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A "Hot" and "Cool" First Amendment: Analyzing Speech Effects in a Shifting Media Environment

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The First Amendment's usually strict protection of the right to free speech sometimes appears to give way when listeners would have difficulty evaluating a given communication. But it is far from clear when or why courts relax the dictates of the Speech and Press Clauses in light of the effects of speech on listeners. Courts' failure to develop a clear method for assessing speech effects under the First Amendment is particularly troublesome in light of the novel speech-related issues that have come with rapid advances in modern communications technologies. Arriving at an approach for evaluating the impact of speech on listeners would clarify First Amendment jurisprudence, helping to resolve questions about how the Speech and Press Clauses should apply in a hyperconnected, hypercommunicative, high-technology world. This Note turns to communications theory, and in particular to the work of Marshall McLuhan, to develop such an approach.

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INTRODUCTION

In a 2005 commencement address at Kenyon College, the late writer David Foster Wallace told a story about two young fish who came across an older fish, swimming the other way. "Morning, boys," the older fish says. "How's the water?" The two young fish swim on. Then one of them turns to the other and asks, "What the hell is water?"[1]

Wallace's parable has a simple moral: it's possible to be so thoroughly immersed in something that you cease to be aware of its presence. Writing forty years before Wallace, communications scholar Marshall McLuhan argued that this was precisely our relationship with communications media. McLuhan contended that media and communications technologies have a profound effect on individuals and society. But he noted that people were generally unaware of that fact: "[It] is sometimes a bit of a shock to be reminded that . . . the medium is the message."[2] He sought to make visible the effects of communications media themselves on the human psyche and senses at a time when communications scholars were focused narrowly on content.[3]

Were McLuhan alive today, chances are he would still feel like the older fish trying to explain water to the young fish. He is perhaps the most influential figure in media studies, but society has not absorbed the implications of his famous mantra: "[T]he medium is the message." Neither has the law. Take First Amendment jurisprudence. It is hard to think of a case decided under the Speech and Press Clauses that hasn't rested on an assumption about how the communication at issue will affect listeners, but such assumptions are rarely made explicit in the cases. Chief Justice Warren Burger once described how

1. David Foster Wallace, *Plain Old Untrendy Troubles and Emotions*, GUARDIAN (Sept. 19, 2008), http://www.theguardian.com/books/2008/sep/20/fiction [http://perma.cc/52N4-VA87].

2. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 19 (W. Terrence Gordon ed., 2003).

3. *Id.* at 25. "I am in the position of Louis Pasteur telling doctors that their greatest enemy was quite invisible, and quite unrecognized by them," he lamented. *Id.* at 30–31.

difficult it was to assess the effects of communications on listeners, while simultaneously acknowledging the relevance of those effects to First Amendment analysis. The effects of speech on the senses and psyche "may be intangible and indistinct, but they are nonetheless real," he wrote.[4]

This Note turns to McLuhan's work in an attempt to make these effects somewhat more tangible and distinct, and to develop a means of thinking about their role in First Amendment jurisprudence. While McLuhan has served as a frequent point of reference in First Amendment scholarship,[5] commentators have not attempted to apply his work in any detail to First Amendment doctrine. This Note undertakes that project. Reading McLuhan alongside First Amendment cases and scholarship provides a new perspective on theories of what the First Amendment should cover. It offers a justification for relaxing First Amendment protection in light of the effects of communications on listeners ("speech effects"). And it suggests that courts' failure to address the issue has sowed confusion in the doctrine. This Note represents merely a first attempt to put McLuhan's work in conversation with First Amendment law.

I.
SPEECH EFFECTS AND THE FIRST AMENDMENT

The Supreme Court has often loosened First Amendment protection based on the effects it believes speech will have on listeners. But it has failed to articulate a justification for doing so, or a means for determining when courts should allow government to regulate speech in order to protect listeners from particular effects. This Note turns to communications theory, and to the work of Marshall McLuhan in particular, to better understand the role speech effects should play in this area of the law. McLuhan insisted that communications media have a major effect on people and cultures, regardless of the messages those media convey. This lends a new perspective on the First Amendment treatment of speech effects, suggesting that certain communications technologies and effects should be closer to the core of First Amendment protection than others. This view is consistent with existing theoretical approaches to the First Amendment, and indeed reveals that the most prevalent theoretical approaches prioritize values that are closely tied to the print medium itself.

A. Relevance of Speech Effects Under the First Amendment

Perhaps the least-developed aspect of First Amendment jurisprudence has been the analysis of the immediate effects of speech on listeners' senses and

4. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (citation and internal quotation marks omitted).

5. *See, e.g.*, Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1087 (1990); M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459, 1460 (1989).

psyches—what this Note refers to as "speech effects."[6] There may be good reason for this: the U.S. Supreme Court has repeatedly stated that the Speech and Press Clauses of the First Amendment bar government from regulating truthful speech simply because of the effects it thinks that speech will have on listeners.[7] The Court has typically dismissed arguments that certain forms of communication will influence people in undesirable ways as "paternalistic."[8] Instead, it has asserted that the First Amendment assumes that "people will perceive their own best interests if only they are well enough informed."[9] Indeed, it "would be the end of freedom of speech" if government were allowed to regulate speech simply because it subtly conditioned users, Judge Frank Easterbrook once wrote.[10]

The Court has often departed from this principle, however. For instance, it has recognized the need for government to guard against speech that might provoke a listener to fight,[11] or that might incite members of a crowd to violate the law.[12] The Court has also relaxed First Amendment protection for aggressive, in-person solicitation for products and services, reasoning that such speech might cause users to act against their own best interests.[13] And it has approved efforts to ban pornographic films on the basis that they may subtly influence viewers.[14] In stark contrast to its assertion that the First Amendment assumes people will be able to perceive their own interests so long as they have accurate information, the Court has defended the role of government in limiting speech for the purpose of "protect[ing] the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."[15]

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6. As used here, the term is distinct from what courts have called the "secondary effects" of speech, such as the impact of theaters showing pornographic films on the character of the surrounding neighborhood. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

7. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("[The First Amendment assumes that] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.").

8. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996) (asserting that states lack "broad discretion to suppress truthful, nonmisleading information for paternalistic purposes").

9. *See Va. State Bd.*, 425 U.S. at 770.

10. Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985).

11. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that the First Amendment does not protect "fighting words," that is, words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

12. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the First Amendment does not protect advocacy that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

13. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978) (rejecting First Amendment challenge to law prohibiting in-person solicitation by lawyers, reasoning that some people may be "incapable of making informed judgments or of assessing and protecting their own interests" in the face of such appeals).

14. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63–64 (1973).

15. *Id.* at 64.

It isn't readily apparent when and why the Court sets aside the assumption that listeners should be allowed to evaluate speech for themselves, however. Indeed, the Court has taken a haphazard approach to the issue of speech effects, addressing it infrequently and reluctantly. It has relied by turns on psychological theory,[16] empirical evidence,[17] and comparisons to other media[18] to determine how a new form of speech might affect users, using a grab bag of vague terminology. Radio is "invasive"[19] and "pervasive,"[20] but the Internet is neither.[21] Movies are mere "spectacles."[22] Pornography may have a "corrupting and debasing impact," whereas good books "lift the spirit" and "improve the mind."[23] The Supreme Court has maintained at one point or another that all of these effects are relevant to the First Amendment analysis of speech. But it has given few clues about how to apply these concepts to new situations. Often, the Court dodges the issue altogether, failing to discuss speech effects in cases where they would appear to be highly relevant.

The Court's analysis in *Brown v. Entertainment Merchants Association* of the effect violent video games have on users is typical of its seat-of-the-pants approach to the issue of speech effects. In *Brown*, the State of California (State) argued that it had a compelling interest in regulating violent video games because the games' "interactive" nature made the children who played them more aggressive.[24] This required the Court to evaluate when the First Amendment does and does not protect against such effects. Writing for the majority, Justice Antonin Scalia brushed aside the State's contention in a couple brief paragraphs. He concluded that the State had no cognizable First Amendment interest in protecting users from the subtle conditioning effects of violent video games.[25] It is "nothing new" that video games allow players to participate in the action, he reasoned: book readers make decisions about which plot to follow in choose-your-own-adventure stories.[26] And indeed "all literature is interactive" in the sense that it stimulates imagination: "Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own."[27]

16. *Id.*

17. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2739 (2011) (assessing studies of the effects of video games on minors).

18. *See id.* at 2738 (comparing video games to literature).

19. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989).

20. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

21. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868–70 (1997) (distinguishing the characteristics of the Internet from those of broadcast).

22. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–44 (1915).

23. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

24. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2737–38 (2011).

25. *Id.*

26. *Id.*

27. *Id.* at 2738 (internal quotation marks omitted) (quoting Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).

This brief analysis implies that "interactivity" is a First Amendment value, a quality that might entitle a communications medium to protection under the Speech and Press Clauses. But Justice Scalia's quick dismissal of the State's argument failed to explain what interactivity has to do with the First Amendment, and offered few clues as to how one might go about evaluating whether a given medium is interactive. He suggested that user choice was a relevant consideration, but didn't explain what kinds of choices qualify, aside from determining what a video game character does next or how a book will end. It is unclear whether radio, television, billboards, and movies offer sufficient choice to make them "interactive," for example. Nor is it clear which media stimulate the imagination in a way that would render them "interactive." Clearly books and the Internet have vastly different effects on the imagination, but *Brown* offered little indication of how a court might go about evaluating these effects for First Amendment purposes.

Scholars have taken a similarly piecemeal approach to evaluating speech effects. Instead of holistically assessing which effects the First Amendment should and should not protect against, most commentators work backwards. They tend to (1) argue that a particular form of speech is nettlesome; (2) find a theory that will justify slackening protection for it; and (3) argue that First Amendment protection should accordingly be relaxed. For instance, one scholar has (1) identified "manipulative" marketing as harmful speech because it causes consumers to buy products they don't actually want; (2) argued that the First Amendment should not protect manipulative marketing because it influences consumers through subliminal channels; and (3) concluded that courts should thus give greater deference to legislators under the commercial speech doctrine in such cases.[28] Another has (1) identified online hate speech as a particular scourge because such speech "create[s] social division and inequality"; (2) argued that hate speech is less valuable than other forms of speech because it does nothing to advance the democratic process; and (3) argued that the First Amendment exception for fighting words should be expanded to encompass online hate speech.[29]

The approaches of both courts and commentators to the issue of speech effects are unsatisfying because they lack either grounding in the First Amendment, or a means of consistent application. Theories of what the Speech and Press Clauses protect are plentiful. Whatever result a judge or scholar desires, she can probably find a theory to back it up. But this approach tends to turn the First Amendment into Joseph's coat. What is needed is an analytical

28. Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 502 (2015) (arguing that the commercial speech doctrine should protect against the manipulation of users).

29. *See* Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 818, 839–43, 847–48 (2001) (discussing the proliferation of hate speech on the Internet).

framework for assessing speech effects that can be applied consistently across cases.

B. Speech-Effects Theory

Communications study is a logical starting point in the search for a way to assess speech effects under the First Amendment. No one has written with as much insight about these effects as Marshall McLuhan. Famous for the phrase "the medium is the message," McLuhan viewed communications technologies as a central shaping force in modern life, emphasizing the importance of media themselves at a time when scholars focused on content.[30] For McLuhan, a communication's medium affects people and society "not primarily through the content that it mediates but through its formal, technical properties as a medium."[31] For example, while we may think that it makes no difference whether we get our news over radio, television, or the Internet, McLuhan would contend that we take in and process the same information across these various media in very different ways.[32] Hence, the medium itself—as much as the ideas or information it conveys—is the message.[33] McLuhan used the example of the light bulb to illustrate the importance of media themselves, noting its profound influence on social life despite its total lack of "content."[34] For him, media were not mere means of disseminating ideas, but rather environments that affected the whole person.[35]

McLuhan published his major book, *Understanding Media*, in 1964. More than fifty years later, his work remains "remarkably enduring."[36] Professors W.J.T. Mitchell and Mark B.N. Hansen have described *Understanding Media* as "arguably the first and still most influential effort to articulate a comprehensive theory of media."[37] Communications scholar Megan Mullen has noted that McLuhan's core theories remain valid, and that "we are living in an era when [McLuhan's] predictions . . . are in evidence all around us."[38] Commentators often describe him as a visionary who anticipated the effects of

30. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 25. "I am in the position of Louis Pasteur telling doctors that their greatest enemy was quite invisible, and quite unrecognized by them," McLuhan lamented. *Id.* at 30–31.

31. *Introduction* to CRITICAL TERMS FOR MEDIA STUDIES, at x (W.J.T. Mitchell & Mark B.N. Hansen eds., 2010).

32. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 20.

33. John W. Abrams, *Herbert Marshall McLuhan (1911–1980)*, 22 TECH. & CULTURE 843, 843 (1981).

34. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 19–21.

35. *See id.* at 64–65.

36. Megan Mullen, *Coming to Terms with the Future He Foresaw*, 47 TECH. & CULTURE 373, 380 (2006) (reviewing MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964)).

37. *Introduction* to CRITICAL TERMS FOR MEDIA STUDIES, *supra* note 31.

38. Mullen, *supra* note 36, at 379.

electronic media on both individuals and patterns of human interdependence.[39] The journalist and novelist Tom Wolfe has described McLuhan as one of our major thinkers:

> I can't think of another figure who so dominated an entire field of study in the second half of the 20th century. At the turn of the 19th century and in the early decades of the 20th, there was Darwin in biology, Marx in political science, Einstein in physics, and Freud in psychology. Since then, there has been only McLuhan in communications studies. [40]

Part of the reason that McLuhan's work remains a natural starting point in thinking about speech effects is that media theory has developed little in the past half-century. While McLuhan studied media as "the totality of technical, social, and aesthetic reality," the field has since splintered into narrower disciplines, with scholars failing to engage media in a holistic way.[41] Joshua Meyrowitz, one of the most prominent media scholars to embrace McLuhan's holistic approach, has observed that McLuhan's ideas are "not easily integrated into other theoretical research frames."[42] And McLuhan's theories are by and large not verifiable in a scientific sense.[43] Though he wrote at a time when social scientists were carrying out experiments to "demonstrate harmful 'media effects,'" his work was "invariably grounded in a humanistic scholarly tradition."[44] McLuhan was an empiricist in the broader sense of the word, however, in that he derived knowledge from sense-based experience, rather than abstract reasoning.[45] But his project was not to produce scientific knowledge.[46] He derided the reduction of the world to mathematical form as excluding most of the important questions from study in the quest for an

39. *See, e.g.*, David Carr, *Marshall McLuhan: Media Savant*, N.Y. TIMES (Jan. 6, 2011), http://www.nytimes.com/2011/01/09/books/review/Carr-t.html [http://perma.cc/3Z4P-Q75M].

40. Tom Wolfe, *McLuhan's New World*, 28 WILSON Q. 18, 20 (2004).

41. *Introduction* to CRITICAL TERMS FOR MEDIA STUDIES, *supra* note 31, at xvi–xvii; *see, e.g.*, KEVIN WILLIAMS, UNDERSTANDING MEDIA THEORY 190 (2003) (noting that, for contemporary scholars, "enquiry into media effects has been replaced by examination of the creativity of audiences in the generation of meaning"); DAVID R. CROTEAU & WILLIAM D. HOYNES, MEDIA/SOCIETY: INDUSTRIES, IMAGES, AND AUDIENCES 305, 308 (2003) ("[I]t is . . . easy to overstate the determining role of media technologies [in social change]. . . . [T]he message cannot be reduced to the medium."); Lynn Spigel, *TV's Next Season?*, 45 CINEMA J. 83, 85 (2005) (noting that research on film and television has moved away from "'medium'-scale abstractions . . . toward questions about how film and television intersect with the textures and rhythms of everyday life").

42. JOSHUA MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR 21 (1985).

43. *See* Wolfe, *supra* note 40, at 24.

44. Mullen, *supra* note 36, at 375; *see also Introduction* to CRITICAL TERMS FOR MEDIA STUDIES, *supra* note 31, at viii (noting the divergence in the "empirical" and "interpretive" approaches to media studies).

45. *See* Peter Markie, *Rationalism v. Empiricism*, STAN. ENCYCLOPEDIA PHIL. (Mar. 21, 2013), http://plato.stanford.edu/entries/rationalism-empiricism [http://perma.cc/T6RR-KJ3H] ("Empiricists claim that sense experience is the ultimate source of all our concepts and knowledge.").

46. Mullen, *supra* note 36, at 374.

"irrelevant precision."[47] Rather, his persuasive technique rests on an appeal to the reader's own sensory experience.

Some might prefer a more scientific approach. To be sure, researchers have conducted plenty of studies on the effects of different forms of speech, both before and since McLuhan published *Understanding Media*.[48] Legal scholars have attempted to apply some of this research to the First Amendment.[49] But without a conceptual framework to explain when and why certain effects are relevant to First Amendment analysis, empirical studies are of little help. We may know that television and books stimulate the brain differently,[50] but this does us little good without a theory of how these effects are relevant to First Amendment analysis.

Others might argue that the effects of communications on our senses are simply too subtle for the law to take account of them at all. This argument is not without merit. Indeed, this may be an area that resists precise description. It is no coincidence that the most famous judicial adoption of gestalt principles of reasoning[51]—Justice Potter Stewart's "I know it when I see it"—came in the context of analyzing a movie under the Speech and Press Clauses.[52] But the subtlety of the issue of speech effects has not stopped courts from assessing it in First Amendment cases.[53] The issue will only arise more frequently as questions proliferate about how to apply the First Amendment to ever-evolving communications technologies. Chief Justice Burger once wrote, on behalf of the majority in an obscenity case, that the effects of speech on the senses and psyche "may be intangible and indistinct, but they are nonetheless real."[54] Following Chief Justice Burger, judges should seek to engage with the difficult issue of speech effects, and to develop the critical awareness of media that McLuhan encouraged. In the absence of empirical studies, they should be "guided by a robust common sense" in this area.[55]

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47. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 219.

48. *See* MASS MEDIA EFFECTS RESEARCH: ADVANCES THROUGH META-ANALYSIS (Raymond W. Priess et al. eds., 2007) (describing various experiments).

49. *See, e.g.*, Rodney J.S. Deaton, *Neuroscience and the In Corpore-ted First Amendment*, 4 FIRST AMEND. L. REV. 181, 181–86 (2006); Marisa E. Main, *Simply Irresistible: Neuromarketing and the Commercial Speech Doctrine*, 50 DUQ. L. REV. 605, 605–06 (2012).

50. *See* Herbert E. Krugman, *Brain Wave Measures of Media Involvement*, 11 J. ADVERT. RES. 3, 8 (1971).

51. Gestalt reasoning proceeds directly from sensory impressions, rather than through deduction or abstraction. *See* Robin Rollinger, *Christian von Ehrenfels*, STAN. ENCYCLOPEDIA PHIL. (May 28, 2015), http://plato.stanford.edu/entries/ehrenfels/#GesQua [http://perma.cc/FVR2-L9TU].

52. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

53. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (upholding ban on obscene films despite lack of empirical evidence of harmful effects, and noting that "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data").

54. *Id.* (citation and internal quotation marks omitted).

55. *Id.*

1. Hot and Cool Media

McLuhan developed a rough framework for evaluating the effects of different communications media on individuals and society. He classified media as either "hot" or "cool" depending on the way they affect the senses.[56] Hot media, McLuhan posited, engage one sense in "high definition."[57] They bombard the user with a large amount of data,[58] sending her into a private mental experience.[59] Cool media offer comparatively little information.[60] As a result, they foster a more participatory experience, forcing the user to employ her own mind and senses to fill in the gaps.[61] Cool media encourage the interplay of all the senses,[62] requiring "a kind of commitment and participation in situations that involves all of one's faculties."[63]

McLuhan contrasted a photograph with a cartoon to illustrate the difference between hot and cool media. A photograph is "high definition," containing a bounty of information for the eye to take in and calling for great visual attention.[64] It reproduces many of the details of the environment it captures—subtleties in texture, shade, lighting, body language, and expression. The viewer pores over the image, noticing things she had missed before. A cartoon, by contrast, is "'low definition,' simply because very little visual information is provided."[65] It offers merely the outlines of objects, requiring the viewer to fill in details of the scene with her own mind—the color of a character's hair, the texture of a sled, the coolness of the snow.

Other examples may help elucidate the concept. Sunglasses are cool in comparison to eyeglasses, creating an "inscrutable" image that "invites a great deal of participation and completion."[66] The rural environment is cool because it allows for great range of motion and interaction with the land, while the city is hot because it guides people along orderly paths—turning them into consumers, rather than participants.[67]

In a move that may seem counterintuitive to some, McLuhan asserted that hot media stimulate the imagination to a much greater extent than cool ones do. For instance, print and film, both of which McLuhan characterized as hot, share a great power to "generate fantasy in the viewer or reader," he wrote.[68] Hot media divorce sensory experience from imaginative life, fostering "detachment

56. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 11–12.
57. *Id.* at 39.
58. *Id.*
59. *Id.* at 391, 401.
60. *Id.* at 39.
61. *Id.*
62. *Id.* at 39, 441.
63. *Id.* at 11.
64. *Id.*
65. *Id.*
66. *Id.* at 49.
67. *See id.* at 46.
68. *Id.* at 383.

and noninvolvement," the ability to separate sensation and action from thought.[69] Cool, participatory media, on the other hand, wed the two.[70] They demand total involvement of the mind and the senses, cutting off the ability to retreat into a private world.[71]

McLuhan used the hot radio medium and the cool telephone to illustrate the difference between hot and cool media in engendering imagination. While the mind may wander when one listens to the radio, conjuring up images of the things described, it is impossible to retreat into the imagination and visualize things while talking on the cool telephone.[72] The reason, he wrote, is that the telephone "demands complete participation . . . of our senses and faculties."[73] The hot radio may summon up pictorial scenes in the imagination, and the hot print medium may spur the imagined sound of dialogue.[74] But this is different altogether from the multisense involvement that cool media engender. Where the radio listener retreats to imagined pictures, the telephone user paces or doodles because she feels the need to participate with her whole body, with all her senses.[75]

McLuhan classified film, radio, and print as hot media, while identifying television, oral speech, and handwriting as cool.[76]

Figure 1: McLuhan's Typology of Media Effects

"Hot" Media		**"Cool" Media**
Print		Handwriting
Radio		Oral Speech Telephone
Film		Television

These distinctions may seem counterintuitive at first; McLuhan's typology separates media that are more commonly grouped together. Handwriting and print both convey the written word; in-person speech and radio both center on the human voice; television and film both transmit moving

69. *Id.* at 235, 442.

70. *Id.* at 420.

71. *Id.* at 39; *see also id.* at 360 (noting that the cool telephone medium "is a participant form that demands a partner").

72. *Id.* at 358. McLuhan continued, "At once the reader will protest, 'But I do visualize on the telephone!' When he has a chance to try the experiment deliberately, he will find that he simply can't visualize while phoning, though all literate people try to do so and, therefore, believe they are succeeding." *Id.*

73. *Id.* at 358–59.

74. *Id.* at 358 ("As we read, we provide a sound track for the printed word; as we listen to the radio, we provide a visual accompaniment.").

75. *Id.* at 359.

76. *Id.* at xvii, 39, 383, 413, 424–25.

images with sound. Nevertheless, McLuhan placed the items in these pairs in different groups when it came to classifying media as either hot or cool.

Film is hot in McLuhan's typology, while television is cool.[77] Whereas the film projector creates a commanding, high-definition visual impression, television offers far less data, forming a comparatively "crude" image.[78] (The dividing line between film and television images was much clearer in 1964 than it is today.) A close-up on TV "provides only as much information as a small section of a long-shot on the movie-screen."[79] Indeed, directors at the time when McLuhan was classifying media effects referred to the TV image "as one of 'low definition,' in the sense that it offers little detail and a low degree of information."[80] And because the televisual image is backlit and formed by a constantly shifting electrical field, it "has the quality of sculpture and icon, rather than of picture."[81] In emphasizing the TV image's lack of definition, McLuhan noted that, "whereas a glossy photo the size of the TV screen would show a dozen faces in adequate detail, a dozen faces on the TV screen are only a blur."[82]

In contrast to the prevailing notion that TV breeds passivity, McLuhan contended that it is highly participatory.[83] (Recall that McLuhan identified participation with involvement in the communication itself, rather than imagination.) In contrast to film, TV requires the viewer to constantly fill the gaps in the blurry image. McLuhan supported his argument that television is a participatory medium by referring to studies demonstrating that it was easier to teach children over TV than in print, over the radio, or through a lecture.[84]

McLuhan used the 1960 debates between John F. Kennedy and Richard Nixon as an illustration of the difference between hot and cool media. He attributed TV viewers' disapproval of Nixon not to his supposedly haggard appearance,[85] but rather to the fact that the image the candidate presented was too sharp and well defined for TV. Kennedy's features were soft, his expression neutral, his voice mellow, his tone nonchalant.[86] He did not look like a rich man or a politician, McLuhan wrote.[87] Indeed, Kennedy "could have been anything from a grocer or a professor to a football coach."[88] Nixon, on the

77. *Id.* at xvii.
78. *Id.* at 225, 418.
79. *Id.* at 419.
80. *Id.*
81. *Id.* at 418.
82. *Id.* at 423.
83. *See id.* at 219.
84. *Id.*
85. *See, e.g.*, Ron Grossman, *The Great Debate that Transformed Politics*, CHI. TRIB. (Sept. 30, 2012), http://articles.chicagotribune.com/2012-09-30/site/ct-per-flash-debates-0930-20120930_1_face-to-face-debate-first-presidential-debate-kennedy-and-nixon [http://perma.cc/M5FC-Z95W].
86. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 437–38.
87. *Id.* at 438.
88. *Id.*

other hand, stared out at the viewer with dark eyes.[89] He spoke crisply and with flourish.[90] He looked like a corporate lawyer.[91] "When the person presented *looks* classifiable, as Nixon did, the TV viewer has nothing to fill in."[92] The viewer becomes frustrated because she has no role to play in completing the image.[93]

Nixon's sharp, definite manner of speaking was, however, well suited to the hot radio—indeed, people who listened to the debate on the radio thought Nixon had won.[94] McLuhan implied that Nixon's manner of self-presentation would have worked well in film, as well.[95] But the defined features and crisp manner of speech that served Humphrey Bogart so well on the big screen failed Nixon on TV.

McLuhan divided telephone, in-person oral speech, and radio in a similarly counterintuitive fashion—classifying telephone and oral speech as cool, and radio as hot.[96] While all three convey human speech, he posited that they affect the user in markedly different ways.[97] The telephone, he wrote, is a cool medium that demands participation and involvement.[98] He noted that people feel compelled to answer a ringing public phone, and that a ringing phone on stage creates instant tension because it "demands a partner."[99] Oral speech elicits a similar demand for participation because it "involves all of the senses dramatically."[100] McLuhan wrote: "[I]n speech we tend to react to each situation that occurs, reacting in tone and gesture even to our own act of speaking."[101]

Meanwhile, radio is a hot medium, stimulating one sense and plunging the listener into a private experience.[102] Whereas the telephone calls for participation, radio can serve as background noise, engaging only the aural sense while allowing the listener to occupy herself with other activities.[103] McLuhan's analysis suggests the futility of laws that prohibit drivers from holding a cell phone and talking on it, while allowing the use of "hands-free" phoning. He would likely assert that our inability to safely drive and talk on the

89. *Id.* at 437.
90. *Id.*
91. *Id.* at 437–38.
92. *Id.* at 438.
93. *Id.*
94. Kayla Webley, *How the Nixon-Kennedy Debate Changed the World*, TIME (Sept. 23, 2010), http://content.time.com/time/nation/article/0,8599,2021078,00.html [http://perma.cc/D7UY-K6EP].
95. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 438.
96. *Id.* at 39.
97. *Id.*
98. *Id.* at 360.
99. *Id.*
100. *Id.* at 111.
101. *Id.* at 113.
102. *Id.* at 401.
103. *Id.* at 360, 401.

phone stems from the highly participatory character of the telephone as a medium, not from the indisposition of our hands.

Words printed on paper are hot in McLuhan's typology. The printed word consists of repeatable letters with sharp, well-defined outlines, in linear, precise, uniform arrangement,[104] "pushed to a high degree of abstract visual intensity."[105] McLuhan contended that the print medium engenders a state of detachment, encouraging people to evaluate the world from a neutral perch.[106] On the other hand, he maintained that hieroglyphic characters and handwriting are cool, because they involve the reader by leaving more for her to complete.[107]

Though there have been major developments in communications technologies since the publication of *Understanding Media* in 1964, McLuhan's work on media effects remains relevant. His work does not discuss video games or smart phones, for instance, but it does provide a basis for characterizing new media forms as either hot or cool. He probably would have classified video games as a cool medium, counter to Justice Scalia's characterization of video games as similar to print.[108] Far from calling upon and "heating up" a single sense, video games encourage a holistic sensory awareness, requiring viewers to anticipate image and sound, and to respond via touch. The video game image is generally more comparable to the cool television image than the hot film image, providing a low-definition picture (relative to film) that requires gamers to fill it in.[109] Like television (and unlike radio and film), video games demand constant attention by the user. One cannot use them as mere background stimulation.

McLuhan's work also strongly suggests that he would have classified computing devices such as laptops, tablets, and smart phones as cool media. The images they display are relatively low-definition, like the television image. As in video games, users direct the action on the screen through touch, either with a keyboard and mouse, or by tapping the screen. Computers foster a demand for connection, participation, and interplay, a demand that has been evident in the rapid spread of the Internet and social media. Discourse over the Internet resembles participatory, cool, oral culture much more closely than it resembles print correspondence, notwithstanding that printed words are frequently the content of Internet communication. Indeed, there is reason to think that McLuhan had something very much like the Internet in mind when

104. *Id.* at 235.
105. *Id.* at 39.
106. *Id.* at 93.
107. *Id.* at 39, 424–25.
108. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011). For simplicity's sake, I am limiting my analysis of video games here to the traditional console-plus-television set-up.
109. Increasingly well-developed graphics and larger home viewing screens may challenge this assessment in some circumstances.

he wrote that electric technologies promised to transform the world into a global village reminiscent of oral tribe-based cultures.[110]

While some of McLuhan's work suggests that his concept of hot and cool media is a binary one—a medium is either hot, or it is cool—he actually described media along a spectrum from hot to cool. For example, he wrote that bringing more detail to the televisual image would make the medium hotter,[111] and that shrinking the projection screen would make film cooler.[112] "Hot" and "cool" are helpful terms for organizing our thoughts about media, not absolutes. This is particularly important to keep in mind in applying McLuhan's work to the contemporary media environment, where communications technologies are becoming increasingly difficult to tell apart. Film screens are shrinking as theater operators strive to offer a more intimate experience,[113] while television has embraced "high definition." The computer is swallowing up television and film alike. Smart phones may be used both as telephones and radios. "It's a mixed-up, muddled-up, shook-up world."[114] But even if particular media have transformed since McLuhan's time, his basic framework remains applicable because it offers a means for analyzing any communications medium. And his work is helpful in assessing the development of First Amendment doctrines in an era when there was greater division among media than there is today.

2. Hot and Cool Content

While McLuhan deemphasized the role that the content of a given communication has on the way users perceive a message,[115] his distinction between media and content was less rigid than some suppose it to be.[116] A close reading of his work reveals that content may be hot or cool, just as media may be hot or cool.[117] McLuhan implied at several points in *Understanding Media* that certain content may advance or retard the effects of particular medium. Hot content tends to make a communication over a hot media hotter, for instance, whereas cool content tends to dampen the effects of a hot medium.

As an extreme example of this phenomenon, McLuhan wrote that cool content tends to enhance the cool features of the television medium. Close-ups, which allow the audience to participate in the actors' minute gestures, are

110. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 6; Wolfe, *supra* note 40, at 25 (describing McLuhan as the "patron saint" of the Internet).

111. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 15.

112. *Id.* at 391.

113. *My Spot: The New Parkway Theater in Oakland*, KQED (Oct. 13, 2014), http://ww2.kqed.org/news/2014/10/13/my-spot-new-parkway-theater-oakland [http://perma.cc/2SUV-BFRX] (describing a theater in Oakland, California, that "feels like . . . a friend's living room").

114. THE KINKS, *Lola*, *on* LOLA VERSUS POWERMAN AND THE MONEYGOROUND, PART ONE (Reprise 1970).

115. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 20.

116. *See* Mullen, *supra* note 36.

117. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 47.

natural to TV, whereas close-ups in movies are used "for shock."[118] In terms of theme, McLuhan argued that the most effective TV programs are "those that present situations which consist of some process to be completed," complementing the cool, participatory nature of television.[119] Thematically, the western genre worked well on TV because its mantra was "[l]et's make a town."[120] The audience participated in the "shaping and processing of a community from meager and unpromising components."[121] Today, the appeal of participatory TV programs is evident in the proliferation of "reality" shows, through which the viewer involves himself in the quotidian details of the characters' lives. It may also be seen in prize-oriented shows that allow the audience a backstage pass, so to speak, to witness the making of a star singer, chef, or model.

Meanwhile, McLuhan asserted that the hot radio medium performs better "[w]hen given additional intensity."[122] He maintained that intense orators make the most effective use of radio, amplifying the medium's tendency to engage a single sense and send the listener into private reverie.[123] To illustrate this point, McLuhan noted that the bombastic Soviet Premier Nikita Khrushchev appeared cartoonish on the participatory TV medium, but would have been very effective over radio.[124] He also contended that it was radio's particular power to captivate and entrance that allowed Orson Welles to create mass hysteria in his *War of the Worlds* play, and that enabled Hitler to drum up fervent support in Nazi Germany.[125] "It was Hitler who gave radio the Orson Welles treatment for *real*," McLuhan wrote, noting that both men knew how to use the medium to whip people into a frenzy.[126] Used to its full potential, radio engenders a deep world of "unspoken communication between writer-speaker and listener," turning "the psyche and society into a single echo chamber."[127] But where McLuhan asserted that commanding orators maximize radio's force,[128] he noted that another form of content—traditional news programs with their comparatively lower intensity—tend to dampen it.[129]

McLuhan suggested that the content of printed materials may be hot or cool, as well. Aphorisms and symbolist poems are cool because they are incomplete, he wrote, requiring the reader's participation in understanding their

118. *Id.* at 423.
119. *Id.* at 425.
120. *Id.* at 426.
121. *Id.*
122. *Id.* at 416.
123. *Id.* at 401, 410.
124. *Id.* at 400–01.
125. *Id.* at 401.
126. *Id.* at 401–02.
127. *Id.*
128. *Id.* at 401, 410.
129. *Id.* at 410.

meaning.[130] Detective stories are cool, allowing the reader to "participate[] as co-author simply because so much has been left out of the narrative."[131] Books with more spelled-out narratives, on the other hand, are hot.[132]

The silent film is cool in McLuhan's typology, whereas the sound film is hot, because the former requires the audience member to do more to complete it.[133] And the carefully plotted film is hot in comparison to unstructured movies, like those of Federico Fellini or Ingmar Bergman, because the former allow the viewer less freedom to interpret the action.[134]

3. Hot and Cool Cultures

McLuhan argued that media play a significant role in shaping cultures, as well as individuals. He distinguished cultures oriented around hot media from those that feature comparatively cool media.[135] He characterized America as a hot media culture because American life had developed around hot media, particularly print, before the advent of television.[136] McLuhan insisted that this fact had a profound effect on patterns of American life,[137] attributing the historical emphasis on individualism in the United States in large part to the shaping influence of print media.[138] He wrote much about the connection between typography and the concept of individualism.[139] His elaboration of this idea is too complex to do it any justice here. In brief, McLuhan contended that the hot print medium emphasized a private point of view[140] and engendered introspection and detachment, fostering a sense of individualistic separation from the world.[141]

McLuhan described speech effects as relative, not absolute: the effect of a new communications medium is entirely dependent on what kinds of media the user is accustomed to.[142] Shifts in the media environment can thus have a major effect on both individuals and societies, as people adapt their senses and values to the new medium.[143] Often, this is a subtle process. But the effects may be more extreme when one encounters media that are much hotter or cooler than the existing mix of communications technologies.[144]

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130. *Id.* at 49, 425, 430.
131. *Id.* at 46, 430.
132. *Id.* at 425.
133. *Id.* at 386.
134. *See id.* at 11.
135. *See id.* at 48.
136. *Id.* at 417.
137. *Id.* at 30, 233.
138. *Id.* at 6, 66, 403.
139. *See* MARSHALL MCLUHAN, THE GUTENBERG GALAXY 58–61 (2011).
140. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 235.
141. *Id.* at 6, 66, 403.
142. *Id.* at 48.
143. *Id.* at 40.
144. *Id.* at 50.

For instance, McLuhan attributed Hitler's rise to his effective use of the hot radio medium in a culture that had been oriented around cool media.[145] Radio had a profound effect when it was introduced in continental Europe, with its "more earthy and less visual" cultures and its emphasis on oral speech rather than literacy.[146] Hitler used the radio to remarkable effect, McLuhan wrote, but not because it relayed his thoughts effectively.[147] Indeed, "[h]is thoughts were of very little consequence."[148] Rather, McLuhan suggested that the radio medium itself entranced the German people.[149] He contrasted the effect of radio in Germany with its comparatively mild impact on American culture.[150] Americans assimilated the hot radio medium easily, because they were so accustomed to the hot print medium.[151] Their exposure to print also made it easy for them to adapt to film, which, like the book, "offers an inward world of fantasy and dreams."[152]

But the introduction of cool communications technologies in America's hot media culture was profoundly disruptive, McLuhan contended.[153] TV changed the "sense-lives and . . . mental processes" of Americans, fostering a taste for in-depth, participatory experience.[154] He argued that cool electric technologies have gradually eroded the centrality of individualism and privacy in American life, restoring tribal patterns of interdependence.[155] He suggested that government regulation of media could help to ease the transition into this new environment.[156]

C. Speech-Effects Theory and First Amendment Theory

McLuhan's work tells us much about speech effects, but it has nothing to say about how courts can address those effects in a way that is consistent with the rationales for First Amendment protection of speech. There are interesting points of connection, however, between First Amendment theory and McLuhan's theory of media effects. The basic rationales that scholars have articulated for First Amendment protection have much in common with the private, individualistic tendencies and values that McLuhan claims are inculcated by the print medium. When we place First Amendment theory and McLuhan's media theory side-by-side, a picture emerges of a First Amendment that has primarily protected the print medium itself. This provides a new

145. *Id.* at 401–02.
146. *See id.* at 399, 402, 420.
147. *Id.* at 402.
148. *Id.*
149. *Id.* at 401–03.
150. *Id.* at 420.
151. *Id.* at 399.
152. *Id.* at 391.
153. *Id.* at 48.
154. *Id.* at 439.
155. *Id.* at 29, 41.
156. *Id.* at 45.

perspective on how First Amendment protection of speech should adjust to a rapidly evolving communications landscape.

An article by Professor Thomas Emerson published one year before *Understanding Media* continues to serve as the touchstone for First Amendment theorists.[157] In the article, Emerson, one of the most prominent scholars of the Speech and Press Clauses,[158] offered four basic rationales for affording speech First Amendment protection.[159] The central purpose of the Speech and Press Clauses was to "guarantee the maintenance of an effective system of free expression," he wrote.[160] He broke this down into four subcategories: (1) ensuring individual self-fulfillment; (2) attaining truth; (3) securing participation in a democratic society; and (4) allowing people to blow off steam.[161]

In describing each of these rationales, Emerson characterized self-expression as an individual right, that is, one justified "first of all as the right of an individual purely in his capacity as an individual."[162] He maintained that the concept of free expression was inextricably tied up with Western civilization's belief in the "dignity, the reason and the freedom of the individual."[163] Self-fulfillment, for example, is "an *individual* process" for Emerson, one that allows man to form his own opinions, express his "individual personality," and realize his full potential.[164] The attainment of truth, Emerson's second rationale, is similarly centered on the individual[165]: each person evaluates facts and arguments for herself to arrive at an opinion, and society coalesces around the most convincing of these individual opinions.[166] Likewise, Emerson's third rationale, participation in democratic decision making, rests on every individual's ability to gather information: "Since facts are discovered and opinions formed only by the individual, the system demands that all persons participate."[167] Finally, the First Amendment's protection of the ability of disenchanted people to "let off steam" rests on a conception of the body politic as a collection of discrete individuals, some of whom may have strong opinions that are contrary to those of the majority.[168]

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157. *See, e.g.*, Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1044 (citing Emerson's work).

158. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 151 (1973) (Douglas, J., concurring) (describing Emerson as "our leading First Amendment scholar").

159. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963).

160. *Id.* at 878.

161. *Id.* at 878–79, 885.

162. *Id.* at 879.

163. *Id.* at 878.

164. *Id.* at 879–81.

165. *See id.* at 881.

166. *Id.* at 881–82.

167. *Id.* at 882.

168. *Id.* at 885.

McLuhan's association between print and individualism suggests that Emerson's rationales for First Amendment protection are closely tethered to the print medium itself.[169] In this gloss, the First Amendment protects the state of mind and the cultural values inculcated by print, which was the dominant communications medium at the time of the founding.[170] While commentators and courts have often deemed some forms of speech "low value" under the First Amendment, this perspective suggests that "low-value" speech is simply that which is most dissimilar from print in its effects on users.

The recognition that the First Amendment theories in widest circulation take the persistence of the values inculcated by print for granted raises interesting issues for First Amendment jurisprudence, given the proliferation of cool electric communications technologies. Cool technologies foster different tendencies and values than hot media, like print. They inculcate a desire for participation and involvement in the lives of other people; they assert the primacy of the collective over that of the individual.[171] A media-oriented approach to the Speech and Press Clauses suggests that, as these values become increasingly central to American life, First Amendment protection should shift accordingly. The Speech and Press Clauses may also have a role to play in acting as a damper pedal on the inevitable individual and cultural shifts brought about by new communications technologies. Allowing for government regulation of speech that is significantly hotter or cooler than the existing media environment may reduce the disruption occasioned by the spread of new media.[172]

II.
SKETCHING A HOT AND COOL FIRST AMENDMENT

While the Court has failed to analyze speech effects systematically under the First Amendment, its approach to the issue has often aligned with what speech-effects theory might suggest. As First Amendment jurisprudence developed in the early twentieth century, the Court used a number of doctrinal tools that served, as a functional matter, to relax protection of communications positioned at the extreme ends of the speech-effects spectrum. More recently, however, First Amendment jurisprudence has fallen out of step with speech-effects theory. As new media have proliferated, the Court has applied First Amendment doctrines that developed in the context of particular media across the media spectrum. I posit that this has caused much of the confusion that scholars have identified in modern First Amendment doctrine. This Section

169. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 6, 66, 403.

170. *See* Katsh, *supra* note 5 (linking the understanding of the First Amendment at the founding to print technology).

171. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 29, 41, 439.

172. *Id.* at 45.

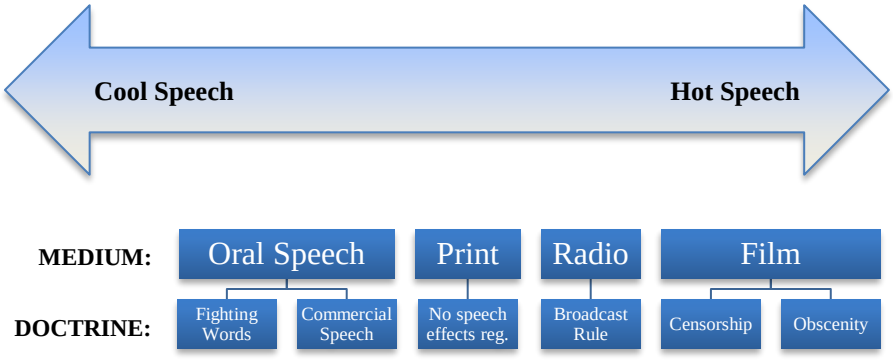
describes these developments, and offers suggestions for how to realign First Amendment jurisprudence with speech-effects analysis.

I should acknowledge that the idea of applying McLuhan's work to particular First Amendment doctrines may seem strange to some. Whereas McLuhan wrote mainly about the effects of media, courts tend to focus on content in First Amendment cases. But those differences are not quite as rigid as they might at first appear. McLuhan's discussion of speech effects is much more content-oriented than is commonly thought,[173] and several First Amendment doctrines are more closely tied to particular media than the black-letter law would suggest. This Note seeks to put the two in conversation by taking a closer look at each.

A. Speech-Effects Analysis and the First Amendment: Alignment

We cannot begin to think about reshaping First Amendment doctrine in light of the speech effects of new media until we understand how courts have dealt with the issue in the past. In the early development of First Amendment jurisprudence, the Supreme Court's regulation of speech was roughly consistent with what speech-effects theory might suggest it should be. As a functional matter, the Court afforded print media a privileged place—a practice that was justified from the perspective of speech-effects theory, given the centrality of the print medium in American culture. Meanwhile, the Court more readily allowed for regulation of speech that was significantly cooler or warmer than the existing communications environment. This approach has allowed the First Amendment to function as a damper pedal on the most disruptive effects of new media.[174] The chart below offers an overview of the functional connections this Note draws between communications media and First Amendment doctrine.

Figure 2: Speech Effects in First Amendment Jurisprudence



173. *See infra* Part II.B.
174. *See infra* Part II.C.

1. Print (Hot): No Regulation

According to black-letter law, print receives no more protection under the First Amendment than any other medium. But a functional analysis of First Amendment jurisprudence reveals that the Court has in fact given print an elevated place under the Speech and Press Clauses. The meaning of "press" in the Speech and Press Clauses has long been debated, but the Court's First Amendment cases might lead one to believe that it refers to the technology of the printing press itself.[175] Perhaps the Court's oft-repeated statement that the First Amendment assumes people can process information for themselves[176] should be qualified with the addendum, "when it is in print."

For instance, while the Court has upheld a number of regulations of obscene films, it has been much more reluctant to find printed materials obscene.[177] In addition, the Court has rarely sustained regulations of printed advertisements under the commercial speech doctrine. For instance, it has upheld a broad ban across all media on advertisements for gambling, while striking down similar laws that regulated advertisements printed on the labels of liquor bottles.[178] And while the Court has upheld laws that limit a lawyer's ability to make in-person appeals to potential clients under the commercial speech doctrine, it has struck down similar regulations on print solicitations.[179] In one case, the Court noted that printed ads were "more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney."[180] This recalls both Emerson's celebration of private, individual decision making, and McLuhan's association of detachment and privacy with print. In other areas of First Amendment jurisprudence, the Court has rejected government attempts to control the content of newspapers, while sustaining nearly identical efforts to regulate the content of radio and television broadcasts.[181]

175. *See* Katsh, *supra* note 5 (linking the understanding of the First Amendment at the founding to print technology).

176. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (noting that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them").

177. *See* L.A. Powe, Jr., *"Or of the [Broadcast] Press,"* 55 TEX. L. REV. 39, 62 (1976) ("The obscenity cases demonstrate a greater solicitude for books than for films.").

178. *Compare* Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986) (upholding broad ban on gambling advertisements), *with* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996) (rejecting the approach of the *Posadas* Court in striking down a labeling law).

179. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985) (striking down a ban on print advertising for legal services while upholding a similar ban on oral speech).

180. *Id.*

181. *Compare* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking down a statute requiring newspapers to provide an opportunity for response when a person has been attacked), *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 367–68 (1969) (upholding right of response law over broadcast).

Some have criticized the Court for treating print differently than other media.[182] But speech-effects analysis suggests that the assumption that people need less protection from the effects of print media has been a sensible one. Print is central to American culture. Americans receive long training in evaluating it, both inside and outside the classroom. From this perspective, the Court has been justified in preventing states from regulating print out of fear of the effects that particular printed materials might have on readers.[183]

2. Oral Speech (Cool): Fighting Words and Commercial Speech

The Court has afforded government much more leeway to regulate against the effects of cool oral speech, limiting First Amendment protection for such speech under the fighting words exception and the commercial speech doctrine. Under both doctrines, the Court has put aside its usual assumption that the First Amendment protects people's ability to evaluate speech for themselves.[184] It has instead allowed government to regulate speech that might cause people to make snap decisions—speech that prevents the sort of detached reflection that McLuhan associated with print, and that Emerson associated with the rationales for First Amendment protection.[185]

The Court has exempted "fighting words"—words that "by their very utterance . . . tend to incite an immediate breach of the peace"—from First Amendment protection.[186] The fighting words doctrine is inextricably tied to oral speech: the Court announced it in a case that involved oral speech, and it is indeed unclear whether it applies at all outside of that context.[187] The exception allows states to guard against sudden calls to participation, recognizing that listeners may be unable to restrain themselves from lashing out in response to provocative speech.[188] In other words, the doctrine protects against speech that sits at the cool extreme of the speech-effects spectrum.

The Court has justified the fighting words exception on the basis of content: fighting words have no value in the marketplace of ideas because they cannot help society come closer to arriving at the "truth."[189] But the exception

182. *See, e.g.*, Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 253 (1994).

183. *See Zauderer*, 471 U.S. at 642.

184. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

185. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) ("[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.").

186. *See Chaplinsky*, 315 U.S. at 572.

187. *See* Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009) (noting the existence of a "strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations").

188. *Chaplinsky*, 315 U.S. at 573.

189. *Id.* at 572.

is equally justified under speech-effects analysis. Listeners are unable to process fighting words in the private, detached way in which they would take in the same words had they read them in a book. In First Amendment parlance, I would suggest that fighting words are of less "value" than other forms of speech because they prevent the exercise of reflection, encouraging impulsive responses that have no place in Emerson's system of measured private thought and expression.

The Court has also allowed government to regulate cool speech that invites participation by calling on listeners to buy a product or service.[190] It established in a 1942 case, *Valentine v. Chrestensen*, that the First Amendment "imposes no . . . restraint on government as respects purely commercial advertising."[191] Nominally, the *Valentine* rule applied to every communications medium that featured "purely commercial advertising."[192] In practice, however, the Court used the rule almost exclusively in cases involving in-person oral solicitation.[193] In cases where it was uncertain whether the exception applied, the Court sometimes resolved the issue by asking whether the solicitation at issue was particularly aggressive—in McLuhan's terms, whether the call for participation was particularly cool. For instance, the Court in its post-*Valentine* cases distinguished commercial advertising from other substantially similar forms of speech by emphasizing the unique skill of professional salesmen to put undue pressure on prospective customers.[194] In one case, it held that door-to-door sales of magazine subscriptions by professionals were commercial advertising.[195] In other cases, it held that sales of material by religious proselytizers and door-to-door distribution of literature by neighbors were not.[196] The professional pitchmen received less protection because they were "well-trained" and "persistent," particularly deft at "corner[ing] the quarry in his home and through his open door put[ting] pressure on the prospect to purchase."[197] In other words, they were simply better than the neighbor and the evangelist at inviting participation in their pitches.

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190. *See* Breard v. Alexandria, 341 U.S. 622, 627, 644 (1951).

191. 316 U.S. 52, 54 (1942).

192. *Id.*

193. A Westlaw search reveals nine cases in which the Court applied the *Valentine* rule between 1942 and 1970. All but one of the cases involved solicitation by oral speech. In the ninth case, the Court affirmed a provision of the Labor Relations Management Act of 1947 that required union officers to take an anti-Communist oath in order for their unions to receive certain protections under the National Labor Relations Act. Am. Commc'n Ass'n, C.I.O. v. Douds, 339 U.S. 382, 385–87 (1950). The Court cited *Valentine* in reasoning that "[t]hose who . . . would subvert the public interest cannot escape all regulation because, at the same time, they carry on legitimate political activities." *Id.* at 412.

194. *Breard*, 341 U.S. at 627, 642–44.

195. *Id.* at 644–45.

196. *See* Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (sales of religious material); Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (door-to-door distribution of literature).

197. *Breard*, 341 U.S. at 627, 644.

The Court continued to allow states to restrict persistent oral solicitation under the later-developed commercial speech doctrine. In a series of cases decided from the mid-1970s to the early 1980s, the Court established that the First Amendment did in fact protect commercial speech,[198] but that government may regulate such speech where it has a substantial interest in doing so.[199]

In its commercial speech cases, the Court has insisted that the government has no interest in regulating advertising where the ads provide accurate information.[200] But it has carved out an exception to this rule for particularly persistent oral solicitations.[201] For instance, the Court has held that states can ban in-person solicitation by attorneys because such solicitation "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."[202] What the Court really seemed to be protecting here was the listener's ability to evaluate the speech at issue in a manner similar to that in which people evaluate print. This again aligns with traditional rationales for First Amendment protection. Cool in-person appeals do not encourage Emerson's private, individual decision-making process, and such appeals may be difficult for print-oriented listeners to evaluate.

3. Film (Hot): Censorship and Obscenity

The Court has functionally subjected the hot film medium to a lower level of speech protection than it has provided for print. McLuhan asserted that film is similar in many respects to print, and that the sequential nature of print primed Americans to accept the film medium.[203] Still, First Amendment protection has given way for what we may think of as particularly hot content projected over the hot film medium—first through the Court's approval of state censorship boards, later through its application of the obscenity doctrine to film. The Court's approach has much in common with McLuhan's analysis of the effects of film on viewers.

198. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

199. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (establishing a four-part test for evaluating the constitutionality of commercial speech regulations).

200. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 497 (1995) ("Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment. . . ."); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983) ("[T]he restriction of the free flow of truthful information constitutes a basic constitutional defect regardless of the strength of the government's interest.") (citation and internal quotation marks omitted); Friedman v. Rogers, 440 U.S. 1, 10 (1979) (noting that states may regulate commercial messages to "prevent [them from] being deceptive") (quoting *Va. State Bd.*, 425 U.S. at 771 n.24).

201. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 498 (1996) (noting that the commercial speech doctrine recognizes that states may "restrict some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers").

202. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457, 465 (1978).

203. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 383–84.

In a 1915 case, *Mutual Film Corp. v. Industrial Commission*, the Court afforded states broad latitude to censor movies.[204] Interpreting a state constitutional provision that was substantially similar to the First Amendment, it held that film could not be considered the equivalent of print.[205] In explaining why, Justice Joseph McKenna described the effects of film on viewers in terms that recall McLuhan's contention that hot media tend to engage a single sense to a great extent, plunging users into a private experience.[206] Justice McKenna depicted moviegoers as almost helpless in the face of certain films, unable to resist their appeal.[207] Movies were "capable of evil," he wrote, "having power for it, the greater because of their attractiveness and manner of exhibition."[208] People may come to the theater seeking to be educated about the film's subject, he reasoned.[209] But they are likely to be swept away by the medium, despite themselves: "[A] prurient interest may be excited and appealed to."[210]

It is worth noting the similarities between McLuhan's analysis of the effects of particularly hot media on the senses and the Court's analysis of the effects of film on moviegoers. McLuhan wrote that particularly hot media tend to hypnotize viewers, sending them into a trance-like state and giving them new access to inner experience.[211] The moviegoer Justice McKenna envisioned has much in common with the hypnotized patient.[212] The similarity between McLuhan's analysis of film and that of the *Mutual Film Corp.* Court appears particularly striking when we consider the ideas about the effects of film that were circulating when the Court decided the case. Contemporary commentators linked the suggestibility of film audiences to the suggestibility of patients under hypnosis;[213] films were thought to move faster than books, impressing themselves on the mind in unaccountable ways.[214] In a book published the year after the Court decided *Mutual Film Corp.*, psychologist Hugo Münsterberg argued that film broke down the viewer's normal resistance, making her highly impressionable.[215] Thus hypnotized, viewers would lose themselves in the picture and abandon self-control.[216]

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204. 236 U.S. 230, 242–45 (1915). The statute allowed states to censor any film that was not "harmless." *Id.* at 245.

205. *Id.* at 243–44.

206. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 391, 418.

207. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915).

208. *Id.*

209. *Id.* at 241–42.

210. *Id.* at 242.

211. *See* LES BRANN ET AL., THE HANDBOOK OF CONTEMPORARY CLINICAL HYPNOSIS: THEORY AND PRACTICE 19, 27, 115 (2012); MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 50.

212. *See* BRANN ET AL., *supra* note 211, at 27.

213. Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 673 n.40 (2012).

214. *Id.* at 674.

215. *Id.* at 674–75.

216. *Id.* at 675.

Today, it is easy to view *Mutual Film Corp.* as a curio of the Court's First Amendment jurisprudence, a knee-jerk reaction to an alien medium. Indeed, the Court itself later disavowed the holding,[217] and has since characterized the case as the product of a misguided approach to the First Amendment.[218] When we consider speech effects, however, it seems less clear that the Court's approach was wrongheaded. Forms of communication that are significantly warmer or cooler than the existing media environment may have a major impact on both people and culture.[219] It isn't unreasonable to think that film might have been further from the center of the country's media heat spectrum when it was first introduced, before people had become accustomed to it. Society's embrace of film was inevitable once the medium began to spread, but there is reason to think that government regulation of the medium may have served to slow and smooth its integration into American life.

Even after the Court rejected the holding of *Mutual Film Corp.*, it continued to decide cases under the First Amendment exception for obscenity on the basis of similar concerns about film's effect on viewers. The obscenity exception is nominally media-blind,[220] but in practice it served as a tool to police film: the Court applied it far more often to movies than to books.[221] In a 1973 case, *Paris Adult Theater I v. Slaton*, the Court echoed *Mutual Film Corp.* in painting a picture of viewers helpless to resist the appeal of pornographic films.[222] Responding to the defendant's contention that enjoining a theater from showing obscene movies constrained the "free will" of movie-going adults, the Court pointed out that the law often operates to "protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."[223] It described the films at issue as almost irresistible, akin to

217. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

218. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2737 (2011) (describing Mutual Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 242 (1915), in recounting the history of failed attempts at censorship in America).

219. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 40.

220. The obscenity exception applies to "[p]atently offensive representations or descriptions" of sexual acts. Miller v. California, 413 U.S. 15, 25 (1973); *see also* Kaplan v. California, 413 U.S. 115, 118–19 (1973) ("When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the expression.").

221. Courts have rarely found books to be obscene. *See* Robert A. Jacobs, Comment, *Dirty Words, Dirty Thoughts and Censorship: Obscenity Law and Non-Pictorial Works*, 21 SW. U. L. REV. 155, 176 (1992); *see also* Powe, *supra* note 177, at 62 ("The obscenity cases demonstrate a greater solicitude for books than for films."). The one case in which the Court found printed words obscene appears to be the exception that proves the rule. It involved a book consisting of a never-ending stream of explicit sex scenes—resembling nothing so much as a pornographic film. *Kaplan*, 413 U.S. at 116–17 ("The book . . . is made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous; there is only the most tenuous 'plot.' Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.").

222. 413 U.S. 49, 64 (1973).

223. *Id.*

addictive drugs.[224] It reasoned that government intervention had been necessary to protect would-be viewers from themselves, since the films "exert[ed] a corrupting and debasing impact leading to antisocial behavior,"[225] changing people in subtle ways they could not control. The juxtaposition between the Court's reasoning in *Mutual Film Corp.* and its statement only three years later in *Virginia State Board of Pharmacy* that "information is not in itself harmful" and "people will perceive their own best interests if only they are well enough informed" is striking.[226] The cases are difficult to reconcile without reference to differences in the way print and film affect readers and viewers.

McLuhan did not discuss pornographic films in outlining his hot-cool typology. However, there is reason to think that he would have described pornography as a particularly hot use of a hot medium. McLuhan focused mainly on the projected image itself in describing film's hot characteristics.[227] And pornography appeals to a fascination with the image itself, mostly discarding narrative and camera technique and bringing the on-screen action to the fore.[228] If the hot film medium generally leaves little to filled in by the viewer,[229] the pornographic image leaves almost nothing to be filled in. Considered in these terms, pornographic movies represent a particularly hot use of a hot medium. This helps to justify the Court's varying application of the obscenity exception to movies and books. Considered from the perspective of speech effects, the First Amendment does not protect obscene films because they are at an extreme end of the spectrum of media effects.

4. Radio (Hot): Broadcast Rule

In consonance with speech-effects theory, the Court's treatment of radio under the First Amendment has, as a functional matter, allowed the Federal Communications Commission (FCC or Commission) latitude to prevent compelling orators from dominating the medium. The Court has stated that broadcast media is entitled to less First Amendment protection than other forms of speech due to its "unique characteristic[s]."[230] For instance, in a 1942 case,

224. *Id.* at 67–68 ("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution.").

225. *Id.* at 63.

226. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("[I]nformation is not in itself harmful, . . . people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.").

227. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 383–96.

228. *See* Jacob Held, *What Is and Is Not Porn: Sex, Narrative, and* Baise-Moi, *in* SEX AND STORYTELLING IN MODERN CINEMA: EXPLICIT SEX, PERFORMANCE AND CINEMATIC TECHNIQUE (Lindsay Coleman ed., 2015), http://www.academia.edu/3679179/What_is_and_is_not_Porn_Sex_Narrative_and_Baise-moi [http://perma.cc/9KTK-ETK9] (contending that porn's defining characteristic is a "lack of narrative strength such that the film becomes a mere delivery system for the spectacle of sex as spectacle beyond any further meaning").

229. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 418.

230. Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1942).

National Broadcasting Company v. United States, the Court approved of the FCC's ability to favor news programming over entertainment in distributing broadcast licenses.[231] It later affirmed the FCC's "fairness doctrine," which the agency used to compel broadcasters to air both sides of an issue and provide an opportunity for response.[232] The Court's rulings in these cases made radio resemble the newspaper; the fairness doctrine essentially codified the practices of newspaper journalism into broadcast law. This treatment parallels McLuhan's contention that news programming impedes the hot effects of radio.[233] The Court's approach to radio has thus functioned to bring the medium closer to the middle of the speech-effects spectrum, preventing its use by individual orators who may capitalize on radio's power to entrance.[234]

B. Misalignment

The Court has often applied the Speech and Press Clauses in a manner consistent with the analysis of speech effects offered here. This was particularly true in the early development of First Amendment jurisprudence, with courts fashioning doctrines that covered only a single communication technology, in function if not in name. The fighting words exception, the holding in *Valentine* that the First Amendment did not protect commercial advertising, and the commercial speech doctrine all enabled courts to relax First Amendment protections for the use of cool oral speech. Meanwhile, the obscenity rule and the distinctive treatment of broadcast radio functioned to reduce First Amendment protections for the hot media of film and radio, respectively.

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231. *Id.* at 226–27. The Court justified its holding in the case with reference to the fact that radio "inherently is not available to all" who wish to broadcast, given the limitations of the broadcast spectrum. *Id.* at 226. But this explanation is not very satisfying, and may suggest that the Court's apprehension of the radio medium had as much to do with its effects on listeners as with its technological nuances. Commentators have criticized the reasoning behind the scarcity rationale, pointing out that it did not necessarily follow that the FCC could only award broadcast spectrum based on its own determination of what constituted broadcasting "in the public interest"—an auction system would have worked as well, without requiring the government to make decisions about the nature of the programming on the air. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO L.J. 245, 259, 355 (2003). Indeed, the idea that the broadcast medium's "scarcity" justifies different First Amendment treatment has come under heavy criticism from a number of commentators who argue that access to newspapers is similarly scarce, if not more so. *See, e.g.*, Powe, *supra* note 177, at 56–58 (noting economic barriers to starting a newspaper, and concluding that, "to the extent scarcity is the rationale for regulation, daily newspapers rather than radio stations are more likely candidates for regulation"); *see also* Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1403 (2005) ("No one besides the Supreme Court actually believes the scarcity rationale."); Thomas W. Hazlett et al., *The Overly Active Corpse of* Red Lion, 9 NW. J. TECH. & INTELL. PROP. 51, 69–76 (2010) (criticizing the "scarcity fallacy").

232. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369 (1969). Though the Court's holding in *Red Lion* applied to radio and television equally, the fairness doctrine is treated here because it developed in the context of the radio medium.

233. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 2, at 410.

234. *See id.* at 401, 410.

But as new media proliferated, courts began to apply doctrines that had developed in the context of one communications technology to a variety of other media. They used the commercial speech doctrine, which had grown out of the *Valentine* line of cases involving oral speech, to evaluate advertising over newspapers,[235] product labels,[236] billboards,[237] television,[238] radio,[239] telephone,[240] fax,[241] and the Internet.[242] Courts and the FCC applied First Amendment rules that had evolved around the hot radio medium to the cool television medium, grouping two communications technologies that have very different effects under the same set of First Amendment rules.[243] It is perhaps not a coincidence that the commercial speech doctrine and the treatment of broadcast speech have become particularly knotty areas of First Amendment jurisprudence. This fact may be attributed at least in part to courts' application of the doctrines to media at opposite ends of the speech-effects spectrum.[244]

Commentators have criticized the commercial speech doctrine as ill-defined, ill-founded in First Amendment theory, and difficult to apply[245]—for good reason. The Court has used the doctrine inconsistently from case to case, resulting in outcomes that are difficult to square with one another.[246] It has failed to provide a convincing justification for affording less First Amendment protection for commercial speech in the first place.[247] And it has never clearly established what qualifies as commercial speech.[248] Commentators have been quick to seize on these shortcomings in calling for the Court to abandon the doctrine.[249]

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235. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 626 (1985).

236. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 476 (1995).

237. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 490 (1981).

238. *See* Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 582 (D.D.C. 1971).

239. *See* United States v. Edge Broad. Co., 509 U.S. 418, 418 (1993).

240. *See* Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1229 (10th Cir. 2004).

241. *See* Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 650 (8th Cir. 2003).

242. *See* United States v. Bell, 414 F.3d 474, 474 (3rd Cir. 2005).

243. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396 (1969) (holding that the fairness doctrine applied equally to radio and television).

244. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990) (commercial speech); Yoo, *supra* note 231, at 263 (broadcast speech).

245. *See* Kozinski & Banner, *supra* note 244, at 638–48.

246. *Compare, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986) ("[R]esidents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct."), *with* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996) (explicitly rejecting the approach of the *Posadas* Court and stating that states lack "broad discretion to suppress truthful, nonmisleading information for paternalistic purposes").

247. *See* Kozinski & Banner, *supra* note 244, at 634–38 (contending that the Court's stated justifications—the hardiness and verifiability of commercial speech—make little sense); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 296–97 (1987) (same).

248. Kozinski & Banner, *supra* note 244, at 638–48.

249. *Id.* at 651–52.

But perhaps the confusion in the commercial speech doctrine has resulted not from some fatal doctrinal flaw, but rather from the Court's failure to ground the doctrine in the effects of speech on listeners. The Court has never reconciled its willingness to credit assertions that communications may unduly influence potential customers in the context of oral speech with its unwillingness to do so in the context of print media. Time and again in commercial speech cases involving print, the Court has held that the laws at issue were fatally flawed because they restricted the flow of truthful information to consumers.[250] But in cases involving cool in-person solicitation, the Court has held that the government does indeed have an interest in protecting consumers from manipulation by speech, even when the speech is truthful.[251] These cases are difficult to square doctrinally. But speech-effects analysis suggests a reason for this treatment: the commercial speech doctrine functions to guard against calls for participation, and it is cool media—not hot ones—that threaten to unduly involve listeners.

First Amendment doctrine has also shown strain when courts have handled radio and television under the same First Amendment standards. When the FCC began to regulate television, it applied the rules it had developed to govern radio to the new medium, apparently due to technical similarities between the way radio and television were transmitted.[252] Courts followed suit, evaluating television and radio together under standards that had developed in the context of radio alone.[253] But it quickly became apparent that tools designed for radio did not quite fit television.

This was particularly evident in courts' review of administrative and legislative attempts to regulate TV advertising. In the mid-1960s, the FCC used the fairness doctrine, which required broadcasters to air a variety of views on matters of public importance,[254] to require counteradvertisements warning of the hazards of smoking.[255] The FCC's rulings on cigarette ads applied to radio as well as television, so it is impossible to say that the Commission was

250. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 497 (1995) ("Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment."); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985) (striking down a ban on print advertising for legal services); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74–75 (1983) (rejecting the regulation of accurate mailers and noting that "the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest"); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977) (rejecting regulation of accurate newspaper ads).

251. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978); *see also Zauderer*, 471 U.S. at 642.

252. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399 (1969) (discussing regulation of television and radio as primarily an issue of allocation of space on the broadcast spectrum that the two media share).

253. *See id.*

254. Steven J. Simmons, *Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective*, 75 COLUM. L. REV. 1083, 1094 (1975).

255. *In re* Complaint Directed to Station WCBS-TV, N.Y., 8 F.C.C.2d 381, 381 (1967).

concerned solely with TV. But there is good reason to think that television ads were indeed its primary focus. In all its years regulating radio, the Commission had never before applied the fairness doctrine to advertising content.[256] The decision to regulate cigarette ads came amid national concern about the role of television advertisements in promoting smoking.[257] The adjudication in which the FCC announced that the fairness doctrine applied to cigarette ads involved a television station, rather than a radio station.[258] Commissioners described the issue as one of "*televised* cigarette advertising"[259] in their written opinion, adding that they were particularly concerned with advertisements on television.[260] In describing the FCC's decision to apply the fairness doctrine to broadcast cigarette ads, publications at the time focused on the rule's impact on television.[261] And cigarette ads were simply much more prevalent on television than over radio. By 1963, cigarette makers were spending over five times as much money on TV ads as they were on radio spots,[262] with CBS proclaiming television to be the "greatest cigarette vending machine ever devised."[263]

In any event, the FCC's attempt to apply the fairness doctrine to television resulted in doctrinal confusion, eventually collapsing under its own weight. The Commission repeatedly modified its standards for determining when advertising touched on an "issue of public importance," triggering the requirement that the opposing view be given equal time.[264] Federal courts didn't have any less difficulty resolving the issue. Upholding the FCC's determination that the fairness doctrine applied to cigarette advertisements, the D.C. Circuit reasoned that cigarette commercials contributed negligibly to public debate—then concluded, paradoxically, that applying the fairness doctrine to such commercials would help to ensure "rugged debate."[265]

Even after receiving judicial approval of its decision, the FCC retreated from its efforts to apply the fairness doctrine broadly to product

256. *Id.*

257. Richard W. Pollay, *Exposure of US Youth to Cigarette Television Advertising in the 1960s*, 3 TOBACCO CONTROL 130, 130 (1994) (noting that the Tobacco Institute focused on TV ads in pushing for regulation of tobacco advertising). The surgeon general released its first report on the negative effects of cigarette smoking in 1964. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

258. *See In re* Television Station WCBS-T.V., N.Y., 9 F.C.C.2d 921, 921 (1967).

259. *Id.* at 937 (emphasis added).

260. *Id.* at 944.

261. *See, e.g.*, *Smoke-Free Wasteland*, 95 SCI. NEWS 185, 185 (1969) ("Television without Marlboro country, television without Newport's springtime lovers or the worn boots of the Camel walker—as incredible as television without football.").

262. BUREAU ECON., A REPORT ON CIGARETTE ADVERTISING AND OUTPUT 28 (1964).

263. Pollay, *supra* note 257, at 130.

264. *See In re Television Station*, 9 F.C.C.2d at 937–38.

265. Banzhaf v. FCC, 405 F.2d 1082, 1102–03 (D.C. Cir. 1968).

advertisements, limiting it to cigarette ads.[266] When Congress banned cigarette ads entirely from television and radio in 1971, the FCC abandoned its application of the fairness doctrine to advertisements entirely.[267] In a complete turnabout, it stated that, "standard product commercials, such as the old cigarette ads, make no meaningful contribution toward informing the public on any side of any issue," and accordingly did not fall within the ambit of the fairness doctrine after all.[268]

McLuhan's work suggests that the fairness doctrine was an inapt tool for addressing the potentially harmful effects of television. Applied to radio, it functioned in part to tamp down hot, one-sided uses of the medium by particularly compelling orators, shaping radio broadcasts into newspaper-like presentations of differing viewpoints. But the fairness doctrine made less sense as a means of countering the involving appeal of cool television advertisements. Tacking on public-service announcements warning of the harms of cigarettes would have been like appending rebuttals to Hitler's radio addresses. It would have done nothing to change the effect of the original communication. While some have suggested that the FCC's decision to cease applying the fairness doctrine to advertisements represented the FCC's capitulation to corporate interests,[269] it seems equally plausible that it was merely the inevitable outcome of its attempts to regulate television advertisements without either a theoretical justification or the appropriate doctrinal tools.

Congress's total ban on broadcast cigarette advertisements resulted in similar doctrinal confusion as courts sought to justify the ban under the First Amendment. Speech-effects analysis suggests that allowing government to regulate television advertisements would have been consistent with the First Amendment, given that such ads represent a cool call for participation over a cool medium. But a three-judge panel of the U.S. District Court for the District of Columbia[270] struggled in *Capital Broadcasting Co. v. Mitchell* to justify the ban under existing First Amendment doctrines.[271] The court upheld the law, but it failed to provide a sound doctrinal explanation for its decision. Its opinion pulled in several directions at once. The court situated the government's ability to regulate television ads somewhere between the fairness doctrine and the

266. Simmons, *supra* note 254, at 1095. Professor Simmons contended that the FCC's cases "demonstrate [a] . . . confused approach to product commercials." *Id.* He noted that the FCC clearly tried to "close the gate on product commercials" after the cigarette case, and that it time and again referred to the case of cigarette advertising as "unique." *Id.*

267. *Id.* at 1106.

268. *Id.*

269. *See* P.M. Schenkkan, Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 733 (1974).

270. Contemporary federal law required that a three-judge district court hear suits that sought injunctions to acts of Congress on constitutional grounds. 28 U.S.C. § 2282 (1958), *repealed by* Pub. L. 94–381, §§ 1, 2, 90 Stat. 1119 (1976).

271. 333 F. Supp. 582, 583 (D.D.C. 1971).

Valentine commercial advertising rule, while also nodding to the "subliminal impact" of radio and television.[272]

In dissent, Judge J. Skelly Wright, sitting by designation on the district court panel, highlighted the confused nature of the court's opinion.[273] He noted that the *Valentine* rule allowing restrictions on "purely commercial" advertising would not seem to apply, because the D.C. Circuit had previously indicated that cigarette ads were public discourse.[274] The fairness doctrine was equally inapposite: the FCC had only applied it to provide time to present other viewpoints and allow people to respond to criticism.[275] It had never used the doctrine to justify a complete prohibition on a certain kind of speech.[276]

The Supreme Court appeared similarly conflicted about the doctrinal justification for banning cigarette ads. It summarily affirmed the district court's decision,[277] but later exhibited ambivalence about the basis for its holding. It cited *Mitchell* in cases decided under the commercial speech doctrine, while simultaneously explaining its holding with reference to the "peculiar characteristics of the electronic media."[278]

Mitchell offers perhaps the clearest example of how the lack of a means for analyzing speech effects has sowed confusion in First Amendment jurisprudence. Members of Congress clearly felt that cigarette advertising possessed little value as speech. The district court agreed. But a justification for the ban was hard to come by under established doctrine.

C. Realignment

Focusing on a communication's effects on listeners, rather than its content or technical mode of conveyance, may help to clarify First Amendment jurisprudence. This Section suggests several ways in which courts might realign various First Amendment doctrines with speech-effects analysis and strengthen the justifications that underlie the doctrines. I am working here within the existing exception-based framework that characterizes the First Amendment, but I note that rapid changes in the U.S. media landscape may eventually militate in favor of a more flexible balancing approach.

Would-be reformers of the commercial speech doctrine have focused their efforts on redefining "commercial speech." Some have contended that the doctrine should cover every form of speech designed to promote products or

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272. *Id.* at 584–86.

273. *See id.* at 590–93 (Wright, J., dissenting).

274. *Id.* at 592–94.

275. *See, e.g.*, *In re* Complaint Directed to Station WCBS-TV, N.Y., 8 F.C.C.2d 381, 381–82 (1967).

276. *Mitchell*, 333 F. Supp. at 590–93 (Wright, J., dissenting).

277. Capital Broad. Co. v. Kleindienst, 405 U.S. 1000, 1000 (1972).

278. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 387 (1973).

services,[279] including, for example, product placement in movies.[280] Others have sought to limit it to straightforward offers of products for sale.[281] Neither of these approaches is particularly satisfying. Promotion of all kinds is omnipresent in today's world of "brand identification,"[282] yet advertisers rarely make direct offers anymore. Accordingly, the former approach would be practically unbounded, while the latter would encompass precious little speech.

Focusing instead on how different forms of advertising affect audiences may provide a more coherent basis for limiting the doctrine, while still capturing the ads that are most likely to disarm consumers. Speech-effects analysis suggests that courts should apply the commercial speech doctrine only at the cool extreme of the effects spectrum. Doing so would ensure that the doctrine only covers speech which courts have functionally treated as being of "low value" as this Note defines it—that is, speech which fails to allow for the sort of detached reflection that print encourages.

Applied to Internet advertising, this suggests that courts should afford less First Amendment protection to low-key brand promotion than to more straightforward advertising techniques. The Court has noted that commercial speech is "usually defined as speech that does no more than propose a commercial transaction."[283] On the Internet, however, communications that demand a high level of cool participation usually do not propose a transaction at all. Techniques such as disguising advertising appeals as posts from other social media users or creating Twitter promotions that encourage users to join in demand far more participation than do eye-catching banner advertisements that push particular products. The latter lie closer to the middle of the speech-effects spectrum because they are hot, detailed visual images conveyed over a cool medium.

This is not to say that courts should uphold every government regulation of particularly cool commercial speech. They should merely be more inclined to do so where the speech is cool. Doctrinally, courts may accomplish this in one of two ways. First, they may adopt greater skepticism about the threshold question of what qualifies as commercial speech when assessing speech that is comparatively hot. Second, they may give more weight to the government interest in regulating speech for the effect it might have on users where the speech is cool.

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279. *See* Kasky v. Nike, Inc., 45 P.3d 243, 247 (Cal. 2002).

280. *See* Douglas C. McGill, *The Media Business Advertising; Questions Raised on "Product Placements,"* N.Y. TIMES (Apr. 13, 1989), http://www.nytimes.com/1989/04/13/business/the-media-business-advertising-questions-raised-on-product-placements.html [http://perma.cc/7TNH-TAQR] (describing calls to regulate product placements in film as advertising).

281. *See* Nike, Inc. v. Kasky, 539 U.S. 654, 678–79 (2003) (Breyer, J., dissenting from dismissal of writ of certiorari as improvidently granted).

282. *See* Jason Choe, *Brand Identification*, BUS. TODAY (Mar. 9, 2014), http://www.businesstoday.org/brand-identification [https://perma.cc/SM4J-92CV].

283. United States v. United Foods, 533 U.S. 405, 409 (2001).

Speech-effects analysis also suggests that the much-maligned "fighting words" exception may have a role in our increasingly cool media environment, given that the exception developed in the context of a cool medium. Courts have whittled away at the exception over the years, to the point that some question whether it still exists.[284] But the proliferation of cool, interactive technologies suggests that a revival may be in order. There are strong parallels between the effects of spoken fighting words and those of online bullying.[285] Indeed, cyberbullying has proven to be as virulent and effective as its in-person counterpart, if not more so.[286] It represents an attempt to involve the target over the participatory Internet medium, and accordingly falls at the extreme cool end of the speech-effects spectrum.

Cyberbullying does not fit within the classic definition of fighting words, given that it is unlikely to lead to immediate physical violence.[287] Instead, it tends to cause the recipient to withdraw herself from the group.[288] The basic effect of the speech, however, is similar: the speech involves its target to a high degree, often producing an emotional response. Whether the speech results in a breach of the peace or withdrawal from a social group, it is "low-value speech" in the sense that the listener may have difficulty evaluating it in a detached manner. Providing less protection for such speech would thus be consistent with the approach outlined here.

Speech-effects theory also provides a justification for the diminishing place of the exception for obscenity in First Amendment jurisprudence. Beginning in the 1950s, obscenity law generally functioned to guard against hot content (pornography) conveyed over a hot medium (film).[289] But McLuhan's work suggests that pornography does not pose the same threat of captivating one sense when viewed on a small computer screen rather than in a movie theater. That is, Internet pornography represents hot content conveyed over a cool medium, falling closer to the middle of the speech-effects spectrum than pornographic films.[290]

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284. Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1528 (1993).

285. *See* Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 20 (2010).

286. *See* Emily Bazelon, *How to Stop the Bullies*, ATLANTIC (Mar. 2013), http://www.theatlantic.com/magazine/archive/2013/03/how-to-stop-bullies/309217 [http://perma.cc/L5G6-Q22Z].

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

288. MAURICE J. ELIAS & JOSEPH E. ZINS, BULLYING, PEER HARASSMENT, AND VICTIMIZATION IN THE SCHOOLS: THE NEXT GENERATION OF PREVENTION 35–37 (2003); *see also Cybertrolls Increasingly Target Women*, CBS NEWS (Mar. 20, 2015), http://www.cbsnews.com/news/cyberbullying-cybertrolling-increasingly-target-women-monica-lewinsky-ashley-judd [http://perma.cc/7MDB-JMPT] (noting that Twitter users are leaving the site due to cyberbullying).

289. *See supra* Part II.A.3.

290. *See id.*

To be sure, several other factors unrelated to speech effects help explain the downfall of obscenity law since the spread of the Internet. First, there are fewer First Amendment justifications for preventing people from watching pornography in the privacy of their homes.[291] Second, while courts define obscenity as speech that is indecent according to "contemporary community standards," the transboundary reach of the Internet makes it difficult to know which community's standard should apply.[292] Finally, there are substantial technical obstacles to regulating Internet pornography. Speech-effects theory merely provides an additional reason to be skeptical of the application of obscenity law to the Internet.

Speech-effects theory also supports the result in *Brown*, though not for the reason offered by the Court majority. The combination of a hot, detailed image and a cool, participatory medium puts video games closer to the center of the spectrum of speech effects. Hence there is little justification for regulation based on the effects the games have on users. Contrary to the *Brown* Court's analysis, it is the hot aspect of video games, for example, the highly detailed graphics, that makes them similar to print in their effects. Video games with more primitive graphics that involve the user to a greater extent may, on the other hand, deserve less First Amendment protection because they are closer to the extreme cool end of the speech-effects spectrum.

More generally, courts would do well to shape First Amendment jurisprudence around the effects of speech, rather than its content or its mode of conveyance. The Court's attempts to cordon speech off from First Amendment protection based on its content have faltered with the proliferation of new media because the same content conveyed over different media can have quite disparate effects. A pitch by a salesman raises very different concerns when he's standing in your living room than when he's projected onto a film screen.

Meanwhile, attempts to treat particular media differently for First Amendment purposes have become increasingly problematic as media have converged. It once was possible to limit the application of certain First Amendment rules to radio because it was clearly a distinct medium. But it is no longer so easy to tell media apart. Applying the same regulations to the hot radio medium and the cool television medium, and evaluating those regulations under the same First Amendment standards, bred doctrinal confusion.[293] In recent years, courts have struggled to decide, for example, whether broadcast and cable television should be evaluated under the same standard, and whether the Internet should be lumped in under the First Amendment rule for broadcast

291. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the First Amendment protects the possession of obscene material in the privacy of one's own home).

292. *See* Noah Hertz-Bunzl, *A Nation of One? Community Standards in the Internet Era*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 145, 146 (2011).

293. *See supra* Part II.B.

television and radio.[294] Creating new medium-specific doctrines would only sow more confusion. Focusing instead on speech effects would provide a more stable baseline for First Amendment analysis than content- or media-based approaches, allowing courts to consider the effects of both content and media in a constantly shifting media environment, without applying hard rules about either.[295]

Admittedly, however, even an effects-based approach to First Amendment jurisprudence would represent a moving target. For purposes of simplicity, I have mostly treated the country's communications environment as a fixed variable thus far. But that is not the case. The idea that America's speech-effects spectrum is centered on the print medium depends on the continuing importance of print in American culture and institutions. And at a time when people spend far more time watching television and working on computers than reading books, it is by no means clear that American life continues to revolve around print. As new technologies integrate themselves into American life, they bring with them new values. First Amendment protection should change to accommodate these transformations.

This suggests that it may make sense for the rule-based approach to the First Amendment to eventually give way to a balancing test that allows courts flexibility to account for changes in the country's media environment and speech values. Indeed, proponents of increased governmental speech regulation and of stringent First Amendment protections have both argued that courts should do away with at least some of the historical First Amendment exceptions and adopt an all-purpose balancing test.[296] Under a test centered on speech effects, courts might evaluate (1) the nature of medium at issue; (2) the nature of the content the medium conveys; and (3) the relevant media-culture context in determining whether or not to uphold a regulation of speech. This approach may not please those who favor bright-line rules. It may nevertheless be the best way to get at an issue that is "intangible and indistinct, but . . . nonetheless real."[297]

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294. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 662, 638–40 (1994) (comparing rationales for First Amendment protection of broadcast and cable television); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868–70 (1997).

295. For instance, courts incorporated considerations of speech effects into their application of doctrinal rules in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 467 (1978), *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 586 (D.D.C. 1971), and *Breard v. Alexandria*, 341 U.S. 622, 627 (1951).

296. *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (arguing that courts should apply strict scrutiny to all speech regulations in light of the complications brought about by new media); Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age*, 2007 BYU L. REV. 1595, 1597 (arguing that courts should apply intermediate scrutiny to most speech regulations in light of new-media complications).

297. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (citation and internal quotation marks omitted).

CONCLUSION

The effects of speech on users over different media have played a major, if often unacknowledged, role in First Amendment jurisprudence. But courts' analysis of speech effects has been erratic. This Note has drawn on communications theory, and in particular on the work of Marshall McLuhan, to develop a means for analyzing speech effects amidst a constantly shifting media environment. The mode of analysis this Note sets forth does not furnish easy answers to the question of what the Speech and Press Clauses should protect. But this is not necessarily a vice: the First Amendment's development around rigid rules provides a prime example of how oversimplification can complicate difficult areas of the law. This is one area in which courts and commentators would do well to acknowledge and grapple with difficulty.