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Dropped Calls:

The Extent of the Free Speech Guarantee to Wireless Communications Service

by
CANDICE SHIH

I. INTRODUCTION

As President Hosni Mubarak scrambled to hold on to control of Egypt in the face of tens of thousands of protesters in January 2011, he made a most modern decision. “One by one, the lines of communication that connected Egypt to the 21st century shut down. Twitter, Facebook, and eventually all Internet access were cut off; text messaging became impossible, and then millions of mobile phones went silent across the country.”¹ As the world knows, it was for naught; Mubarak’s retirement was announced on February 11, 2011.²

Egypt has not been alone in disabling such infrastructure during the Middle East uprisings known as the Arab Spring that began in late 2010.³ As the anti-government protests spread across the region, Libya cut off Internet almost entirely,⁴ Syria intermittently shut down

1. Babak Dehghanpisheh et al., *Rage Against the Regime*, NEWSWEEK, Feb. 17, 2011, at 18.

2. David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, THE NEW YORK TIMES, (Feb. 11, 2011), <http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html>.

3. *Timeline: The Major Events Of The Arab Spring*, NPR (Oct. 6, 2012), <http://www.npr.org/2012/01/02/144489844/timeline-the-major-events-of-the-arab-spring>

4. David D. Kirkpatrick & Mona El-Naggar, *Qaddafi's Son Warns of Civil War as Libyan Protests Widen*, THE NEW YORK TIMES, (Feb. 20, 2011), <http://www.nytimes.com/2011/02/21/world/africa/21libya.html>.

its 3G mobile network;⁵ and web traffic in Bahrain was reduced by ten to twenty percent, with sites such as YouTube blocked.⁶

China imposed an even longer blackout when it terminated Internet and cell phone service in July 2009 in the Xinjiang region to stop the spread of deadly ethnic rioting.⁷ The government, known for its censorship apparatus called the Great Firewall, fully restored the communication services ten months later after the threat of violence had dissipated.⁸

Americans cannot be confident that they are immune from such restrictions on modern communication. On August 11, 2011, the Bay Area Rapid Transit System (BART) shut down cell phone and wireless service in an effort to thwart protestors, angry about a fatal shooting of a knife-wielding man by a BART police officer in San Francisco, from disrupting transit services.⁹ The parallel characteristics to foreign events were immediately evident. In all of these cases, the state or a state agency terminated a wireless service on the grounds of public safety. Creating neologisms out of the familiar situation, the Electronic Frontier Foundation said, “BART Pulls a Mubarak in San Francisco,”¹⁰ and Egyptian activists called the transit system’s move a “muBARTak.”¹¹ However similar these acts by BART were to those of Mubarak, the question to be considered in this Note is whether they violated the free expression guarantee of

5. Jennifer Preston, *Seeking to Disrupt Protesters, Syria Cracks Down on Social Media*, THE NEW YORK TIMES, (May 22, 2011), <http://www.nytimes.com/2011/05/23/world/middleeast/23facebook.html>.

6. Fahmida Y. Rashid, *Bahrain Restricts Internet Traffic, Blocks YouTube in Crackdown on Protests*, EWEK (Feb. 18, 2011), <http://eweek.com/c/a/Security/Bahrain-Restricts-Internet-Traffic-Blocks-YouTube-in-Crackdown-on-Protests-386152/>.

7. *Internet cut in Xinjiang to Prevent Spread of Riot*, CHINA DAILY, (July 7, 2007), http://www.chinadaily.com.cn/china/2009-07/07/content_8387845.htm; Edward Wong, *After Long Ban, Western China Is Back Online*, THE NEW YORK TIMES, (May 14, 2010), <http://www.nytimes.com/2010/05/15/world/asia/15china.html>.

8. Wong, *supra* note 7.

9. *A Letter From BART to Our Customers*, Bay Area Rapid Transit, (Aug. 20, 2011), <http://www.bart.gov/news/articles/2011/news20110820.aspx>; Michael Cabanatuan, *BART Admits Halting Cell Service to Stop Protests*, SAN FRANCISCO CHRONICLE, (Aug. 13, 2011), <http://www.sfgate.com/news/article/BART-admits-halting-cell-service-to-stop-protests-2335114.php>

10. Eva Galperin, *BART Pulls a Mubarak in San Francisco*, ELECTRONIC FRONTIER FOUNDATION (Aug. 12, 2011), <https://www.eff.org/deeplinks/2011/08/bart-pulls-mubarak-san-francisco>.

11. Joshua Hersh, *Egyptian Activists See Hypocrisy in BART Shutdown, London Riots*, HUFFINGTON POST, (Oct. 16, 2011), http://www.huffingtonpost.com/2011/08/16/bart-london-riots-egypt_n_928144.html.

the First Amendment¹² and the constitutional validity of related possible governmental interference with wireless communications.

Reflecting concern among the public that BART exceeded its authority, the Federal Communications Commission (“F.C.C.”) began a continuing investigation on August 15, 2011.¹³ The F.C.C. stated, “[a]ny intentional interruption of wireless service, no matter how brief or localized, raises significant concerns and implicates substantial legal and policy questions We are concerned that there has been insufficient discussion, analysis, and consideration of the questions raised by intentional interruptions of wireless service by government authorities.”¹⁴

In the meantime, BART adopted a new policy on December 2, 2011, permitting future interruption of wireless communication only where “there is strong evidence of imminent unlawful activity’ threatening safety, property or service” and only in limited areas and during limited time periods.¹⁵ In fact, “[u]nder the new policy, BART would not have turned off the wireless phone system under circumstances similar to those in August” but instead would have instructed police officers to arrest people who were breaking the law.¹⁶

12. U.S. CONST. amend. I.

13. Sara Jerome, *FCC Probing Wireless Blocking by San Francisco Authorities*, NATIONAL JOURNAL (Aug. 15, 2011), <http://techdailydose.nationaljournal.com/2011/08/fcc-probing-wireless-blocking.php>; *FCC Chairman Julius Genachowski’s Statement on BART Policy Adoption*, FEDERAL COMMUNICATIONS COMMISSION, (Dec. 1, 2011), <http://www.fcc.gov/document/fcc-chairman-julius-genachowskis-statement-bart-policy-adoption>.

14. *Commission Seeks Comment on Certain Wireless Service Interruptions*, FEDERAL COMMUNICATIONS COMMISSION, (Mar. 1, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0301/DA-12-311A1.pdf. [hereinafter *Commission Seeks Comment*].

15. Michael Cabanatuan, *BART Cell Phone Shutdown Rules Adopted*, SAN FRANCISCO CHRONICLE, (Dec. 2, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2011/12/01/BA1C1M74UB.DTL&tsp=1>.

16. Edward Wyatt, *F.C.C. Asks for Guidance on Whether, and When, to Cut Off Cellphone Service*, THE NEW YORK TIMES, (Mar. 2, 2012), <http://www.nytimes.com/2012/03/03/technology/fcc-reviews-need-for-rules-to-interrupt-wireless-service.html>. Additionally, California legislators considered a bill that would require a magistrate order to implement an interruption in wireless service, although it was vetoed by the governor for putting too much pressure on law enforcement officials responding to an emergency. S.B. 1160, 2011-2012 Reg. Se.. (Ca. 2012), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1160_bill_20120831_enrolled.pdf, http://leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1160_vt_20120929.html; Don Babwin, *Chicago Asked Not to Stifle Wireless at Summits*, THE ASSOCIATED PRESS, (Feb. 15, 2012), <http://www.businessweek.com/ap/financialnews/D9SU230O0.htm>.

Whether BART itself faces another occasion in which to consider disabling its wireless infrastructure, future protests and threats to public safety in the United States are inevitable. To that end, Congress has considered bills that would grant the President the ability to essentially shut down the Internet, including the Protecting Cyberspace as a National Asset Act¹⁷ and the Cybersecurity Act of 2010.¹⁸ Whether a shutdown of cell phone and wireless services is local or national in scale, the government's interests must be balanced with First Amendment rights. This Note will discuss the various doctrines that inform when such a termination of modern communication systems is constitutional and when it is not.

II. BACKGROUND

What First Amendment rights do we as Americans have to wireless Internet and phone access? Consider a brief examination of older forms of communication. The Constitution itself only envisioned the Postal Service as a means of communication between distant parties.¹⁹ However, the right to send mail through the federal system is not absolute, as the U.S. Supreme Court upheld a statute allowing residents to remove their names from mailing lists in *Rowan v. United States Post Office Dept.*²⁰ The sender did not have a First Amendment right to send unwanted mail; because it was unwanted and invaded the home, the Court likened the sender's act to a form of trespass that did not warrant such constitutional protection.²¹ Further, the Constitution does not mandate the provision of land-based telephone lines.

As with mail, courts have held that one's First Amendment right to use a phone is not absolute. For example, prisoners' phone rights are "subject to rational limitations in the face of legitimate security

17. Protecting Cyberspace as a National Asset Act of 2010, S. 3480, 111th Cong. § 249 (2nd Sess. 2010).

18. Cybersecurity Act of 2009, S. 773, 111th Cong. § 18 (1st Sess. 2009). However, considering the successful protests against SOPA (Stop Online Piracy Act) and PIPA (Protect Intellectual Property Act) on Jan. 18, 2012, passage of such an act would likely face significant civic hostility and political backlash. See Andrew Rosenthal, *Behold the Power of Google*, THE NEW YORK TIMES, (Jan. 18, 2012), <http://loyalopposition.blogs.nytimes.com/2012/01/18/behold-the-power-of-google/>. (On the same day thousands of websites, most notably Wikipedia, instituted a blackout in protest of the bills, Congress members pulled their support for them).

19. U.S. CONST. art. I, § 8, cl. 7. See generally, U.S. CONST.

20. 397 U.S. 728 (1970).

21. *Id.* at 735-37.

interests,”²² and drivers in many states, including California, are banned from using cell phones to send text messages to avoid distractions.²³ Both situations involve a content-neutral ban, which faces a lower level of judicial review. To meet that standard of review, the restriction must be “narrowly tailored to serve a significant government interest” and leave open ample alternative means of communication, as articulated in *Ward v. Rock Against Racism*.²⁴ Restrictions on phone use while imprisoned or driving appear appropriately tailored to the safety interest that the government promotes. As for the alternative means of communication, prisoners, who already face limited rights, may be permitted use of land-based phones and drivers can simply pull over and commence with texting.

However, the U.S. Supreme Court held that the Internet receives full First Amendment protection in *Reno v. American Civil Liberties Union*,²⁵ even though it is unclear when that protection is outweighed by other concerns that include public safety. “(T)he Internet – as ‘the most participatory form of mass speech yet developed’ – is entitled to ‘the highest protection from government intrusion.’”²⁶ In striking down a federal statute that restricts the computer transmission of indecent material to minors on First Amendment grounds, the Court declined to apply the jurisprudence it has developed relating to broadcast media.²⁷ Special justifications for regulating television and radio include the scarcity of available frequencies and the “invasive” nature of such media.²⁸ But “[t]hose factors are not present in cyberspace,” a vast democratic forum that has not been subject to the government supervision and regulation long associated with the broadcast industry.²⁹

A consideration of the limits of First Amendment freedoms regarding new media necessitates analysis under the Supreme Court’s established doctrines of content neutrality, public forums,

22. *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986).

23. *Cell Phone and Texting Laws*, GOVERNORS HIGHWAY SAFETY ASSOCIATION., (Sept. 2012), http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html.

24. 491 U.S. 781, 796, 802 (1989) (*quoting* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) at p. 796).

25. 521 U.S. 844, 845 (1997).

26. *Id.* at 863 (*citing* *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., supporting opinion)).

27. *Id.* at 868.

28. *Id.*

29. *Id.* at 868-69.

overbreadth, and prior restraints.³⁰ The strength of the government's justification for blocking wireless communication will depend on which doctrine is employed. However, under any doctrine, the government should find significant constitutional limitations on such action, and rightly so as Internet and cell phone use grows to dominate modern forms of communication.

III. ANALYSIS

A. Content Neutrality

A threshold question for determining the government's ability to restrict First Amendment activity is whether the government action is content-based or content-neutral.³¹ When an action or statute is content-based, it is presumed to be invalid³² and the government must survive strict scrutiny review by demonstrating a compelling government interest that is addressed through the most narrowly tailored means.³³ Narrow tailoring is achieved under strict scrutiny if less restrictive alternative means are not available.³⁴ When a regulation is content-neutral, the government only needs to establish that it has a significant interest that is narrowly tailored while leaving open ample alternative means of communication.³⁵ The narrow tailoring requirement is less stringent under the *Ward* analysis, as it is satisfied as long as the regulation would be achieved less effectively absent the regulation.³⁶

1. *The Government's Termination of Wireless Communication to Squelch Protest Should be Considered Content-Based and thus Subject to Strict Scrutiny.*

Terminating a geographic area's access to wireless communication appears to be content-neutral on its face. Although other countries have blocked certain sites such as Twitter and Facebook, what took place in San Francisco was a blockage based on a medium, not any particular content provider. No one in the downtown San Francisco

30. Another doctrine, vagueness, is not likely to be a direct concern where the government has acted to shut down wireless access to the Internet and mobile phone infrastructure.

31. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641-42 (1994).

32. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

33. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

34. *Id.*

35. *Ward*, 491 U.S. at 796, 802.

36. *Id.* at 799 (*citing* *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

BART stations on Aug. 11, 2011 could use their cell phones to call, text, or communicate with anyone. However, BART's purpose was not only content-based, but arguably viewpoint-based, which makes its action even less likely to be constitutional.³⁷ The reason behind the interruption of cell phone communication at BART was to prevent protestors from gathering and disrupting service.³⁸ BART wanted to prevent a particular message from being distributed among protestors, for example, "Come to Civic Center Station at 4:30 p.m. We're going to stop service by chaining ourselves to the trains."³⁹ With the focus on a specific message, BART's purpose was content-based and possibly viewpoint-based even though its action was facially content-neutral. One could draw the same conclusions regarding the protests in Egypt and to hypothetical future protests in the United States; where wireless communication has been terminated to thwart a protest, the purpose is content-based while the action may be facially content-neutral.

U.S. Supreme Court jurisprudence demonstrates that a statute that is content-neutral on its face but content-based in purpose may be held to a higher degree of scrutiny. The *Ward* Court stated: "The principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration."⁴⁰ In *Ward*, the Court determined the government's purpose was content-neutral as it intended to control noise levels to protect neighborhood character, rather than a particular type of sound or noise.⁴¹ In contrast, the government's purpose in terminating wireless communication is to silence public demonstrations, not eliminate all cell phone conversations or Internet use.

This argument may appear to be undercut by the Court's holding in *United States v. O'Brien* that the government's purpose in

37. *Hill v. Colorado*, 530 U.S. 703, 723 (2000). (citing *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980)).

38. Letter From BART, *supra* note 9.

39. See Cabanatuan, *supra* note 15.

40. *Ward*, 491 U.S. at 791. See also *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) ("In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation . . .") and *Turner*, 512 U.S. at 642 ("[A] content-based purpose may be sufficient in certain circumstances to show that a regulation is content based . . ."). *But see* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (rejecting a test for content neutrality based on the justification for the regulation). (citing *Community for Creative Non-Violence*, 468 U.S. at 295).

41. *Ward*, 491 U.S. at 792.

restricting speech does not factor into the constitutional analysis.⁴² However, the Court only explicitly stated that it could not void legislation based on congressional purpose given the dangers of relying on the statements of “fewer than a handful of Congressmen.”⁴³ In the later case of *Ward*, the Court relied on the government’s “clearly content-neutral goals” to determine it should apply an intermediate level of review in evaluating the restriction.⁴⁴ In fact, *O’Brien* and *Ward* are not inconsistent but may be applied together; whereas the *O’Brien* Court refused to look at government purpose to invalidate an act, the *Ward* Court considered the government purpose only in deciding which level of review to apply. One analyzing the BART situation could consider the government’s purpose to be content-based and apply strict scrutiny review, without violating *O’Brien*’s instruction not to leap directly from government’s purpose to invalidation.

O’Brien is also inapt to the BART scenario because the statute at issue there had no “inevitable unconstitutional effect” given that the destruction of draft cards was not necessarily expressive.⁴⁵ In contrast, shutting off wireless communication services has an unconstitutional effect by abridging a significant amount of expressive, constitutionally protected speech. If they had the technological ability on August 11, 2011, the thousands of people who used or rode through the downtown BART stations during the weekday rush hour⁴⁶ would likely have generated hundreds, if not thousands, of calls, text messages, and other forms of communication unrelated to participation in the protest. (In fact, many would have likely sent a message such as this: “BART delayed. Will be late.”)

Lower courts have relied on *Ward*, without referencing *O’Brien*, in finding that a government regulation is content-based because the government’s purpose was content-based. In particular, the Third Circuit reviewed a case in which an anti-abortion demonstrator was removed from a sidewalk in front of the Liberty Bell Center in Philadelphia by National Park Service rangers in *United States v. Marcavage*.⁴⁷ The court rejected an argument that removing the protestor was a content-neutral action because the government was

42. 391 U.S. 367, 382-83 (1968).

43. *Id.* at 384.

44. *Ward*, 491 U.S. at 782-83.

45. *O’Brien*, 391 U.S. at 385.

46. See *Monthly Ridership Reports*, BAY AREA RAPID TRANSIT, <http://www.bart.gov/about/reports/ridership.aspx> (last visited Mar. 17, 2012).

47. 609 F.3d 264, 269 (3d Cir. 2010).

concerned about public safety and he was impeding traffic flow.⁴⁸ Citing *Ward*,⁴⁹ the court looked at the evidence, including testimony of the government's witnesses,⁵⁰ to determine the government's purpose was in fact content-based⁵¹ and that its action must therefore be reviewed under strict scrutiny.⁵² Also relying on *Ward*, a District Court applied strict scrutiny after finding a statute that prohibits the influence of a judge or juror was content-based because the government's purpose in enacting it was content-based⁵³ despite the application's facial content-neutrality:

It is the message of influence itself which is conveyed in these communication[s] and which the statute seeks to prevent. The justification for the statute is to prevent the evil associated with the content of these communications. The question of whether a communication to a judge or juror violates Article 247 depends on the content of the communication.⁵⁴

Despite indications that a content-based purpose could doom a facially content-neutral action, the Supreme Court "almost never labels an action according to this determination."⁵⁵ The problem is that finding sufficient evidence that the purpose in question truly is content-based is difficult to do, thus requiring a challenger to successfully argue it is facially content-based in order for a court to apply strict scrutiny.⁵⁶ Although such factual findings are rare or even avoided, as in *Hill v. Colorado*,⁵⁷ they were discovered in *Marcavage*

48. *Id.* at 280.

49. *Id.* at 279.

50. *Id.* at 281.

51. *Id.* at 283.

52. *Id.* at 286.

53. *Caribbean Int'l News Corp. v. Fuentes Agostini*, 12 F. Supp. 2d 206, 217 (D.P.R. 1998).

54. *Id.* Other varied court findings based on the same principle in *Ward* include *Farnsworth v. City of Mulvane, Kan.*, 660 F. Supp. 2d 1217, 1225-26 (D. Kan. 2009) (where restricting the speech of a private citizen at a city council meeting was viewpoint-based); *Moser v. F.C.C.*, 826 F. Supp. 360, 363 (D. Or. 1993), *rev'd*, 46 F.3d 970 (9th Cir. 1995) (where a finding that the statute was content-based because of the government's purpose was reversed); and *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 688 (M.D. Tenn. 1998) (*rev'd on other grounds*, 180 F.3d 758 (6th Cir. 1999), *rev'd on other grounds*, 531 U.S. 288 (2001), and *rev'd on other grounds*, 262 F.3d 543 (6th Cir. 2001)) (relying on *Ward* to identify a content-based purpose justifying strict scrutiny).

55. Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 620 (2003).

56. *Id.* at 621.

57. 530 U.S. 703. See *infra* notes 62-66.

and they could be determined in the BART situation. In fact, BART has made it clear that it terminated wireless service in order to prevent would-be protestors from communicating information about the protest with each other.⁵⁸

The secondary effects doctrine also focuses on government purpose rather than on the content neutrality of the application. In *City of Renton v. Playtime Theatres, Inc.*, the Court determined that a statute that was content-based on its face was actually content-neutral because of its purposes.⁵⁹ There, a zoning ordinance prohibiting adult theaters from operating in a certain area was reviewed as content-neutral and upheld because the content-neutral purpose was to protect the neighborhood from the secondary effects of decreased quality of life and property values.⁶⁰

Reliance on *Ward* and *Renton* could lead one to believe that a government regulation that is content-neutral in application but content-based in purpose would be considered content-based and subject to strict scrutiny. However, such a position would require distinguishing the cases upholding speech-free buffer zones around abortion clinics.⁶¹ In *Hill*, for example, the Court determined that a restriction on speech within 100 feet of the entrance to an abortion clinic was content-neutral even though it appeared clear that the purpose of the buffer zone was to silence anti-abortion protests.⁶² But a majority of justices could not agree on the standards by which content neutrality should be decided. The plurality opinion written by Justice Stevens held the statute was content-neutral because it did not restrict any viewpoint or subject matter;⁶³ a concurrence by Justice Souter, joined by three justices, stated it was content-neutral because it targeted the delivery of the messages and not the content of the messages themselves;⁶⁴ Justice Scalia's dissent, joined by Justice Thomas, argued it was content-based because it was a means of impeding speech against abortion as applied;⁶⁵ Justice Kennedy wrote

58. Letter From BART, *supra* note 9.

59. 475 U.S. 41, 47 (1986).

60. *Id.* at 44, 48.

61. See *Hill*, 530 U.S. 703 and *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

62. *Hill*, 530 U.S. at 707-09, 725.

63. *Id.* at 719.

64. *Id.* at 737-38 (Souter, J., concurring).

65. *Id.* at 743-44 (Scalia, J., dissenting).

a separate dissent and stated that it was content-based because it restricted speech on particular topics.⁶⁶

The point of highlighting this disagreement in *Hill* is to emphasize the availability of arguments to a party interested in challenging state termination of wireless communication and the unsteadiness of the Court's approach to actions that are content-neutral on their face and content-based in their purpose. The Court's First Amendment jurisprudence leaves open the door for holding that such a regulation, under circumstances similar to what occurred in San Francisco, would be treated as content-based because of its purpose and thus subject to strict scrutiny.

Under strict scrutiny, an action or statute can only be held constitutionally valid if a compelling government interest is addressed through the most narrowly tailored means, in which no alternative means are less restrictive.⁶⁷ First, a court must identify a compelling government interest. In the BART case, two possible government interests are clear: public safety and regular provision of transportation services. Public safety has not been held by the Supreme Court to be a compelling government interest in a speech case, although it has in other contexts⁶⁸ that may reasonably be applied here and in other protest scenarios that have the potential to become dangerous. As for the second possible state interest, the Court has never addressed whether providing regular, uninterrupted transit services is a compelling government interest. However, it may be a stretch to call such an interest "compelling." The government would have an easier time arguing it is compelling if it involved longer-term access to public transportation or a more urgent need to move commuters through the system beyond the needs of a regular weekday rush hour.

Second, the government action must be the most narrowly tailored, and thus least restrictive, means of achieving the compelling government interest. Cutting off wireless communications where public safety is the purported compelling government interest may likely not be the least restrictive means of achieving that interest particularly because such an action impinges on the constitutional right of free speech. BART itself showed it had other better options,

66. *Id.* at 767 (Kennedy, J., dissenting).

67. *Playboy Entm't Group*, 529 U.S. at 813.

68. *See United States v. Salerno*, 481 U.S. 739, 740 (1987).

such as closing stations as it did later in August of 2011,⁶⁹ thereby reducing the possibility of dangerous clashes among protestors, commuters, and police without precluding speech. In other protests, such as the Occupy Wall Street demonstrations, police have taken different measures to quell public safety hazards, such as dispersing people camping in public areas.⁷⁰ But where a protest becomes particularly large and deadly, as in Egypt, the bigger issue is more likely whether the government's interest is in fact public safety or the censorship of political speech. BART did not show its means were the most narrowly tailored to achieve its ends, regardless of whether those ends were "compelling." Future constitutional challenges to the termination of wireless communications services will likely fail strict scrutiny.

2. *Even if Such a Regulation is Deemed to be Content-Neutral, it may still be Unjustified Under the Constitution.*

The Court's test on the constitutionality of a content-neutral restriction is the "time, place, and manner" doctrine. A content-neutral restriction on First Amendment activities is permissible if it is narrowly tailored to serve a significant government interest and leaves open ample alternative means of communication.⁷¹ In a protest scenario, the government could convincingly argue, as under strict scrutiny review, that its interest was public safety. (Again, BART's interest possibly had more to do with providing regular, uninterrupted service. The Court has not reviewed whether such an interest is "significant" although it would be more likely to do so than to find it to be "compelling" under strict scrutiny.⁷²) Public safety, the most likely government interest to be alleged for interrupting wireless

69. Lisa Pickoff-White, *BART Shuts Down Stations After Second Anonymous Protest*, News Fix, KQED NEWS, (Aug. 22, 2011), <http://blogs.kqed.org/newsfix/2011/08/22/bart-braces-for-another-anonymous-protest/>.

70. E.g., James Barron & Colin Moynihan, *City Reopens Park After Protesters are Evicted*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html> and Demian Bulwa, *Oakland Orders Occupy Protesters to Leave Plaza*, SAN FRANCISCO CHRONICLE (Oct. 21, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/10/20/BATMILKJ24.DTL>. Occupy was not without its own controversies, perhaps most notably the use of pepper spray against student protestors at University of California at Davis. Brian Stelter, *U.C. Davis Calls for Investigation After Pepper Spraying*, THE LEDE, N.Y. TIMES, (Nov. 19, 2011), <http://thelede.blogs.nytimes.com/2011/11/19/video-of-police-pepper-spraying-u-c-davis-students-provokes-outrage/>.

71. *Ward*, 491 U.S. at 796, 802.

72. *See supra* III.A.i.

communication during a protest, does fall under the category of significant government interests.⁷³

The question remains whether the government's termination of wireless infrastructure is a narrowly tailored reaction. When a government regulation is content-neutral, it is considered to be narrowly tailored if its ends would be achieved less effectively absent the regulation. It remains unclear whether BART's termination of cell phone service actually was effective and had an impact on public safety. After all, people could still wirelessly communicate protest plans to each other outside of the underground stations. In truth, they later congregated above ground, potentially creating public safety hazards there, when the stations themselves were shut down.⁷⁴

Furthermore, while such a regulation may appear narrowly tailored in "time" and "place," it may not have been in terms of "manner" and would thus fail the applicable test. The BART shutdown took place in a discrete and geographical space for a period of a few hours,⁷⁵ satisfying the "time" and "place" prongs. But when reviewing "manner," one should consider that BART shut down all cell phone communication, not only the messages it found dangerous or offensive. While it is not common to do so, particularly in the United States, a cell phone service provider may have the technology to censor the content of text messages.⁷⁶

Although Egypt may not have left open alternative means of communication when it shut down mobile phone connections and the Internet, there is room for debate as to whether BART did so. Because of the shutdown's limited geographical reach, a commuter wanting to use his cell phone could likely just leave the station, go above ground, and make his call. But an emergency could arise that prevents him from being able to do so, perhaps the need to stay by someone having a heart attack or a blockage of the exits by the

73. *Madsen*, 512 U.S. at 768.

74. Pickoff-White, *supra* note 68.

75. *Cabanatuan*, *supra* note 8.

76. See e.g., Reza Sayah, *Pakistan Bans 'Obscene' Words from Text Messages*, CNN (Nov. 22, 2011), <http://www.cnn.com/2011/11/19/world/asia/pakistan-banned-words/index.html>; Chris Matyszczyk, *How Google's Nexus One Censors Cuss Words*, CNET (Jan. 23, 2010) http://news.cnet.com/8301-17852_3-10440115-71.html. But such a regulation would be content-based and subject to strict scrutiny, upon which the regulation would fail. See *supra* III.A.i. It may be conceded, however, that selecting certain words to censor still would not achieve the government's aims. For example, censoring all messages that say "BART," "4:30," and "protest" may block out some innocent messages ("There's a protest at the BART station at 4:30 so I'll be late") and not other objectionable messages ("Let's riot at the Civic Center station in half an hour").

protestors.⁷⁷ Furthermore, it is not hard to imagine that the government may shut down wireless services in a larger geographic area in the future. What alternative means of communication would be left? Pay phones are disappearing, as is the use of land line phones, as more and more people rely on their cell phones as their only means of telephonic communication.⁷⁸ If the government also shuts down the means with which to access the Internet, the action would not have left open ample alternative means of communication and would fail the time-place-manner test.

Content-neutral regulations also must be shown not to suppress too much speech by foreclosing an entire medium of expression. The Court stated in *City of Ladue v. Gilleo*: “The First Amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression.”⁷⁹ In that case, a city ordinance that generally prohibited display of signs on residential private property was struck down even though it was assumed to be content-neutral and viewpoint-neutral.⁸⁰ “[The city of] Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages.”⁸¹ The Court also noted that residential signs play an important part in political campaigns.⁸² So, too, could this analysis be applied to wireless communication, which is being made entirely unavailable in the protest situation posited here.⁸³ In *Ladue*, the Court indicated particular concern for the medium of residential signs to be available for political discourse.⁸⁴ The constitutional right to gather people in order to express political opinions would be severely curtailed by a

77. The F.C.C. estimates 70 percent of 911 calls are made from wireless phones. *Wireless 911 Services*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/guides/wireless-911-services> (last visited Mar. 9, 2012).

78. Brad Tuttle, *In the Future: No More . . . Well, No More Lots of Things*, MONEYLAND, TIME, (Jan. 5, 2010), <http://moneyland.time.com/2010/01/05/in-the-future-no-more-%E2%80%A6-well-no-more-lots-of-things/>.

79. 512 U.S. 43, 55 (1994) (citing Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57-58 (1987)).

80. *Ladue*, 512 U.S. at 43.

81. *Id.* at 54.

82. *Id.* at 55.

83. Even though BART’s action was temporary and the city of Ladue’s was not, BART may not pass the “time, place, and manner” test due to its failure of the “manner” prong.

84. *Ladue*, 512 U.S. at 54-55.

blanket termination of wireless services. A foreclosure of the use of those forms of communications would likely mean a foreclosure of real-time communication and the chilling of political speech. Thus, even a content-neutral regulation may be constitutionally invalid in this context.

B. Public Forum Analysis

Whether an area is determined to be a public forum and, if so, what type of public forum, affects the constitutional standard of review.⁸⁵ However, it is unclear how public forum analysis may be applied here. First, a court would have to consider what the public forum in question is. In the case of BART, was it the train station or the coverage of cell phone services? Is it the physical space where wireless communication services are provided or is it a virtual space created by a facilitator such as BART? It is hardly a trivial matter considering that airport terminals were held to be a nonpublic forum in *International Society for Krishna Consciousness, Inc. v. Lee*.⁸⁶ The *Krishna* Court's reasoning fits soundly with a local rail station such as BART since it determined that "neither by tradition nor purpose can the terminals be described as public fora."⁸⁷ The Port Authority in *Krishna* was thus permitted by the Court to restrict expressive activity, which included solicitation for money. Consider the oft-repeated request to turn off cell phones during flight: analyzing the public forum as the geographic location protects the government, acting through the Federal Aviation Administration, when it disallows cell phone use on airplanes. Like the airport terminal in *Krishna*, airplanes and the regional rail station would not likely receive protection as public forums considering tradition and their primary purpose of transporting people.⁸⁸

A more likely future scenario is a protest at a public outdoor location, such as city parks, which were used across the country during the Occupy Wall Street demonstrations,⁸⁹ or city streets. In that case, the physical location in question would certainly be a

85. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

86. 505 U.S. 672, 680 (1992).

87. *Id.* at 672.

88. In fact, many BART commuters expressed extreme displeasure at being so inconvenienced by the 2011 protests. C.W. Nevius, *BART Protests: Patrons, Police Losing Patience*, SAN FRANCISCO CHRONICLE, (Aug. 25, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/08/24/BAB91KRBA5.DTL>. See generally the User Comments, *id.*

89. OCCUPY WALL STREET, <http://occupywallst.org/> (last visited Mar. 9, 2012).

traditional public forum. “Wherever the title of streets and parks may rest, they 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 thought between citizens, and discussing public questions.”⁹⁰ Although the Court has identified limits to speech in those areas,⁹¹ public parks and streets receive the highest protection from government attempts to chill free speech.⁹²

But does that mean that a protestor needs to choose a street or park for wireless services to be protected under the First Amendment? Not necessarily, for the public forum at issue may be the wireless service area, which was affirmatively created by BART working with private contractors.⁹³ As a threshold matter, one needs to consider whether the public forum analysis would even apply to an area defined by wireless communications service. This doctrine was rejected in a case considering leased television access channels, given the dynamism of the medium,⁹⁴ and the Court repeated the limit of the doctrine with regards to the Internet.⁹⁵ “[W]e would hesitate to import ‘the public forum doctrine . . . wholesale into’ the context of the Internet. We are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.”⁹⁶ Presumably, the Court would be just as reluctant to apply public forum analysis to a cell phone service area.

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

91. “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. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Perry*, 460 U.S. at 45.

92. *Id.*

93. *Wireless Connections, BAY AREA RAPID TRANSIT*, <http://www.bart.gov/guide/wireless.aspx> (last visited Mar. 9, 2012). However, where the government has not acted affirmatively to provide a forum for speech, public forum analysis does not apply. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1054, 1342 (2d ed. 2005) (“[T]here generally is no right to use private property for speech purposes . . . there is no state action, and the Constitution does not apply.”). If the government acts to terminate a private provider’s wireless service, the doctrines of content neutrality, overbreadth, and prior restraint will be appropriate instead.

94. *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 729 (1996).

95. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 205-07 (2003).

96. *Am. Library Ass’n*, 539 U.S. at 207 n.3 (citing *Denver Area*, 518 U.S. at 749).

If the Court were to undertake the public forum analysis with regards to a wireless service area, it would be left to consider whether it is a designated public forum or a non-public forum since the traditional public forum applies only to public locations such as streets and parks. A non-public forum would receive a lower level of scrutiny requiring only that it be reasonable and not discriminatory as to viewpoint,⁹⁷ but it is unlikely to be a factor in the scenarios hypothesized here given that wireless communications services are provided by government agencies for the purpose of facilitating speech. What is more likely is that the communications area would be considered a designated public forum because the government made its property available for the purpose of allowing the free exchange of speech.⁹⁸ In the case of BART, the state agency was not required to provide wireless service but chose to presumably for the convenience of customers who wanted to be able to use their cell phones to communicate with others. As such, BART's wireless coverage could be considered a designated public forum. Whether a designated public forum is of a limited or unlimited character, "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum."⁹⁹ That is to say, any government efforts to regulate speech in such an area on the basis of content would be subject to strict scrutiny. But the Court would have to be willing to extrapolate "property" in the context of the public forum in *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*¹⁰⁰ to include the virtual space of a wireless service area, perhaps by flouting its reluctance to do so in *United States v. American Library Ass'n. Inc.*¹⁰¹

In summary, what is most important to determine under the public forum doctrine is which potential public forum is at issue. A traditional public forum such as a public park or street would receive the highest First Amendment protection, as strict scrutiny must be applied to any government regulation on speech. An area in which the government has provided, or facilitated in providing, Internet or wireless phone access may either be a designated public forum, also subject to strict scrutiny, or may not even be a public forum for the purposes of this analysis. In the latter case, First Amendment

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

98. *Id.* at 37.

99. *Krishna*, 505 U.S. at 678.

100. 460 U.S. at 37.

101. 539 U.S. at 205-07.

protection may come instead from a finding of the action being content-based and thus subject to strict scrutiny.

C. Overbreadth

The overbreadth doctrine invalidates government action that substantially inhibits more speech than is necessary to punish unprotected speech, according to the Court's holding in *Broadrick v. Oklahoma*.¹⁰² Even assuming that it is proper for the government to stop protestors from using their phones to gather, one must consider how much innocuous and constitutionally protected speech¹⁰³ is being chilled when the government terminates wireless communication in an area. A court could find that too many innocuous messages were blocked through the manner in which BART interrupted wireless communication. Consider also Egypt, which ended up restricting a disproportionate number of apolitical individuals, including the business community, in its efforts to quell protests.¹⁰⁴

Relevant cases have hinged on what kind of speech was banned. The Court most recently identified an instance of overbreadth, consistent with *Broadrick*, in 2010 in the case of *United States v. Stevens*.¹⁰⁵ In that case, a federal ban on the creation, sale, and possession of videos of animal cruelty was found to be overbroad, covering too many areas of protected speech, particularly because the States disagree as to what constitutes animal cruelty.¹⁰⁶ Contrast *Bd. of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, where a ban on all "First Amendment activities" at an airport was determined to be overbroad.¹⁰⁷ The Respondents in that case had been stopped from distributing religious literature, but the Court found the regulation even "prohibit[ed] talking and reading, or the wearing of campaign buttons or symbolic clothing."¹⁰⁸

In the case of BART, the termination of certain technological services—rather than an inelegantly worded statute, as in *Stevens* and

102. 413 U.S. 601, 615 (1973).

103. See generally, Christine Rosen, *Our Cell Phones, Ourselves*, THE NEW ATLANTIS, (Summer 2004), <http://www.thenewatlantis.com/publications/our-cell-phones-ourselves> (describing common cell phone use as including making appointments, locating a friend, checking voicemail messages, or checking in at work).

104. Alexandra Dunn, *Unplugging A Nation: State Media Strategy During Egypt's January 25 Uprising*, 35-SUM FLETCHER F. WORLD AFF. 15 (2011).

105. 130 S. Ct. 1577 (2010).

106. *Id.* at 1588-91.

107. 482 U.S. 569, 569 (1987).

108. *Id.* at 575.

Jews for Jesus—makes it clear what speech is being foreclosed: speech that takes place on a cell phone. The Court, which balked at the restriction of talking and reading at an airport in *Jews for Jesus*¹⁰⁹ and of hunting videos in *Stevens*,¹¹⁰ should take as much issue with the prevention of the type of speech that so often occurs through cell phone communication. A summary of an average person's cell phone use, including live conversations, voicemail, and text messages, is likely to include such communication as, "Let's go to the 8 p.m. movie;" "I want to sell 100 shares of GloboStock;" and "Don't you think Mom is being unreasonable?"—all constitutionally protected speech. Cell phones are used for social gaming as well,¹¹¹ but even the content of video games was found to be protected by the First Amendment in *Brown v. Entertainment Merchants Ass'n.*¹¹² While any government agency that shuts down cell phone or Internet service may claim a legitimate reason for doing so, it will no doubt face an overbreadth problem by prohibiting a substantial amount of harmless speech.

The Court faced a similar question in considering two acts intended to prevent children's exposure to obscenities online, where one was found to be overbroad and invalidated and the other was upheld. In *Reno*, the Court reviewed portions of the Communications Decency Act (CDA) of 1996, finding them to be overbroad as well as content-based and not sufficiently narrowly tailored in a 7-2 decision.¹¹³ The CDA, which criminally prohibited the knowing transmission, by means of a telecommunications device, of "obscene or indecent" material and the knowing use of an interactive computer service to send that material to a minor, lacked the precision required by the First Amendment.¹¹⁴ "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."¹¹⁵ Its breadth was wholly unprecedented, encompassing nonprofits and individuals posting indecent messages or displaying them on their own computers

109. *Id.*

110. *Stevens*, 130 S. Ct. at 1590.

111. See e.g., Maria Sciallo, *Words with Friends Soars in Popularity*, CHICAGO SUN-TIMES, Sep. 26, 2011, <http://www.suntimes.com/lifestyles/7806663-423/words-with-friends-soars-in-popularity.html>

112. 131 S. Ct. 2729, 2731 (2011).

113. *Reno*, 521 U.S. at 848, 864, 868, 882.

114. *Id.* at 844, 874.

115. *Id.* at 874.

in the presence of minors.¹¹⁶ The CDA's use of the terms "indecent" and "patently offensive" were undefined and "cover[ed] large amounts of nonpornographic material with serious educational or other value."¹¹⁷ The Court, citing the District Court's decision below, also noted that there was no practical way—given existing technology—to deny minors access to certain communication without also denying access to adults.¹¹⁸

However, an act targeting the same behavior was upheld in 2002 by the Court. In *Ashcroft v. American Civil Liberties Union*, the Court, voting 5-4, declined to find that the Child Online Protection Act (COPA) was overbroad.¹¹⁹ COPA was distinguished from the CDA for applying to significantly less material than did the CDA by defining the offensive material more narrowly.¹²⁰ In particular, the Court decided that COPA's reliance on "contemporary community standards" for determining what material is harmful to minors was not overbroad.¹²¹ But while it alluded to the technological difficulties in limiting the availability of Internet material to a geographic area,¹²² the majority did not address a fatal point it identified in *Reno*, that denying minors access to some material would mean denying adults the same access.¹²³ Instead, Justice Thomas, writing for the majority, found the technological limitations relevant in that different geographic areas may have different community standards.¹²⁴

Although members of the Court penned five different opinions in *Ashcroft*, only Justice Stevens, in his dissent, referred specifically to the problem of overbreadth where the Internet has technological limitations in restricting access based on the age of the user:

COPA seeks to limit protected speech that is not targeted at children, simply because it can be obtained by them while surfing the Web. In evaluating the overbreadth of such a statute, we should be mindful of Justice Frankfurter's admonition not to 'burn the house to roast the pig.' COPA

116. *Id.* at 877.

117. *Id.*

118. *Id.* at 876.

119. 535 U.S. 564, 584-85 (2002). However, the majority upheld the district court's preliminary injunction on other grounds. *Id.* at 565.

120. *Id.* at 578.

121. *Id.*

122. *Id.* at 575.

123. *Id.* at 568.

124. *Id.* at 577.

not only restricts speech that is made available to the general public, it also covers a medium in which speech cannot be segregated to avoid communities where it is likely to be considered harmful to minors. The Internet presents a unique forum for communication because information, once posted, is accessible everywhere on the network at once. . . . Even the narrowest version of the statute abridges a substantial amount of protected speech that many communities would not find harmful to minors. Because Web speakers cannot limit access to those specific communities, the statute is substantially overbroad. . . . [T]he audience cannot self-segregate. As a result, in the context of the Internet this shield also becomes a sword, because the community that wishes to live without certain material rides not only itself, but the entire Internet of the offending speech.¹²⁵

Stevens's acknowledgement of the inability of users to self-segregate may be the key to deciding, as the Court did in *Reno*, that a statute restricting Internet access for minors is overbroad because of its effect on adults. In the BART example, the same analysis could be applied in deciding that the technological limitations in blocking certain content to certain people will mean that a regulation blocking all messages to everyone will be overbroad.

One might find a window of flexibility, however, in the *Broadrick* requirement that only a regulation that prohibits substantially more speech than is necessary is overbroad. A question exists if it was truly necessary for BART to terminate cell phone service during an expected time of protest. Although the protest with which BART was concerned moved above ground,¹²⁶ it is impossible to know whether allowing cell phone communication would have resulted in a situation underground that would have compromised public safety. However, it is not difficult to imagine a dire scenario that might justify interrupting wireless communication. For example, cell phones have been used in combat to trigger explosives.¹²⁷ If the government received a credible tip that a bomb had been planted at Civic Center Plaza in San Francisco and would be detonated via

125. *Id.* at 604-12 (Stevens, J., dissenting).

126. Pickoff-White, *supra* note 68.

127. *Cargo Plane Bomb Plot: Explosive Fears Could Spell End of In-Flight Wi-Fi*, THE TELEGRAPH, (Nov. 3, 2010), <http://www.telegraph.co.uk/technology/mobile-phones/8108185/Cargo-plane-bomb-plot-Explosive-fears-could-spell-end-of-in-flight-Wi-Fi.html>.

wireless communication at a given time on a given day, certainly many people would agree with the constitutionality of a government action to shut off wireless services in the area where the bomb was thought to be located.¹²⁸ While the government regulation would likely have an impact on a substantial amount of constitutionally protected speech, it could be justified as “necessary” under *Broadrick* considering the technological limitations of segregating wireless speech and the graveness of the government interest. Short of such circumstances, terminating wireless services in a geographic area should be considered overbroad and thus unconstitutional.

D. Prior Restraint

The doctrine of prior restraint is usually applied to government actions such as injunctions or requiring licenses to create speech.¹²⁹ Although the government action to terminate wireless communication services is neither, it still constitutes a state action that prevents speech from occurring. Such actions are deemed to be constitutionally invalid as in the canonical case of *Near v. State of Minnesota ex rel. Olson*.¹³⁰ In that case, the Court held a statute that targeted the distribution of malicious or scandalous material prior to publication constituted the “essence of censorship.”¹³¹ However, it acknowledged limited circumstances in which such prior restraint on speech would be permitted, including national security concerns and preventing obscenity.¹³² The Court provided the paradigm example: “No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”¹³³

The Court further clarified its position in *New York Times Co. v. United States*,¹³⁴ relying on *Near* but also allowing the government to meet a “heavy burden of showing justification for the imposition of such a restraint.”¹³⁵ In that case, the Court found the government had not met its burden in enjoining the publication of the Pentagon

128. The FCC envisions such a scenario. *Commission Seeks Comment*, *supra* note 15.

129. See *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931) and *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

130. 283 U.S. at 713.

131. *Id.*

132. *Id.* at 716.

133. *Id.*

134. 403 U.S. 713 (1971).

135. *Id.* at 714 (*citing* *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

Papers.¹³⁶ This threshold fits appropriately with the BART situation and the hypothetical scenario where the government expects a bomb to be triggered by a wireless device. Under *New York Times*, it would be more challenging for the government to justify its restraint on speech in the case of BART as it would in the hypothetical bomb scenario, as it should be—the greater the government interest, the more likely it could justify a prior restraint on speech.

In a previous situation where neither an injunction nor a license to speak was involved, the Court declined to find a prior restraint.¹³⁷ However, the holding in *Hill*, which involved a speech-free buffer zone around an abortion clinic, was premised on several factors that aren't present here. The *Hill* Court found relevant, for example, that no channel of communication was foreclosed by the regulation and that the restriction only applies if the hearer doesn't consent to being approached.¹³⁸ The case of BART is contrasted with a foreclosure of an entire medium and the fact that the recipients of potential cell phone communication by BART users would have likely welcomed the communication. Nonetheless, the *Hill* Court also found that the prior restraint doctrine applies to restrictions imposed by official censorship.¹³⁹

Thus, the restricted application of the prior restraint doctrine in *Hill* conflicts with the principles behind *Near* and *New York Times*. Consider the fear that troop movements will be shared with the wrong party. Would it matter, under the prior restraint doctrine, if the troop movements were published in a newspaper, or if someone shouted them out loud to an unwilling listener outside an abortion clinic? The Court is surely more concerned about the content of speech, when it involves national security, than the means in which such sensitive speech is restrained. A focus on the substance of this doctrine, rather than its form, results in the conclusion that a termination of wireless services could be considered a prior restraint on speech and invalid when the government has failed to meet its heavy burden in justifying it.

IV. CONCLUSION

When BART terminated cell phone and wireless services to silence a protest on Aug. 11, 2011, it added fuel to the fire. The

136. *Id.*

137. *Hill*, 530 U.S. at 734-35.

138. *Id.* at 734.

139. *Id.*

protestors were now not only angry about the incident that provoked the protest in the first place, a fatal shooting of a knife-wielding man by a BART police officer, but also about what appeared to be an infringement of their First Amendment rights. BART's decision to terminate wireless services caused alarm as well because of the similarities to what autocratic regimes have done across the world to quell protest.

But the United States, unlike Mubarak's Egypt and modern China, values the rights of people to have opinions, particularly regarding politics and government action, and to share them with the public. This should not change even when new forms of communication, such as cell phone and other wireless services, are made available by the government.

The importance of safeguarding speech that takes place over wireless communications devices is not only based in principle but in the constitutional doctrines of the First Amendment. BART's actions would likely be held invalid under the doctrines of content neutrality, public forum analysis, overbreadth, and prior restraint. Any future government action that disables the public's access to wireless communications should also be considered suspect.