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## BART Cell Phone Service Shutdown: Time for a Virtual Forum?

Rachel Lackert

*Indiana University Maurer School of Law*

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# BART Cell Phone Service Shutdown: Time for a Virtual Forum?

Rachel Lackert\*

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\* J.D. Candidate, Indiana University Maurer School of Law, May 2013; B.A. in Neuroscience, Smith College, May 2010. The Author would like to thank the entire *Federal Communications Law Journal* staff for their valuable insight and hard work in preparing this Note for publication. In addition, the Author would like to thank her family and friends for their continuous encouragement and support in all her endeavors.

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## I. INTRODUCTION

The balancing act between protecting First Amendment rights and the necessity of law enforcement to maintain public order is not simple under any circumstances, but, in 2011, this conflict was front-page news.<sup>1</sup> Rapid advances in technology, such as smartphones and social networking platforms like Twitter and Facebook, have severely heightened this issue by providing people with a greater capability to organize and implement protests quickly.<sup>2</sup> From “flash mobs” that rampage through the streets (as they did in England),<sup>3</sup> to revolutions which overthrow governments (as they did in Egypt),<sup>4</sup> to peaceful protest movements such as Occupy Wall Street<sup>5</sup> (and all of the “Occupy” spinoffs such as “Occupy D.C.”) that exploded overnight, all have one aspect in common—rapid communication by protesters via text, Twitter, and Facebook on Internet and non-Internet based cell phones. In fact, in countries where the Internet was shut down, as happened in Egypt,<sup>6</sup> the only means of communication was through the existing telephone system and landlines because this service was not easily or centrally controlled by Internet servers.<sup>7</sup>

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1. See, e.g., Gene Policinski, *BART Cell Shutdown a Landmark in Cyber-Assembly*, FIRST AMENDMENT CENTER, Aug. 19, 2011, <http://www.firstamendmentcenter.org/bart-cell-shutdown-a-landmark-in-cyber-assembly>.

2. Brent Lang, *Social Media at Forefront of Social Protest*, REUTERS, Feb. 3, 2012, available at <http://ca.news.yahoo.com/social-media-forefront-social-protest-034529821.html> (Some causes “would have inspired protests in the past, but the rate at which a movement materializes, intensifies and concludes has accelerated from years to months to, in the most recent instances, a matter of days.”).

3. Rioting has led the English government to consider curbs on social media and texting. Prime Minister David Cameron stated that “anyone watching the riots would be ‘struck by how they were organised via social media.’” *England Riots: Government Mulls Social Media Controls*, BBC NEWS: TECH., Aug. 11, 2011, <http://www.bbc.co.uk/news/technology-14493497>.

4. Nathan Olivarez-Giles, *Egypt Shuts Down the Internet, Some Phone Service as Protests Enter Fourth Day*, L.A. TIMES TECH. BLOG (Jan. 28, 2011, 9:56 AM), <http://latimesblogs.latimes.com/technology/2011/01/egypt-shuts-down-the-internet.html>.

5. Jennifer Preston, *Protesters Look for Ways to Feed the Web*, N.Y. TIMES, Nov. 24, 2011, <http://www.nytimes.com/2011/11/25/business/media/occupy-movement-focuses-on-staying-current-on-social-networks.html>.

6. Benny Evangelista, *Tech World Stunned at Egypt’s Internet Shutdown*, S.F. CHRON., Jan. 29, 2011, [http://articles.sfgate.com/2011-01-29/business/27090014\\_1\\_internet-access-egyptian-people-facebook-and-twitter](http://articles.sfgate.com/2011-01-29/business/27090014_1_internet-access-egyptian-people-facebook-and-twitter).

7. Doug Aamoth, *Egyptians Sidestep Internet Blackouts with Landline Phones*, TIME TECHLAND, Feb. 1, 2011, <http://techland.time.com/2011/02/01/egyptians-sidestep-internet-blackouts-with-landline-phones/> (stating that internet providers outside of Egypt have set up dial-up phone numbers that can be used for connections like the ones that have died out in countries as soon as broadband internet becomes more prevalent).

As governments across the political spectrum have become alarmed at this development, they have struggled with how to respond by giving varying weights to public expression versus public order. In the United States on August 11, 2011, the very essence of this problem was exemplified by the Bay Area Rapid Transit's ("BART") actions in San Francisco, California.<sup>8</sup> BART decided to shut down Internet and cell phone service on station platforms to prevent people from communicating with each other in order to organize and implement planned protests.<sup>9</sup> The protests were held to express continuing public outrage over the use of alleged excessive force by BART police officers for fatally shooting a man on July 3, 2011.<sup>10</sup> BART stated that the shutdown was proper to protect public order,<sup>11</sup> but this unilateral action raised significant legal questions as to whether this was authorized under federal telecommunications law relating to the right of the passengers to access the telephone network and the legality of a shutdown by a quasi-governmental authority such as BART. Additionally, BART's actions raised issues concerning the First Amendment rights of the passengers and protesters to freedom of speech and assembly.

Both the constitutional and telecommunications law implications of BART's cell phone and Internet shutdown provide for needed analysis and reform, especially in an age of rapidly advancing technology. Part II of this Note will discuss the facts surrounding the planned protests and BART's reaction to the crisis by shutting down cell phone and Internet service. Part III will highlight portions of the Communications Act of 1934 ("the 1934 Act") and expand on its relevance in relation to emerging technologies. Additionally, Part III will discuss the First Amendment under the freedom of assembly and speech doctrines, focusing primarily on prior restraints and public forum doctrines. Part IV will assess the potential issues raised by BART's cell phone and Internet shutdown in relation to telecommunications law and the First Amendment in light of the clearly political nature of the speech involved. Finally, Part V will offer a proposal to conform current technology and the law by recognizing the principle of a "virtual forum" comprised of the Internet and telecommunications networks. This virtual forum is extensively used in the present as a means for political expression and should be protected by the First Amendment.

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8. Zusha Elinson, *After Cell Phone Action, BART Faces Escalating Protests*, N.Y. TIMES, Aug. 20, 2011, <http://www.nytimes.com/2011/08/21/us/21bcbart.html?page-wanted=all>.

9. *Id.*

10. *Id.*

11. *Id.*

The recognition of the virtual forum will adequately protect First Amendment rights in the wake of recent government tendencies to shut down communication nodes, which are arguably performed either to protect the public order or to suppress opposition.

## II. BART CELL PHONE SERVICE SHUTDOWN

### A. Overview

Protests were organized to demonstrate public outrage over the shooting of Charles Hill by BART police officers on the Civic Center station platform on July 3, 2011.<sup>12</sup> BART officials stated that Hill wielded a four-inch knife and threw a bottle at BART officers before he was fatally shot.<sup>13</sup> This followed a highly publicized fatal shooting on January 1, 2009, where a BART officer shot Oscar Grant III in the back while he lay unarmed on the station platform.<sup>14</sup> The officer was found guilty of involuntary manslaughter and served only eleven months of a two-year sentence after claiming that he mistook his firearm for a stun gun.<sup>15</sup>

A social justice group named “No Justice No BART” deemed these shootings to be use of excessive force by BART police officers and decided to organize a protest on the Civic Center station platform, where Charles Hill was killed.<sup>16</sup> On July 11, 2011, people gathered for a demonstration at the Civic Center station where, according to BART, at least one person climbed on the top of the train while other protestors blocked train doorways and held train doors open.<sup>17</sup> As a consequence, other BART stations were completely or partially shut down and inoperable.<sup>18</sup> When BART officials learned that a similar protest might be planned for August 11, 2011, they decided to block all cell phone and Internet service at certain spots within the BART railway system.<sup>19</sup> Service was shut down from 4:00

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12. *Id.*

13. *Id.*

14. Jack Leonard, *Former BART Officer Convicted of Involuntary Manslaughter*, L.A. TIMES, July 8, 2010, <http://articles.latimes.com/2010/jul/08/local/la-me-bart-verdict-20100709>.

15. Gale Holland, *BART Officer who Killed a Man is Freed*, L.A. TIMES, June 14, 2011, <http://articles.latimes.com/2011/jun/14/local/la-me-mehserle-20110614>.

16. Michael Cabanatuan, *BART Admits Halting Cell Service to Stop Protests*, S.F. CHRON., August 13, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/08/12/BAEU1KMS8U.DTL>.

17. Justin Silverman, *BART Phone Blackout: Did the S.F. Transit Agency Violate Free Speech Protections?*, CITIZENS MEDIA LAW PROJECT BLOG (Aug. 25, 2011, 5:19 PM), <http://www.citmedialaw.org/blog/2011/bart-phone-blackout-did-sf-transit-agency-violate-free-speech-protections>.

18. *Id.*

19. *Id.*

p.m. to 7:00 p.m. in the Embarcadero, Montgomery Street, Powell Street, and Civic Center BART stations.<sup>20</sup> This unprecedented action was intended to prevent potential protesters from using social media in order to help others avoid the BART police.<sup>21</sup>

According to BART, Verizon, AT&T, and T-Mobile all provide service in the Transbay Tube, which “runs beneath the San Francisco Bay, connecting San Francisco to Oakland, Berkeley, and other East Bay cities.”<sup>22</sup> Cell phone providers were not asked by BART to shut down their towers located near BART stations and BART did not ultimately jam these wireless signals.<sup>23</sup> However, “BART owns and controls the wireless networks strung through its subways, and BART police ordered it switched off, after receiving permission from [the] BART Interim General Manager.”<sup>24</sup> The shutting down of cell phone and Internet service made it impossible for protesters to organize, and efforts to engage in the planned protests were ultimately thwarted by the actions of BART officials.<sup>25</sup>

BART’s shutdown of cell phone and Internet service generated outrage among commuters, civil libertarians, and the activist group Anonymous.<sup>26</sup> Anonymous, an infamous international hacker network, planned subsequent protests in response to both the excessive force used by BART officers and BART’s shut down of cell phone and Internet service.<sup>27</sup> Additionally, Anonymous disabled BART’s official website for six hours, twice as long as BART shut off cell phone and Internet service.<sup>28</sup> The hacking resulted in the release of “the names, home addresses, and e-mail addresses and passwords of just over 100 BART police officers.”<sup>29</sup>

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20. Elinor Mills, *S.F. Subway Muzzles Cell Service During Protest*, CNET NEWS (August 12, 2011, 12:59 PM), [http://news.cnet.com/8301-27080\\_3-20091822-245/s.f-subway-muzzles-cell-service-during-protest/](http://news.cnet.com/8301-27080_3-20091822-245/s.f-subway-muzzles-cell-service-during-protest/).

21. *Id.*

22. *Id.*

23. Cabanatuan, *supra* note 16.

24. *Id.*

25. *Id.*

26. Elinson, *supra* note 8 (comparing the BART cell phone shutdown to the communications shut down in Egypt by the hash tag #MuBARTek).

27. Carly Schwartz, *‘Anonymous’ Targets BART: Hacker Group Goes After San Francisco Transit System After Cell Phone Shutdown*, HUFFINGTON POST (last updated Oct. 14, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/08/14/anonymous-bart-cell-phone-shutdown-protest\\_n\\_926574.html](http://www.huffingtonpost.com/2011/08/14/anonymous-bart-cell-phone-shutdown-protest_n_926574.html).

28. *Id.*

29. Aaron Sankin, *‘Anonymous’ BART Police Attack: Hackers Expose Cops’ Personal Information*, HUFFINGTON POST (last updated Oct. 17, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/08/17/anonymous-bart-police-attack-personal-information\\_n\\_929627.html](http://www.huffingtonpost.com/2011/08/17/anonymous-bart-police-attack-personal-information_n_929627.html).

*B. BART's Response and New Policy*

BART officials stated that the cell phone and Internet service shutdown was in their legal authority as it was executed “out of concern that protestors 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.”<sup>30</sup> The decision was made after BART officials saw details of the protest on an organizer’s website.<sup>31</sup> BART officials made a formal statement on their website that “organizers planning to disrupt BART service on August 11, 2011 stated they would use mobile devices to coordinate their disruptive activities and communicate about the location and number of BART Police.”<sup>32</sup> Additionally, BART officials stated that “a civil disturbance during commute times at busy downtown San Francisco stations could lead to platform overcrowding and unsafe conditions for BART customers, employees and demonstrators.”<sup>33</sup>

BART officials also noted that BART owned the equipment that it shut off, and that it provided Internet and cell phone service to its customers as a sort of amenity, which BART had the right to discontinue at any time.<sup>34</sup> BART spokesperson, Linton Johnson, stated “that the cell phone companies are like tenants and ‘part of their agreement was that during a safety sensitive or emergency situation that [BART] can turn off the [cell phone] service.’”<sup>35</sup> BART also released a statement on August 18, 2011, addressing free speech: BART’s primary purpose is providing “safe,

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30. Michael Cabanatuan, *supra* note 16; *see also* Statement on BART Police Union Website Intrusion, Bay Area Rapid Transit (Aug. 17, 2011), <http://www.bart.gov/news/articles/2011/news20110817.aspx> (BART Interim General Manager, Sherwood Wakeman, stating, “We condemn this latest attack on the working men and women of BART. We are deeply concerned about the safety and security of our employees and their families. We stand behind them and our customers who were the subject of an earlier attack. We are deeply troubled by these actions.”).

31. *Calif. Transit Agency Shuts Off Cell Service, Dials Up Controversy*, ASSOCIATED PRESS, Aug. 15, 2011, *available at* <http://www.firstamendmentcenter.org/calif-transit-agency-shuts-off-cell-service-dials-up-controversy>.

32. Statement on Temporary Wireless Service Interruption in Select BART Stations in Aug. 11, Bay Area Rapid Transit (Aug. 12, 2011), <http://www.bart.gov/news/articles/2011/news20110812.aspx> [hereinafter BART Statement].

33. *Id.*

34. Zusha Elinson, *BART: ‘We Were Within Our Legal Right’ to Shut Down Cell Service*, THE BAY CITIZEN (Aug. 12, 2011), <http://www.baycitizen.org/bart-police-shooting/story/bart-cell-phone-service-legal/>.

35. Sydney Lupkin & Zusha Elinson, *Feds Probe BART’s Unprecedented Cell Phone Shutdown*, THE BAY CITIZEN (Aug. 15, 2011), <http://www.baycitizen.org/bart-police-shooting/story/feds-probe-barts-unprecedented-cell/>.

secure, efficient, reliable, and clean transportation services.”<sup>36</sup> The statement also added that “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.”<sup>37</sup> The BART statement implied that areas outside the stations and platforms that are accessible to unticketed individuals can be used for expressive activities.<sup>38</sup>

In December 2011, in order to accommodate free speech concerns, BART created a new policy regarding the shutting down of cell phone and Internet service.<sup>39</sup> The policy allows BART officials and police to shut down wireless communications, which is a valuable service to BART passengers, in train stations only under extraordinary circumstances.<sup>40</sup> To mollify free speech concerns further, BART’s new policy allows shutdowns only when there is “strong evidence of imminent unlawful activity that threatens [] safety . . . [and] the interruption will substantially reduce the likelihood of such unlawful activity . . . [and] such interruption is narrowly tailored . . . [as] necessary to protect against unlawful activity.”<sup>41</sup> The agency included several examples of the kind of extraordinary circumstances that would warrant the shut off of cell phone access, such as strong evidence that cell phones are being used to engage as instrumentalities for detonating explosives, to enable violent criminal activity, and to facilitate plans of destroying public property or disrupt train service.<sup>42</sup>

### C. FCC Review

In addition to BART revising their own policy on shutting down cell phone and Internet service in their transit system, the FCC has also

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36. BART Statement, *supra* note 32.

37. *Id.*

38. *Id.* (stating that “[n]o person 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.”). Additionally, if protestors want to exercise their rights to free speech on BART property, they must now obtain a permit. BAY AREA RAPID TRANSIT, *Permit to Engage in Expressive Activity*, <http://bart.gov/about/business/permits/eapermits.aspx>.

39. Paul Elias, *BART’s New Cell Phone Policy Allows for Outage*, ASSOCIATED PRESS, Dec. 1, 2011, *available at* [http://www.huffingtonpost.com/2011/12/02/barts-new-cellphone-policy\\_n\\_1126687.html](http://www.huffingtonpost.com/2011/12/02/barts-new-cellphone-policy_n_1126687.html).

40. *Id.*

41. BAY AREA RAPID TRANSIT, *Cell Service Interruption Policy*, [http://www.bart.gov/docs/final\\_CSIP.pdf](http://www.bart.gov/docs/final_CSIP.pdf).

42. *Id.*

reviewed and commented on the implications of BART's decision to obstruct the efforts of the protesters on August 11, 2011, as well as BART's new policy.<sup>43</sup> Due to the potential First Amendment issues, the FCC is taking a close look at BART's shutdown and will release a subsequent policy announcement to provide further guidance on these issues.<sup>44</sup> While the FCC said BART's new policy is an "important step in responding to legitimate concerns raised by its August 11, 2011 interruption of wireless service," the agency also believes that "[t]he legal and policy issues raised by the type of wireless service interruption at issue here are significant and complex."<sup>45</sup> The FCC will be reviewing the ramifications of the conflict, but has noted that "[f]or interruptions of communications service to be permissible or advisable, it must clear a high substantive and procedural bar."<sup>46</sup> In making suggestions about the policy, the FCC advised BART to add language concerning threats to public safety in addition to a requirement that the public safety outweigh the safety risks of an interruption, but the FCC made it clear that this should not be construed as an endorsement of the policy.<sup>47</sup>

### III. BACKGROUND

#### A. *The Communications Act of 1934*

##### 1. Overview

The 1934 Act combined and organized the federal regulation of telegraph, telephone, and radio communications, and created the FCC to regulate and supervise these industries.<sup>48</sup> As new communication technologies have been invented, such as cable, satellite television, and broadcast, the 1934 Act has been modified in order to accommodate these advances.<sup>49</sup>

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43. *FCC to Review BART Service Shutdown Policy*, CBS NEWS (December 2, 2011, 10:34 PM), [http://www.cbsnews.com/8301-205\\_162-57336077/fcc-to-review-bart-cell-service-shutdown-policy/](http://www.cbsnews.com/8301-205_162-57336077/fcc-to-review-bart-cell-service-shutdown-policy/).

44. *Id.* (internal quotations omitted).

45. *Id.* (internal quotations omitted).

46. Press Release, FCC Chairman Julius Genachowski's Statement on BART Policy Adoption, FCC (Dec. 1, 2011), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-311310A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311310A1.pdf).

47. Michael Cabanatuan, *BART Cell Phone Shutdown Rules Adopted*, S.F. CHRON., Dec. 2, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/12/01/BA1C1M74UB.DTL>.

48. U.S. DEP'T. OF JUSTICE, *Privacy & Civil Liberties: Federal Statutes*, available at <http://it.ojp.gov/default.aspx?area=privacy&page=1288> (last visited Apr. 8, 2012).

49. *Id.*

In relation to cell phones, the 1934 Act considers them to be “real phones for legal purposes.”<sup>50</sup> Section 332(c) of the 1934 Act defines cell phones, or Commercial Model Radio Service (“CMRS”), as Title II telecommunications common carriers, which implies that a cell phone is as much of a telephone as a landline phone.<sup>51</sup> Under the 1934 Act, “voice calls are considered a Title II service and are subject to the rules and regulations of the FCC, not the carriers like Verizon and AT&T.”<sup>52</sup> Therefore, common carriers must obtain a permit from the FCC in advance in order to shut down such cell phone service.<sup>53</sup>

## 2. Blocking and Jamming Signals

The operation of transmitters that are designed to block or jam<sup>54</sup> wireless communications is a violation of the 1934 Act under Sections 301, 302(a), and 333.<sup>55</sup> According to Section 302(a)(b) of the Telecommunications Act of 1996, the FCC declared that cell phone blocking is illegal, as “[n]o person shall manufacture, import, sell, offer for

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50. Harold Feld, *Why Shutting Down Cell Service is Not Just Against The Law, It's a Really Bad Idea*, PUBLIC KNOWLEDGE POLICY BLOG (August 23, 2011), <http://www.publicknowledge.org/blog/why-shutting-down-cell-service-not-just-again>.

51. *Id.*

52. Brynna Quillin, *BART and the Limits of Free Speech*, BERKELEY POL. REV. (Oct. 21, 2011, 8:35 PM), <http://bpr.berkeley.edu/2011/10/bart-and-the-limits-of-free-speech/>.

53. *Id.*

54. Cell phones act as a two-way radio device with the base station antennae they communicate. S. Robert Carter III, *The Sound of Silence: Why and How the FCC Should Permit Private Property Owners to Jam Cell Phones*, 28 RUTGERS COMPUTER & TECH. L.J. 343, 349 (2002). “Jamming technology blocks the transmission and reception of radio signals necessary for cell phones to function” by emitting electromagnetic white noise at the same frequency to allow for the jamming signal to collide with the cellular signal so that they cancel each other out. Erin Fitzgerald, *Comment: Cell “Block” Silence: Why Contraband Cellular Telephone Use in Prisons Warrants Federal Legislation to Allow Jamming Technology*, 2010 WIS. L. REV. 1269, 1282–83 (2010). In contrast, blocking a cell phone signal is achieved by using architecture to obstruct the wireless signal, which creates the same effect as a cell phone jammer. Carter III, *supra*, at 361. Examples include “concrete structures, steel beams, and walls embedded with copper-wire mesh.” Lisa Guernsey, *Taking the Offensive Against Cell Phones*, N.Y. TIMES, Jan. 11, 2001, <http://www.nytimes.com/2001/01/11/technology/taking-the-offensive-against-cell-phones.html>. An effective way to block cell phone signals is to configure a structure that produces a “Faraday Cage” effect, which is “a metal grid that blocks a conductor’s charge . . . [so] the electric charge remains on the outer surface of the cage . . . [so that] cell phones within the cage cannot send or receive their signals” due to no electrostatic field being within the cage. Carter III, *supra*, at 361. *See also* Brian P. Murphy, *Where Cell-Phone Silence is Golden*, BUS. WK., July 9, 2001, [http://www.businessweek.com/magazine/content/01\\_28/c3740019.htm](http://www.businessweek.com/magazine/content/01_28/c3740019.htm).

55. FCC, *Operations: Blocking & Jamming*, [http://wireless.fcc.gov/services/index.htm?job=operations\\_1&id=broadband\\_pcs](http://wireless.fcc.gov/services/index.htm?job=operations_1&id=broadband_pcs) (last visited Apr. 23, 2012) [hereinafter *Blocking & Jamming*].

sale, or ship devices . . . or use devices, which fail to comply with [the] regulations . . . .”<sup>56</sup> Section 333 of the 1934 Act strictly declares, “[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed by or under this chapter or operated by the United States Government.”<sup>57</sup> A cell phone jammer is one of the devices implied by the 1934 Act, and cell phone jammers are “illegal radio frequency transmitters that are designed to block, jam, or otherwise interfere with authorized radio communications.”<sup>58</sup> The main concerns over cell phone jammers are property theft, as the radio spectrum allotted by the government for radio communication should not be stolen, and safety concerns, as cell phone jammers block all calls to and from cell phones, including emergency calls.<sup>59</sup> Additionally, the requirements of the enhanced 911 regulations of the FCC “are intended to improve the reliability of wireless 911 services, by requiring wireless carriers to provide to emergency dispatchers information on the location from which a wireless call is being made.”<sup>60</sup> Therefore, the blocking or jamming of cell phone service is a violation of federal law as evidenced by Sections 301, 302(a), and 333.<sup>61</sup>

## B. *The First Amendment*

### 1. Freedom of Assembly

The First Amendment prohibits the government from abridging “the right of the people peaceably to assemble.”<sup>62</sup> Although this right has been historically applied to traditional public places, such as sidewalks and parks, the Supreme Court has held that in some instances, this constitutional protection may be extended to certain types of private property. In *Marsh v. Alabama*, the operators of a company-owned town could not prohibit the distribution of literature as the Supreme Court determined that the free speech and assembly rights were paramount to the company’s property rights.<sup>63</sup> The Court reasoned that “[t]he more an

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56. 47 U.S.C. § 302(a)(b) (2006).

57. *Id.* § 333.

58. FCC, *GPS, Wi-Fi, and Cell Phone Jammers: Frequently Asked Questions (FAQs)*, <http://transition.fcc.gov/eb/jammerenforcement/jamfaq.pdf>.

59. Suganya Sukumar, *Is Cell Phone Jamming Legal?*, BUZZLE.COM (Sept. 26, 2011), <http://www.buzzle.com/articles/is-cell-phone-jamming-legal.html>.

60. Press Release, FCC Adjusts Its Rules to Facilitate the Development of Nationwide Enhanced Wireless 911 Systems, FCC (Sept. 8, 2000), <http://wireless.fcc.gov/releases/e911reconFinalPR.pdf>.

61. *Blocking & Jamming*, *supra* note 55.

62. U.S. CONST. amend. I.

63. 326 U.S. 501, 504–05 (1946).

owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the . . . constitutional rights of those who use it.”<sup>64</sup> The town involved “the assumption by a private enterprise of all of the attributes of a state-created municipality” in that the owner of the company town was effectively taking on the role of the state.<sup>65</sup> In *Lloyd Corporation, Ltd. v. Tanner*, the Supreme Court limited the *Marsh* decision and noted that “[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use” and that the closest decision and greatest extent of this theory was its ruling in *Marsh*.<sup>66</sup> Therefore, in order for private property to be considered de facto public property for the purposes of the exercise of the freedom of assembly and other First Amendment rights, the property owner must, in effect, assume the role of the state.<sup>67</sup>

## 2. Freedom of Speech: Prior Restraints

A prior restraint is a technical term in First Amendment law that refers to a law or policy that would prohibit speech prior to any communication of that speech.<sup>68</sup> The purpose of a prior restraint is to prevent the speech from getting to the public such that “restrictions which could be validly imposed when enforced by a *subsequent* punishment are, nevertheless, forbidden if attempted by prior restraint.”<sup>69</sup> Prior restraints have a presumption against them, such that if punishment or remedies against a speaker are permitted, the law allows such remedies only *after* the speaker has spoken.<sup>70</sup> In order to determine if the government can prohibit public speech, especially subversive speech, the regulation must satisfy the two-part test set forth in *Brandenburg v. Ohio*.<sup>71</sup> The government is allowed to restrict speech only when that speech is: 1) directed to inciting or producing and 2) likely to produce imminent, lawless action.<sup>72</sup>

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64. *Id.* at 506.

65. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972).

66. *Id.*

67. *See id.*

68. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT: CASES – COMMENTS – QUESTIONS* 284 (5th ed. 2011).

69. Thomas Emerson, *The Doctrine of Prior Restraint*, 20 *LAW AND CONTEMP. PROB.* 648, 648 (1955) (emphasis added).

70. *Near v. Minnesota*, 283 U.S. 697, 713–14 (1931) (“Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.”).

71. 395 U.S. 444, 447 (1969).

72. *Id.*

Additionally, the Supreme Court in *Near v. Minnesota* stated, “[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.”<sup>73</sup> Therefore, in order to restrict political speech under the doctrine of prior restraints, which are presumptively unconstitutional, there must be extremely limited circumstances, such as instances of national security.<sup>74</sup>

### 3. Freedom of Speech: Public Forum Doctrine

The public forum doctrine is an aspect of the freedom of speech in which the Court answers the question of when people can speak and on what types of property.<sup>75</sup> Traditional public fora, such as sidewalks and parks, have “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>76</sup> The First Amendment right to use public fora is not absolute, and the government has the ability to regulate speech that occurs in a public forum.<sup>77</sup> If the government regulates speech based on its content in a public forum, the government must show “that its regulation is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end.”<sup>78</sup> The state can also create content-neutral regulations and impose time, place, and manner restrictions,<sup>79</sup> which are narrowly tailored, serve a significant government interest, and leave open sufficient alternative channels of communication.<sup>80</sup>

The Supreme Court has been reluctant to extend the public forum doctrine to create new public fora in which the government would be subjected to the high standard of strict scrutiny under a content-based regulation and a time, place, and manner standard under a content neutral regulation. Public facilities can fall outside the designation of a traditional

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73. 283 U.S. at 716.

74. *Id.* at 715–16.

75. SHIFFRIN, *supra* note 68, at 350.

76. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

77. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

78. *Id.*

79. Time, place, and manner restrictions on speech are those that take into consideration the time, place, and manner of the speech so as to conserve the public convenience. *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941). These include the state, through a content neutral regulation, wanting to “keep its streets safe for traffic, litter-free, or relatively quiet. To accomplish these goals, it may seek to silence (or perhaps reduces the quantity or volume of) speech.” ARNOLD H. LOEWY, *THE FIRST AMENDMENT: CASES AND MATERIALS* 428 (1999).

80. *Id.*

public forum if they were created for purposes other than expressive activities and have not been historically used for expression.<sup>81</sup> For example, an airport terminal was held to be a nonpublic forum because it is among those publically owned facilities that could be closed to all except those who have legitimate business there.<sup>82</sup> If a certain location is deemed to be a nonpublic forum, the government can maintain a regulation so long as the regulation is viewpoint neutral and reasonable.<sup>83</sup> Therefore, public forum doctrine is dependent on the categorization of the area in which the speech is taking place as well as the nature of the regulation in order to determine what constitutional test needs to be satisfied by the government.

#### IV. BART CELL PHONE SERVICE SHUTDOWN IMPLICATIONS

##### A. *The Communications Act of 1934*

Although BART did not specifically block or jam cell phone and Internet service, potential telecommunications law issues arise from BART's cell phone and Internet service shutdown. When addressing reasons for the shutdown, BART focused on the First Amendment, which completely diverges from the fact that officials shut down a phone system.<sup>84</sup> If BART is allowed to disable a phone system to impede potential protests, other local law enforcement could possibly use the same tactic.<sup>85</sup>

BART can be considered a quasi-governmental agency as well as an instrumentality of California, and would therefore not need to be a network operator in order to fall within the 1934 Act.<sup>86</sup> Section 214(a) prohibits a network operator from discontinuing a Title II phone service without first notifying the FCC.<sup>87</sup> If BART was acting as a network operator, it would be directly subject to Section 214(a) and the relevant provisions of the FCC and the California Public Utilities Commission ("CPUC") that are directed to carriers.<sup>88</sup> These provisions prohibit a unilateral interruption in phone service without following the appropriate procedures for notifying both the

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81. *Int'l. Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

82. *United States v. Grace*, 461 U.S. 171, 178 (1983).

83. *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) ("It is . . . undisputed that . . . under properly drawn statutes, or ordinances, concerning the time, place, duration, or manner of use of streets for public assemblies may be vested in administrative officials, provided that such limited discretion is . . . free from improper or inappropriate consideration and from unfair discrimination.") (internal citations omitted).

84. *Feld*, *supra* note 50.

85. *Id.*

86. *Id.*

87. 47 U.S.C. §214(a) (2006).

88. *Feld*, *supra* note 50.

FCC and the CPUC and seeking permission for the cell phone and Internet shutdown.<sup>89</sup>

On August 11, 2011, BART was most likely acting in a law enforcement capacity and was acting in the interest of public safety.<sup>90</sup> BART was also acting with authority and physical control over the means by which passengers and customers accessed the Title II services on BART's trains and station platforms.<sup>91</sup> In *People v. Brophy*, the California Court of Appeals held that citizens of California have a right to phone service.<sup>92</sup> Additionally, there is arguably a federally derived right of access to the phone network as stated in Sections 201 and 202 of the 1934 Act derived from the duty of common carriage.<sup>93</sup> In the present circumstances of BART's actions, CRMS service (or cell phone service) is applicable to *Brophy* as a common carrier under Section 201 and 202 of the 1934 Act.<sup>94</sup> BART is an instrumentality of California, like the Attorney General in *Brophy*, and the mere allegation that a phone *may* be used for illegal purposes does not warrant a unilateral shutdown of the cell phone network, even if it is physically located within the BART system, because BART is likely a quasi-governmental agency.<sup>95</sup>

Of course, there is also an additional concern of public safety in BART's decision to shut down cell phone and Internet service that makes this instance distinguishable from *Brophy*. BART officials had to take into account the safety ramifications of their actions, which is a consideration that was not present in the suspected gambling operation being conducted in *Brophy*. Although safety concerns were undoubtedly at issue and might warrant less justification for shutting down cell phone service than in *Brophy*, it is disconcerting that BART officials, by their own admission, had knowledge of the planned protest days before August 11, 2011 and still decided to shut down cell phone and Internet service. BART officials should have followed procedural protocol and asked general counsel to contact the CPUC in advance to receive a legal order giving BART officials permission to shut down cell phone and Internet service in reaction to the planned protest.

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89. *Id.*

90. *Id.*

91. *Id.*

92. 120 P.2d. 946 (Cal. App. 1942) (holding that the California Attorney General could not order that the phone company discontinue service to a person that the Attorney General suspected of running a gambling operation by the use of a telephone).

93. Feld, *supra* note 50.

94. *Id.*

95. *Id.*

By allowing the FCC and the CPUC to review petitions to shut down communications, agencies with actual authority over the phone system will be able to weigh the cost to individuals being deprived of their federal right to phone service against the threat to public safety in maintaining that phone service. Additionally, this agency oversight prevents every local jurisdiction from making decisions on whether to shut down cell phone and Internet service. Those localities only have to address issues in their specific jurisdiction, whereas larger agencies, such as the FCC and the CPUC, have to take into account the greater policy implications and overall ramifications of a decision to shut down a phone system.

### B. *Freedom of Assembly*

The First Amendment does not protect the right of people to assemble in order to disrupt train service, and the government can impose reasonable restrictions on protests.<sup>96</sup> The California Supreme Court held that a train station is an appropriate place to assemble for a nondisruptive protest, but the court dealt with a restriction on protests as to the physical location of the station platform and not with the shutting off of a communications system to prevent the assembly from occurring.<sup>97</sup> While BART officials did not prevent assembly per se since people could still assemble, by shutting down cell phone and Internet service, BART officials imposed a serious restriction on the protestors' ability to do so. Additionally, BART officials have stated that individuals can only assemble in areas of the BART transit system that are not used by ticketed passengers, which excludes train cars and station platforms.<sup>98</sup>

Moreover, the BART transit system is more akin to the company owned town in *Marsh*; although the infrastructure of BART is privately owned, the public uses many aspects of the transit system and it functions first and foremost to serve the public. BART is a California government agency,<sup>99</sup> however, the wireless services in the Transbay Tube are provided

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96. Michael T. Risher (ACLU of Northern California), *BART's Shutdown of Cell Phone Service: Two Legal Opinions*, KQED NEWS: BLOGSPOT (August 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/>.

97. *In re Hoffman*, 67 Cal.2d 845 (Cal. 1967) (holding that a city could not prohibit nondisruptive political activity inside a railway station).

98. BART Statement, *supra* note 32 ("Paid areas of BART stations are reserved for ticketed passengers who are boarding, exiting or waiting for BART cars and trains, or for authorized BART personnel. No person 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.").

99. Ken Paulson, *Did BART Railroad Free Speech, Legal Protest?*, THE FIRST AMENDMENT CENTER (Aug. 15, 2011), <http://www.firstamendmentcenter.org/did-bart>

by private companies and operators, such as Sprint, Verizon, AT&T, and T-Mobile.<sup>100</sup> These providers also pay for the installation and operational costs related to their service within the BART transit system.<sup>101</sup> This entanglement of both the private and public characteristics of the BART transit system makes it difficult to strike an appropriate balance between any semi-private property interest BART might have within its infrastructure and the rights of individuals to use such property to assemble and protest.

### C. *Freedom of Speech: Prior Restraints*

BART officials have implied that they had enough evidence to satisfy the constitutional test set forth in *Brandenburg*.<sup>102</sup> On August 20, 2011, BART provided a letter to the public that referred to the situations as an “imminent threat of unlawful and dangerous activities.”<sup>103</sup> BART intelligence, on August 10, 2011, revealed that the individuals “would be giving and receiving instructions to coordinate their activities via cell phone after their arrival on the train platforms at more than one station.”<sup>104</sup> Additionally, BART stated, “[i]ndividuals were instructed to text the location of police officers so that organizers would be aware of officer locations and response times.”<sup>105</sup> The information about this protest led BART to conclude that this planned action consisted of an imminent threat to the safety of BART passengers and personnel at a level that would far exceed the protest on July 11, 2011.<sup>106</sup>

There is widespread criticism about the imminent threat reasoning of BART because there is skepticism about the amount of danger that would have to be posed by cell phone use without the BART restrictions in place.<sup>107</sup> Given the strong general sentiment against prior restraints by government, BART could have utilized other tactics to combat the unruly protesters, such as arrest, in contrast to directly and unilaterally interfering with the communications of commuters.<sup>108</sup> On the contrary, those

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railroad-free-speech-legal-protest.

100. BAY AREA RAPID TRANSIT, *BART Expands Wireless Access to Transbay Tube*, Dec. 21, 2009, <http://www.bart.gov/news/articles/2009/news20091221b.aspx>.

101. *Id.*

102. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

103. *A Letter from BART to Our Customers*, BAY AREA RAPID TRANSIT, Aug. 20, 2011, <http://www.bart.gov/news/articles/2011/news20110820.aspx> [hereinafter *Letter from BART*].

104. *Id.*

105. *Id.*

106. *Id.*

107. *See, e.g.*, Silverman, *supra* note 17.

108. *Id.*

defending the actions of BART stated “that there is no constitutional right to use a cell phone and that the restriction itself did not prohibit speech, but the manner in which that speech was communicated.”<sup>109</sup> There is a greater issue that is being overlooked because of the new technology being used. For example, preventing an editorial in a newspaper that an individual might consider likely to incite violence from publication by disabling the printing press would be an overbroad and impermissible interference by the government, because it would create an inability to print a variety of information.<sup>110</sup> Therefore, the scope of the reaction to the potential protest by BART officials is overbroad by encompassing many types of communications unrelated to the protest and restricting speech in the event that violence might occur. Although BART officials reacted to the potential protest in a manner that was overbroad by shutting down all communications, BART would not likely succeed if a content-based restriction that applied only to communications related to the protest were implicated; such content-based restriction is unlikely to prevail under strict scrutiny.

#### *D. Freedom of Speech: Public Forum Doctrine*

For the purposes of the public forum doctrine, the main question is whether the BART station platform is considered a public forum, in which the government’s ability to limit speech is severely restricted. In its August 20, 2011, letter to customers, BART officials distinguished a train platform from a traditional public forum, stating, “BART has designated the areas of its stations that are accessible to the general public without the purchase of tickets as unpaid areas that are open for expressive activity upon issuance of a permit subject to BART’s rules.”<sup>111</sup> If this is held to be acceptable, then BART can legally restrict all speech on train platforms as long as the regulation is viewpoint neutral.<sup>112</sup> If the distinction is not made, then its policies will be subjected to a more rigorous constitutional analysis, such as the time, place, and manner analysis or strict scrutiny.<sup>113</sup>

In addition to categorizing the locality of the speech, another issue is whether or not the cell phone restriction is content based. BART’s cell phone restriction is facially content neutral, but the justification for the cell phone service shut down is related to the content of the speech (i.e., organizing a protest). The government is not trying to prevent the physical

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109. *Id.*

110. *Id.*

111. *Letter from Bart, supra* note 103.

112. Silverman, *supra* note 17.

113. *Id.*

disruption caused by the noncommunicative effects of cell phones, such as safety regulations to turn off cell phones while on an airplane, but the disruption caused by the cell phones when people use them to communicate with one another.

While BART officials' public safety concern about overcrowding is legitimate, it is difficult to believe that this was the sole reason to shut down cell phone and Internet service. Regardless of BART's stated intentions, it is not entirely clear why cell phone and Internet service was shut down. Yet if public safety was the sole concern, then BART officials and police could have taken more direct measures, such as blockading certain areas of stations and arresting individuals who were disorderly, instead of shutting down the entire BART communications system. Further, by cutting off passengers' ability to contact emergency personnel, BART officials created new safety concerns where none existed before.

It is arguable that the BART cell phone shutdown was content based because it was directed at a communicative harm. A content-based restriction, as previously noted, must serve a compelling state interest and the restrictive means must be narrowly tailored to serve that interest.<sup>114</sup> Public safety is almost always considered a compelling state interest, but the way in which it was achieved (shutting down all communications networks) is unlikely to be considered narrowly tailored to the interest of public safety.

If the restriction is determined to be content neutral, the state has more authority and can regulate the time, place, and manner of speech as long as the restrictions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."<sup>115</sup> BART claimed that other channels existed by stating:

[T]emporary interruption of cell phone service was not intended to and did not affect any First Amendment rights of any person to protest in a lawful manner in areas at BART stations that are open for expressive activity. The interruption did prevent the planned coordination of illegal activity on the BART platforms, and the resulting threat to public safety.<sup>116</sup>

This restriction arguably also prevented the coordination of *legal* activity, as people could not place emergency calls for potentially dangerous incidents caused by the protest. Aside from bystanders, people protesting the shooting by BART officers did so at the Civic Center station platform *because* that was where the victim was killed. The very place of

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114. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

115. *Id.*

116. *Letter from Bart*, *supra* note 103.

the speech was the message, and restricting people's ability to gather at the place of the brutality severely reduced the effectiveness and resonance of their speech. Additionally, people that did want to peaceably protest the shootings by BART officers had absolutely no alternative. It is arguable that when government restricts speech and expression, there *is* no adequate alternative, as the use of alternative channels of expressing First Amendment freedoms may damage the effectiveness, audience, and style of the initial message.

Since BART stations are government-owned and created for transportation purposes, the stations are likely to fall into the category of a nonpublic forum. The nature of the location of train station platforms is more analogous to an airport terminal than a sidewalk or town square. Even though the restriction might be content-based because it was aimed at a communicative harm, the restriction did not distinguish between different opinions about the protest and therefore is viewpoint neutral. Moreover, the government has greater ability to impose content-based, viewpoint-neutral regulations with reasonable restrictions in a nonpublic forum.<sup>117</sup> The restriction in the BART instance would most likely pass the low threshold of the reasonableness standard.<sup>118</sup>

On the other hand, as soon as a venue opens its doors to public speech, those doors are difficult to close. The ACLU of Northern California disagreed with BART's contention that train station platforms were not for the exercise of free speech, and the ACLU stated that "[w]hile the government has no obligation to build a public park, once it does so, it cannot shut the park gates to speakers with whom it disagrees."<sup>119</sup> BART added cell phone service to its platforms and trains shortly after the terrorist attacks of September 11, 2011, when it became apparent that widespread availability of cell phone service to enable citizens to contact the authorities in case of an emergency was imperative in order to ensure public safety.<sup>120</sup> Although BART is under no obligation to provide cell phone and Internet service to its trains and station platforms, once the service became

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117. Silverman, *supra* note 17.

118. *Id.* The reasonableness standard applies to property, which is not a designated or traditional public forum. "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." *Perry Educ. Ass'n*, 460 U.S. at 46.

119. Letter from Abdi Soltani & Allan Schlosser, ACLU of Northern California, to Kenton W. Rainey, BART Chief of Police (Aug. 22, 2011), [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).

120. Silverman, *supra* note 17.

available, it is highly concerning that discontinuing that service specifically to prevent a protest should be justifiable.

### V. NEW PUBLIC FORA: THE “VIRTUAL FORUM”

The events of the potential BART protest raised concerns about the public forum doctrine and whether it would provide adequate constitutional protection for the individuals affected by the shutdown. The histories of both the law and of the Constitution itself have shown flexibility in addressing new issues based on well-established legal principles. A famous example of the Supreme Court reaching beyond traditional doctrine in order to protect constitutional rights is their determination in *Griswold v. Connecticut* that the Bill of Rights creates a “penumbra of privacy.”<sup>121</sup> However, the same history has shown that the law is always one step behind technological developments and needs to be updated to address new issues<sup>122</sup> such as patenting the human genome, trademarking Internet domain names, or creating property rights in outer space.

The BART regulation will most likely pass the reasonableness standard of a content-based restriction in the nonpublic forum, but whether the courts are ready or not, 2011 has demonstrated that the new “virtual forum” is here to stay. In fact, *Time* magazine gave the 2011 Person of the Year Award to the generic “Protester.”<sup>123</sup> As evidenced by rapid advancements in technology, the online world has become the virtual forum of the 21st century where individuals readily debate, converse, and connect with each other. For example, with U.S. citizens spending 22.5 percent of their waking hours on websites like Facebook, LinkedIn, and Tumblr,<sup>124</sup> political issues are discussed in new “newsletters” and “pamphlets,” which take the form of online blogs and forums. The ability to send out a text message on Twitter that a protest march will start in one hour at a certain location to all one’s followers, and then have that message retweeted rapidly to those followers’ followers, in a logarithmic manner in

121. 381 U.S. 479, 483 (1965).

122. Manav Tanneeru, *Can the Law Keep Up With Technology?*, CNN TECH (Nov. 19, 2009), [http://articles.cnn.com/2009-11-17/tech/law.technology\\_1\\_libel-digital-content-law-and-technology?\\_s=PM:TECH](http://articles.cnn.com/2009-11-17/tech/law.technology_1_libel-digital-content-law-and-technology?_s=PM:TECH) (noting that the law is generally five years behind technology as it is developing).

123. Kurt Andersen, *The Person of the Year Award: The Protester*, TIME, Dec. 14, 2011, [http://www.time.com/time/specials/packages/article/0,28804,2101745\\_2102132,00.html](http://www.time.com/time/specials/packages/article/0,28804,2101745_2102132,00.html).

124. A report released on September 11, 2011 by Nielson Wire, the media research and ratings company, reveals that Americans are spending a lot of time on social networking sites and blogs. In May 2011, Americans logged onto Facebook for 53.5 billion minutes or roughly 101,720 years. Bianca Bosker, *Facebook More Popular Than Any Other Website -- By A Lot: Nielson*, HUFFINGTON POST (Sept. 12, 2011), [http://www.huffingtonpost.com/2011/09/12/facebook-most-popular-website-nielson\\_n\\_958254.html](http://www.huffingtonpost.com/2011/09/12/facebook-most-popular-website-nielson_n_958254.html).

which to create a huge public forum for discussion and debate. Even political candidates routinely take political and public policy questions by YouTube, Twitter, and Facebook.<sup>125</sup>

The issue is not the technology *medium*—paper pamphlet versus online blog—but rather the *content* of political speech.<sup>126</sup> If courts were to extend to these online fora the same protection as conventional fora, BART clearly can be seen as violating the constitutional rights of the passengers to speak freely about a possible protest. BART has also interfered with these passengers' rights to assemble peacefully. Additionally, communications technology, from printing presses and mimeograph machines to bullhorns, have been used for years to organize protests and to exercise political speech.<sup>127</sup> The Constitution as well as telecommunications law has adapted to these new technologies in order to preserve First Amendment rights and should again in the wake of a new technological age. If government is to regulate the virtual forum of cellular communications that are used for the purposes of exercising one's rights guaranteed by the Constitution, it should only be in the most extreme circumstances and subject to strict scrutiny by requiring a compelling government interest and means that are narrowly tailored. BART seems to recognize this fact by amending its cell phone and Internet shutdown policy in order to be allowed only in the most extreme circumstances, such as when cell phones are used as instrumentalities to detonate explosives, enable severe criminal activity, or facilitate plans to destroy public property.<sup>128</sup> As our dependence on electronic media continues to grow, we can only expect more political dialogue to take place in cyberspace. The law must recognize the virtual forum as a legitimate place in which political speech is protected.

## VI. CONCLUSION

The balance between providing adequate protection for First Amendment rights and allowing the government to maintain the public

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125. See, e.g., Annie Dwyer, *GOP 2012 Candidates Shouldn't Underestimate the Power of Social Networks*, POLITICO (Mar. 18, 2012), <http://redaltrpolitics.com/2012/03/18/gop-2012-candidates-shouldnt-underestimate-the-power-of-social-networks/>.

126. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("And whatever 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.") (internal citation omitted).

127. Larry Magid, *BART's Decision to Cut Cell Service Was Boneheaded*, LARRYSWORLD.COM (Aug. 22, 2011), <http://www.larrysworld.com/2011/08/22/barts-decision-to-cut-off-cell-service-was-boneheaded/>.

128. BAY AREA RAPID TRANSIT, *supra* note 41.

order is a delicate one. Continuing advances in communications technology and social media networks have severely complicated this balance. Many countries have erred on the side of public safety or arguably censorship by shutting down Internet and cell phone access in order to prevent civilian protests.<sup>129</sup> This complex balance hit closer to home when San Francisco's BART officials unilaterally shut down cell phone and Internet service to prevent a protest over alleged police brutality. This action by BART, aside from creating severe policy and political implications, raised both telecommunications law and First Amendment concerns.

The ramifications of BART's decision to shut off cell phone service to prohibit protests will not just be felt by the citizens of California. The United States, and countries around the world, must determine a proper balance between emerging communications technologies and the tools that these technologies provide citizens to exercise their constitutional freedoms. If the government, without a compelling state interest, can shut off cell phone service as a means of communication, what is left of First Amendment rights? There is a point on the continuum of civility where excessive regulation becomes repression and censorship. The terms of the proper role for law enforcement in controlling modern communications must be resolved so that an appropriate balance is maintained. First Amendment doctrine is flexible and should accommodate advancements in technology to assure adequate protection of the rights of citizens guaranteed by the Constitution. Courts should do so by recognizing that there is a virtual forum where people communicate daily as an imperative form of political debate and discussion, of which a unilateral shut down by a quasi-governmental agency should not be tolerated. In the end, it can be expected that a virtual forum should be legally recognized as long as adequate safeguards are in place to avoid unwanted harm to fundamental constitutional rights.

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129. *England Riots: Government Mulls Social Media Controls*, *supra* note 3; *see also* Matt Ritchel, *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>.