

# BART's Unconstitutional Speech Restriction: Adapting Free Speech Principles to Absolute Wireless Censorship

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## Introduction

ON AUGUST 11, 2011, BAY AREA RAPID TRANSIT (“BART”) authorities shut down mobile phone and Internet access<sup>1</sup> in an attempt to disrupt planned protests over the July 3, 2011 fatal shooting of Charles Hill by BART police.<sup>2</sup> That day, Internet access and cell service was silenced in four downtown San Francisco stations for three hours during the height of the evening commute (the “BART restriction”).<sup>3</sup> According to BART, during the preceding week organized activists<sup>4</sup> had planned to use social media sites to coordinate protests

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1. See Elinor Mills, *SF Subway Muzzles Cell Service During Protest*, CNET NEWS (Aug. 12, 2011), [http://news.cnet.com/8301-27080\\_3-20091822-245/s.f-subway-muzzles-cell-service-during-protest/?part=rss&subj=news&tag=2547-1\\_3-0-20](http://news.cnet.com/8301-27080_3-20091822-245/s.f-subway-muzzles-cell-service-during-protest/?part=rss&subj=news&tag=2547-1_3-0-20); *Bay Area Rapid Transit Accused of Censorship for Blocking Wireless Services to Foil Protests*, DEMOCRACY NOW! (Aug. 15, 2011), [http://www.democracynow.org/2011/8/16/bay\\_area\\_rapid\\_transit\\_accused\\_of](http://www.democracynow.org/2011/8/16/bay_area_rapid_transit_accused_of).

2. See Kevin Fagan, *Man shot to death by BART officer identified*, S.F. CHRON. (July 7, 2011), <http://www.sfgate.com/crime/article/Man-shot-to-death-by-BART-officer-identified-2355477.php>; Chris Roberts, *BART Officer Who Killed Homeless Man Cleared of Wrongdoing*, NBC BAY AREA (July 10, 2012), <http://www.nbcbayarea.com/news/local/BART-Officer-Who-Killed-Homeless-Man-Cleared-of-Wrongdoing-161971485.html>.

3. See Mills, *supra* note 1.

4. The most infamous of these groups, Anonymous, later claimed responsibility for hacking BART's website and stealing personal BART employee information. See Casey Newton, *BART Website Hacked, Customer Info Leaked*, S.F. CHRON. (Aug. 14, 2011), <http://www.sfgate.com/bayarea/article/BART-website-hacked-customer-info-leaked-2335175.php>.

and disrupt BART service.<sup>5</sup> Since the incident, BART has offered both safety and prevention of lawless activity as justifications for curtailing mobile Internet access, but both the media and legal advocacy groups have challenged the BART restriction as unlawful and unconstitutional.<sup>6</sup>

The outcry was fueled in part because of recent social movements around the world. Across the globe, 2011 was the year of “Twitter revolutions.”<sup>7</sup> Rebellions in many Arab states, especially Egypt and Tunisia, leveraged social media to coordinate and execute demonstrations and full-blown political coups.<sup>8</sup> Governments responded with Internet censorship measures, including former Egyptian President Hosni Mubarak’s decision to “switch off” Egypt’s Internet.<sup>9</sup> Our western legal framework is typically averse to this sort of absolute and totalitarian speech restriction, but the possibility of rampant Internet censorship drew closer to home when riots across the United Kingdom prompted Prime Minister David Cameron to suggest a protest-disruption strategy that included censoring access to social media sites.<sup>10</sup> Similarly, U.S. legislators have recently weighed the propriety of granting the President an Internet “kill-switch” for use against cyber warfare.<sup>11</sup>

Within this framework, the reality of absolute Internet censorship measures suggests the significance of the BART restriction. While

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5. See Bay Area Rapid Transit, Statement on temporary wireless service interruption in select BART stations on Aug. 11 (Aug. 12, 2011, 1:08 PM) <http://www.bart.gov/news/articles/2011/news20110812.aspx> [hereinafter BART statement].

6. See Mills, *supra* note 1; Harold Feld, *Why Shutting Down Cell Service Is Not Just Against The Law, It’s a Really Bad Idea*, PUB. KNOWLEDGE (Aug. 23, 2011), <http://www.publicknowledge.org/blog/why-shutting-down-cell-service-not-just-again>; Eva Galperin, *BART Pulls a Mubarak in San Francisco*, ELECTRONIC FRONTIER FOUND. (Aug. 12, 2011), <https://www.eff.org/deeplinks/2011/08/bart-pulls-mubarak-san-francisco>.

7. See, e.g., Mathew Ingram, *Was What Happened In Tunisia a Twitter Revolution?*, GIGAOM (Jan. 14, 2011), <http://gigaom.com/2011/01/14/was-what-happened-in-tunisia-a-twitter-revolution/>; John Hudson, *The ‘Twitter Revolution’ Debate: The Egyptian Test Case*, ATLANTIC WIRE (Jan. 31, 2011), <http://www.theatlanticwire.com/global/2011/01/the-twitter-revolution-debate-the-egyptian-test-case/21296/#>.

8. See Ingram, *supra* note 7; Hudson, *supra* note 7.

9. See Ryan Singel, *Egypt Shut Down Its Net With a Series of Phone Calls*, WIRED (Jan. 28, 2011), <http://www.wired.com/threatlevel/2011/01/egypt-isp-shutdown/>.

10. Coincidentally, the UK riots occurred in the week preceding the BART restriction, and Prime Minister Cameron proposed his censorship policy on the same day as the BART protest and mobile Internet shutoff. See Josh Halliday, *David Cameron considers banning suspected rioters from social media*, THE GUARDIAN (Aug. 11, 2011), <http://www.guardian.co.uk/media/2011/aug/11/david-cameron-rioters-social-media>; Craig Johnson, *S.F. Subway System Admits Cutting Cellphone Service to Stop Planned Protest*, CNN THIS JUST IN BLOG (Aug. 13, 2011), <http://news.blogs.cnn.com/2011/08/13/s-f-subway-system-admits-cutting-cellphone-service-to-stop-planned-protest/>.

11. See S. 3480, 111th Cong. (2d Sess. 2010).

BART maintains its interruption of wireless Internet service is consistent with the First Amendment<sup>12</sup>, the facts surrounding the BART restriction may shed light on a developing area of First Amendment jurisprudence. In the days and weeks following the incident, legal scholars and First Amendment advocates opined on the constitutionality of the BART restriction, but no clear consensus has emerged.<sup>13</sup> While no formal action has been filed challenging the BART restriction's constitutionality, some lawmakers have taken steps to prevent such an occurrence in the future. For example, earlier this year California State Senator Alex Padilla spearheaded a bill through committee that would require California agencies to obtain a court order before interrupting wireless services.<sup>14</sup> Similarly, a Chicago alderman proposed an ordinance limiting law enforcement's power to interrupt wireless access.<sup>15</sup>

Despite these legislative proposals, there has been little discourse on the underlying constitutionality of the BART restriction. In a humble attempt to address this, this Comment explores two questions. First, did BART violate the First Amendment when it temporarily blocked mobile Internet access?<sup>16</sup> Second, to the extent our present

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12. See Bay Area Rapid Transit, Cell Service Interruption Policy (Dec. 1, 2012), [http://www.bart.gov/docs/final\\_CSIP.pdf](http://www.bart.gov/docs/final_CSIP.pdf).

13. Compare Eugene Volokh, *An Unusual (But Likely Constitutional) Speech Restriction*, THE VOLOKH CONSPIRACY (Aug. 13, 2011), <http://volokh.com/2011/08/13/an-unusual-but-likely-constitutional-speech-restriction/> (arguing the BART Restriction is permissible under the First Amendment), with Justin Silverman, *BART Phone Blackout: Did the S.F. Transit Agency Violate Free Speech Protections?*, SUFFOLK MEDIA LAW (Aug. 27, 2011), <http://suffolkmedialaw.com/2011/08/27/bart-phone-blackout-did-the-s-f-transit-agency-violate-free-speech-protections/> (arguing the BART Restriction is likely impermissible under the First Amendment).

14. See S.B. 1160, 2011-2012 Reg. Sess. (Ca. 2012) (requiring government agencies to obtain a court order before shutting down cellular phone access); Wyatt Buchanan, *Bill bars cell service shutdown by public agencies*, S.F. CHRON. (Apr. 19, 2012), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/04/18/MNQM1O5B1R.DTL>.

15. See Don Babwin, *Chicago Asked Not to Stifle Wireless at Summits*, THE ASSOCIATED PRESS (Feb. 15, 2012), <http://www.businessweek.com/ap/financialnews/D9SU23000.htm>.

16. A quick note on scope: As mentioned above, the BART restriction suggests numerous legal issues. For example, there has been at least one complaint filed with the FCC challenging BART's restriction under the Communications Act. See, e.g., Public Knowledge, *Emergency Petition for Declaratory Ruling*, RM-\_\_\_\_ (FCC Aug. 29, 2011), available at <http://www.publicknowledge.org/files/docs/publicinterestpetitionFCCBART.pdf>. Since this petition, the FCC has issued a notice requesting public comment on "intentional interruptions of Commercial Mobile Radio Service." *Commission Seeks Comment On Certain Wireless Service Interruptions*, Public Notice, DA 12-311 (FCC 2012); see also Edward Wyatt, *F.C.C. Asks for Input on Whether, and When, to Cut Off Cellphone Service*, N.Y. TIMES, Mar. 3, 2012, at B3. While the Communications Act may indeed prohibit BART's speech restraint, this Comment seeks to distill and analyze the purely constitutional issues surrounding the BART restriction.

First Amendment framework does not adequately solve the distinctive challenges presented by the BART restriction, how might free speech law be best adapted in the era of the Twitter revolution?

Part I summarizes the state of First Amendment law relevant to determining the constitutionality of BART's actions. It considers the precedent controlling protected and unprotected Internet speech, the doctrine of prior restraints, the tripartite framework of the public forum doctrine, and these doctrines' triggering of the varying levels of judicial scrutiny.

Part II applies the Supreme Court's First Amendment framework to the BART restriction and concludes (1) mobile Internet access is presumptively protected by the First Amendment and could not be silenced in BART stations on the basis of incitement, (2) mobile Internet access in BART stations qualifies as a designated public forum triggering strict scrutiny, (3) the BART restriction on Internet access constituted an impermissible prior restraint, also triggering strict scrutiny, and (4) the BART restriction was content-based and fails to pass the strict scrutiny standard applied to a content-based restriction.

Part III sets out a normative argument that government-provided Internet access should always qualify as a designated public forum, and restricting these "internet access fora" should trigger strict scrutiny unless the targeted speech itself falls into an unprotected category. Finally, this Comment concludes that this adaptation to the public forum doctrine best balances the substantial benefits of Internet free speech against legitimate governmental and safety interests.

## I. Legal Background: Free Speech Jurisprudence Online and Off

In assessing the constitutionality of a state-propagated speech restriction, our modern First Amendment framework comprises of often-competing sub-doctrines that consider whether the speech falls within the ambit of the First Amendment, whether the speech occurred in a public forum, and whether the restriction targeted the speech based on the content or viewpoint of the message. In other words, a court must ask *what* the speech was, *where* the speech occurred, and *how* the government's restriction targeted the speech.<sup>17</sup> Additionally, a court considers whether the restriction was a so-called

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17. See Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 Hastings Const. L.Q. 631, 637-38 (2011). See generally MELVILLE NIMMER, NIMMER ON

“prior restraint” on speech.<sup>18</sup> The answer to each of these questions determines the level of scrutiny a court uses to review the government’s restriction.<sup>19</sup>

There are (at least) three levels of scrutiny a court can apply: strict scrutiny, intermediate scrutiny and rationality review.<sup>20</sup> If a regulation is to survive strict scrutiny, it must be narrowly tailored, serve a compelling government interest, and use the least restrictive means to serve that interest.<sup>21</sup> If a regulation is subject to intermediate scrutiny, it must be “‘narrowly tailored to serve a significant governmental interest,’” be substantially related to that interest, and “‘leave open ample alternative channels for communication of the information.’”<sup>22</sup> Finally, a regulation subject to the default level of constitutional review—rational basis review—must be reasonably related to a legitimate government interest.<sup>23</sup>

### A. Protected and Unprotected Speech

Even though the First Amendment appears to be written in conclusive language,<sup>24</sup> the right to free speech is not absolute. Certain categories of speech are presumptively protected, while other categories fall entirely outside the ambit of protection.

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FREEDOM OF SPEECH (1984); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978).

18. See *Near v. Minnesota*, 283 U.S. 697, 709–23 (1931) (holding that a prior restraint on publication failed constitutional muster under the First Amendment). A prior restraint is a speech restriction imposed by the government in advance of the speech’s utterance, publication or distribution. The classic example is the government securing an injunction against a newspaper to prevent the newspaper from ever publishing particular content. See, e.g., *id.* at 732–37.

19. See analysis *infra* Part II.

20. See Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 433–36 (2009); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007).

21. *Id.* at 1315–34. This most demanding level of scrutiny has been notoriously referred to as “‘strict’ in theory and fatal in fact.” Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). But see Adam Winkley, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 869–71.

22. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

23. See Fallon, *supra* note 20, at 1273 & n.20; Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 803 (2006).

24. See U.S. CONST., AMEND. I.

The Supreme Court was clear in *Reno v. ACLU*<sup>25</sup> that speech occurring online is generally presumed protected.<sup>26</sup> On this basis, the Court struck down a law criminalizing the transmission of indecent material to a minor as violative of the First Amendment.<sup>27</sup> It is less clear to what extent the First Amendment protects an individual's right to *access* the Internet. In offline contexts, the Court has found the right to receive information is inherent in the right to speak and "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."<sup>28</sup> In online contexts, the Court has at least implicitly assumed access to the Internet is a protected expressive activity under the First Amendment. For example, in *United States v. American Library Ass'n*<sup>29</sup> ("ALA"), the Court upheld a law requiring libraries to install Internet filtering software on their computer terminals in exchange for funding.<sup>30</sup> The American Library Association challenged the funding provision, one element of the Children's Internet Protection Act ("CIPA"), claiming it forced libraries to censor online adult material in violation of library patrons' First Amendment rights. While the majority upheld the law, it based its decision on the public forum doctrine and assumed without stating that access to the Internet is presumptively protected under the First Amendment.<sup>31</sup> Lower courts have more explicitly presumed access to the Internet constitutes protected speech. In *Mainstream Loudon v. Board of Trustees of Loudon County Library*,<sup>32</sup> for example, a district court struck down a statute requiring libraries to implement filtering software on their computer terminals, arguing that it abrogated library patrons' right to access the Internet.<sup>33</sup>

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

26. *See id.* at 850–53, 868–69.

27. *Id.* at 849.

28. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas").

29. 539 U.S. 194 (2003).

30. *Id.* at 199.

31. *See generally id.*

32. 24 F. Supp. 2d 552 (E.D. Va. 1998).

33. *See id.* at 570. While ALA appears to contradict, or even overrule, *Mainstream Loudon*, this Comment argues the cases are distinguishable on their specific facts. Notably, the trial court in *Mainstream Loudon* made significant findings of fact regarding the library board's intent to designate the library as a public forum. *Id.* at 361–63. In ALA, the Court had no such findings before it, and instead relied solely on its own assumption that "[a] public library does not acquire Internet terminals in order to create a public forum." ALA, 539 U.S. at 206. This difference is significant for public forum analysis, and a more detailed comparison of ALA and *Mainstream Loudon* is provided *infra*, Part I.B.

Even if online speech is presumptively protected, there are certain circumstances where the government may still restrict speech regardless of where it is spoken or whether the regulation is facially content-based. This speech is usually characterized as “utterly without redeeming social importance.”<sup>34</sup> Examples of unprotected speech include incitement,<sup>35</sup> fighting words,<sup>36</sup> obscenity,<sup>37</sup> child pornography,<sup>38</sup> defamation,<sup>39</sup> and communicative conduct.<sup>40</sup> The only category relevant to the BART restriction is incitement.<sup>41</sup>

Under *Brandenburg*, advocacy of “imminent lawless action,” which is “likely to incite or produce such action,” is speech unworthy of First Amendment protection.<sup>42</sup> In outlining this test, the Court reversed the conviction of a Ku Klux Klan leader who gave a speech warning “that there might have to be some revengeance [sic] taken” for “continue[d] suppress[ion] of the white, Caucasian race.”<sup>43</sup> The Court found that the speech was not calculated to provoke “imminent lawless action,” and was unlikely to actually produce such action.<sup>44</sup> *Brandenburg*'s test is notoriously difficult to meet, and the Supreme Court has rejected numerous cases raising the issue of incitement.<sup>45</sup>

## B. The Public Forum Doctrine

Once speech is categorized as protectable under the First Amendment, the second major inquiry focuses on where the speech occurred. In its original and broadest formulation of the so-called public forum doctrine, the Supreme Court held that speech occurring on certain government property merits greater protection than speech

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34. Roth v. United States, 354 U.S. 476, 484 (1957).

35. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969).

36. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

37. See, e.g., Miller v. California, 413 U.S. 15 (1973).

38. See, e.g., New York v. Ferber, 458 U.S. 747 (1982).

39. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

40. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968).

41. Following the August 11, 2011 protest, BART officials released a letter explaining that prior to the protest, police amassed evidence of an “imminent threat of unlawful and dangerous activities.” A Letter from BART to Our Customers, <http://www.bart.gov/news/articles/2011/news20110820.aspx> (Aug. 20, 2011) [hereinafter BART Letter]. This language tracks closely to the test from *Brandenburg*, 395 U.S. at 447 (government may prohibit advocacy “inciting or producing imminent lawless action and is likely to incite or produce such action”). On this basis, BART argued that its disruption of cell service did not abrogate the First Amendment. See BART Letter, *supra* note 41.

42. *Brandenburg*, 395 U.S. at 447.

43. *Id.* at 445–48.

44. *Id.*

45. See, e.g., Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Clairborne Hardware, 458 U.S. 886 (1982).

occurring elsewhere.<sup>46</sup> In other words, “[t]he proper First Amendment analysis differs depending on whether the area in question falls in one category rather than another.”<sup>47</sup> In its present formulation, the public forum doctrine includes three categories or fora: the traditional public forum, the designated public forum, and the non-public forum.<sup>48</sup>

In determining whether government property may be categorized as a traditional public forum, the Court asks whether the area was “time out of mind . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>49</sup> As the case law developed, the clearest examples of traditional public fora included streets and parks,<sup>50</sup> and later, with some limitations, sidewalks.<sup>51</sup> In these settings, content-based regulations are subject to strict scrutiny, even if those regulations are viewpoint-neutral.<sup>52</sup> If, however, the restrictions are content-neutral and regulate only the time, place, and manner of the speech (a “TPM” restriction), the restrictions must be “narrowly tailored to serve a significant governmental interest [and] leave open ample alternative channels for communication of the information.”<sup>53</sup>

Despite this relatively clear formulation, the Court has added two other potential fora where speech may occur, creating a tripartite framework.<sup>54</sup> The “designated” public forum emerges when “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose; speech restrictions in such a forum are subject to the same strict scrutiny as restrictions in a traditional public forum.”<sup>55</sup> While a state does not need to keep the

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46. See *Hague v. C.I.O.*, 307 U.S. 496, 515–16 (1939). See generally *Schneider v. New Jersey*, 308 U.S. 147 (1939).

47. See *Board of Airport Com’rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572–73 (1987).

48. See *Christian Legal Soc’y v. Martinez* (“*CLS*”), 130 S. Ct. 2971, 2984 n.11 (2010).

49. *Hague*, 307 U.S. at 515.

50. See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

51. See *U.S. v. Grace*, 461 US 171, 177 (1983).

52. See *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion) (upholding under strict scrutiny a ban on last-minute campaigning in vicinity of polling place); *Carey v. Brown*, 447 U.S. 455 (1980) (striking down ban on residential picketing because of labor exception).

53. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

54. See Davis S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 160–64 (1991).

55. *CLS*, 130 S. Ct. 2971, 2984 n.11 (2010) (internal quotation marks removed); see also *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009).



forum open for speech purposes forever, “as long as it does so it is bound by the same standards as apply in a traditional public forum.”<sup>56</sup> That is, “[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”<sup>57</sup>

The final category, the non-public forum, is any forum that does not fit into the two preceding categories.<sup>58</sup> In non-public fora the government has broad discretion to pass laws that are content-based, so long as they are not viewpoint based.<sup>59</sup> In effect, this means any non-viewpoint-based regulation must pass the low bar of rationality review.<sup>60</sup>

The term “limited” public forum was previously used by scholars and the Court as a synonym for designated public forum,<sup>61</sup> but recently the Court has suggested that the limited public forum may actually be a subset of the non-public forum, and is created when the government opens property “limited to use by certain groups or dedicated solely to the discussion of certain subjects.”<sup>62</sup> In this type of forum, “a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.”<sup>63</sup>

The Court has not directly dealt with the issue of the train station as a public forum; however, in *International Society for Krishna Consciousness, Inc. v. Lee*<sup>64</sup> (“ISKCON”) the Court found an airport was neither a traditional nor a designated public forum.<sup>65</sup> Airports, according to the Court, were relatively recent inventions with the purpose of transport-

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56. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

57. *Id.*

58. *See id.*

59. *See id.* A content-based restriction is one that silences a message based on its subject matter, whereas a viewpoint based restriction is one that silences a message based on the position the speaker has taken on the subject matter.

60. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269–73 (1988).

61. *See* Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 300–02 (2009).

62. *CLS*, 130 S. Ct. 2971, 2984 n.11 (2010). For example, in *CLS*, the chapter of the Christian Legal Society at the University of California, Hastings College of the Law, which only permitted membership to non-homosexual students of faith, filed suit against the school for barring them from student organization funding and support. Since the school created its student organization funding program with the purpose of facilitating only certain types of speech, the Court reasoned, the program constituted a limited public forum. Further, the school was constitutionally permitted to bar access to student groups not in compliance with the school’s open membership policy for student groups. *See id.* at 2978–82.

63. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

64. 505 U.S. 672 (1992).

65. *See id.*

ing customers, and have neither been areas traditionally used for expressive activity, nor areas designated by the government for the purpose of expressive activity.<sup>66</sup> On this basis, the Court upheld a regulation prohibiting the distribution of handbills in the airport.<sup>67</sup>

The applicability of the public forum doctrine to the Internet is the subject of continued debate.<sup>68</sup> In *ALA*, for example, the Court held a library had not created a designated public forum by installing computer terminals and allowing access to the Internet.<sup>69</sup> The Court reasoned that “[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves,” but instead “to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.”<sup>70</sup> On the other hand, in *Mainstream Loudon*, a lower court struck down a library regulation blocking certain Internet sites based on their content.<sup>71</sup> It concluded the library board “intended to designate the Loudoun County libraries as public fora” for numerous purposes, “including the receipt and communication of information through the Internet.”<sup>72</sup>

While *ALA* may appear to vitiate the district court’s reasoning in *Mainstream Loudon*, the cases are distinguishable on their facts. Both the Supreme Court and district court focused their public forum inquiries on the question of government intent. In *ALA*, the plurality concluded the libraries had not intended to create a forum for all expressive online activities. In order to create such a forum, the Court explained, “the government must make an affirmative choice to open up its property for use as a public forum.”<sup>73</sup> Conversely, in *Mainstream Loudon* the district court had an extensive record of facts indicating the library board’s intent to open a broad forum for a wide variety of speech activities.<sup>74</sup> For these reasons it is not entirely clear how the

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66. *See id.* at 680–81.

67. *See id.*

68. *See* Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 158–59 (1998). *See generally* Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998); Stacy D. Schesser, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CAL. L. REV. 1791 (2006).

69. *See* United States v. Am. Library Ass’n (“*ALA*”), 539 U.S. 194, 206 (2003).

70. *Id.*

71. 24 F. Supp. 2d at 570.

72. *Id.* at 562–63.

73. *ALA*, 539 U.S. at 206.

74. *See infra* note 125 and accompanying text detailing the specific facts on which the *Mainstream Loudon* court relied.

Supreme Court might rule on a finding of facts analogous to *Mainstream Loudon*, but the key factual difference between the cases does allow future courts to reconcile what might otherwise seem to be inconsistent precedent.

At the least, this pair of cases highlights the importance of government intent in determining whether particular government property constitutes a designated public forum.<sup>75</sup> As the government continues to open Internet access terminals to the public, courts are likely to evaluate the government's stated intent or purpose in providing gateways to the web.

### C. The Doctrine Against Prior Restraints

Knitted within the First Amendment's doctrinal quilt is the general disapproval of speech restrictions enforced in advance of publication, dissemination or reception.<sup>76</sup> While the doctrine lacks some clarity, the general formulation first adopted by the Supreme Court in *Near v. Minnesota*<sup>77</sup> distinguished between restrictions prohibiting speech prior to publication and regulations that impose ex post sanctions.<sup>78</sup> In *Near* the Court held invalid a state court's injunction prohibiting all future publications of a potentially defamatory newspaper.<sup>79</sup> Chief Justice Hughes, writing for the majority, explained the "liberty of the press, historically considered and taken up by the Federal Constitution, has meant . . . immunity from previous restraints or censorship."<sup>80</sup>

Prior restraints take many forms.<sup>81</sup> The most common present-day prior restraints are injunctions and administrative licensing

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75. See generally Felix Wu, Note, *United States v. American Library Ass'n: The Children's Internet Protection Act, Library Filtering, and Institutional Roles*, 19 BERKELEY TECH. L.J. 555, 570-75 (2004) (explaining and disagreeing with the role government intent plays in forum analysis).

76. See John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 412-17 (1983).

77. 283 U.S. 697 (1931).

78. *Id.* at 709-23.

79. *Id.* at 722-23.

80. *Id.* at 716.

81. Prior restraints can be traced back to "administrative preclearances" in England. See Richard Favata, *Filling the Void in First Amendment Jurisprudence: Is There A Solution for Replacing the Impotent System of Prior Restraints?*, 72 FORDHAM L. REV. 169, 169-70 (2003). This history was influential to the Court's reasoning in *Near*. Speaking for the majority, Chief Justice Hughes explained:

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional

schemes.<sup>82</sup> Since *Near*, the Court has reaffirmed that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>83</sup> As a result, the State “carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>84</sup> Despite this strong presumption against prior restraints, there exists a litany of exceptions to the doctrine. For example, narrowly tailored prior restraints are sometimes permissible when the threatened speech is considered obscene,<sup>85</sup> when the speech might affect the fairness of a criminal trial,<sup>86</sup> or when the speech poses a substantial risk to national security.<sup>87</sup> In *Near*, the Supreme Court also noted “the security of the community life may be protected against incitements of violence and the overthrow by force of orderly government.”<sup>88</sup>

What has generally emerged from these and subsequent opinions is a framework that permits prior restraints when it is clear at the outset the restricted speech would constitute incitement.<sup>89</sup> Like other speech restrictions, prior restraints that take the form of licensing restrictions are generally permissible if the restrictions regulate the

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protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. 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.”

*Near*, 283 U.S. at 713–14 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*151–52).

82. See Favata, *supra* note 81, at 170; Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 298–99 (1999).

83. *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

84. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

85. See *Times Film Corp. v. Chicago*, 365 U.S. 43, 47–50 (1961); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 440 (1957).

86. See *Neb. Press Ass’n. v. Stuart*, 427 U.S. 539, 570 (1976).

87. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“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.”). See generally *N.Y. Times Co. v. United States*, 403 U.S. at *passim* (discussing and rejecting the applicability of the national security exception); Robert F. Flinn, *The National Security Exception to the Doctrine of Prior Restraint*, 13 WM. & MARY L. REV. 214, 218–21 (1971).

88. *Near*, 283 U.S. at 716.

89. See, e.g., Silverman, *supra* note 13.

time, place or manner of the speech.<sup>90</sup> Pre-publication licensing restrictions based on a message's content, however, are presumptively unconstitutional and subject to strict scrutiny.<sup>91</sup> Thus, while incitement analysis and time, place and manner analysis are often formulated as separate free speech doctrines, the doctrine of prior restraints snugly abuts both concepts.

#### D. Types of Restrictions and Judicial Scrutiny

Having determined that speech has fallen within a particular forum or was subject to a prior restraint, the court will then look to the type of speech targeted by the restriction in order to decide the proper judicial scrutiny. As mentioned above, in traditional or limited public fora, restrictions that are content neutral, or proper time, place, and manner restrictions, are subject to intermediate scrutiny.<sup>92</sup> Regulations that are content or viewpoint based, however, are subject to strict scrutiny.<sup>93</sup> In a non-public forum, only viewpoint based restrictions receive heightened judicial scrutiny—all other restrictions are usually analyzed under rational basis review.<sup>94</sup>

Content-based restrictions are generally subject to a higher level of scrutiny because "Government action that stifles speech on account of its message or that requires the utterance of a particular message favored by the Government, contravenes [the free speech] right."<sup>95</sup> The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of* [agreement or] disagreement with the message it conveys."<sup>96</sup> View-

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90. Though licensing restrictions qualify as prior restraints on speech, when such restrictions are not content-based the Supreme Court has often characterized these restrictions as permissible time, place and manner restrictions without engaging in a prior restraints analysis. *See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) (rejecting dissent's contention that noise regulation constituted a prior restraint). *See generally* *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (upholding regulation prohibiting the burning of draft cards without considering prior restraint doctrine); *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (upholding prohibition on speech activities around curtilage of a jail without considering prior restraint doctrine).

91. *See* Marin Scordato, *Distinction Without A Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).

92. *See, e.g.,* *Ward*, 491 U.S. at 791.

93. *See* *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (upholding under strict scrutiny ban on last-minute campaigning in vicinity of polling place); *Carey v. Brown*, 447 U.S. 455, 460 (1980) (striking down ban on residential picketing because of labor exception).

94. *See* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

95. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

96. *Ward*, 491 U.S. at 791; *see also* *Boos v. Barry*, 485 U.S. 312, 318 (1988).

point based restrictions are those where the government has sought to restrict speech not just because of the message's content, but because of the specific position the message takes on a particular issue.<sup>97</sup>

Unlike content and viewpoint based regulations, TPM restrictions, which are enacted not because of agreement or disagreement with the content of the message, are aimed at curtailing secondary effects of speech by altering the time, place, or manner in which individuals may engage in such speech. For example, in *City of Renton v. Playtime Theatres, Inc.*,<sup>98</sup> the Court upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods.<sup>99</sup> The majority determined Renton had not enacted its ordinance in order to censor particular content or subject matter, instead to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protect and preserve the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'"<sup>100</sup> Because Renton sought to control these secondary effects, and "allow[ed] for reasonable alternative avenues of communication," the ordinance was constitutional.<sup>101</sup>

In applying these tests to Internet-related restrictions, the Court found a regulation criminalizing the transmission of indecent material to minors to be content-based.<sup>102</sup> Similarly, a regulation requiring libraries to filter pornographic content in exchange for funds was also content-based.<sup>103</sup> The Court has not addressed the specific issue of whether a temporary shutdown of Internet access would be a proper TPM restriction. Presumably such a restriction would be valid if it targeted only secondary effects caused by the speech and allowed reasonable alternative channels of communication.

## II. Analyzing the BART Restriction

When the foregoing doctrines are applied to the BART restriction, the restriction fails to meet the requisite First Amendment thresholds. As argued more fully below, the restriction infringed upon a protected class of speech: a passenger's right to receive ideas via

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97. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 535 (2001).

98. 475 U.S. 41 (1986).

99. *Id.* at 48–49.

100. *Id.* at 48. The Court explained "[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." *Id.* at 49.

101. *Id.* at 50.

102. See *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004); *Reno v. ACLU*, 521 U.S. 844, 871 (1997).

103. See *United States v. Am. Library Ass'n (ALA)*, 539 U.S. 194, 205 (2003).

access to the Internet. This speech was not incitement because there was no evidence of imminent lawless activity. The restriction was implemented within a designated public forum—the forum defined not by the geographic bound of the trains or stations, but more narrowly by the radio towers and wireless devices over which information is transferred. The restriction was also an impermissible prior restraint. The BART restriction was content-based since it was implemented because of disagreement with a specific message. As a content-based prior restraint in a designated public forum, the BART restriction is subject to strict scrutiny and fails to pass this high standard.

The very limited scholarship analyzing the BART restriction has sometimes come to a different conclusion. Notably, Professor Eugene Volokh believes the restriction to be constitutional because it was imposed on government property that was a non-public forum.<sup>104</sup> In the following analysis, this Comment will specifically address Volokh's argument and suggest why the BART restriction fails constitutional muster. The disagreement, however, is little more than a testament to the muddled state of the law and, as argued in Part III, highlights the need for greater development and clarification among First Amendment doctrines.

#### A. Internet Access Constitutes Protected Speech

While it is clear from *Reno* that online speech is presumptively within the ambit of First Amendment protection, extending such a presumption to Internet access itself is also consistent with Supreme Court precedent.<sup>105</sup> Access to speech amounts to protected First Amendment activity. The right to receive information is inherent in the right to speak, and the Court has explained “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”<sup>106</sup> It follows that BART passengers have a First Amendment right to access information on the Internet. The Court in *ALA* implicitly assumed as much by treating patrons' rights to access the Internet, including pornographic materials, as protected speech.<sup>107</sup> Similarly, lower courts have followed suit in presuming ac-

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104. Volokh, *supra* note 13.

105. See *Reno*, 521 U.S. at 852–53.

106. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

107. See *ALA*, 539 U.S. at 215 (Kennedy, J., concurring) (agreeing with the majority's disposition but noting the statute may be unconstitutional “if it is shown that an adult user's election to view constitutionally protected Internet material is burdened”).

cess to the Internet constitutes protected speech.<sup>108</sup> For these reasons the right to access the Internet in BART stations is presumptively protected under the First Amendment.

### B. Internet Access in BART Stations Was Not Incitement

The next step of the inquiry asks whether, despite this general presumption of protection, the specific speech at issue was “utterly without redeeming social importance” such that it falls into a category of unprotected speech.<sup>109</sup> The only category of unprotected speech at issue here is incitement, as BART asserted the wireless network disruption was aimed at ensuring the safety of its customers.<sup>110</sup> However, “there is skepticism about the amount of danger, if any, that would have been posed by cell phone use without any restrictions in place.”<sup>111</sup> BART argues that the intelligence it received about the planned protest, considered in context with a protest that occurred a month earlier in which a protestor crawled on top of a train, combined to “constitute a serious and imminent threat to the safety of BART passengers.”<sup>112</sup> Yet this statement only suggests that the intelligence gathered by BART might be considered incitement. While this earlier speech may or may not have passed the *Brandenburg* test, there is no way BART could have known in advance that cutting web access would prevent advocacy of lawlessness from occurring via cell phones on the day of the scheduled protest. This conclusion demonstrates why prior restraints are presumptively invalid limits on speech.<sup>113</sup> It would be impossible for BART, or a jurist of any caliber, to draw the legal conclusion that certain speech constitutes incitement before that

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108. See, e.g., *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Lib.*, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998).

109. *Roth v. United States*, 354 U.S. 476, 484 (1957).

110. See BART Letter, *supra* note 41. BART has made no claim the speech curtailed by the BART restriction constituted any other type of unprotected speech (including fighting words, obscenity, child pornography, defamation, or communicative conduct). See *id.* At any rate, none of these categories are particularly relevant to the present inquiry, since it is generally unlikely these unprotected types of speech were being transmitted or received over BART’s mobile Internet system at the time of the restriction. For case law generally outlining these unprotected categories of speech see generally *supra* notes 35–40. Even if these other types of speech were being communicated or received over the Internet by BART patrons, the BART restriction would likely fail for overbreadth. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989).

111. See Silverman, *supra* note 13.

112. BART Letter, *supra* note 41.

113. See discussion on prior restraints *infra* Part II.D.



speech is ever uttered.<sup>114</sup> Even if the indicators suggested each and every patron in BART stations and trains was going to advocate lawless activity, and this advocacy was actually likely to incite such activity, the mere threat of such speech would not be enough to suppress the speech on a theory of incitement. In the language of justiciability, the matter would not be ripe for review. BART had general and amorphous claims of threats to passenger safety, and that alone cannot permit a speech restriction under *Brandenburg*.

### C. Internet Access in BART Stations as Designated Public Fora

There is no doubt BART stations and trains, and the technology and equipment used to provide Internet access in those stations and trains, constitute government-owned property. Thus access to the Internet in BART stations and trains falls within one of three fora. The nascence of the technology also dictates that Internet access, either generally or in BART stations and trains, has not been “time out of mind . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>115</sup>

Some scholars and commentators have suggested that since BART stations themselves do not fit into the category of traditional public fora, they are non-public fora.<sup>116</sup> Professor Volokh, for example, relies on the *ISKCON* decision for just such a proposition.<sup>117</sup> But this reasoning is errant in two ways: First, it fails to examine whether BART stations might fall into the intermediate category of designated public fora; and second, it mischaracterizes the “geographic” area to be analyzed. In conducting a forum analysis on the BART facts, confusion abounds as to what speech was actually restricted. Was it a protestor’s right to speak or assemble on the BART platform, or a patron’s right to access the Internet on a platform and train? Certainly both were subject to certain restrictions. Professor Volokh is right to say that under *ISKCON*, protestors had no constitutional right to protest within BART stations themselves. But this is distinct from a patron’s right to access the Internet within a station or train, especially when the transit agency took affirmative steps to offer this access. This can be thought of as BART’s “Internet access forum.” The forum is bound

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114. See Silverman, *supra* note 13.

115. *Hague*, 307 U.S. at 515.

116. See Volokh, *supra* note 13; Silverman, *supra* note 13; *Technology Aids Free Speech - And Its Suppression*, Talk of the Nation, NAT’L PUB. RADIO (Aug. 19, 2011), <http://www.npr.org/2011/08/19/139790022/technology-aids-free-speech> (with guests Eugene Volokh and Ken Paulson).

117. See Volokh, *supra* note 13.

in two ways. First geographically, to the BART trains and stations where the signal from BART's towers extend and second, technologically, to the radio towers, signals, and wireless handheld devices that actually transmit and render bits of information into decipherable user interfaces.

Having established the appropriate physical bounds of the forum in question, the next inquiry focuses on the intent of the government actor in opening such a forum. As discussed earlier, the government's intent in opening a forum is largely dispositive in determining the scope of that forum. Here, BART took the affirmative steps to wire their trains and stations to provide Internet access to passengers.<sup>118</sup> Most publicly available evidence suggests BART installed this technology with the purpose of providing its customers convenient and unrestricted access to the Internet.<sup>119</sup> While the cell towers support access to mobile phones as well as mobile Internet, Chuck Rae, BART's manager of telecommunications revenue, was reported in 2005 as stating he expected most riders would use their wireless devices to read and send e-mail or browse the Internet.<sup>120</sup> According to Mr. Rae, the goal was to "completely wire 100 percent of the underground so a passenger (on a wireless device) wouldn't know if they were above ground or underground."<sup>121</sup>

BART's purpose in opening this forum is distinguishable from Professor Volokh's analogy to university classrooms where Internet access is restricted to keep students focused.<sup>122</sup> At a university, Internet access within classrooms is offered as a pedagogical tool. Perhaps the ability to access the Internet within a classroom is simply a technological necessity—a spillover from offering Internet access in other parts of campus. It is hard to believe that a university would offer access to the Internet for general use within a classroom if it also believed this type of broad access to the Internet for non-pedagogical purposes would distract and detract from learning. Thus the distinguishing characteristic between a university classroom and a BART station is the purpose for which the forum was opened in the first place.

BART offered Internet access to customers specifically for broad use within their stations and trains. BART had no expectation that

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118. See Michael Cabanatuan, *Underground, But Not Unconnected—BART Offers Wireless Service to Riders*, S.F. CHRON. (Nov. 19, 2005), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/11/19/MNGF2FR6C11.DTL>.

119. See *id.*

120. *Id.*

121. *Id.*

122. See Volokh, *supra* note 13.

access to the Internet would be used only to further BART's purpose as an agency or institution.<sup>123</sup> There was also no requirement for BART to open access to the Internet to its customers. All of this indicates that BART "intentionally" opened a public forum "not traditionally regarded as a public forum" for the purpose of offering unfiltered wireless access to its customers.<sup>124</sup> This formulation is consistent with the designated public forum as described in *ALA* and *Mainstream Loudon*. While the Supreme Court in the former, and the district court in the latter, came to different conclusions on whether Internet access within a library constituted a designated public forum, the cases are legally consistent because both agree the touchstone of these cases is the intent of the state actor. The district court in *Mainstream Loudon* concluded from the record that the library's intent in offering unrestricted Internet access to its patrons was to open a forum for a wide variety of speech activities.<sup>125</sup> In a similar way, all publicly available information indicates BART's intent in providing equally unrestricted access to the Internet. BART's Internet access forum is a designated public forum consistent with *Perry*, *ISKCON*, *ALA*, *Mainstream Loudon* and *CLS*.

#### D. The BART Restriction Was an Impermissible Prior Restraint

The BART restriction also fails to pass constitutional muster on the grounds that the speech restriction was an impermissible prior restraint. Since most modern-day prior restraints take the form of licensing restrictions or judicial injunctions, there is little precedent regarding prior restraints limiting Internet access, and what little there is focuses almost exclusively on Internet filtering restrictions.<sup>126</sup> The doctrine remains undeveloped where the restriction in question was a

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123. While one must assume BART's primary goal was to increase ridership and revenue by offering convenient wireless access, this alone does not negate the agency's intention to accomplish this goal by offering unbound Internet access.

124. *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 2984 n.11 (2010).

125. The court relied specifically on a resolution adopted by the Library Board a few years earlier, noting:

[The] defendant declared that its "primary objective . . . [is] that the people have access to all avenues of ideas." Furthermore, the same resolution states that the public interest requires "offering the widest possible diversity of views and expressions" in many different media, not diminishing the library collection simply because "minors might have access to materials with controversial content," not excluding any materials because of the nature of the information or views within, and not censoring ideas.

*Mainstream Loudon*, 24 F. Supp. 2d at 563 (citations omitted).

126. See, e.g., Dawn C. Nunziato, *How (Not) to Censor: Procedural First Amendment Values and Internet Censorship Worldwide*, 42 GEO. J. INTL. L. 1123, 1142-57 (2011) (relying on the

complete (albeit temporary) censor on access to a particular medium of communication. This is almost certainly because such restrictions remained entirely unprecedented until the BART restriction.<sup>127</sup>

Despite the lack of precedent, it is clear BART's total censorship restriction would fare poorly under *Near*.<sup>128</sup> The restriction sought to suppress speech prior to publication (or, in this case, dissemination and reception). The restriction was not a traditional licensing scheme, so the doctrine's permission of content-neutral or time, place and manner licensing restrictions do not permit BART's swift and absolute cell phone shutdown. The strongest argument in favor of the BART restriction characterizes the restricted speech as incitement, yet there was no way for BART to know whether speech occurring over its cell phone network would advocate "imminent lawless action," and even if it did, whether such speech was "likely to incite or produce such action."<sup>129</sup> Whether speech constitutes incitement and merits no First Amendment protection is a legal conclusion that could only be drawn post-utterance. The BART example is markedly different from the situation where the government seeks an injunction to bar a newspaper from publishing a piece that may threaten national security.<sup>130</sup> In that scenario, a judge may evaluate the merits of the government's restriction by reviewing the speech before it is ever disseminated.

The BART restriction thus poses a unique question: whether speech may be suspended consistent with the doctrine of prior restraints on the possibility such speech *might* constitute incitement.<sup>131</sup> The rationale behind *Near* suggests it cannot. The Court rejected the notion that a publisher could, consistent with the First Amendment, be enjoined from future publication of potentially defamatory material,<sup>132</sup> because such a restriction constitutes "the essence of censorship."<sup>133</sup> In the same way, BART was not permitted to effect a total cell

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prior restraints doctrine to propose a framework of procedural safeguards for online speech).

127. See 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/>.

128. See Silverman, *supra* note 13.

129. *Brandenburg*, 395 U.S. at 447 (1969).

130. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

131. Recalling that "falsely shout[ing] 'Fire!' in a crowded theater" constitutes the classic example of unprotected speech, Policinski appropriately frames the question in the BART case: "Does a report that someone, sometime might falsely shout 'Fire!' justify taping over the mouths of all of the theatergoers as they enter . . . if only in that place, on that night, and only during that play?" Policinski, *supra* note 127.

132. *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931).

133. *Id.* at 713.

phone blackout on the mere suspicion incitement might occur over their network. Thus, the BART restriction constituted a pure and direct prior restraint. Since “[a]ny system of prior restraints . . . bear[s] a heavy presumption against its constitutional validity,” the BART restriction is undoubtedly subject to strict scrutiny.<sup>134</sup>

#### E. The BART Restriction was Content-Based and Fails Strict Scrutiny

The BART restriction was based on the content of the message it was trying to suppress. Professor Volokh agrees with this point, explaining:

The restriction is facially content-neutral, but the justification is related to the content of the speech that the government is worried about — the government isn’t just trying to prevent physical disruption caused by the noncommunicative effects of cell phones . . . but physical disruption caused by what people communicate to each other using cell phones.<sup>135</sup>

It is clear from BART’s letter it was not targeting mobile Internet access generally, but communication among protestors specifically.<sup>136</sup> This satisfies the “principal inquiry in determining content neutrality,” which is “whether the government has adopted a regulation of speech *because of* [agreement or] disagreement with the message it conveys.”<sup>137</sup>

The BART restriction also fails under the *Renton* standard for a proper TPM restriction. BART might argue its restriction was based not on the content of the message, but the secondary effects of lawlessness caused by the message. Even if this were the case, the speech restriction was not tailored in a way that left open ample alternative methods of communication. When Internet access is curtailed, there is no reasonable alternative means by which to disseminate and receive information. If BART had filtered access to only certain social networking sites, perhaps the outcome would be different. A patron who cannot check Facebook might be able to Tweet. Or a passenger who temporarily cannot access the *New York Times* might check *Huffington Post*. But complete censorship of Internet access is inconsistent with the Court’s formulation of a proper TPM restriction as outlined in *Renton*.

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134. *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

135. See Volokh, *supra* note 13.

136. See BART Letter, *supra* note 41.

137. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Because BART implemented a content-based prior restraint in a designated public forum, the restriction must meet strict scrutiny: it must be narrowly tailored, serve a compelling government interest, and the regulation must be the least restrictive means to serve that interest.<sup>138</sup> BART's alleged purpose—safety—is usually considered a significant state interest.<sup>139</sup> But BART's means of achieving that goal is not narrowly tailored. Just as the *Reno* Court struck down the law because other more tailored alternatives were available, here too BART could have ensured safety by adding more police officers, being more vigilant about protest policies, or never offering Internet access in its stations at the outset. Similarly, the restriction was not the least restrictive means for serving BART's interest. It could have attempted to filter access to websites it presumed would fuel unsafe protest.<sup>140</sup> Instead, it silenced every type of speech facilitated by Internet access. As such, the restraint serves as the very model of an overbroad limit. While passenger safety is a particularly compelling interest, BART had a number of alternative methods available to ensure the security of its patrons. Instead, it curbed First Amendment activities with a shotgun approach that flunks an examination under strict scrutiny.

### III. Policy Considerations: Protecting Internet Access Under an Internet Access Forum Doctrine

In the above analysis this Comment has argued the forum at issue in the BART case is an "Internet access forum," a designated public forum defined by the geographic limitations of the Internet signal and the technological limitations of the devices over which data is sent and received. This concept should be broadly adopted as a special version of the designated public forum. When government opens up public access to the Internet intended for broad public use, the Internet access forum must remain open, and any attempt by state actors to regulate it must be reviewed with strict judicial scrutiny.

Because the intent of state actors tends to set the scope of a designated public forum, and can lead to different conclusions on similar facts, the Internet access forum should be analyzed with a strong presumption of unrestricted access. Only when the state actor has clearly

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138. See Fallon, *supra* note 20.

139. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (identifying safety as a compelling state interest in an Establishment Clause case).

140. To be clear, this type of filtering restriction would raise a catalogue of its own First Amendment concerns. See generally Nunziato, *supra* note 126, at 1142–57. The example serves only to demonstrate the extent of the BART restriction's overbreadth.

and affirmatively proved its intention to offer Internet access in a restricted or filtered manner should an Internet access forum be limited in scope. Such a limitation or filter would also need to comply with other First Amendment doctrine.

There are at least three reasons why courts should always afford Internet access fora the same protection as designated public fora: First, the Internet epitomizes free speech principles in a way no other medium of communication can; second, access to the Internet is a human right; and third, an Internet access forum doctrine is consistent with precedent and resolves tension by clarifying the law.

### A. The Internet as Manifest Free Speech

There are many rationales for free speech under the First Amendment, including the insurance of self-governance, the pursuit of truth, the advancement of autonomy, and the promotion of tolerance.<sup>141</sup> On balance, the utility of our First Amendment jurisprudence recognizes “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>142</sup> The Internet furthers these principles in ways the Framers could not have imagined.

In the first major free speech test for the Internet, the Supreme Court immediately recognized the inimitable nature of the medium, comparing it “to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”<sup>143</sup> Indeed, it is “no exaggeration to conclude that the content on the Internet is as diverse as human thought.”<sup>144</sup> With this diversity, the Internet promotes tolerance, not just among different people, but also among different ideas. These ideas are tested against one another, each thought trying “to get itself accepted in the competition of the market.”<sup>145</sup>

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141. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1223–26 (1983). Compare J.S. MILL, ON LIBERTY 19–67 (1965) (detailing a marketplace rationale for free speech), with Baker, *supra* note 17, at 964–65 (rejecting Mill’s marketplace principles with a free speech theory founded on individual liberty).

142. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

143. *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

144. *Id.* at 852.

145. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

The very architecture of the Internet promotes free speech principles. A prime example is the anonymity each Internet user maintains while surfing under the guise of an IP address. A user can promote heretical viewpoints absent fear of individual retribution. While this anonymous architecture opens the door for plenty of unprotected speech, courts have been reluctant to allow plaintiffs to unmask anonymous speakers.<sup>146</sup> Along with anonymity, the robust and decentralized architecture of the Internet makes it generally less prone to speech suppression. As Internet innovator John Gilmore succinctly stated, “[t]he Net interprets censorship as damage and routes around it.”<sup>147</sup> Both the anonymous and naturally open nature of the web encourage self-governance, autonomy, and the pursuit of truth by establishing a safe haven for the consideration of minority ideas. This was particularly evident during the Arab Spring revolutions over the past two years. Where once a government could bury reports of police brutality and state oppression, social media encouraged the memetic spreading of such reports.<sup>148</sup> Under the shield of anonymity inherent in the architecture of the Internet, social media enabled protesters to “organiz[e] the protests and . . . disseminat[e] information about them, including publicizing protesters’ demands internationally.”<sup>149</sup>

It is perhaps cliché to say the Internet promotes free speech values more than any previously known technology, but the gravity of this proposition cannot be understated. The Internet is manifest free speech. It is the inevitable result of the open and unrestricted sharing of ideas. The concept of the Internet access forum stands for this formulation by maintaining unfettered access under all but exceptional circumstances.

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146. See, e.g., *Doe v. Cahill*, 884 A.2d 451, 460–61 (Del. 2005) (requiring plaintiff in defamation action to make a *prima facie* showing of evidence sufficient to overcome a summary judgment standard before court would compel disclosure of online speaker’s identity).

147. Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, available at <http://www.time.com/time/magazine/article/0,9171,979768,00.html>; see also Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507–11 (1999) (identifying the architecture or “code” of the Internet as a “modality of regulation”).

148. It was the power of social media in particular that fanned the flames of revolution in Tunisia, Egypt, Lybia and now Syria. See *Twitter, Facebook and YouTube’s Role in Arab Spring (Middle East uprisings)*, Social Capital Blog (May 23, 2012), <http://socialcapital.wordpress.com/2011/01/26/twitter-facebook-and-youtubes-role-in-tunisia-uprising/>.

149. Ekaterina Stepanova, *The Role of Information Communication Technologies in the “Arab Spring”*, PONARS EURASIA POLICY MEMO NO. 159 at 1, 2 (May 2011), available at [http://www.gwu.edu/~ieresgwu/assets/docs/ponars/pepm\\_159.pdf](http://www.gwu.edu/~ieresgwu/assets/docs/ponars/pepm_159.pdf).



## B. Internet Access as a Fundamental Human Right

Even before Egypt shut off Internet access to its citizens, scholars and organizations extolled Internet access as a human right in and of itself.<sup>150</sup> Pointing to corollary benefits such as access to economic opportunity, education, disaster relief, and global citizenship and democracy, these human right proponents continue to seek to bring the Internet to the nearly 5 billion currently unconnected people.<sup>151</sup> While there remains some debate over whether Internet access is worthy of the lofty status of “human right,”<sup>152</sup> countries including France,<sup>153</sup> Estonia,<sup>154</sup> Finland,<sup>155</sup> Greece<sup>156</sup> and Spain<sup>157</sup> have already affirmed a right to access the Internet. Consistent with this movement, last year the United Nations Human Rights Council (“UNHRC”) declared Internet access to be a fundamental human right.<sup>158</sup> The UNHRC emphasized the “unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom

150. See, e.g., A HUMAN RIGHT, <http://www.ahumanright.org> (last visited Aug. 28, 2012); Andrew Moshirnia, *The Online Odyssey: Internet Use in the Age of HADOPI's Scylla and Holder's Charybdis*, CITIZEN MEDIA LAW PROJECT (Oct. 27, 2009, 3:10 PM), <http://www.citimedialaw.org/blog/2009/online-odyssey-Internet-use-age-hadopis-scylla-and-holders-charybdis>. See generally HUMAN RIGHTS IN THE GLOBAL INFORMATION SOCIETY (Rikke Frank Jorgensen ed., 2006).

151. See, e.g., A HUMAN RIGHT, *supra* note 150. For example, A Human Right launched a “Buy This Satellite” campaign, soliciting donations to purchase an unused communications satellite and position it above Africa to provide Internet access. See Jim Fields, *Q&A: As Egypt Shuts Down the Internet, One Group Wants Online Access for All*, TIME (Jan. 31, 2011), <http://www.time.com/time/health/article/0,8599,2045428,00.html>.

152. See Vinton G. Cerf, Op-Ed, *Internet Access is Not a Human Right*, N.Y. TIMES, Jan. 5, 2012, at A25.

153. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, Jun. 10, 2009, J.O. 308 (Fr.) (in which France's Constitutional Council struck down a large portion of an antipiracy law on the grounds it infringed a French citizen's right to access the Internet).

154. Colin Woodward, *Estonia, where being wired is a human right*, CHRISTIAN SCIENCE MONITOR (Jul. 1, 2003), <http://www.csmonitor.com/2003/0701/p07s01-woeu.html>.

155. Don Reisinger, *Finland makes 1Mb broadband access a legal right*, CNET NEWS (Oct. 14, 2009), [http://news.cnet.com/8301-17939\\_109-10374831-2.html](http://news.cnet.com/8301-17939_109-10374831-2.html).

156. See 2001 SYNTAGMA [SYN.] [CONSTITUTION] 5A (Greece).

157. Sarah Morris, *Spain govt to guarantee legal right to broadband*, REUTERS (Nov. 17, 2009), <http://www.reuters.com/article/2009/11/17/spain-telecoms-idUSLH61554320091117>.

158. Rep. of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, U.N. H.R.C., 17th Sess., May 30 – June 17, 2011, U.N. Doc. A/HRC/17/27 (May 16, 2011); David Kravets, *U.N. Report Declares Internet Access a Human Right*, WIRED.COM (June. 3, 2011), <http://www.wired.com/threatlevel/2011/06/internet-a-human-right/>; Mathew Ingram, *Is Internet Access a Fundamental Human Right?*, GIGAOM (Jan 5, 2012), <http://gigaom.com/2012/01/05/is-internet-access-a-fundamental-human-right/>.

of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole.”<sup>159</sup>

Despite these strong positive statements in favor of a free and open Internet, the fact that the Internet was developed and invented here,<sup>160</sup> and that the most speech-protective case law emerged here,<sup>161</sup> the United States sadly lags behind the rest of the world.<sup>162</sup> The United States, as a leader in both technology and free speech doctrine must align its law with other industrialized nations and into full compliance with the UNHRC declaration. Efforts at this type of reform may take many forms, but a sensible place to start is in strictly limiting the government’s ability to shut off mobile Internet access. The Internet access forum proposed by this Comment accomplishes this goal and represents a strong step in the right direction.

### C. Promoting Judicial Clarity and Economy

While the idea of an Internet access forum would support general First Amendment policy considerations, and more specifically would promote Internet access as a fundamental right, the doctrine would also cast light on some particularly murky First Amendment rules. Application of the forum would require a government regulation to meet the strict scrutiny standard unless the speech restricted is, without any doubt, unprotected. First, such a doctrine is desirable specifically because of its ease of adoption. It does not advance First Amendment jurisprudence any further than it has already progressed. Rather, it simply clarifies the application of the designated public forum to Internet access restrictions. This methodology also leaves the government enough leeway to curtail access in the most dire of circumstances.<sup>163</sup>

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159. *Id.* at 1.

160. See Elmer-Dewitt, *supra* note 147.

161. *Freedom of Expression – ACLU Position Paper*, AMERICAN CIVIL LIBERTIES UNION (Jan. 2, 1997), <http://www.aclu.org/free-speech/freedom-expression-aclu-position-paper> (arguing that “ours is the most speech-protective country in the world”).

162. While the United States has implemented a program to ensure broadband access for a broad swath of society, it has stopped short of declaring Internet access a basic human right. Compare Leslie Meredith, *U.S. Considers ‘Internet Access for All’*, TECHNEWS DAILY (Jan. 26, 2010), <http://www.technewsdaily.com/47-us-considers-internet-access-for-all-100128.html>, with *supra* notes 153–58 and accompanying text.

163. For example, a government actor may restrict speech if it is previously known the speech in question falls outside the ambit of First Amendment protection (if, for example, it is judicially determined the speech is incitement, obscenity, or any of the other unprotected forms of speech). These limitations are, of course, subject to the doctrine of prior restraints. But as both *Near* and *New York Times* identified, the general proviso against pre-publication restrictions may yield in circumstances threatening national security. See *supra*

The need for greater clarity in First Amendment law, especially in the law's interaction with new technologies, tends to be a point of scholarly consensus.<sup>164</sup> In search of judicial clarity, applying public forum principles to the Internet is hardly novel. Even before *ALA*, *Mainstream Loudoun*, or *Reno*, early commentators, including David Goldstone, identified the deficiencies in free speech protection online and proffered public forum principles as a potential solution.<sup>165</sup> But Goldstone is quick to highlight the significant drawbacks in applying the tripartite framework to a burgeoning information superhighway.<sup>166</sup> Attempting to do so in three possible scenarios, the "analysis of [the] simple hypothetical cases became quite complicated."<sup>167</sup> The proposed solution, then, was a more nuanced approach to the doctrine's application in online contexts.<sup>168</sup>

With the benefit of hindsight, it is easier for us to identify where and how public forum doctrine might be applied to further speech rights *vis a vis* access to the Internet. *Mainstream Loudoun* provides a model scenario for when government owned access terminals constitute a designated public forum. Yet *ALA*'s opposite conclusion on similar facts emphasizes the doctrine's murkiness. The most significant difference in these cases regarded the intent of the state actor in opening the forum.<sup>169</sup> The Internet access forum heralded by this Comment seeks to purify the government intent standard by creating an initial presumption of absolute openness. When a state actor provides access to the Internet, the burden must be on the government to prove its initial intent to limit the Internet. Further, any proven intent to restrict access to certain types of speech must pass the test of other First Amendment doctrines. Finally, once a forum is opened, it must

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text accompanying notes 87–88. State Senator Padilla's proposed legislation seems to have these exceptions in mind by requiring the government actor to obtain a court order before it could shut down access. See *supra* text accompanying note 14.

164. E.g., David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U. L. REV. 1981, 1982 (2010); see also, e.g., Jeffries, *supra* note 76, at 420 (describing the prior restraint doctrine as "a formulation whose current contribution to the interpretation of the First Amendment is chiefly confusion"); Rohr, *supra* note 61, at 303–26 (detailing the ongoing confusion surrounding the limited public forum doctrine).

165. David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, 46 HASTINGS L.J. 335, 349–402 (1995) (proposing a nuanced application of the public forum doctrine to the "information superhighway").

166. See *id.* at 402.

167. *Id.*

168. *Id.*

169. See *supra* Part I.B.

remain open until the state makes an affirmative, non-arbitrary choice to close the forum.

The clarification the Internet access forum provides would also preempt potential speech-restrictive laws. For example, it would limit “kill-switch” legislation by ensuring the President could cut off Internet access only for the most compelling reasons and in the most narrowly tailored manner. Future legislation, therefore, could not grant the executive unnecessarily broad power to curtail unpopular speech, or utilize a kill-switch in less than calamitous situations. By synthesizing and expanding on *ALA* and *Mainstream Loudown*, the Internet access forum clarifies and reinforces existing free speech precedent in a way that is easily and widely applicable. It places a high burden on government actors who offer access to the Internet. The result is jurisprudence that is able to work within technological realities, built to shield speech from the flighty whims of power.

## Conclusion

When BART took the affirmative steps to offer its passengers Internet access on its stations and trains, it designated its relay towers as a new channel of communicative activity—a new Internet access forum. Once this forum was opened to all with no discernible restrictions, BART was not permitted to limit access without meeting strict scrutiny. The BART restriction fails to meet this level of scrutiny, and thus violates the First Amendment.

It may seem harsh to force a government agency to sacrifice the safety of its passengers to protect a seemingly trivial free speech interest. After all, BART has some duty to its passengers to ensure their safe and expeditious journeys home. Their self-described purpose as an agency “is providing safe, efficient and reliable public transit services.”<sup>170</sup> Moreover, the restriction seems a minor inconvenience: a mere three hours without the privilege of texting a friend or checking email from a seat on the train. This temporary abrogation of a luxury good appears to be the very embodiment of a first-world problem.<sup>171</sup>

Such sentiments hold a certain degree of truth. And perhaps in the context of the BART facts, the harm to free speech was minimal. But when our speech rights are curtailed in even seemingly insignificant circumstances, without a comprehensive speech-protective doc-

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170. Cell Service Interruption Policy, *supra* note 12.

171. See *First World Problems*, KNOWYOURMEME, <http://knowyourmeme.com/memes/first-world-problems> (last visited Aug. 28, 2012).

trine in place the erosion of the First Amendment is rapid and permanent.<sup>172</sup>

There are numerous legislative or administrative solutions that can balance both passenger safety and free speech interests. Upon collecting public comment and considering the scope and effect of the Communications Act on government enacted cell phone censorship measures, the FCC should publish guidelines for all government agencies that offer Internet access to their patrons.<sup>173</sup> The California legislature should also seriously consider Senator Padilla's bill requiring government agencies to consult a judicial officer before shutting down Internet service.<sup>174</sup> But both of these solutions solve only part of the problem. The reach of the FCC via the Communications Act is necessarily shorter than that of the Constitution. And the California legislature cannot solve a problem of national scope. Technology is changing as rapidly as ever, and sectoral or piecemeal solutions cannot adequately preempt the unpredictable and unprecedented free speech issues that accompany the growth of cyberspace.

Courts should build a fortress around First Amendment rights and adopt an Internet access forum doctrine. The doctrine should require that when the government opens access to the Internet to everyone for the broad and unlimited purpose of using the Internet, the government may not subsequently restrict access without a compelling interest and narrowly tailored policy. This solution ensures protection of the most valuable pro-speech medium the world has known, while striking an appropriate balance with government interests. Now is the time to learn from the lessons of the Arab Spring. If we allow our free speech rights to become luxuries, we may find our first-world problems look more like these third-world nightmares.

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172. See generally Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV., 1469, 1470–73 (broadly discussing the effect of slippery slope arguments on free speech).

173. See generally *Commission Seeks Comment On Certain Wireless Service Interruptions*, Public Notice, DA 12-311 (FCC, Mar. 1, 2012).

174. See S.B. 1160, 2011–2012 Reg. Sess. (Ca. 2012).

