

SWITCHING THE FLIP: QUESTIONING THE
GOVERNMENT’S AUTHORITY TO SHUT DOWN
COMMUNICATION NETWORKS IN FURTHERANCE
OF PUBLIC SAFETY[•]

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INTRODUCTION

On July 3, 2011, a caller alerted police that a man at San Francisco’s Civic Center subway station appeared intoxicated and was handling an open container.¹ The police responded in numbers and

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¹ Robin Wilkey, *Charles Hill Lawsuit: Chris Hill, Brother of Homeless Man Killed by BART Police, Sues Agency (VIDEO)*, HUFFINGTON POST (San Francisco) (Jan. 26, 2012, 1:46 PM), http://www.huffingtonpost.com/2012/01/26/charles-hill-lawsuit_n_1234295.html [hereinafter

quickly located the man.² Armed with a glass bottle and brandishing two knives, the man was reported to be aggressive in responding to police questioning, which quickly escalated the situation.³ Following an exchange lasting only a matter of minutes (while mothers pushing strollers and commuters rushed to catch their trains only feet away),⁴ the police officers shot the man twice.⁵ He later succumbed to his wounds.⁶

Following the shooting, a group of loosely organized, mostly young people sought to band together and visibly demonstrate their frustration with an event they saw as indicative of greater police brutality.⁷ This was an upsetting turn of events for the community; many were optimistic that recently enacted reforms would be effective in stemming incidences of “unnecessary” use of force by transit police.⁸ But nearly as soon as the optimism set in, the topic of police brutality came crashing back into community focus.

In response to the shooting, protesters undertook social media campaigns, using services such as Twitter to congregate at a moment’s notice at subway stations and stand in opposition to what they saw as overzealous police tactics.⁹ Reacting to these ongoing protests and waves of antagonism toward local government, the transit authority, characterizing the situation as an impending threat to public safety, decided on the unprecedented.¹⁰ Enacting a policy on very short notice¹¹ to combat what was thought to be an increasingly brazen protest movement,¹² Bay Area Rapid Transit (“BART”) officials would

Wilkey, *Charles Hill*]; Robin Wilkey, BART Releases Charles Hill Civic Center Shooting Video (VIDEO), HUFFINGTON POST (San Francisco) (July 21, 2011, 9:30 PM), http://www.huffingtonpost.com/2011/07/21/bart-releases-civic-cente_n_906307.html.

² See Wilkey, *Charles Hill*, *supra* note 1.

³ Zusha Elinson & Shoshana Walter, *Latest BART Shooting Prompts New Discussion of Reforms*, N.Y. TIMES (July 16, 2011), <http://www.nytimes.com/2011/07/17/us/17bcbart.html?scp=3&sq=zusha%20elinson%20bart&st=cse>.

⁴ See Joe Eskenazi, *Charles Hill BART Shooting Video*, SF WEEKLY BLOGS (July 21, 2011, 4:52 PM), http://blogs.sfweekly.com/thesnitch/2011/07/charles_hill_bart_shooting_vid.php.

⁵ See Elinson & Walter, *supra* note 3.

⁶ Will Reisman, *As Criticism Mounts, BART Stays the Course*, SF EXAMINER (Aug. 16, 2011, 4:00 AM), <http://www.sfoxaminer.com/local/2011/08/criticism-mounts-bart-stays-course>.

⁷ See Elinson & Walter, *supra* note 3.

⁸ See *id.* Although a similar incident played out roughly two years prior, which led to the enactment of new regulations for transit police, it appeared to many that the reforms had accomplished little. See *id.*

⁹ See *id.*

¹⁰ *BART Board Mulls Developing Cell-Phone Policy*, FIRST AMENDMENT CENTER (Aug. 25, 2011), <http://www.firstamendmentcenter.org/bart-board-mulls-developing-cell-phone-policy> (“BART is the first reported U.S. government agency to turn off wireless access to quell social unrest.”).

¹¹ See *id.* (“[BART Chief Spokesman Linton] Johnson said the idea came to him in the wee hours of Aug. 11 as he lay awake thinking of how to deal with the planned demonstration over the police shooting. Johnson said he sent an e-mail to BART police, who liked the idea, and interim general manager Sherwood Wakeman approved it.”).

¹² See Dennis Cuff, *BART Limits Cellphone Service Blackouts*, GADGETS (Dec. 1, 2011), <http://gadgets.tmcnet.com/news/2011/12/01/5967869.htm> (“BART police have said they had

shut down underground wireless range extenders for several hours at four subway stations—eliminating the protesters’ ability to effectively organize and, temporarily, forestalling demonstrations.¹³

The incident was a public relations fiasco for BART, with some commentators hyperbolically portraying the San Francisco municipal government as a totalitarian regime.¹⁴ While it is clear that one isolated incident should not color the character of an entire government, this incident begs the question: if this could happen in San Francisco, what would stop authorities from conducting similar actions across the United States? Could state agencies or the federal government shut down the Internet or cell phone service any time the government determines there is an impending threat to public safety?

Little is known of any purported legal justification from BART for the network shutdown,¹⁵ and BART currently faces no pending legal action from the incident. However, many facts are available to hypothesize arguments the public transportation agency would raise in defending its decision. Of note, the shutdown of cell phone service was not part of a safety protocol planned for in advance of the incident¹⁶ and there was not widespread agreement for the shutdown within the municipal authority.¹⁷ Additionally, at least one spokesperson for BART mentioned the seminal First Amendment case of *Brandenburg v. Ohio*¹⁸ as justification for the shutdown.¹⁹ It appears unlikely that the

evidence that protesters planned to disrupt transit service by chaining themselves to trains or other equipment.”)

¹³ Eva Galperin, *Bart Pulls a Mubarak in San Francisco*, ELECTRONIC FRONTIER FOUND. (Aug. 12, 2011), <https://www.eff.org/deeplinks/2011/08/bart-pulls-mubarak-san-francisco>. See *BART Protest: ‘Anonymous’ Plans Another Demonstration At Civic Center Station (LIVE UPDATES)*, HUFFINGTON POST (Aug. 22, 2011, 5:22 PM), http://www.huffingtonpost.com/2011/08/22/bart-protest-anonymous-civic-center-station_n_933460.html.

¹⁴ See, e.g., Taylor Wiles, *Arab Spring Activists Sit Down with Silicon Valley Suits*, HUFFINGTON POST (Oct. 31, 2011, 6:47 PM), http://www.huffingtonpost.com/taylor-wiles/arab-spring-silicon-valley_b_1065632.html.

¹⁵ See *Statement on Temporary Service Interruption in Select BART Stations on Aug. 11*, BART (Aug. 12, 2011), <http://www.bart.gov/news/articles/2011/news20110812.aspx> (“BART’s primary purpose is to provide, safe, secure, efficient, reliable, and clean transportation services. BART accommodates expressive activities that are constitutionally protected by the First Amendment to the United States Constitution and the Liberty of Speech Clause of the California Constitution (expressive activity), and has made available certain areas of its property for expressive activity.”).

¹⁶ See *BART Board Mulls Developing Cell-Phone Policy*, *supra* note 10.

¹⁷ See *id.* BART board member Lynette Sweet made a statement regarding the shutdown: “I’m just shocked that they didn’t think about the implications of this. We really don’t have the right to be this type of censor In my opinion, we’ve let the actions of a few people affect everybody. And that’s not fair.” See also Reisman, *supra* note 6 (describing how many BART officials were not told of the shutdown decision in advance).

¹⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁹ Michael Cabanatuan, *No BART Protests; More Debate on Wireless Shutdown*, SF GATE (Aug. 17, 2011, 4:00 AM), http://articles.sfgate.com/2011-08-17/bay-area/29895325_1_wireless-service-bart-police-civic-center-station (describing BART spokesman Linton Johnson’s reference

BART incident will reach the courts, as two of the most likely candidates to pursue such litigation—the American Civil Liberties Union (“ACLU”) and the Electronic Frontier Foundation (“EFF”)—have declined to file suits.²⁰

However, shortly after the incident occurred, the Electronic Frontier Foundation, Public Knowledge, and other public interest groups filed an emergency petition asking the Federal Communications Commission (“FCC”) to formally deny BART and all other state agencies the authority to shut down communication networks in the interest of preventing an impending threat to public safety.²¹

Regardless of how the FCC rules on the statutory challenge, it is important that the legal community recognize the BART shutdown as an opportunity to pause and question the role the incident, and other potential incidents like it, should play in shaping free speech rights in this age of wireless communication. The shutdown was an unprecedented event in American history.²² In shutting down wireless services, BART was ultimately ineffective at ensuring public safety²³ and may have also put those persons denied access to the network at risk.²⁴ However, it is also true that all indications show that BART

to *Brandenburg v. Ohio* as providing authority to place the interest of public safety before free speech when there was an imminent danger to the public). Johnson claimed that “BART police had evidence that groups protesting the July 3 fatal shooting of a homeless man at Civic Center Station planned to climb atop trains, disrupt service and create mayhem at multiple BART stations . . . coordinating their activities by wireless messages and phone calls.” *Id.*

²⁰ Brian Shields, *ACLU and EFF Unlikely to Sue BART Over Cell Phone Shutdown*, KRON (Aug. 16, 2011), <http://www.kron4.com/Article.aspx?ArticleID=1750>; *ACLU Eases off Lawsuit Threat Against BART*, ABC KGO-TV S.F., CAL. (Aug. 16, 2011), http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=8309840.

²¹ Emergency Petition of Pub. Knowledge for Declaratory Ruling that Disconnection of Telecomm. Servs. Violates the Commc’ns Act, FED. COMMS. COMMISSION (filed Aug. 29, 2011), available at <http://www.publicknowledge.org/files/docs/publicinterestpetitionFCCBART.pdf>. Although the petition is a sign of pushback against the BART shutdown, the petition shows that the FCC’s authority to permit or prohibit actions taken by municipal authorities in this matter is debatable. Additionally, the FCC has shown hesitancy in deviating from its own rules even when particular factual circumstances appear to make an exception at least a reasonable course of action. See Letter from James D. Schlichting, Acting Chief Wireless Telecommunications Bureau of the Federal Communications Commission, to Devon Brown, Director of Columbia Department of Corrections (Feb. 18, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-354A1.pdf (The FCC refused to make an exception to allow correction officers to use banned cell phone jammers even when there was a possibility of violence.).

²² *BART Board Mulls Developing Cell-Phone Policy*, *supra* note 10.

²³ See Zusha Elinson, *After Cellphone Action, BART Faces Escalating Protests*, N.Y. TIMES, Aug. 20, 2011, http://www.nytimes.com/2011/08/21/us/21bcbart.html?_r=1&pagewanted=all (“The protests, while still small, appear to have grown in number and potency. Using the Twitter hashtag #MuBARTek, a wry reference to Hosni Mubarak’s efforts to shut down communications before he was toppled as president of Egypt, activists organized a new round of protests that forced BART to shut down four stations during rush hour last Monday.”).

²⁴ See Michael Cabanatuan, *Cell Phones Win Backing Among BART Riders*, SF GATE (Oct. 10, 2001, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/10/10/MN170059.DTL> (reporting that the original purpose for extending cell phone service at platforms was for public

enacted the shutdown because authorities thought in good faith that it was necessary to preserve the safety of the public.²⁵ In response to these concerns, the legal community should look to develop a protective and predictable constitutional framework that defines when it is appropriate for government agents of any kind to shut down wireless communication networks under their control in order to stop an impending threat to public safety.

In addition, or in the alternative, and if presented with a matter bearing similar facts, the courts need to make clear that traditional First Amendment doctrine does not readily apply in the BART scenario. Courts should recognize that while precedent retains some value, this unique factual circumstance calls for a framework and remedies tailored to twenty-first-century communication considerations. This new framework should aspire to achieve the right balance between the public's need for security and constitutional free speech rights. In many ways this undertaking is a search for defining what it means to have true public safety and the sacrifices required along the way.²⁶ Additionally, an important issue at the heart of the matter is how to more succinctly define an impending threat to public safety.²⁷ Clarity is important in order to define limits for government actors to restrain speech in the interest of "public safety."

This Note uses the BART shutdown as a springboard to survey and analyze the current state of the law as applied to government authority to shut down wireless communication networks in times of threats to public safety. Part I begins with an overview of relevant First Amendment doctrine. Part II summarizes arguments made for and against the constitutionality of the BART shutdown in light of First Amendment doctrine and relevant case law; illustrates the difficulties in applying current law to the BART shutdown; and considers how a decision in the BART context would have ramifications for the growing number of Americans relying on municipal Internet. Part III surveys constitutional principles and general historical considerations in the designing of First Amendment doctrine. Finally, this Note proposes a

safety after the September 11th attacks).

²⁵ 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>.

²⁶ See Framework for Next Generation 911 Deployment: Reply Comments of the Elec. Frontier Found., Docket No. 10-255 (March 12, 2011), available at <https://www EFF.org/files/ng911.pdf> ("Communications technology has made us steadily safer and safer for over a century by making it ever cheaper and faster to tell people who can help about problems in a timely way. The 911 system is a great triumph that represents an important piece of this puzzle, but another piece is simply making communications cheaper, more reliable, and more ubiquitous. Even communications channels that cannot contact 911 services at all aid public safety by increasing the chance that someone who can help will find out about a problem promptly.")

²⁷ See generally Marvin Ammori, *BART SF 3: Kill Switches*, AMMORI.ORG (August 13, 2011), <http://ammori.org/2011/08/13/bart-sf-3-kill-switches/>.

new framework to address the BART shutdown and future attempts to close wireless communication networks while simultaneously striving to preserve the free speech rights of the individual.

I. AN OVERVIEW OF FIRST AMENDMENT DOCTRINE

Assessing First Amendment doctrine, the BART incident represents a new scenario not yet seen before by the courts. The following doctrines and case law from which they derive provide useful guidance, but this vastly different factual circumstance begs caution against wholesale adoption of these principles. Indeed, as will be clear, the BART incident is unique and raises many constitutional questions, as it manages to engage with, in a substantive way, a great number of the classical First Amendment canons.

A. *Incitement of Illegal Activity*

The government has limited rights to punish inflammatory speech. The narrow exception to this rule allows the government to stop the proliferation of speech determined to be directed toward and likely to incite imminent lawless action.²⁸ *Brandenburg v. Ohio* is the seminal case in this constitutional arena.²⁹ Although a BART spokesman claimed that *Brandenburg* gave BART the constitutional authority to enact the shutdown,³⁰ it is an open question whether such a unique factual scenario should lead to ready application of a case borne from a different era of communication.

On June 28, 1964, the Ku Klux Klan held a rally on a farm in rural Ohio.³¹ Clarence Brandenburg, a high-ranking member of the group, invited a Cincinnati television reporter to document the rally.³² The footage, which would come to be televised both locally and nationally, began in the suspected fashion with twelve hooded figures, some carrying firearms, gathering around a burning cross and proclaiming words of racial violence.³³ During the course of the footage, Brandenburg raised his voice and stated the purpose of the rally: “[w]e’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.”³⁴ He added that the group was planning a nearly half-a-million-strong march starting on the Fourth of July—

²⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁹ See Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971 (2010).

³⁰ Cabanatuan, *supra* note 19.

³¹ *Brandenburg*, 395 U.S. at 445.

³² *Id.*

³³ *Id.* at 445–46.

³⁴ *Id.* at 446.

continuing six days later to Congress and from there to Florida and Mississippi.³⁵

Soon after the video hit the Ohio airwaves, Brandenburg was indicted under Ohio's Criminal Syndicalism Act,³⁶ charged with advocating the propriety of violence "as a means of accomplishing . . . political reform."³⁷ Brandenburg was convicted by jury trial and sentenced.³⁸ The film of the rally was a key component of the state's evidence.³⁹

In holding the Ohio statute unconstitutional, the Supreme Court in a unanimous, *per curiam* opinion, found that the statute, "by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments."⁴⁰ The Court was clear that the "incitement of imminent lawless action" and not mere "advocacy" was speech unprotected by the First Amendment.⁴¹ The Court found that the First Amendment barred states from punishing "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."⁴²

It was far from clear that Brandenburg intended to incite imminent lawless action.⁴³ Brandenburg's intent seemed more directed toward gaining media coverage for his group's beliefs than to advocate for any violent crimes that night.⁴⁴ The imminence element was also not met as Brandenburg only talked about possible revenge and advocated for a march on Washington to come later.⁴⁵ Although some members of the group had firearms, and the Klan was notorious for their deplorable violent acts, it was clear that there was no immediate danger to the President, Congress, or the Supreme Court.⁴⁶ In many ways, the facts

³⁵ *Id.*

³⁶ *Id.* at 444.

³⁷ *Id.* at 444–45 (quoting OHIO REV. CODE ANN. § 2923.13 (West 1964) (repealed 1974)). Brandenburg was charged with two counts under the statute. First, that he: "unlawfully by word of mouth advocate[d] the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform." *Id.* at 449 n.3. "The second count charged that [Brandenburg] 'did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism.'" *Id.*

³⁸ *Id.* at 444–45. Brandenburg was "fined \$1,000 and sentenced to one to 10 years' imprisonment." *Id.* at 445.

³⁹ *See id.* at 445.

⁴⁰ *Id.* at 449.

⁴¹ *Id.* at 447.

⁴² *Id.*

⁴³ *See id.* at 446.

⁴⁴ *See* Susan M. Gilles, *Brandenburg v. State of Ohio: An "Accidental," "Too-Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517 (2010).

⁴⁵ *See id.*

⁴⁶ *Brandenburg*, 395 U.S. at 449.

resemble the 1919 case of *Abrams v. United States*, in which Justice Holmes, now certain that his “clear and present danger” test was too far astray from his original design, wrote in dissent: “[that] nobody can suppose the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.”⁴⁷

Indeed, the *Brandenburg* test was a much stronger protector of speech than the “clear and present danger” test it replaced.⁴⁸ And indeed *Brandenburg* went far beyond settled law⁴⁹ to produce “the most speech-protective standard yet evolved by the Supreme Court.”⁵⁰ Although the Court originally provided little guidance for the application of the test, some elements for a constitutional deprivation of advocacy speech were clear: “[a] conviction for incitement under *Brandenburg* only is constitutional if several requirements are met: imminent harm, a likelihood of producing illegal action, and an intent to cause imminent illegality.”⁵¹

Although few in number, several subsequent Supreme Court decisions helped to more clearly define the *Brandenburg* standard.⁵² In *Hess v. Indiana*, for example, an anti-war protester was convicted of disorderly conduct after declaring, “[w]e’ll take the fucking street later,” after police had moved protesters off the street to end a demonstration.⁵³ The Court held that this speech was protected because the protester’s words could not be shown as intending to produce, or likely to produce, imminent unlawful conduct.⁵⁴ Thus, the words were protected as they amounted to “nothing more than advocacy of illegal action at some indefinite future time.”⁵⁵

Additionally, the Court made clear in *NAACP v. Claiborne Hardware Co.* that even strong and evocative language may be protected, especially if no violence results from the speech.⁵⁶ *NAACP*

⁴⁷ *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

⁴⁸ See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) (describing the *Brandenburg* test as “the most speech-protective standard yet evolved by the Supreme Court.”).

⁴⁹ See *id.* See also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1064 (3d ed., Aspen 2006) (“[P]erhaps the major difference between these cases [*Brandenburg*, *Hess*, and *NAACP*] and the earlier decisions . . . is the social climate. The prior cases were issued in tense times where there were strong pressures to suppress speech. Only in the unfortunate event that such times occur again will it be possible to know if the *Brandenburg* test better succeeds in protecting dissent in times of crisis.”).

⁵⁰ See Gilles, *supra* note 44, at 524 (quoting Gerald Gunther, *supra* note 48, at 755).

⁵¹ CHERMERINSKY, *supra* note 49, at 999.

⁵² See *id.*

⁵³ *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

⁵⁴ *Id.* at 109.

⁵⁵ *Id.* at 108.

⁵⁶ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

concerned a speech made by an NAACP official during the course of a civil rights boycott, which included the statement: “If we catch any of you going in any of them racist stores, we’re going to break your damn neck.”⁵⁷ In holding that the statements were protected by the First Amendment, the Court noted that: “[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.”⁵⁸ The Court went on to say that “[t]o rule otherwise would ignore the ‘profound national commitment’ that debate on public issues should be uninhibited, robust, and wide-open.”⁵⁹

This incitement standard does not lend itself to a straightforward application to the facts of the BART incident. The magnitude and gravity of the harm resulting from the protests seem to be vague and circumspect. And it was at least unclear whether the speaker (in this instance, the protesters) intended for imminent illegal action to occur. Further, although the protest activities appeared to be intended to center around a “public issue,” the American legal system should not grant individuals a free license to cause situations that endanger the public. The incitement standard, by itself, strikes as being insufficient to give local authorities the tools they need to confront threats while balancing the speech rights of those uninvolved.

B. *Prior Restraint*

Another First Amendment principle relevant to the BART shutdown is the doctrine of prior restraint. Characterizing the BART incident as an official restriction of speech in advance of publication, BART protesters and other opponents claimed that the shutdown amounted to censorship.⁶⁰ BART officials counter that their actions were necessary to preserve public safety.⁶¹ With cell phones and other communication technologies being a ubiquitous feature of modern life, these significant interests may increasingly find themselves on opposite sides of an ideological divide.

A succinct definition of what constitutes prior restraint is elusive;⁶² however, it is clear that there is a heavy constitutional presumption

⁵⁷ *Id.* at 902.

⁵⁸ *Id.* at 928 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. at 270 (1964)).

⁵⁹ *Id.* (citation omitted).

⁶⁰ See Letter from Abdi Soltani & Alan Schlosser, Directors, ACLU of Northern California, to Kenton W. Rainey, BART Chief of Police (Aug. 15, 2011), available at http://www.aclunc.org/issues/technology/blog/asset_upload_file335_10381.pdf.

⁶¹ See *Statement on Temporary Service Interruption in Select BART Stations on Aug. 11*, *supra* note 15.

⁶² See CHEMERINSKY, *supra* note 49, at 953.

against its use.⁶³ Perhaps the clearest definition of prior restraint is found in *Alexander v. United States*, in which the Court declared “[t]he term prior restraint is used ‘to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.’”⁶⁴ The constitutional evil is that discretion in the disfavoring of certain speech, where “delay[s] [are] inherent and review relatively remote” can subject otherwise protected speech to a “discriminatory burden by governmental action.”⁶⁵

However, the Court has more recently declined to classify an order as a prior restraint because it was based upon a “continuing course of repetitive conduct” in which the Court was not asked “to speculate as to the effect of publication,” since it was already known.⁶⁶ The Court was also certain to take note that the government’s regulation order did not operate more broadly than necessary to accomplish a legitimate goal.⁶⁷

The Court’s generally unfavorable posture toward prior restraints can be seen in two of the leading cases. In *Near v. Minnesota*, a newspaper publisher was enjoined from “producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper.”⁶⁸ Any violation would subject the publishers of the paper to contempt of court,⁶⁹ as the order was not a punishment for publication; rather, it was a form of government intervention designed to precede any future publication.⁷⁰ The order was therefore a prior restraint and was held unconstitutional.⁷¹ Indeed, the Court found that the lower court’s order was constitutionally problematic as the alleged defamatory publication was political in nature, containing critical commentary on public officials.⁷² Moreover, the Court was clear that the constitutional evil of “circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of

⁶³ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.” Therefore, government “carries a heavy burden of showing justification for the imposition of such a restraint.”) (citations omitted).

⁶⁴ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citing MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH §4.03 4–14 (1984)).

⁶⁵ *AK Media Group, Inc. v. City of Portland*, 1999 WL 34809347, at n.58 (Or. Cir. Ct. Jun. 3, 1999).

⁶⁶ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (2000); see also CHEMERINSKY, *supra* note 49, at 950–52.

⁶⁷ *Id.*

⁶⁸ *Near v. Minnesota*, 283 U.S. 697, 706 (1931).

⁶⁹ *Id.* at 712.

⁷⁰ *Id.* at 715.

⁷¹ *Id.* at 723.

⁷² See *id.* at 714–17.

crime”⁷³ pertaining to “reprehensible conduct, and in particular of official malfeasance”⁷⁴ is a less significant public evil than would be caused “by authority to prevent [such] publication.”⁷⁵

In *New York Times Co. v. United States*, also known as the “Pentagon Papers case,”⁷⁶ the Court refused to institute an injunction on the publication of a classified study entitled, “*History of U.S. Decision-Making Process on Viet Nam Policy*.”⁷⁷ The government claimed that the publication of the study would endanger the ongoing war effort,⁷⁸ but in a splintered opinion, even this alleged military security interest was not sufficient to meet the “heavy burden of showing justification for the imposition of such a restraint.”⁷⁹

Subsequent cases have provided additional clarity to the “heavy presumption” standard. In *Nebraska Press Association v. Stuart*, the Court held that despite the significant governmental interest in preserving an accused murderer’s Sixth Amendment right to a fair and impartial jury, the trial court judge’s order restricting the news media from “publishing or broadcasting accounts of confessions or admissions made by the accused” could not meet constitutional scrutiny.⁸⁰ In reaching the decision, the Court took into account: (i) whether “measures short of an order restraining all publication [would not] have insured the defendant a fair trial”⁸¹ and (ii) the ease and suitability of implementing a more speech protective alternative.⁸²

If the speech is unprotected by the First Amendment, the standard changes slightly, but maintains the overall form. In an example illustrating this still-significant level of constitutional protection, an administrative board proscribing a licensing scheme to restrict the operation of adult book stores was still required to meet tough requirements: (i) procedures enacted to ensure prompt administrative decision-making; (ii) “burden of proof rules favoring speech;”⁸³ (iii) and judicial review procedures in place so that “courts remain sensitive to the need to prevent First Amendment harms.”⁸⁴

The BART incident would be a unique application of prior restraint doctrine. Because the shutdown affected many persons not

⁷³ *Id.* at 722–23.

⁷⁴ *Id.* at 723.

⁷⁵ *Id.*

⁷⁶ See generally DAVID RUDENSTEIN, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 1–2 (1996).

⁷⁷ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

⁷⁸ *Id.* at 718.

⁷⁹ *Id.* at 714.

⁸⁰ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 541 (1976).

⁸¹ *Id.* at 563.

⁸² See *id.* at 563–66.

⁸³ *City of Littleton v. Z.J. Gifts*, 541 U.S. 774, 779 (2004).

⁸⁴ *Id.* at 781.

associated with the allegedly hazardous speech⁸⁵ and because such a shutdown was the first in American history,⁸⁶ it is unclear whether prior case law would provide useful guidance in application of the doctrine. However, with events arguably related to national security threats insufficient as a justification for prior restraint, it appears that proponents of the shutdown would struggle to justify their actions as necessary in light of the heavy presumption against the use of speech restraints.

C. *Public Forum*

The public forum doctrine, derived from the First Amendment, is also relevant to the BART shutdown and the constitutional limitations on government authority to close communication networks. A fundamental principle of First Amendment doctrine,⁸⁷ public forum analysis has a significant effect upon the speech rights to be exercised on public property. An important question in the BART shutdown is whether the wireless communication network or the subway station platform itself is the forum for the requisite constitutional analysis. Answering this question is crucial for defining governmental rights to interfere with speech.

The First Amendment does not provide individuals with the right to use private property owned by others for speech.⁸⁸ In this realm of constitutional law, the location of the speaker can be the deciding factor in the constitutionality of the speech.⁸⁹ Thus, the Court recognized long ago, after initially denying the right,⁹⁰ that freedom of speech in public places is imperative for the right to free speech to have any real power.⁹¹

Once this right to free speech on government property was recognized, the Court needed to define what sort of property could be

⁸⁵ See Galperin, *supra* note 13.

⁸⁶ BART Board Mulls Developing Cell-Phone Policy, *supra* note 10.

⁸⁷ See Robert C. Post, *Between Governance And Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1714 (1987) (citation omitted).

⁸⁸ See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

⁸⁹ See *id.* Although the state action doctrine blurs this distinction, see, e.g., *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (discussing the state action doctrine as well as the associated “public function” and “entanglement” exceptions). See also *PruneYard Shopping Ctr v. Robins*, 447 U.S. 74 (1980) (holding that a state could create a state constitutional right of access to shopping centers for speech purposes).

⁹⁰ See *Commonwealth v. Davis*, 162 Mass. 510, 513 (1895) (holding constitutional a public ordinance prohibiting “any public address” on publicly owned property without an express permit from the Mayor).

⁹¹ See, e.g., *Hague v. Comm. For Industrial Org.*, 307 U.S. 496 (1939) (finding that an ordinance mandating a permit for use of public streets or parks for public assembly or gatherings and enabling a government official the power to refuse a permit based solely upon his opinion is unconstitutional); see also *Schneider v. State of New Jersey*, 308 U.S. 147, 162 (1939) (“[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution [of pamphlets] results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering.”).

used for speech and under what conditions. This development recognized that different considerations should be at play, if, for example, an individual bursts into the House of Representatives demanding the right to speak compared with Occupy Wall Street or Tea Party protesters demonstrating in an otherwise quiet and empty public park. Case law developed to recognize three types of government property for First Amendment purposes: traditional public forum, nonpublic forum, and designated public forum.⁹² A brief foray into the three respective classifications serves as a useful tool to discern the differences between each, and more importantly, the considerations for the differences in classification.

Public forum considerations play a significant role in analyzing the constitutionality of the shutdown. As certain forums entitle speakers to greater protections from government speech than others, it will be crucial to locate the relevant forum for constitutional analysis—be it the subway platform or the wireless network—in order to determine the rights of the speakers therein.

1. Traditional Public Forum

Using the language of *Perry Education Ass'n v. Perry Local Educators' Ass'n*, traditional public forums are:

[p]laces which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the [s]tate to limit expressive activity are sharply circumscribed . . . [such as] streets and parks In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.⁹³

Even though at one time it appeared that the public forum doctrine was solely a product of an affirmative constitutional mandate to broadly protect speech related to government and policy issues, the Court has dug its heels into rigid categorization and enforced a more limited restriction.⁹⁴ This model is more consistent with a negative mandate preventing public officials from “skewing public debate by denying

⁹² *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983); see also Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1 (2012) (stating in part that the Court has not developed a rule to determine classification of a particular place, and instead, has ruled on many specific places).

⁹³ *Perry Educ. Ass'n*, 460 U.S. at 45 (citations omitted).

⁹⁴ See Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 102 (1993). Known as the “enhancement model,” it derives in large part from Justice Brennan’s opinion in *N.Y. Times v. Sullivan* establishing a commitment to a “profound national commitment to the principle that debate on public issues be uninhibited, robust and wide-open.” 376 U.S. 254, 270 (1964).

access to citizens because they want to express disfavored views.”⁹⁵

2. Nonpublic Forum

Not all public property is, by tradition or through designation, a forum for public communication. For these other public spaces, “the [s]tate 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.”⁹⁶ Even for these other government properties, speech remains protected by the First Amendment. In these nonpublic forums, the government must act reasonably and may enact content-based speech restrictions, but must not act to restrict speech based on the speaker’s viewpoint.⁹⁷ As Professor Marvin Ammori noted in his blog, “[r]easonable is a low threshold, but it’s not nothing.”⁹⁸ Reasonableness precludes “an effort to suppress expression merely because public officials oppose the speaker’s view.”⁹⁹ In other words, a law applying to actions in a non-public forum cannot be viewpoint-based, which is something more targeted than a mere content-based restriction.¹⁰⁰ Furthermore, for the nonpublic forum, it remains unclear whether even a very significant government interest could justify an absolute prohibition on speech.¹⁰¹

3. Designated Public Forum

The third category of government free speech forums consists of “public property which the [s]tate has [voluntarily] opened for use by the public as a place for expressive activity.”¹⁰² Even though a state is not required to indefinitely keep the property in an open state of free public communication, “as long as it does so it is bound by the same standards as apply in a traditional public forum.”¹⁰³ Therefore, if the state does increase speech rights in a public space or “designate” public property for expressive activity where it otherwise would not be

⁹⁵ Bevier, *supra* note 94, at 105. This model, known as the “distortion model,” views “the essential task of the First Amendment rules is to restrain government from deliberately manipulating the content or outcome of public debate and to prohibit it from censoring, punishing, or selectively denying speech opportunities to disfavored views.” *Id.* at 103.

⁹⁶ *Perry Educ. Ass’n*, 460 U.S. at 46.

⁹⁷ Marvin Ammori, *Free Speech Rights: Here, There, and Everywhere (BART SF)*, AMMORI.ORG (Aug. 16, 2011), <http://ammori.org/2011/08/16/free-speech-rights-here-there-and-everywhere-bart-sf/>. See generally Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315 (1997).

⁹⁸ *Id.* (citing Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)).

⁹⁹ *Perry Educ. Ass’n*, 460 U.S., at 46.

¹⁰⁰ See Marvin Ammori, *Bart SF 4: More on First Amendment Analysis*, AMMORI.ORG (Aug. 13, 2011), <http://ammori.org/2011/08/13/bart-sf-4-more-first-amendment/>.

¹⁰¹ See *id.*

¹⁰² *Perry Educ. Ass’n*, 460 U.S., at 45–46.

¹⁰³ *Id.* at 46.

available, then the Court will apply traditional public forum analysis.¹⁰⁴ There remains a great deal of uncertainty, however, regarding how the government can establish or revoke designated public forum status.¹⁰⁵ Still, the government may not act to suppress speech in a content and viewpoint neutral manner if doing so burdens far more speech than necessary to achieve an important governmental interest.¹⁰⁶

II. THE TROUBLE WITH FIRST AMENDMENT DOCTRINE

There is no common law precedent dealing with a government shutdown of a wireless communications network in the United States.¹⁰⁷ Additionally, First Amendment doctrine, while still a useful tool, cannot apply wholesale in the shutdown scenario because it relies on distinctions that do not easily transfer to wireless communications. Ascertaining a speaker's intent and the likelihood of imminent lawless action under the *Brandenburg* test can be more difficult on a website or a text message than a face-to-face encounter.¹⁰⁸ Should a "like" on Facebook be used as a measure of intent? Should the number of re-tweets on Twitter be used to ascertain the likelihood of imminent lawless action? And even before applying the intricate public forum conventions, it is unclear which "forum"—the wireless network or the physical location—is the appropriate medium for analysis. Furthermore, and perhaps most significantly, a full shutdown of wireless communication speech necessarily implicates all First Amendment free speech doctrines, for even though this deprivation of speech was temporary, it completely foreclosed an avenue of speech capable of receiving and delivering speech from nearly any entity. By silencing one avenue of speech and restricting the overall free speech ability of an unknown number of bystanders, it appears that this encroachment on rights (for at least potentially suspect reasons) requires a searching judicial inquiry.

A. *For and Against The BART Shutdown*

Leading academics are split in their analyses of the proper

¹⁰⁴ See *Krishna Consciousness*, 505 U.S. at 673; see also *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding, based on free speech grounds, that a university opening school buildings for student groups could not preclude student religious groups from access). *But see* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (wherein the Court's holding illustrates the difficulties in identifying forum designation and designation protraction: "[t]he State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum.'") (citations omitted).

¹⁰⁵ See *Bevier*, *supra* note 94.

¹⁰⁶ *Krishna Consciousness*, 505 U.S. at 673.

¹⁰⁷ *BART Board Mulls Developing Cell-Phone Policy*, *supra* note 10.

¹⁰⁸ See Daniel T. Kobil, *Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV. 227 (2000).

application of current legal precedent to the BART shutdown. Professor Ammori takes the position that the BART shutdown, viewed from any of at least three points of legal analysis, was most likely unconstitutional.¹⁰⁹ First, assuming that the BART stations are nonpublic forums, the shutdown is unconstitutional because it has the effect of “[broadly] banning an entire medium of speech.”¹¹⁰ Ammori cites *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*¹¹¹ and *International Society for Krishna Consciousness, Inc. v. Lee*¹¹² for the proposition that the shutdown likely fails both prongs of the test for permissible speech restrictions in nonpublic forums. Although failing only one prong of the test is required for a finding of unconstitutionality, he found the action “was both unreasonable and likely viewpoint based.”¹¹³ Second, Ammori claims that if the wireless network at the BART station is seen as a forum itself, and not as a medium of speech, “then it is either a nonpublic forum or a designated public forum.”¹¹⁴ If the cellular network is considered a designated public forum, a stricter test applies to the constitutionality of the government’s actions.¹¹⁵ A complete ban on using the wireless network, according to Ammori, would have to be narrowly tailored to a compelling governmental interest.¹¹⁶ And, for Ammori, BART would likely fail to show the required narrow tailoring.¹¹⁷ This is so because the restriction would burden far more people than necessary in order to accomplish the goal.¹¹⁸ Additionally, even if the shutdown could be characterized as a content-neutral time, place, and manner restriction, the government would still need to show some tailoring and an important government interest. Ammori claims it would be difficult to show this tailoring, though admittedly less so than if the shutdown were viewed as a total ban.¹¹⁹ Third, Ammori briefly addresses the BART spokesman’s use of *Brandenburg* to justify the agency’s actions. Ammori recognizes that *Brandenburg* sets such a high bar for suppressing speech claims that the test presents a barrier that BART is unlikely to overcome.¹²⁰

The ACLU also undertook the legal analysis and came to the same

¹⁰⁹ Marvin Ammori, *BART Disruption and First Amendment*, AMMORI.ORG (Aug. 30, 2011), <http://ammori.org/2011/08/30/bart-disruption-and-first-amendment>.

¹¹⁰ *Id.*

¹¹¹ *Bd. of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

¹¹² 505 U.S. 672 (1992).

¹¹³ Ammori, *BART Disruption and First Amendment*, *supra* note 109.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Ammori, *BART SF 4: More on First Amendment Analysis*, *supra* note 100.

¹¹⁹ Ammori, *BART Disruption and First Amendment*, *supra* note 109.

¹²⁰ *See id.*

conclusion that BART's actions were unconstitutional.¹²¹ In a letter addressed to BART Chief of Police Kenton Rainey, the ACLU makes clear that broad bans of speech that affect many who are not involved in the protest are unconstitutional.¹²² In the letter, the ACLU first takes care to note that as political speech, the protesters vis-à-vis the wireless network should have been entitled to significant protection from heavy-handed government suppression: “[t]he First Amendment reflects the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’”¹²³ Second, the ACLU raises the contention that even if the shutdown may have been neutral on its face in regards to content or speaker, “BART’s ‘purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional.’”¹²⁴ Third, the ACLU paints BART’s action as a prior restraint on speech, comparing the decision to “prohibiting the printing and dissemination of all newspapers because of concerns that a single letter to the editor may include plans for a protest.”¹²⁵ Citing the Ninth Circuit decision of *Collins v. Jordan*, the ACLU argues for an adequate police presence targeting those actually engaged in illegal conduct rather than the suppression of “legitimate First Amendment conduct as a prophylactic measure.”¹²⁶ Finally, the ACLU addresses BART’s use of *Brandenburg*, distinguishing the facts from the precedent and concluding that the mere possibility that some speech may indirectly lead to disruption cannot be a sufficient justification to ban an entire medium of speech.¹²⁷ Even under the government-friendly “clear and present danger” incitement test, the ACLU claims that BART’s action fails to meet constitutional scrutiny.¹²⁸

In opposition to the views of Ammori and the ACLU, Professor Eugene Volokh offers his analysis of the BART shutdown and comes to the conclusion that the shutdown was likely constitutional.¹²⁹ First, Volokh states that BART property is not a traditional public forum and therefore the government implicitly has more leeway to regulate and

¹²¹ Letter from Soltani & Schlosser, *supra* note 60.

¹²² *See id.*

¹²³ *Id.* at 1 (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹²⁴ *Id.* at 2 (citing *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2664 (2011)).

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1997)).

¹²⁷ *See id.*

¹²⁸ *Id.* *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (holding that speech is “protected against censorship or punishment, less shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”).

¹²⁹ Eugene Volokh, *An Unusual (But Likely Constitutional) Speech Restriction*, THE VOLOKH CONSPIRACY (Aug. 13, 2011, 11:22 AM), <http://volokh.com/2011/08/13/an-unusual-but-likely-constitutional-speech-restriction/>.

restrict speech.¹³⁰ Shutting down cell phone hardware on government property, Volokh argues, is much different from shutting down speech on private property or in streets or parks.¹³¹ Next, Volokh concedes that the restriction is content-based, as the shutdown was focused not on the “physical disruption caused by the noncommunicative effects of cell phones, as with the restrictions on cell phones on airplanes” but instead on the “physical disruption caused by what people communicate to each other using cell phones.”¹³² However, because the government property is not a traditional public forum, “the government has a good deal of authority to impose content-based but viewpoint-neutral and reasonable restrictions. And the restriction here did seem to be both viewpoint-neutral and reasonable.”¹³³ For Volokh, the shutdown was reasonable because the purpose of the network was to provide convenience. Once the network became a tool used for disruption, it was appropriate to close a service BART had no obligation to provide in the first place.¹³⁴

On balance, and despite Volokh’s arguments, it appears slightly more likely than not that the BART shutdown was unconstitutional. However, this analysis is heavily contingent on available facts; and with the great degree of uncertainty inherent in this legal analysis, it is entirely possible that any upstanding court could reach a conflicting conclusion.

First, under *Brandenburg*, the protesters’ Twitter posts and other social media updates do not appear to satisfy the incitement speech standard to lose protection under the First Amendment. BART officials seemed to justify their decision to shut down wireless communications in part because of their belief that illegal conduct was imminent based on information gathered from the website of a single organizer.¹³⁵ Although past protests may have had individuals participating in activities that potentially endangered others,¹³⁶ it may not have been clear that the forestalled protest would have necessarily included these dangerous elements. Although the speech directing protesters to chain themselves to trains may have been advocacy of illegal activity, there did not appear to be a showing that any speaker actually intended the activity to occur, nor was there any evidence that the activity was likely

¹³⁰ *Id.*

¹³¹ Jon Brooks, *BART’s Shutdown of Cell Phone Service – Two Legal Opinions*, KQED News (Aug. 16, 2011, 3:09 PM), <http://blogs.kqed.org/newsfix/2011/08/16/audio-barts-shutdown-of-cell-phone-service-two-legal-opinions-lynette-sweet/>.

¹³² Volokh, *supra* note 129.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Associated Press, *Calif. Transit Agency Shuts Off Cell Service, Dials up Controversy*, FIRST AMENDMENT CENTER (Aug. 15, 2011), available at <http://www.firstamendmentcenter.org/calif-transit-agency-shuts-off-cell-service-dials-up-controversy> (reporting that the decision also appeared to be based upon the protests in the days preceding the shutdown).

¹³⁶ See Franklin & Wakeman, *supra* note 25.

to occur.¹³⁷ Without actual words from identified protesters, the connection between alleged incitement speech and the protest seems attenuated. Additionally, this incident is unlike typical incitement speech scenarios because the silencing (or punishing) affects all individuals and not just those intending to participate in the illegal activity. Taking these factual considerations as a whole, BART may have overreached in its attempt to justify a well-intentioned act with the highly speech-protective *Brandenburg* incitement test.

Second, BART's response to the public safety threat protesters allegedly posed does not appear to be sufficiently tailored or effective to overcome the "heavy presumption" against the use of prior restraints. While protecting the public is undoubtedly a significant governmental interest, from the facts available, it appears that: (i) BART officials may not have been able to show that without the shutdown, public safety would be jeopardized; (ii) measures short of a shutdown could not have protected the public; and (iii) the shutdown would have been an effective tool by which to guarantee public safety. Furthermore, available statements do not adequately address how a wireless network originally installed in the interest of public safety now presents a safety risk.¹³⁸ However, BART would be undoubtedly correct to note that the network was originally introduced in the wake of September 11th to provide emergency service before mass-market cellular phones carried wireless Internet access.¹³⁹

Importantly, it is unclear whether there were no alternative measures available to ensure public safety. If the concern was that protesters would chain themselves to trains, transit police could have been on the lookout for individuals carrying large chains into subway stations and stopped them from entering. And similarly, if BART had concerns about protesters organizing by shirt colors,¹⁴⁰ it could have alerted transit police to be vigilant of groups of individuals dressed in matching colors. Of course the viability of these tactics heavily depends on the existence of a sufficiently large and trained transit police force that is prepared for the undertaking, which, in this case, may not have existed. Finally, although the scheme was largely effective at protecting public safety during the shutdown, it was unclear whether the protests posed such a threat. If the protests themselves were threats to public safety, the shutdown was ultimately ineffective, as the protests that took place in response to the shutdown were much larger than any

¹³⁷ See Galperin, *supra* note 13.

¹³⁸ Cabanatuan, *supra* note 24.

¹³⁹ See *The Evolution of Cell Phone Design Between 1983-2009*, WEBDESIGNER DEPOT, <http://www.webdesignerdepot.com/2009/05/the-evolution-of-cell-phone-design-between-1983-2009/> (last visited March 30, 2012).

¹⁴⁰ Franklin & Wakeman, *supra* note 25.

that occurred in the transit police shooting.¹⁴¹

Importantly, even if *Brandenburg* applies and the alleged incitement speech was unprotected by the First Amendment, the shutdown may still have been unconstitutional. If found to be a prior restraint, BART might have had to ensure that there were procedures in place for making this decision and that judicial review of the incitement determination would be available.¹⁴² However, as mentioned, there were no specific procedures in place for making the shutdown decision.¹⁴³ In fact, the decision was made outside of typical procedures for such general matters and was enacted without board approval.¹⁴⁴

Third, public forum considerations also might result in a finding that the BART shutdown was unconstitutional. As a threshold matter, it seems fairly clear that subway platforms are not traditional public forums.¹⁴⁵ Separating out the wireless network from the physical subway platform, it is also likely that the network itself is not a traditional public forum, although the law is less clear on this point.¹⁴⁶

Even though there was no traditional public forum, the shutdown still might have been unconstitutional because a court might find it was unreasonable and viewpoint based. The speech rights of untold numbers of commuters who had absolutely nothing to do with the protests were affected when BART decided to shut down the network. Many of these people undoubtedly used the network for purposes other than staging a protest. Furthermore, the ban was pervasive in that it foreclosed an entire medium of speech instead of, for instance, only allowing emergency dial capabilities.

Balanced against this burden on network users, the government proffers the possibility of an imminent threat to public safety. The facts available, at the very least cast some doubt on this argument,¹⁴⁷ although threats to public safety should be taken seriously by

¹⁴¹ *BART Letter to Customers Addresses Cellphone Disruption*, ABC NEWS (San Francisco) (Aug. 21, 2011), http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=8319033.

¹⁴² See *City of Littleton v. Z.J. Gifts*, 541 U.S. 774, 780-81 (2004); *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965).

¹⁴³ See *BART Board Mulls Developing Cell-Phone Policy*, *supra* note 10. See also Zuscha Elinson, *BART Director: Cell Phone Shutdown Didn't Go Through Proper Channels*, BAY CITIZEN (Aug. 13, 2011), <http://www.baycitizen.org/bart-police-shooting/story/bart-director-cell-phone-shutdown-didnt/>.

¹⁴⁴ *Id.*

¹⁴⁵ See *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983). There is no indication that BART subway platforms have a "long tradition or by government fiat have been devoted to assembly and debate." *Id.*

¹⁴⁶ See *U.S. v. American Library Ass'n*, 539 U.S. 194, 195 (2003) (holding that Internet access in public libraries "is neither a 'traditional' nor a 'designated' public forum."). If the court did find that there was a traditional public forum, however, BART's actions were undoubtedly too broad to be found constitutional.

¹⁴⁷ See Galperin, *supra* note 13.

government entities. Further, while the loss of human life or a more general threat to public safety is undoubtedly significant (and the agency should be commended for its concern), there was no clear indication of the degree of the threat posed to the public.

As a final concern, there is an uneasy conflict with BART officials coalescing a protest with a threat to public safety. If a protest is to always mean a threat to public safety, then the government might be able to eliminate or vastly curtail the right to protest. Such actions might be viewpoint-based restrictions of highly protected political speech.¹⁴⁸

B. Why This Uncertainty Is Troubling

The uncertainty in the application of the current state of the law to the wireless communication context is troubling because uncertainty does not lead to predictable behavior on the side of the authorities or the individuals making use of the network. As wireless communication inevitably expands into tunnels, train stations, and other publicly controlled and maintained areas, granting the government a wide-ranging authority to silence speech would amount to a massive expansion in speech regulation. On the other hand, the possibility exists that without any government action, some individuals might make use of the network in order to carry out acts that endanger public safety. Also, if government becomes too reliant on the shutdown response then those with illicit aims might take advantage of the lack of communication to possibly cause more harm to public transit riders. This all poses problems for users who might come to eschew the service entirely. If the BART decision stands unchecked, it could lead to other municipal bodies following suit, resulting in cheap and expansive speech-restrictive capabilities in the hands of government bodies with interests not always aligned with robust speech rights. Further, as municipal Internet networks become more prevalent, the ramifications of unchecked municipal regulatory authority would become a greater concern as government entities would have broad authority to silence communication.

C. Effects Beyond The BART Scenario

The implications of a policy decision will have effects beyond this relatively narrow factual circumstance. As the government becomes more intertwined with providing and facilitating Internet and other wireless services, as well as increasing regulatory efforts aimed at

¹⁴⁸ See *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (noting that “political speech is entitled to the fullest possible measure of constitutional protection.”).

wireless communication networks, the government will be increasingly in a position to shut down services to further public safety.

1. Municipal Internet

A growing number of supporters see municipal Internet as an effective tool for connecting more Americans to high-speed Internet services.¹⁴⁹ The U.S. has relatively low broadband access rates compared with other nations,¹⁵⁰ and increased access could provide the network effects to boost the whole economy. Although municipal Internet programs have stalled somewhat, some projects are advancing.¹⁵¹ However, there is fierce opposition to municipal Internet plans from some quarters; and some groups are concerned about heavy-handed government market intervention, coupled with the harmful effects it would have on service providers and the jobs they provide in communities across the country.¹⁵² Municipalities have responded that the lack of high-speed services in their areas hurts business.¹⁵³ Political squabbles aside, access and competition concerns should continue to be ongoing themes in the Internet service provider industry.¹⁵⁴

In municipal Internet schemes, with government acting as the service provider,¹⁵⁵ unelected and unaccountable government officials and employees could be in the position to shut down services. The extent of this power is unclear, but if the BART officials are unrestricted in their acts then one of the only protections available to users of municipal Internet could be whatever terms are in the contractual agreement between provider and user. Additionally, many of the municipal Internet programs are designed to help the poor with access,¹⁵⁶ and by eliminating these programs, the most disadvantaged members of society may be pushed out of participating in the wireless communication space altogether. These should be concerns state and local governments should take very seriously in designing policy.

¹⁴⁹ See Ben Scott & Frannie Wellings, *Telco Lies and the Truth about Municipal Broadband Networks* (April 2005), available at http://www.freepress.net/files/mb_telco_lies.pdf.

¹⁵⁰ *Id.* at 2. ("Present estimates are that around 30% of US households subscribe to DSL or cable modem service. This compares to over 70% in countries like South Korea. Virtually every rural state remains underserved and uncompetitive. In urban areas, many families are priced out of the market.")

¹⁵¹ Jason Mick, *UPDATED: NC Republicans Fight to Ban Municipal Internet Services*, DAILY TECH (March 18, 2011, 12:48 PM) <http://www.dailytech.com/UPDATED+NC+Republicans+Fight+to+Ban+Municipal+Internet+Services/article21161.htm>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Preserving the Open Internet, Broadband Industry Practices, FCC Red (Dec. 21, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

¹⁵⁵ Scott & Wellings, *supra* note 149.

¹⁵⁶ See *Public Wireless Internet has had a Tough Time in America. Can Britain do Better?*, THE ECONOMIST (Nov. 19, 2009), available at <http://www.economist.com/node/14927230>.

III. TOWARD A NEW FRAMEWORK DEFINING GOVERNMENT AUTHORITY TO SHUT DOWN WIRELESS COMMUNICATION NETWORKS

Along with some of the more traditionally free-speech-restrictive political regimes,¹⁵⁷ at least one Western European nation, England,¹⁵⁸ appears poised to enact increasingly speech-restrictive legislation for speech facilitated by wireless communication. The concern for these nations is that technology can serve as a medium for incitement and unrest.¹⁵⁹ For the U.S., this development begs the question: should the government take the same position and look to close wireless communication networks that might play a role in ongoing unrest? Or are there policy notions and constitutional values that should counsel another position? These questions help illuminate some of the underlying principles of American democracy and serve as building blocks for a balanced policy solution that takes account of the public's right to safety and the individual's right to expression.

A. Historical Considerations

Although the United States shares common contemporary notions of civil liberties with the U.K., the fundamental philosophical foundations of American constitutional democracy were intentionally designed to represent a split from historically restrictive English speech regulations.¹⁶⁰ With the invention of the printing press and the printing of the first book in England in 1476, the possibility of danger imposed by unfavorable views became magnified.¹⁶¹ To combat this new threat, the crown instituted a licensing system whereby any work intended for publication had to be submitted and approved by government officials

¹⁵⁷ Sampling some more prominent examples: Egypt shut down nearly all web traffic during the peak of the protest movement overthrowing dictator Hosni Mubarak in January 2011. Ryan Singel, *Egypt Shut Down Its Net With a Series of Phone Calls*, WIRED (Jan. 28, 2011, 4:17 PM), <http://www.wired.com/threatlevel/2011/01/egypt-isp-shutdown/>. Syria routinely jails bloggers. Jillian C. York, *A Year of Blogging, Threats and Silence*, AL JAZEERA (Dec. 30, 2011), <http://www.aljazeera.com/indepth/opinion/2011/12/20111230102652797662.html>. In addition, Syria also routinely blocks Internet traffic. Ivan Watson, *Cyberwar Explodes in Syria*, CNN (Nov. 22, 2011), <http://edition.cnn.com/2011/11/22/world/meast/syria-cyberwar/index.html>. Moreover, according to international watchdogs, Iran's censorship regime is not only one of the most expansive in the world; it is also one of the most sophisticated. See *Iran*, OPENNET INITIATIVE, <http://opennet.net/research/profiles/iran> (last visited Jan. 2, 2012).

¹⁵⁸ A recent statement by British Prime Minister James Cameron to Parliament included the following: "[the] [f]ree flow of information can be used for good. But it can also be used for ill. And when people are using social media for violence we need to stop them." Omar El Akkad, *Britain's Musings of Social-Media Ban Fraught with Technical Difficulty*, THE GLOBE AND MAIL (Aug. 12, 2011, 11:47 AM), <http://m.theglobeandmail.com/news/technology/tech-news/britains-musings-of-social-media-ban-fraught-with-technical-difficulty/article2127399/?service=mobile>.

¹⁵⁹ See Eva Galperin, *British Prime Minister Does a 180 on Internet Censorship*, ELECTRONIC FRONTIER FOUND. (August 11, 2011), <https://www.eff.org/deeplinks/2011/08/british-prime-minister-does-180-Internet>.

¹⁶⁰ See STONE ET AL., THE FIRST AMENDMENT 3 (Been et al. eds., 3d ed. 2008).

¹⁶¹ *Id.*

before publishing.¹⁶² Additionally, and perhaps most significantly, the doctrine of seditious libel entered Anglo-American jurisprudence through a 1275 statute outlawing “any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the greater men of the realm.”¹⁶³ The King’s Council, sitting at what came to be called the “Star Chamber,” punished any violations of the statute.¹⁶⁴

It is largely against this backdrop that the framers of the Constitution developed their conception of free expression. Although scholars have puzzled and at times clashed over the actual intent of the First Amendment,¹⁶⁵ some fundamental tenets appear to be clear. First, it seems that the framers did not draft the First Amendment to remedy the matter of licensing as this “had expired in England in 1695 and in the colonies by 1725.”¹⁶⁶ It seems clear, therefore, that the framers did not draft the Amendment in order to amend an issue already decided in favor of the position of liberty, but instead out of fear of seditious libel prosecutions that had so threatened writers, political thinkers, and agitators in England.

B. *Searching for a Boundary*

Although the intent of the framers with regards to the First Amendment may never be fully known, this obstacle has not proven to be a significant hurdle in the development and evolution of First Amendment doctrine.¹⁶⁷ For all the many guiding principles running across First Amendment jurisprudence, certainly one of the most fundamental in greater constitutional law is the search for boundaries.¹⁶⁸ This principle provides significant guidance in the shutdown scenario. The framers assumed that an institution or group of people entrusted with power would be likely to abuse that power.¹⁶⁹ Because of this belief, the framers specifically did not provide for a direct democracy for fear that individuals would underutilize or act overly aggressive with the authority.¹⁷⁰ Instead, only elected representatives were to make

¹⁶² *Id.* This system was largely ineffective and conducive to bribery. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See generally Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 60–63 (1989).

¹⁶⁶ STONE ET AL., *supra* note 160, at 6.

¹⁶⁷ See Liezl Irene Pangilinan, “*When a Nation is at War*”: *A Context-Dependent Theory of Free Speech for the Regulation of Weapon Recipes*, 22 CARDOZO ARTS & ENT. L.J. 683, 694 (2004) (noting that regardless of the framers’ intent, speech rights have expanded significantly beyond those present in early America.)

¹⁶⁸ See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273 (2009).

¹⁶⁹ Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (2009).

¹⁷⁰ *Id.* at 809.

legislative decisions. Although the framers were concerned with the corrupting effects of power, they still had hope that this system of government would preserve liberty—a concept Professor Marci Hamilton has coined as the “Calvinist paradox of distrust and hope.”¹⁷¹ Despite this overwhelming sense of distrust—from distrust of the legislature to distrust of the executive, the people, religion and more—the framers were at least hopeful that they could design a government that would balance competing interests against each other through a system of assigning competing powers to the respective branches.¹⁷² Thus, boiled down, the framers’ theory was relatively simple: if one cannot trust social entities, first ensure that such entities are working toward the common good, but assign power in different and conflicting ways to keep each institution accountable and under pressure from other social institutions. By limiting unchecked power, the framers hoped to avoid both a King George III tyrannical government and an ineffectual do-nothing Articles of Confederation government.¹⁷³

With the source of government authority to shut down and restrict the wireless communication networks unclear, the presumption should not be to place the totality of this authority in the hands of one branch of government. Municipal authorities, acting through the executive branch, should not have unchecked power to unilaterally shut down cell phone or Internet service in light of any event deemed a threat to public safety. Instead, this highly significant and increasingly powerful authority should be subject to oversight and coordination amongst the branches. Taking into account these historical and structural considerations, this Note proposes a simple solution.

C. *The New Framework*

The authority to shut down wireless communication networks in response to an impending “threat” to public safety is an extraordinary government power. Current legal doctrines do not provide ready solutions for this developing concern and leading commentators are split as to the proper way to apply legal doctrine. This uncertainty is troubling and should be addressed in an expedient and balanced manner. A solution should seek to preserve the liberty of free expression while preserving the authority, when necessary, to shut down or limit service in order to prevent impending illegal activity or stop ongoing illegal activity. In order to preserve free speech rights through government-facilitated wireless communication networks, threatened with closure

¹⁷¹ See Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, 293, 295 (Michael W. McConnell et al. eds., 2001).

¹⁷² *Id.*

¹⁷³ *Id.*

due to public safety concerns, several safeguards should be in place.

First, in borrowing from prior restraint doctrine, authorities should be required to make significant efforts to use less-speech-restrictive means to address public safety concerns before looking to a network-wide shutdown. This could mean that authorities make use of technological solutions to, for instance, shut off speech from individual protesters engaging in the sort of incitement speech that meets the *Brandenburg* standard, so long as these decisions are reached by taking into account the practical limitation of drawing sweeping conclusions based on a limited record online speech. It could also mean that these offenders are immediately banned from all future use of the network if they exploit it to conduct illegal activity. Authorities could also take a more active role in using less-speech-restrictive means to prevent misuse of the wireless network. Officers could be trained to use the tips procured from websites and social media to develop more effective policing techniques. In the BART scenario, if transit police were concerned with protesters chaining themselves to trains, officers should have focused on making sure that no individual took metal chains into subway stations instead of using speech-restrictive practices as a first line of defense. It might be difficult to coordinate police officers so quickly, and therefore, new training techniques might need to be developed to fulfill this policy goal. Also, local governments should look to develop or use technologies that could shut off wireless Internet connection to mobile devices, while maintaining cellular services to contact emergency responders if necessary. At a time when many state and local government budgets are pushed to the brink of collapse, the increased training and other costs might seem prohibitively expensive. However, if the protests after the BART shutdown are any indication, implementing these solutions might be a less expensive alternative than reigning in subsequent protests.

Second, and also borrowing from prior restraint doctrine, there should be judicial supervision of government decisions to shut down wireless communication networks, with authorities being required to obtain a court order before enacting a network shutdown. This safeguard would prevent frivolous shutdowns as well as shutdowns from authorities who have not adequately attempted less-speech-restrictive means. Further, this procedural hurdle may disincentivize governments from looking to a wireless communications shutdown as a first option pursuant to public safety concerns. In addition, this requirement leaves open the possibility of approving a communications shutdown, provided that a sufficient record of evidence supports that it is necessary to forestall the certainty or near-certainty of imminent lawless action, after less restrictive means, attempted or reasonably

considered, fail to stop a significant threat to public safety.

Third, authorities facilitating wireless communication services must be required to follow clearly-developed procedures before enacting a network shutdown. By requiring some modicum of procedure, officials may have to moderate their position to gain board or other approval. Additionally, officials must also design procedures to inform individuals of the possibility of a network shutdown. If individuals are aware of the possibility of a shutdown, the burden it presents to their speech rights is correspondingly lower, as they could not justifiably rely on the network to indefinitely remain available.

The counterargument, that the government does not have time to comply with procedural hurdles in times of impending threats to public safety, could be at least partially addressed by setting in place streamlined judicial oversight procedures.¹⁷⁴ Such procedures could be designed for this specific purpose and would set limitations and oversight of government actions. Additionally, as proposed by Professor Ammori, other elected officials in the legislative branch could also be assigned to formally approve wireless communication shutdowns.¹⁷⁵ This procedural hurdle, while expedited, would serve to hold elected officials accountable for the actions of government.

Finally, there must be additional clarity regarding precisely the circumstances in which the conduct of protest ends, and a threat to public safety begins. If any protest could be considered a threat to public safety due to the slim possibility that one face in the crowd could commit acts endangering the public, the right to protest could be nearly eliminated in the interest of public safety. This question is of significant concern in a situation resembling what happened at the four BART stations, whereby many individuals unrelated to the protest had their speech rights curtailed. Protesters and their accompanying political speech, significant and valued components of American democracy, should not be so automatically considered a threat to public safety in order to justify speech suppression. Of course there could be a scenario in which a protest abruptly turns violent and threatens public safety. If shutting down wireless communications could protect bystanders and save lives, then the option should remain viable. However, there should be significant pause before enacting any speech restriction where such interests are not at stake. It may be difficult to entrust government authorities to observe clear distinctions on this front; therefore the courts must take an active role in separating protest rights from legitimate public safety threats posed by isolated elements in the crowd.

¹⁷⁴ As proposed by Professor Ammori on his blog. See Ammori, *BART SF 3: Kill Switches*, *supra* note 27.

¹⁷⁵ See *id.*

These safeguards provide needed protection for free speech rights over government facilitated wireless communication networks. Government shutdowns of wireless communications should require these additional protections as such actions potentially implicate all First Amendment free speech doctrine by foreclosing an avenue of speech and restricting the overall free speech ability of an unknown number of bystanders. By altering the balance of power between free speech and government authority, this new framework aspires to strike the right balance between individual liberty and public safety.

CONCLUSION

With new technologies come new challenges for state and local governments and the police tasked with keeping order on the ground level. The growth of wireless communication networks has led to an unprecedented expansion in the ability of people to quickly and easily coordinate with one another. And with this ability to easily communicate comes the unfortunate possibility that some individuals may use this technology in furtherance of acts that threaten public safety. But this legitimate concern should not be a justification for placing extraordinary and limitless power in the hands of unelected and unaccountable government authorities.

This age of rapidly changing technology and shifting perspectives requires a certain restraint: a restraint to recognize the limitations of applying old ideas to new problems; a restraint to not quickly forestall all options in favor of an easy fix; and an understanding that although new technologies bring new freedoms, they can also bring new means of suppression. By adopting policies which presume the importance of the freedom of speech and which encourage coordination between the branches of government, principled solutions can be found which strike the balance necessary to achieve ordered liberty. For if we are to continually sacrifice our right to expression at every evolution of technology then we might not be left with much freedom to express. After all, there aren't many of us that send letters in the mail anymore.

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