected areas.<sup>144</sup> Whether or not the protest participants' future speech was within a protected category, BART also eliminated cell service to passengers at the platforms. The protestors were only a small portion of all people using BART's cell signal,<sup>145</sup> and there is no evidence that the other passengers' speech was within one of the unprotected categories of speech.

BART eliminated cell service preemptively to remove the threat that future speech would aid an imminent and potentially disruptive protest.<sup>146</sup> If that speech was found to be part of an unprotected class, it would not be subject to First Amendment protection<sup>147</sup> unless the

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[T]he immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. . . . [T]he State is [not] acting arbitrarily or unreasonably when . . . it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

*Gitlow v. New York*, 268 U.S. 652, 669 (1925). However, Spencer suggests that BART's actions were unreasonable because BART "impermissibly based its decision on the fact that violence had previously occurred during a protest of the same nature." Spencer, *supra* note 43, at 785. For this proposition, Spencer cites *Collins v. Jordan. Id.* at 783. "As a matter of law . . . the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)." *Id.* (quoting *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996)).

142. See Bender, *supra* note 22.

143. Ho, *supra* note 22 (quoting a BART spokesman who said, "That delay goes to the protesters . . . That mess, those fringe groups own it." (internal quotation marks omitted)).

144. See Franklin & Wakeman, *supra* note 12.

145. See generally Cabanatuan, *supra* note 49 (discussing BART's wireless coverage). In the July 2011 protest there were only about 100 protestors compared with the approximately 335,000 patrons that used the stations daily in 2010. *BART Fiscal Year Weekday Average Exits*, BART, [http://www.bart.gov/docs/FY11\\_Average\\_Weekday\\_Exits.pdf](http://www.bart.gov/docs/FY11_Average_Weekday_Exits.pdf) (last visited Feb. 10, 2013); Ho, *supra* note 22.

146. See Franklin & Wakeman, *supra* note 12.

147. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

court found BART's actions were content-based.<sup>148</sup> However, it seems more likely the speech was within a protected class. Therefore, the next step would be to subject BART's actions to forum and content discrimination analyses.<sup>149</sup>

*B. BART's Cell Phone Service And BART Platforms: A Multiple Forum Analysis*

The fact the speech restriction occurred on BART property using BART cell signals—both government property—requires a forum analysis to determine whether BART is a public forum, designated public forum, or non-public forum.<sup>150</sup> The BART stations are not traditional public forums because the Court has limited those to streets and parks—places traditionally open to expression.<sup>151</sup> Further, like *Perry*,<sup>152</sup> BART did not grant general access to the paid areas of its platforms, so those areas would not be designated public forums.<sup>153</sup> It does not matter that BART allowed protests to occur inside the paid areas because a government must intentionally open the forum.<sup>154</sup> Therefore, because the platforms were non-public forums,<sup>155</sup> BART's decision to shut down cell service in the paid areas would likely be found constitutional, so long as the decision was not content-based.<sup>156</sup>

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148. *R.A.V. v. St. Paul*, 505 U.S. 377, 383–84 (1992) (stating that unprotected speech can be afforded First Amendment protections if the censorship is content-based).

149. See *supra* notes 74, 90 and accompanying text.

150. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

151. *Id.* at 802.

152. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

153. *Id.* at 45, 47 (stating that there was no evidence the system was open for use by the general public—so it was not a public forum); see also Franklin & Wakeman, *supra* note 12 (describing BART's policy of allowing protest activities only in specified non-paid areas of its stations). The non-paid areas of the stations, unlike the paid areas, may be considered designated public forums because BART had a policy of allowing access to the general public.

154. *Cornelius*, 473 U.S. at 802. Further, BART did not have a policy of allowing protestors to use the paid areas of their stations, as did the University in *Widmar v. Vincent*, 454 U.S. 263, 265 (1981).

155. All other types of public property, other than those falling within the public and designated public forums, are considered non-public forums. See *Int'l Soc'y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678–79 (1992).

156. *Perry*, 460 U.S. at 46. The Court has considered safety concerns significant governmental interests; therefore, BART's safety justification would likely meet the lower standard of reasonableness. See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981).

A forum, however, is not limited to tangible property, so alternately, BART's cell signals could be considered the applicable forum.<sup>157</sup> BART's provision of cell phone signals could be considered a forum because the protestors were seeking to use the signals to organize their protest.<sup>158</sup> If BART's cell service was the forum, it would likely be a designated public forum<sup>159</sup> because BART intentionally made its cell service publicly accessible to anyone with the equipment to use the service.<sup>160</sup>

Assuming, *arguendo*, that BART's cell service is a designated public forum, then the standard of review would depend on the outcome of a content discrimination analysis.<sup>161</sup>

### C. The Content Discrimination Debate

The final phase of this constitutional analysis is to determine whether the decision to cut cell phone service was content-based or content-neutral and apply the appropriate level of scrutiny.<sup>162</sup> No Justice No BART contends the reason BART cut off cell service was to stop a high profile, planned protest about the conduct of BART's own police force, which supports an argument that it was a content-based restriction.<sup>163</sup> BART, on the other hand, contends that, although the cell phone shutdown targeted the protestors, BART's

157. See *Cornelius*, 473 U.S. at 801 (“[I]n defining the forum we have focused on the access sought by the speaker.”). In *Cornelius*, the forum was determined to be a fundraising campaign, not the government building. *Id.* at 801. In *Perry*, the forum was defined as a school's internal mail system and not the school building. *Perry*, 460 U.S. at 47.

158. See Franklin & Wakeman, *supra* note 12 (stating that protestors planned to use cell service within the station to coordinate the protest).

159. See *Perry*, 460 U.S. at 45 (describing the designated public forum).

160. Cabanatuan, *supra* note 49 (discussing BART's wireless coverage); *Wireless Connections*, *supra* note 11. The cell service would likely not be considered a traditional public forum due to the lack of tradition generally associated with new technologies. Some authors have proposed expanding or modernizing the traditional public forum to include technological or “virtual” forums. *E.g.*, Fleming, *supra* note 21, at 652–61; Lackert, *supra* note 21, at 596–98.

161. In designated public forums, the standard for content-based exclusions of speech is a compelling state interest with action “narrowly drawn to achieve that interest.” *Cornelius*, 473 U.S. at 800. Content-neutral actions must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication.” *Id.* at 800 (citations omitted) (internal quotation marks omitted); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981).

162. See Chemerinsky, *supra* note 71, at 53 (“Today, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws.”).

163. See *Response to BART's Illegal Blackout of Phone Service*, *supra* note 44.

decision to cut cell service was motivated by a concern for the safety, welfare, and convenience of their passengers.<sup>164</sup> This supports the theory that it was a content-neutral action.

A government law or action is generally deemed content-based if it is restricted because of its subject matter or viewpoint.<sup>165</sup> On its face, BART's actions appear to be content-neutral because BART shut off cell service to everyone on the platforms.<sup>166</sup> Although BART shut off cell service to all passengers, they only cut the service for a limited time period and at limited locations corresponding to the time and places of No Justice No BART's planned protest.<sup>167</sup> This type of targeted action is similar to *Police Department v. Mosley*, where the Supreme Court overturned a Chicago ordinance allowing peaceful picketing for some groups but not for others.<sup>168</sup> In contrast, in *Hill v. Colorado*, the Supreme Court stated that a government action does not become an unconstitutional content-based restriction on speech simply because it is applied "to the specific locations where [that] discourse occurs."<sup>169</sup> However, unlike *Hill v. Colorado*, BART did not restrict cell service only during regular peak rush hours; they specifically turned it off on one occasion because they believed No Justice No BART would be present.<sup>170</sup>

Even if BART's decision to cut cell service is considered content-based, the secondary effects doctrine would likely apply.<sup>171</sup> Like *City of Renton v. Playtime Theatres, Inc.* and *Boos v. Barry*,<sup>172</sup> BART

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164. See Franklin & Wakeman, *supra* note 12 (citing safety concerns over potential falls from overcrowded platforms near an electrified third rail and safety concerns posed by trains stopped in tunnels).

165. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994).

166. See Franklin & Wakeman, *supra* note 12.

167. See *id.* BART representatives state their actions were aimed at this particular group's activities. See *id.*

168. See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

169. See *Hill v. Colorado*, 530 U.S. 703, 724 (2000) (alteration in original) (discussing that a statute making it illegal to approach within eight feet of another health care facility was not a content-based law). The Court also gave an example of this principle. *Id.* "A statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports . . ." *Id.*

170. See Franklin & Wakeman, *supra* note 12.

171. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

172. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (suggesting that if the contested content-based regulations had been justified by concerns about congestion, interference with ingress or egress, visual clutter, or security, the secondary effects doctrine may have applied); *Playtime Theatres*, 475 U.S. at 47

representatives say their shutdown of service was not due to the message but the effects of the protest organized by the restricted speech.<sup>173</sup> BART clearly states that its concern was the safety of its passengers and the orderly functioning of its transportation system, although some internal e-mail exchanges may belie that contention.<sup>174</sup> Therefore, it is more likely that the Court would consider BART's action to fall within the secondary effects doctrine, meaning it would be scrutinized as if it were a content-neutral action.<sup>175</sup>

If the cell phone shutdown is deemed content-neutral, BART can place reasonable<sup>176</sup> time, place, and manner restrictions on the speech.<sup>177</sup> Like *Grayned*, BART's decision to shut down cell service

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(holding that the location of adult theatres could be restricted because these restrictions targeted the secondary effects of the theatre on the community—such as increased crime—and not the actual content of the adult films).

173. See Franklin & Wakeman, *supra* note 12.

174. See *id.*; Elinson, *supra* note 43; Spencer, *supra* note 43. For a discussion of how BART's internal communications could be the deciding factor in a court finding that BART's actions were content-based, see Spencer, *supra* note 43, at 778–79. This note gives more weight to BART's official statements because they invoke a safety rationale. “As applied by lower courts in recent years, the already watered-down requirements of content neutrality and narrow tailoring have been strained to the point of breaking under the weight of the government's post-Seattle, post-9/11 security interest.” Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1267 (2008). “Temporary regulations enacted in the name of security are the real-world equivalents of get-out-of-jail-free cards for governments seeking to restrict protest.” *Id.* at 1259. “Time and again, judges have simply credited governments' arguments that enjoyed social currency as justifications for restrictions on speech, rather than pressing the government to prove the truth of those assertions.” *Id.* at 1258.

175. If, *arguendo*, BART's action was considered content-based, the Court would review it using strict scrutiny: the government action must be narrowly tailored to meet a compelling state interest. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). BART stated that its actions were based on ensuring the safety of its passengers, and the Court has viewed a threat to public safety as a compelling interest. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992); Franklin & Wakeman, *supra* note 12 (discussing the hazards at the stations). The cell phone shutdown must also be narrowly tailored to meet that compelling safety interest. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). It is unclear if BART's actions were sufficiently tailored to meet this compelling interest. See *infra* notes 186–91 and accompanying text.

176. See *Grayned v. City of Rockford*, 408 U.S. 104, 116–17 (1972) (stating the reasonableness of the restrictions is based on “[t]he nature of a place, [and] the pattern of its normal activities,” and the essential inquiry is “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”).

177. See *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980) (“Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.”); *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977) (“[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425

advances its interests in having safe and orderly transit stations.<sup>178</sup> Also, like *Cox v. Louisiana*, BART's actions to shut down cell service stopped a protest that might have caused serious system-wide disruption to transit schedules.<sup>179</sup> In addition, the shutdown only lasted four hours and was restricted to the platform areas of the concourse where safety issues are highest.<sup>180</sup> BART's restrictions, therefore, appear reasonable.

BART's time, place, and manner restrictions must also be narrowly tailored<sup>181</sup> to serve a substantial governmental interest,<sup>182</sup> and leave open ample channels for communication of information.<sup>183</sup> The Court has frequently said that public safety, order, and convenience are substantial governmental interests.<sup>184</sup> BART

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U.S. 748, 771 (1976) (“We have often approved [time, place, and manner] restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.”). *But see* Fleming, *supra* note 21, at 648 (citing *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) for the proposition that “when the regulation is only temporary in nature, designed specifically to address an immediate issue and not to set a standard that will apply to all speakers in the future, as in the BART situation, the intermediate scrutiny of the reasonable time, place, and manner test should not be applicable and a more searching level should be applied”). However, the Court in *Madsen v. Women’s Health Center, Inc.* was discussing the differences in standards relating to a statutory prohibition versus an injunction, and therefore, it is not directly on point with the BART cell service shutdown. *See* *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 763–65 (1994).

178. *Grayned*, 408 U.S. at 119 (upholding a noise ordinance because it advanced the city’s “interest in having an undisrupted school session conducive to the students’ learning”).

179. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *see also* *Grayned*, 408 U.S. at 115–16 (“A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic . . .”).

180. *See* Franklin & Wakeman, *supra* note 12.

181. *Hill v. Colorado*, 530 U.S. 703, 726 (2000) (“[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.”). *But see* *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (“A complete ban can be narrowly tailored but only if each activity within the proscription’s scope is an appropriately targeted evil.”) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

182. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (“As a general matter, it is clear that a State’s interest in protecting the ‘safety and convenience’ of persons using a public forum is a valid governmental objective.”). In *Heffron*, the Court found that the significance of the governmental interest should be assessed by considering the nature and function of the particular forum. *Id.* at 651. Since the small fairgrounds drew large crowds, “the State’s interest in the orderly movement and control of such an assembly is a substantial consideration.” *Id.* at 641.

183. *See supra* note 88.

184. *See Heffron*, 452 U.S. at 650; *Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949) (stating the government has a legitimate interest in the “comfort and convenience” of its citizens); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (holding that time, place, and manner restrictions placed on a

likewise justifies its actions by citing concerns for safety and order.<sup>185</sup>

Narrow tailoring would present a larger issue for BART. BART's actions impacted more than just the protestors.<sup>186</sup> *Ward v. Rock Against Racism* suggests that BART's sweeping actions of cutting cell service to everyone on the platforms would not be properly tailored because the shutdown affected regular speech that was not "an appropriately targeted evil."<sup>187</sup> Furthermore, because this was a complete shutdown of service on the platform levels,<sup>188</sup> it should be the least restrictive means of achieving BART's goals of safety, order, and convenience.<sup>189</sup> In *Schneider v. New Jersey*, the Court said the least restrictive means to prevent littering from flyer distribution was not to ban the flyers but to punish those who threw the litter in the street.<sup>190</sup> BART could deploy additional police officers, as they did during the prior demonstration, and punish those who become disruptive, which they did not do during the prior protest.<sup>191</sup> However, an alternative interpretation would be that because BART was concerned about the safety effects the future *speech* would cause, BART's actions were narrowly tailored since it only targeted speech.

Most importantly, BART must have left open ample channels for communication of information.<sup>192</sup> BART shut down its cell signal,

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parade license were constitutional because they were based on the city's legitimate interests in regulating traffic and securing public order).

185. See Franklin & Wakeman, *supra* note 12.

186. See *supra* note 145 and accompanying text.

187. *Ward*, 491 U.S. at 800 (citation omitted) (internal quotation marks omitted). Service to customers, who were not protestors, was also disrupted; regular speech impacted by this broad action could have included health care practitioners checking on patients, employees engaging in work-related activities, or just friends and family staying in touch with each other. See Fleming, *supra* note 21, at 645.

188. It could also be argued that this was not a complete shutdown because cell service was still available on the street level. Franklin & Wakeman, *supra* note 12. In *Heffron*, the Court said that the decision to set aside a certain area of the fair for distribution of information was not a total ban because the distributors were "not secreted away in some nonaccessible location, but [were] located within the area of the fairgrounds where visitors are expected, and indeed encouraged, to pass." *Heffron*, 452 U.S. at 655 n.16. This regulation fixed the location but was not a total ban. *Id.*

189. See *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

190. See *Schneider v. New Jersey*, 308 U.S. 147, 162–63 (1939).

191. See *Bender*, *supra* note 22.

192. See *City of Ladue v. Gilleo*, 512 U.S. 43, 45–46, 58, 56 (1994); *Clark v. Cmty. for Creative Non-*

but cell service was not completely unavailable at the stations. Cell service was available at street level.<sup>193</sup> BART also made intercom service and courtesy phones available to passengers.<sup>194</sup> Ultimately, however, the available means of communication either did not connect to the internet or did not allow the user to communicate with multiple persons at once while actively commuting and, therefore, do not seem to be effective substitutes for the type of service BART eliminated.

It is questionable, however, whether courts consider cell service to be an irreplaceable means of communication. In *Gilleo*, the city banned most yard signs arguing that there were other forms of communication homeowners could use to express themselves, but the Court disagreed because yard signs were a distinct, “venerable,” and “long . . . important” form of expression without adequate substitutes.<sup>195</sup> The Court’s description of what constitutes an irreplaceable method of communication is a crucial point. Cell service is an increasingly important medium of communication,<sup>196</sup> but whether a court would consider cell phone communication—digital speech—to be a distinct, “venerable,” and “long . . . important” form of expression is unclear.<sup>197</sup>

A final public policy consideration is whether viewing BART’s actions as unconstitutional would have a chilling effect on government entities providing public access to cell service. If a government feared legal action from shutting down its cell signal, it might not be inclined to make similar future resource allocations.

A court would likely find BART’s actions constitutional if the potential cell communications were considered incitement or if the

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Violence, 468 U.S. 288, 293 (1984). The California Supreme Court observed:

[T]he disconnection of telephones not only may deprive the subscriber of the monetary value of his economic venture, but in such circumstances denies him an essential means of communication for which there is no effective substitute. Hence, this restraint upon communication by the subscriber also affects his right of free speech as guaranteed by the First Amendment of the federal Constitution.

Sokol v. Pub. Util. Comm’n, 418 P.2d 265, 270 (Cal. 1966).

193. Franklin & Wakeman, *supra* note 12.

194. *Id.*

195. *Gilleo*, 512 U.S. at 45–46, 58, 56 (citing other means, such as bumper stickers and flyers).

196. *See supra* notes 14, 16 and accompanying text.

197. *See* discussion *infra* Part III.A.

forum was the BART station itself rather than the cell signal because there would be either no protection for the speech or a lower standard of review for BART to meet.<sup>198</sup> If the forum was the cell signal itself, then BART's actions would be subject to increased levels of scrutiny.<sup>199</sup> The crux is whether the complete shutdown of cell service was sufficiently tailored to meet BART's interests in safety and order and whether BART left open ample alternative channels of communication.<sup>200</sup>

### III. THE NEED TO FIND ALTERNATE SOURCES OF PROTECTION FOR DIGITAL SPEECH

The August 11, 2011 BART incident<sup>201</sup> was not the only attempt by a government entity in the United States to restrict digital speech. Although ultimately vetoed by the mayor, the Cleveland city council passed an ordinance making the use of social media in certain circumstances a misdemeanor.<sup>202</sup> The United States Congress also proposed legislation in 2010 that would have allowed the government to manage cybertechnology, including telecommunications, in the event of a national security threat.<sup>203</sup> In 2012, the Georgia General Assembly introduced a resolution that urged the United States

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198. See *supra* notes 146–48, 151–56 and accompanying text.

199. See *supra* text accompanying notes 157–61.

200. See *supra* text accompanying notes 184–85, 192–97.

201. See discussion *supra* Part I.B.

202. See *Ordinance No. 1012-11*, ACLU OHIO (July 21, 2011), [http://www.acluohio.org/assets/issues/FreeSpeech/CityOfClevelandSocialMediaOrdinance2011\\_0725.pdf](http://www.acluohio.org/assets/issues/FreeSpeech/CityOfClevelandSocialMediaOrdinance2011_0725.pdf) (stating that passage of the proposed ordinance would add a new section to the Codified Ordinances of the City of Cleveland, which would say, “(a) No person shall use social media to induce persons to commit . . . Disorderly Conduct; Intoxication, and/or . . . Unlawful Congregation; (b) Whoever violates this section is guilty of improper use of social media, a minor misdemeanor . . . .”); Thomas Ott, *Cleveland City Council Upholds Mayor Frank Jackson’s Veto on Flash Mobs*, PLAIN DEALER (Aug. 18, 2011, 7:28 AM), [http://blog.cleveland.com/metro/2011/08/cleveland\\_council\\_upholds\\_jack.html](http://blog.cleveland.com/metro/2011/08/cleveland_council_upholds_jack.html) (discussing the Cleveland city council’s decision not to override the mayor’s veto of the social media legislation).

203. See generally S. 3480, 111th Cong. (2010); Denis Binder, Steven Burns & Jeffrey H. Wood, *Homeland Security: 2010 Annual Report*, 2010 A.B.A. ENV’T, ENERGY & RESOURCES L.: YEAR IN REV. 361 (discussing the Protecting Cyberspace as a National Asset Act of 2010 (S. 3480), which would “create a White House Office of Cyberspace Policy to lead federal and private sector efforts to secure critical cyber networks and assets.”). This legislation is sometimes referred to as the internet “kill switch” legislation. See Bob Barr, *Big Brother’s Cell Phone “Kill Switch,”* ATLANTA J. CONST. (Aug. 22, 2011), <http://blogs.ajc.com/bob-barr-blog/?s=BART&x=0&y=0>.

Congress to “amend the Communications Act of 1934 and FCC rules so as to permit the use of ‘cellular jammers’ to prevent illegal cell phone use in prison facilities; and for other purposes.”<sup>204</sup> With increasing use of digital methods of speech, accompanied by increasing attempts to regulate it,<sup>205</sup> more conflict between governmental actions and the First Amendment is likely. There are four sources of law that can address these potential conflicts. These include constitutional protections as interpreted by the Supreme Court, individual state constitutional protections, the Communications Act of 1934, and other government legislation. However, because the Supreme Court has not directly addressed this issue and state supreme court decisions can vary across the country, relying on courts to interpret First Amendment rights in ways that protect this new digital speech<sup>206</sup> would be reactive and unpredictable. Instead, this Note suggests creating new laws or policies that proactively set rules to guide governments’ decision-making processes.

#### *A. The Supreme Court’s View Of Digital Speech And New Technologies*

As seen in the analysis of the BART incident, a government’s traditional safety interests and the need to leave open alternative means of communication are important elements<sup>207</sup> of a free speech

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204. H.R. 1325, 151st Gen. Assemb., Reg. Sess. (Ga. 2012). The resolution passed the Georgia House of Representatives on February 16, 2012. Georgia House of Representatives Voting Record, H.R. 1325 (Feb. 16, 2012).

205. Restricting digital speech can be a very attractive and efficient means for the government to provide a quick resolution to a perceived issue because these new technologies are able to reach a large number of people and because they can be controlled, seemingly, by the flip of a switch. *See supra* note 16. BART’s decision to shut off cell phone service was done by turning power off to the cell nodes. *See supra* note 47. This was an effective tool since the protest never materialized. *See* Elias, *supra* note 9; Jonsson, *supra* note 13.

206. To protect emerging digital technologies, some scholars have proposed that the Supreme Court adopt a virtual or modern forum as part of its First Amendment jurisprudence. *See* Fleming, *supra* note 21; Lackert, *supra* note 21.

207. The First Amendment issues would be reduced to whether the action or regulation by the government was narrowly tailored to meet the government’s traditional and legitimate interests in safety or security while leaving open ample alternative channels for communication. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); *see also supra* text accompanying notes 181–95.

analysis. In future conflicts, how individual fact situations affect these elements will be a large component of the outcomes, but the crucial, yet undetermined, issue in any future case would ultimately turn on the Court's view of technology.<sup>208</sup>

Prior Court statements about how to apply the First Amendment to new technologies are conflicting.<sup>209</sup> Justice Scalia articulated a traditional approach in *Brown v. Entertainment Merchants Association*: “[W]hatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”<sup>210</sup> One First Amendment principle is that when the government restricts an entire medium of speech, it must “leave open ample alternative channels for communication.”<sup>211</sup> The Court has stated that there are no adequate substitutes when the restricted speech is a “venerable,” “long . . . important,” and “distinct” method of communication.<sup>212</sup> Given the recent appearance of digital communications,<sup>213</sup> it is unclear whether this form of communication qualifies. Therefore, if the Court applies First Amendment principles that favor more traditional forms of communications, obtaining free speech protection for new technologies may be difficult.

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208. The crucial concern is the existence of adequate alternatives, which depend on the Court's view of cell technology. See *supra* text accompanying notes 192–97.

209. Compare *Brown v. Entm't Merchs. Assoc.*, 131 S. Ct. 2729, 2733 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)), with *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500–01 (1981). Yet, some scholars have suggested that the Supreme Court has already “recognized the inimitable nature of [internet speech].” *Wiebe, supra* note 21, at 217. The Court has also begun to address new technology in relation to the Fourth Amendment. See *Fleming, supra* note 21, at 654–57. In his concurring opinion in *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Alito, J., concurring), Justice Alito “criticized the majority for applying antiquated law to twenty-first century surveillance techniques.” *Fleming, supra* note 21, at 656. Justice Alito also stated that legislatures are better equipped than courts to “gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.” *United States v. Jones*, 132 S. Ct. 945, 964 (2012); see also *Fleming, supra* note 21, at 656.

210. *Brown*, 131 S. Ct. at 2733 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

211. See *City of Ladue v. Gilleo*, 512 U.S. 43, 45–46, 58, 56 (1994); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

212. See *Gilleo*, 512 U.S. at 54–55 (stating there were no adequate alternatives to yard signs).

213. See generally *The Changes to Mobile Phones over the Last 30 Years*, THE PEOPLE HISTORY, <http://www.thepeoplehistory.com/mobilephones.html> (last visited Feb. 10, 2013) (discussing the history of cell phones and their increased growth over the past three decades).

In contrast to Justice Scalia's traditional approach to new technologies articulated in *Brown v. Entertainment Merchants Association*,<sup>214</sup> the Court in *Metromedia* stated, "This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. . . . Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."<sup>215</sup> The *Metromedia* approach to technology is more modern and would be more likely to take into consideration qualities of digital speech beyond whether it was "venerable" or traditional.<sup>216</sup> The nature of digital speech allows for a variety of communications to take place all in one smartphone.<sup>217</sup> In the past, this range of communications could only be provided by several separate speech methods.<sup>218</sup> Posting opinions and commentary to a social media site, distributing communication and meeting information between like-minded individuals via electronic mail, Twitter, Facebook, instant messaging, and website updating can replicate the function of yard signs, billboards, public speeches, printed newsletters, and other means of expressing thoughts to others. The widespread adoption, speed of message delivery, and variety of applications makes this method of communication, while novel, irreplaceable.<sup>219</sup>

However, until the Court decides digital speech has attained "venerable" status, other forms of protection may be necessary.<sup>220</sup>

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214. *Brown*, 131 S. Ct. at 2733.

215. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500–01 (1981) (footnote omitted) (citations omitted).

216. *See Gilleo*, 512 U.S. at 54–55.

217. *See supra* notes 1, 16.

218. *See supra* notes 1, 15–16 and accompanying text.

219. *See supra* notes 14–16 and accompanying text.

220. Some scholars have suggested that new technologies should be integrated into First Amendment jurisprudence by amending the public forum analysis to include a "virtual" or "modern" public forum that would be subject to the heightened scrutiny of the traditional public forum. Marvin Ammori, *The Year in "First Amendment Architecture,"* 2012 STAN. TECH. L. REV. 6, 19–20 (2012); Fleming, *supra* note 21, at 652–61; Lackert, *supra* note 21, at 596–98. Due to the uncertainty in how the Supreme Court may approach digital speech, this Note proposes other methods of protecting digital speech.

### B. State Constitutional Protections

If the Court does not account for digital speech's unique attributes, then protection for digital speech must come from sources other than the First Amendment of the United States Constitution. State constitutions are a potential source of protection. State constitutions can be more protective of rights but cannot be less protective than the United States Constitution.<sup>221</sup>

California's constitution has its own free speech clause,<sup>222</sup> which California courts have interpreted in ways that differ from the Supreme Court's interpretation of the First Amendment.<sup>223</sup> For example, in *Sokol v. Public Utilities Commission*,<sup>224</sup> the state supreme court said that telephones were "essential" means of communication without "effective substitute."<sup>225</sup> If telephone service is viewed in this manner, then digital telephone technologies, which appear similar, should receive stronger protections under the state free speech guarantee. In addition, California has interpreted forum requirements differently, finding train stations to be traditional public forums.<sup>226</sup> Accordingly, speech in the BART incident would receive greater protection regardless of whether the forum was determined to be the cell service or the station—a consideration in the BART incident.<sup>227</sup> Finally, a California court has said that a telephone company cannot turn off service because it thinks that customers may be using the service to transmit information allowing someone to

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221. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81(1980) (finding a state has the authority to "exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

222. CAL. CONST. art. I, § 2 (West, Westlaw through 2012 Reg. Sess.) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.")

223. *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004) ("The California Constitution provides protections for speakers in some respects broader than provided by the First Amendment of the Federal Constitution."); *see also* letter from Michael T. Risher, ACLU Staff Attorney, to S.F. Bay Area Rapid Transit Bd. Of Dirs. (Aug. 22, 2011), available at [http://www.aclunc.org/aclu\\_letter\\_to\\_bart\\_board\\_of\\_directors\\_aug\\_22\\_2011.pdf](http://www.aclunc.org/aclu_letter_to_bart_board_of_directors_aug_22_2011.pdf).

224. *Sokol v. Pub. Util. Comm'n*, 418 P.2d 265 (Cal. 1966).

225. *Id.* at 270.

226. *E.g., In re Hoffman*, 434 P.2d 353 (Cal. 1967) (finding that train stations are traditional public forums). *See generally* letter from Michael T. Risher, *supra* note 223 (discussing *Hoffman* and other examples).

227. *See* discussion *supra* Part II.B.

violate the law.<sup>228</sup> Because California courts have addressed free speech elements differently than the Supreme Court, California has provided stronger protections for digital speech. In particular, by deciding that there are no effective alternatives to telephones, which are closely related to mobile phones, California's courts have filled a void in this area of Supreme Court jurisprudence.<sup>229</sup>

### C. *The Communications Act Of 1934*

If a state did not provide increased free speech protection, federal laws could potentially afford some legal protection against a government action restricting digital speech. The FCC prohibits jamming of cell technologies under the Communications Act of 1934,<sup>230</sup> but the statute was inapplicable because BART did not jam cell signals but, rather, turned power off to its cell nodes.<sup>231</sup> BART or any other cellular provider may also be subject to 47 U.S.C. § 214(a), which mandates that an entity “impair[ing]” cell service to a community must first obtain an FCC certification stating the action will not inconvenience the public.<sup>232</sup> The statute makes an exception for emergencies, but a party must still make a request prior to the action.<sup>233</sup> Because this law takes the public inconvenience of a cell phone shutdown into consideration, it could protect the public's

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228. See letter from Michael T. Risher, *supra* note 223. The California District Court of Appeals stated:

The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense.

People v. Brophy, 120 P.2d 946, 956 (Cal. Dist. Ct. App. 1942).

229. See *supra* text accompanying notes 195–97.

230. 47 U.S.C. § 333 (2006).

231. See *supra* note 47.

232. 47 U.S.C. § 214(a) (2006).

233. *Id.* (making an exception when an entity requests and the FCC “authorize[s] [a] temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section”). The FCC investigated the BART incident. Daniel B. Wood, *BART Puts Social Media Crackdown in ‘Uncharted’ Legal Territory*, CHRISTIAN SCI. MONITOR, Aug. 16, 2011, available at 2011 WLNR 16237522 (discussing the statement issued by the FCC that said it was investigating “the important issues . . . including public safety and ensuring the availability of communications networks.”).

speech rights if a government contemplates restricting cell service because of the actions of a small group of users. However, the problem with this law lies in its emergency exception. This exception gives the FCC great discretion to balance public inconvenience against an emergency. Because a government's safety interests have long been considered significant,<sup>234</sup> this balance would likely tip toward the government's action, and the regulation would not provide protection for the technology user.

#### *D. Other Legislation Or Policies*

Potential digital speech safeguards include the reactionary protections provided by the Supreme Court and state constitutions and the current weak FCC statutes. Therefore, Congress or state governments should enact legislation or policies that protect digital speech before it is violated—proactive protection.<sup>235</sup> New legislation or policies should address the seemingly unlimited discretion that government officials now have by invoking security concerns to address perceived threats from digital technologies and should impose procedures for determining when shutdowns are appropriate. Admittedly, given the security threats that exist in the post-9/11 world, this would be a difficult line to draw, but there is an appreciable difference between security threats that entail a seven-minute average train delay<sup>236</sup> and ones that involve terrorists using cell signals to detonate a bomb.<sup>237</sup> There are precedents for imposing

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234. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992); Krotoszynski & Carpenter, *supra* note 174.

235. In early 2012, "a California state senator introduced a bill that would require a magistrate order to effectuate a wireless service interruption, and a Chicago alderman proposed an ordinance that would restrict the ability of law enforcement officer to interrupt wireless service." FED. COMMC'N COMM'N, COMMISSION SEEKS COMMENT ON CERTAIN WIRELESS SERVICE INTERRUPTIONS 2 n.6 (2012), available at <http://www.fcc.gov/document/commission-seeks-comment-certain-wireless-service-interruptions>; Don Babwin, *Chicago Asked Not to Stifle Wireless at Summits*, BLOOMBERG BUSINESSWEEK (Feb. 15, 2012, 4:20 PM), available at <http://www.businessweek.com/ap/financialnews/D9SU23000.htm>.

236. See *supra* text accompanying note 34.

237. See Christina Mendez, 'Cell Phone Set Off Bomb,' PHILSTAR.COM, (Jan. 27, 2011, 12:00 AM), <http://www.philstar.com/headlines/651437/cell-phone-set-bomb> (describing an incident where a bomb was triggered by a cell phone). On March 1, 2012, the FCC issued a public notice stating that the FCC was "seek[ing] comment on concerns and issues related to intentional interruptions of [wireless service] by government authorities for the purpose of ensuring public safety." FED. COMMC'N COMM'N, *supra*

such procedures. Section 706 of the Communications Act of 1934 gives the President of the United States authority to shut down wireless communications during war or the threat of war.<sup>238</sup> This Act would not have been applicable in the BART incident, but it is an example of giving the government the ability to take action in a defined circumstance.<sup>239</sup> In addition, in December 2011, BART adopted a new “cell service interruption policy.”<sup>240</sup> This policy outlines the necessary steps to be taken before an interruption can be enacted and states that cell phone service can only be interrupted under “extraordinary circumstances.”<sup>241</sup> Significantly, the policy provides examples of extraordinary circumstances: (1) evidence of use of cell phones “as instrumentalities in explosives;” (2) “to facilitate violent criminal activity;” or (3) “to facilitate specific plans or attempts to destroy District property or substantially disrupt public transit services.”<sup>242</sup> The federal government, states, municipalities, or other public entities should consider passing similar legislation or policies that detail when and how the decision to discontinue cell service should be made. This would provide a procedural hurdle to

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note 235, at 1. The public notice stated that the FCC was “focused on situations where one or more wireless carriers, or their authorized agents, interrupt their own services in an area for a limited time period at the request of a government actor, or have their services interrupted by a government actor that exercises lawful control over network facilities.” *Id.* at 2. The FCC further stated that “[a]ny intentional interruption of wireless service, no matter how brief or localized, raises significant concerns and implicates substantial legal and policy questions.” *Id.*

238. 47 U.S.C. § 606(d) (2006) (stating that the president has the authority to “cause the closing of any facility or station for wire communication and the removal therefrom of its apparatus and equipment”).

239. The Protecting Cyberspace as a National Asset Act of 2010 is an example of a bill that does not adequately limit discretion. *See, e.g.*, S. 3480, 111th Cong. (2010). It allows the federal government to impact cellular service except when there is an undefined “threat.” *Id.*

240. *Extraordinary Circumstances Only for Cell Phone Interruptions*, BART (Dec. 1, 2011), <http://www.bart.gov/news/articles/2011/news20111201.aspx>; Michael Cabanatuan, *BART Cell Phone Shutdown Rules Adopted*, S.F. CHRON. (Dec. 2, 2011, 4:00 AM), <http://www.sfgate.com/bayarea/article/BART-cell-phone-shutdown-rules-adopted-2344326.php>. Reportedly, the FCC reviewed BART’s draft policy and made suggestions for the final policy document. *See id.* The FCC made the following public comment regarding BART’s cell service interruption policy: “Today BART took an important step in responding to legitimate concerns raised by its August 11, 2011 interruption of wireless service. As the policy BART adopted recognizes, communication networks that are open and available are critical to our democracy and economy.” *FCC Chairman Julius Genachowski’s Statement on BART Policy Adoption*, FCC (Dec. 1, 2012), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-311310A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311310A1.pdf).

241. *Cell Service Interruption Policy*, BART, [http://www.bart.gov/docs/final\\_CSIP.pdf](http://www.bart.gov/docs/final_CSIP.pdf) (last visited Sept. 20, 2012).

242. *Id.*

and some accountability on a government official's ability to disrupt an important First Amendment right.

Creating legislation or new policies that consider the unique and important features of digital speech could provide protection for digital speech that is currently lacking under the somewhat muddled state of First Amendment law.

#### CONCLUSION

BART's shut down of cell service on August 11, 2011 was a novel exercise of government power over free speech.<sup>243</sup> BART, as owner of the cell service, shut down speech in anticipation of certain actions that the future speech might provoke.<sup>244</sup> Although BART had legitimate safety interests in protecting its passengers, shutting down an entire, unique means of communication impacted more people than just the protestors.<sup>245</sup> This incident highlights the inadequacies of the Supreme Court's freedom of speech jurisprudence when applied to a situation involving digital technologies.<sup>246</sup> If the Court applied its traditional free speech principles<sup>247</sup> to the BART incident, whether No Justice No BART's speech constituted unprotected incitement and whether the forum was the BART station or the cell service are unclear.<sup>248</sup> Assuming the actions were not incitement and the forum was the cell service, BART's actions could be considered content-neutral and receive a level of scrutiny that pits BART's significant safety interests against the availability of alternate means of communication.<sup>249</sup> How the Court views digital speech is an important, but unknown, factor in the ultimate outcome.<sup>250</sup>

Today, people use smartphones as a kind of mobile printing press. They allow an increasing number of users to communicate widely

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243. See *supra* note 13 and accompanying text.

244. See discussion *supra* Part I.B.

245. See *supra* note 145 and accompanying text.

246. See discussion *supra* Part III.A.

247. See *supra* note 107 and accompanying text.

248. See discussion *supra* Part II.A–B.

249. See discussion *supra* Part II.C.

250. See discussion *supra* Part III.A.

and instantaneously.<sup>251</sup> This widespread and rapid dissemination of ideas provides a means for people to peacefully express their views or to organize rallies, but it also provides means for others to threaten security on a much wider scale. Therefore, there needs to be a careful balancing of free speech rights against public safety concerns—one that involves accounting for the uniqueness and importance of this method of communication. Because the Court may employ a traditional application of First Amendment tests, digital speech may not be adequately protected. Until digital speech attains “venerable” status, it is necessary to enact proactive protections at the federal or state level. The use of social media and emerging technologies continue to increase; therefore, the law needs to address the complicated issues arising from these new means of digital speech.

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251. *See supra* note 16 and accompanying text.

