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When is Aesthetic Expression Speech?: The Neurobiology of Decision-Making and the Need to Fully Protect Aesthetic Expression as Speech under the First Amendment

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Tutorial: Art and Free Speech

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This Article investigates which non-linguistic aesthetic expressions are and should be protected as "speech" under the First Amendment. It argues that "speech" should not be limited to linguistic expressions because aesthetic expressions are very powerful in decision-making, including the decisions central to the individual's role in a democracy.

This Article's argument centers on the current work of neuroscience, which refutes the idea that individuals make decisions, even political decisions, solely on the basis of ideas expressed in language. Rather, all sensory experiences contribute to the brain's process of decision-making.

The work of neuroscience in this area supports the argument the First Amendment should protect expression beyond those expressions with a particularized, linguistically articulable message. Rather, the definition of speech under the First Amendment should include aesthetic expressions, and laws that limit the freedom of aesthetic expression should be constitutional or unconstitutional on the same grounds as those that limit linguistic speech.

I. Introduction

When do people speak? What movements of the body, or expressions of the hands and vocal chords, are "speech" that the government is restricted from infringing under the First Amendment?

Courts debate this legal question when artists or others expressing themselves through the five senses are stifled by state or federal laws. In recent years, it appeared in the question of whether nude dancing is speech,[1] whether flag burning is speech,[2] whether cross burning is speech,[3] whether a parade is speech,[4] whether hiring or not hiring a homosexual is speech,[5] and whether cartoon images in attorney advertisements are speech.[6] This issue has been argued in

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[1] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (yes, but not protected).

[2] Texas v. Johnson, 491 U.S. 397 (1989) (yes).

[3] Virginia v. Black, 538 U.S. 343 (2003) (yes).

[4] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (yes).

[5] Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (yes).

[6] Alexander v. Cahill, (N.D.N.Y. 2007), not reported, *available at* 2007 WL 2125286 (N.D.N.Y.) (yes). Note, however, that although each of the expressions listed in this sentence were found to be "speech," the laws restricting them were upheld. The Supreme Court has created several classes of speech that can be restricted despite the First Amendment's unambiguous language about its protection. For example, acts of incitement, obscenity, fighting words, true threats, and libel, as well as certain expressions of government employees, can be banned despite their classification as acts of speech as well. *See* text, supra at 9.

courtrooms by attorneys skilled in Supreme Court jurisprudence, but the fundamental issues are common sense questions as well: What is "speech"? What modes of expression are included in the protection of speech? Are words on the radio "speech"? Are words in a newspaper speech? Song lyrics? Melodies? Words written in crayon? Shapes written in crayon? Dance?

The line between "speech" and aesthetic expressions that are not "speech" is not a clear one. Therefore, scholars and courts lean heavily in this area (as in other definitional questions) on the *values and purposes* of the First Amendment's protection of speech.[7] They measure this value in a wide variety of ways, including the role of free speech in "assuring individual self-fulfillment," "advancing knowledge and discovering truth," supporting "decisionmaking by all members of society," "achieving a more adaptable and hence a more stable community," individual development, and creating a marketplace of ideas.[8] In the context of aesthetics and free speech, this conversation often moves into wide and wandering realms, such as the purposes of art itself and the nature of human communication.[9]

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[7] *See infra* Part II.A (discussing why courts must articulate the value of free speech to balancing it with conflicting rights, such as property rights and the government interest in public safety).

[8] Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591–96 (1982) (chronicling the ideas of several scholars and quoting from T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970)).

[9] *See generally* RANDALL P. BEZANSON, ART, AESTHETICS, AND FREEDOM OF SPEECH (2006). Bezanson discusses several relevant cases of the interplay between art and free speech; he also delves into the question of the value of art, including the perspectives of Ronald Dworkin, Kant, Dewey, and Plato on the subject. Bezanson, *Story Seven: Dangerous Art*, at 33–38, in *id*.

The most popular and widely-developed justification for free speech generally is its role in allowing American citizens to make decisions in a democracy: the "democratic process" value.[10] As the Supreme Court articulated in 1957, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[11] Under this view, we are each decision-makers in this country. We believe that the government we choose should not censor access to ideas and information because the ideas and information we perceive influence our decisions. If the government could control the stimuli, the government could control the decisions, effectively stripping the people of their power of self-governance.

This is a very powerful argument for protecting speech. Many scholars and courts emphasize a distinction between political speech and non-political speech because they center First Amendment values on the "democratic process." The tests they develop are based on this distinction and vary speech's protection on how well it serves this goal. For example, linguistic expressions (traditional, everyday "speech" in newspapers or political discourse) that reveal government misconduct would be most highly protected,[12] and art that does not communicate a distinct political message would be excluded from the definition of speech. At the extreme, these

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[10] *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1960) (*discussed in* Redish, *supra* note 8, at 592). *See also* Redish, *supra* note 8, at 596 (discussing the "democratic process" value of free speech).

[11] Roth v. U.S., 354 U.S. 476, 484 (1957). (*discussed in* Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996)).

[12] Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RESEARCH 521 (discussed in Redish, *supra* note 8).

scholars argue that the First Amendment should define "speech" only to protect political expression.[13]

This Article delves deeply into the "democratic process" justification for speech protection in the context of First Amendment protections of aesthetic expression. It argues that aesthetic expressions are very powerful in every individual's decision-making, including the decisions central to the individual's role in a democracy. The basis of this argument is the current work of neuroscience, which refutes the idea that individuals make decisions, even political decisions, solely on the basis of ideas expressed in language. Rather, all aesthetic expressions are experienced through the senses and contribute to the process of decision-making: Aesthetic expressions are political expressions. Art is politics.[14] Therefore, aesthetic expressions are as important as political linguistic speech in the "democratic process" value of speech protections.

In summary, this Article rejects the idea that aesthetic expression is speech and so protected under the First Amendment only if it has a particularized, linguistically articulable political message. It argues that the definition of speech under the First Amendment should include aesthetic expressions, and laws that limit the freedom of aesthetic expression should be constitutional or unconstitutional on the same grounds as those that limit linguistic speech.

II. Why Ask Why?: Defining "Speech" Requires a Balancing of Interests

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[13] Redish, *supra* note 8, at 598 (discussing Judge Bork's claim that only speech serving the political process is "principled" and Bork's exclusion of the value Redish places on speech as serving individual "self-realization").

[14] Compare this with David Greene in *Why Protect Political Art as Political Speech*, 27 HASTINGS COMM. & ENT L.J. 359 (2004) (arguing that political art should be protected as political speech).

A layperson might ask why there has been so much debate over the definition of speech and the purpose of the protection of speech. Why do we ask *why* speech is protected when it is plainly stated in the text of the Constitution that it *is* protected? Interpreting the constitution frequently comes down to a balancing of interests.[15] If it is obvious that the constitution does not protect a right, a litigant arguing in favor of it does not get time to make his point before the Court. But when two sides have competing claims to a right, each well-founded in constitutional principles, that the Court must decide whose interest is weightier or more valuable.

Free speech jurisprudence is full of such balancing, and this has led the Court to limit the definition of speech. Americans have a "right," some might say, to be free from exposure to obscene, blasphemous, or intimidating speech.[16] This creates a duty for speakers to avoid using words or images that infringe upon that right. Therefore, the right to be free of such inputs limits the right of free speech.

A. Aesthetic Speech Rights in Conflict

The right of an individual to communicate through aesthetics conflicts with other rights that have been recognized by courts. For example, an artist might be sued for libel if he publishes a representation – in words or in images – of an individual that is malicious, false, and defamatory. If the representation falls under the First Amendment's speech protection, this is

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[15] *See* Redish, *supra* note 8.

[16] Jurisprudence scholars often resist the idea of rights for precisely this reason: as soon as a right emerges, others have a duty to protect it, which always leads to conflicts of rights in an almost absurd cycle of rights and duties. Consider, for instance, John Austin (1790-1859), who suggested that law is a set of duty-imposing rules. BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 57 (2004).

clearly a conflict of rights. Similarly, the copyright laws prohibit the publication of images derived from copyrighted images.[17] The very act of expression may be punishable by heavy damages,[18] which would conflict with the First Amendment right of the speaker if the expression is also "speech."[19] Americans are accustomed to very strong property rights for land, in which any intrusion is punishable by damages regardless of any harm to the property or use of the property. The intrusion itself is considered damaging to the liberty of the property owner.[20] However, some art and other expression intrude upon private property. These range from simple acts of graffiti to elaborate displays of performance art,[21] and they put the interests of the property owners in conflict with the interests of speakers entitled to freedom of speech.[22] When

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17 *See* Rogers v. Koons, 960 F.2d 301 (1992) (holding that a sculptor did not have permission under the First Amendment or under the Fair Use Doctrine to use another artist's copyrighted photograph).

[18] *See, e.g.,* Christina Bohannan, *Copyright Harm and the First Amendment*, U Iowa Legal Studies Research Paper No. 09-15, March 24, 2009, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367624 (arguing that in the area of copyrights the courts do not protect free speech as stringently as they do in other areas).

[19] *See generally* Stephen Fraser, The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet, 16 CARDOZO ARTS & ENT. L.J. 1 (1998).

[20] *See* Bohannan, *supra* note 18.

[21] *See generally* Randall Bezanson and Andrew Finkelman, *Trespassory Art*, LAW REVIEW?, 1 (2009).

[22] *Id.*

the government owns the property, the conflict gets even trickier, for if the government could assert the same rights to control the uses and speech occurring on its property, it could effectively eliminate public art and dramatically reduce American's right to free speech.[23]

Political speech has a long history of protection and its justifications are widely developed by the courts. Therefore, its value outweighs many values in Supreme Court jurisprudence. Racists, sexists, anarchists, communists, and any number of highly offensive groups could publish their own newspapers or websites so long as they do not constitute a real threat to the life of a particular individual. For example, the Ninth Circuit recently upheld the rights of an anti-abortion group who posted the names, addresses, and photographs of doctors who perform abortions on its website as "wanted posters."[24] The dangerous nature of this speech did not justify a state intrusion on the rights of the protestors to publish it. Countless other examples have survived as well, including a group of neo-Nazis who recorded a video of themselves advocating the overthrow of the United States government and later broadcast a portion of that video.[25]

Art and aesthetic expression, in contrast, has sometimes lost in the balancing of interests between free speech and other rights. Two categories of aesthetic expression have emerged in the cases: expressions with or without a distinct, particularized message. Artistic efforts with a clear message are classified as speech and protected on the same grounds as linguistic expressions, but

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[23] *Id.*

[24] Planned Parenthood of Colombia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001) (explaining that speakers "can only be held liable if they authorized, ratified or directly threatened violence").

[25] Cite

those without such an articulable message are not protected.[26] For instance, the Supreme Court has upheld flag burning because it found the act had a clearly articulable message. Other courts have used this justification to deny protection for aesthetic expression: the South Carolina Supreme Court relied on this logic to uphold a ban on tattooing because "the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections."[27] The First Circuit found that a presentation of visual art was not protected as speech because there was "no

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[26] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that a community parade could exclude a gay, lesbian, and bisexual group because the parade itself was speech and the organizers could restrict its message by excluding the group's participation); Texas v. Johnson, 491 U.S. 397 (1995) (holding that the burning of a flag because it was intended to deliver a particularized message and there was a great likelihood that the audience is likely to understand that message).

> The Court has articulated its rejection of this dichotomous distinction:
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> > *Symbolism is a primitive but effective way of communicating ideas, our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even 'marching, walking, or* parading' in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expression conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonenberg, or Jabberwocky verse of Lewis Carroll. … Not many marches, then, are beyond the realm of expressive parades.

Hurley, 515 U.S. at 569. However, the Court has implicitly upheld this dichotomy by founding its protection of expressive acts, such as the flag burning, on their ability to express a distinct, particularized message.

[27] State v. White, 560 S.E. 420, 423 (S.C. 2002) (discussed in Greene, *supra* note 16, at 369).

suggestion, unless in its cheap titles, that plaintiff's art was seeking to express political or social thought."[28] And the Supreme Court has upheld a state ban on nude dancing, explaining that:

> It can be argued, of course, that almost limitless types of conduct-including appearing in the nude in public-are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in O'Brien, saying:
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> > 'We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'[29]

Under the "democratic process" rationale for upholding free speech when it collides with other values, advocates of aesthetic expression have failed to achieve protection for their speech. Perhaps this is because they have not made a strong enough case for upholding freedom of aesthetic expression as a useful tool within the democratic process. This Article builds the

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[28] Close v. Lederle, 424 F.2d 988, 989 (1st Cir. 1970) (discussed in Greene, *supra* note 16, at 368). Compare this to the Second Circuit's conclusion in Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996). The court reversed a district court's decision to uphold New York City's ban on the sale of artworks on public ways which did not also ban the sale of written materials. It explained that:

> written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. As appellants point out, Chinese characters are both narrative and pictorial representations. Nahuatl, a language used by Aztec peoples in Central America, also incorporates pictures in its written language. Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished. … The requirement that appellants' art cannot be sold or distributed in public areas without a general vendors license, while written material may be sold and distributed without a license, must fall ….

Id. at 695, 699.

[29] *Id.* At 569-70, quoting O'Brian, 391 U.S., at 376.

argument that aesthetic expression is political expression because it contributes to individual decision-making regardless of whether the expression has a distinct, particularized, or political message that can be articulated in linguistic terms.[30]

B. Competing Rationalities: Why Protect Aesthetics as Speech?

How does the law begin to answer the question of what *is* protected as speech?

The law has its own rationality, its tried and true ways of resolving a question of constitutional interpretation. It looks to its precedents to find what the Court has previously interpreted the text to mean; to the text of the constitution to read the "plain meaning" of the words; to the intent of the framers of the constitution; to what an objective reader would have said the text meant at ratification; and to the original meaning of the principles in the text, rather than their originally expected applications.[31]

The legal tools have their critics. Relying on precedent is a form of cheating, relying on an old interpretation that may itself have been wrong. Looking to the plain meaning of the text is ineffective when the words could have many meanings. Searching for the framers' intent is a somewhat imaginary exercise, since their motives are neither clear nor uniform. Interpreting through the eyes of an objective reader ties us to someone who never existed, the fabled "objective person." Finally, looking to principles leaves the country at the mercy of the interpretations of the Court, made up of politically unaccountable individuals who would have a

[30] *See* Part III, *infra* (arguing that neuroscience shows that human decision-making is based on sensory inputs and images rather than language-based arguments).

[31] *See generally* ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 13–27 (2006).

great deal of power if they were allowed to rely on principles and then abstract our rules from them.[32]

The legal tools also have their limits. When they fail to discover what *is* protected by the constitution, they often leave us with only policy discussions of what *should be* protected by the law. When looking beyond what is the law to what should be the law, courts look outside the rationalities and tools of the law to outside rationalities to answer legal questions.[33]

Economics is a powerful rationality within the law today,[34] and attorneys and judges often import its internal logic to answer questions in the law. For example, economists are called in to justify or argue for change in the bounds of copyright protection and contract interpretations to incentivize the desired economic outcomes. Legal professionals use economic arguments to determine what would be the best laws in areas as varying as antitrust to environmental protection to the reach of the First Amendment.[35] The rationality of economics, and the laws it inspires, are devoted to the ideal of the optimally functioning marketplace.[36]

Many other rationalities participate in the law and make claims upon what the law is and what the law should be. "[P]olitics, science and technology, the health sector, the media, … [and]

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[32] *Id.*

[33] Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses,* in Richard Rawlings (ed.) LAW, SOCIETY AND ECONOMY (Oxford, Oxford University Press, 1997) 149.

[34] *See, e.g.,* Michael Rushton, *Economic Analysis of Freedom of Speech,* 21 GA. ST. U. L. REV. 693 (2005).

[35] *See id.*

[36] Some describe economists' depth of devotion to this goal as "quasi religious" zeal Teubner, *supra* note 34, at 149.

the morality of lifeworlds" all breathe life into legal arguments.[37] These are "all clearly particularistic rationalities;"[38] in other words, they have their own internal goals – political cohesion or success, or the progress of ideas – and they define ways to meet these goals by crafting laws that help achieve them. Legal scholars might call these rationalities ways of framing the issue;[39] the goals and the means of legal analysis are determined by the perspective or rationality of the analyst, and the law looks past its own views to these outside worlds.

Consider the question of the limits of the First Amendment's protection of speech. A person applying the rationality of politics would balance the interests of freedom of aesthetic expression with strong property rights in a different fashion than a person applying the rationality of religion or economics. The political thinker might set the objective as political stability and balance the value of aesthetic expression for political discussion and its power to avoid the need for violent upheaval with the desires of the individual property owners, who might rise up if their property rights were threatened. The religious thinker might consider aesthetic expression as a tool toward personal spiritual growth against the value of property rights as protection for religious groups from encroachment by threatening religious groups on their property. An

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[37] *Id.* at 150.

[38] *Id.* at 150.

[39] Gaston Bachelard made a similar conclusion in the context of myth: "Are you a rationalist historian? You will find in myth an account of famous dynasties. Are you a linguist? Words tell all, and all legends are formed around sayings. One more corrupted word—one more god! Olympus is a grammar controlling the functions of the gods. Are you a sociologist? Then in myth you will find the means by which, in primitive society, the leader is turned into a god." Gaston Bachelard, in his prologue to Diel, *quoted in* CIRLOT, *infra* note 72at xliv.

economist might balance the ability of aesthetic expression to introduce new, valuable commodities into the marketplace with the property owner's need to utilize his property in the most economically efficient way.

If an expression trespassed on a property holder's rights, each rationality would find and punish the trespass in different circumstances. Take the simple example of graffiti on private property. For the political, it might find that if the expression has some other place that could effectively disseminate the expression, the intrusion would be an unnecessary intrusion and punishable as a trespass.[40] For the religious, if the speaker's spiritual growth intruded upon that of another, it would be a trespass. For the economist, if the use of the land for expressive purposes had the potential to create economic value for the artist and did not interfere with the property owner's economic use of the property, it would be allowed.

This Article looks into the rationality of politics, which dominates the field of free speech jurisprudence, through the eyes of neurobiology. It argues that the free speech goal of helping citizens gather the inputs they need to best perform their role as democracy's decision-makers is not best served by the current distinction between speech that delivers a particularized message and speech that does not. Rather, neurobiology shows us that aesthetic expression, rather than simple language, creates our process of making decisions; the mind does not reason and decide in a world that includes only language and crystallized ideas expressed as particularized messages. Rather, the mind builds ideas and language from images and symbols that influence and even create the world we understand as rational thought.

Therefore, to properly protect speech and its role in our democracy's decision-making process, the Court should protect aesthetic expression as speech. Just as it would be ineffective

[40] *See* Bezanson and Finkelman, *supra* note 21.

for a democratic society to choose its own government under a regime that limited its access to the written word, it is ineffective for a democratic society to choose its own government under a regime that proscribes communication through aesthetics. This Article does not explore the details of the constitutional justifications the Court has provided for limiting aesthetic expression, but focuses instead on why a greater area of aesthetic expression than the Court has previously recognized should be included as sufficiently communicative and, therefore, socially valuable, to be protected as speech.

III. Neurobiology: Defining the Role of Speech Beyond the Bounds of a Particularized Message

The Court's justification for protecting aesthetic expressions in *Texas v. Johnson* and the criteria some courts have applied for rejecting aesthetic expressions as speech are founded on the assumption that aesthetic expressions are valuable to the democratic process and should be protected as speech when they communicate a distinct, particularized message. Courts judge aesthetics as speech if they could be reduced to a set of words that would be protected by the First Amendment. This limited understanding of the power of aesthetics is inconsistent with the modern work of neurobiology. What if neurobiologists were presented with this question: If we are trying to protect from government censorship the expressions that individuals need and use to make decisions as citizens in a democracy, which expressions should the First Amendment protect from censorship? Neurobiologists would answer that to keep open the inputs necessary for decision-making, protected speech should not be limited to the concrete, linguistic communications that the Justices of the Supreme Court imagine that humans rely on. Rather, the Courts should protect aesthetic expressions on the same terms as linguistic expressions because the human brain's perception and recall of aesthetic expressions in all five senses makes up the human power to make decisions.

A. Damasio on the Role of Images in Decision-Making

In *Descartes' Error: Emotion, Reason, and the Human Brain*, Anthony R. Damasio's work in neurobiology, Damasio concludes that images constructed and recalled in our minds – based on sensory inputs – constitute the knowledge we use to make decisions.[41] The knowledge that constitutes our thoughts is not confined to linguistic expressions or abstract ideas; rather, it is formed from the full range of aesthetic perceptions. The following description chronicles the development of images, how those images lead to emotions, and how those images and emotions create the brain's process of decision-making.

1. Images: How Sensory Inputs Become Thoughts

To understand the role of images in the decision-making process, this Article discusses aesthetic expression from the perspective the person who hears, sees, tastes, touches, and smells. It uses the word "image" as shorthand for all the sensory input that a person gathers from the outside world expression, understanding that this is not limited to visual perception. Under Damasio's view:

> having a mind means that an organism forms neural representations which can become images, be manipulated in a process called thought, and eventually [those images] influence behavior by helping predict the future, plan accordingly, and choose the next action.[42]

The outside environment stimulates neural activity in the eyes, the ear, and the skin, taste buds, and nasal mucosa to create sensory inputs, or images. These inputs do not always lead to thoughts, as we know from other animals which we know to have senses but not thoughts; they sense and automatically react. Our brains can perform these same automatic responses: the

[41] ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994).

[42] *Id.* at 90

sensory input is acquired and the brain commands a response, such as the contraction of an organ, the extension of a limb, or the act of walking. The classic example is the reflexive action of moving a hand from a hot stove immediately, before the process of deliberating a response could occur.

The human brain, however, can also command responses that are the result of deliberation. These are the actions with which we are concerned when we think about what citizens in a democracy use to make decisions like voting or organizing social action. What defines the ability to deliberate, to make a decision that is not simply the automatic reaction to a series of steps from input to motor output? Some might argue that this process is separate from the sensory inputs that lead to reflexive responses; they assume that we act rationally in another part of the brain than that which perceives and responds to images. However, Damasio's work in neuroscience shows that the sensory inputs that lead to automatic responses also lead to and make up the deliberative process. We are able to deliberate because of the brain's ability to create and recall images based on sensory inputs.

The process of deliberation begins with the creation of images. This does not happen in one location of the brain, as in a little man inside the head. Rather, the signals from body (the eye, the nerves in the elbow, etc.) are carried by neurons into the brain. There they are delivered to the early sensory cortices, which are located in distinct places for each distinct sense. Each early sensory cortex which has received input forms a representation of the input; as each presents the representation of its assigned sense, the brain creates a multisensory image of the immediate world.[43] Damasio calls these immediate responses to outside stimuli the *perceptual images*: they immediately appear as images in the brain.

[43] *Id.* at 99.

These perceptual images can be recreated later as *recalled images*. This does not, however, occur in one place in the brain that stores these memories like old videos. Rather, the early sensory cortices which originally received the inputs and represented them as images are responsible for the "replays" as well. Convergence zones throughout the brain store dispositional representations of the previous activity that made up the image. These dispositional representations are the patterns the brain remembers for how to reconstitute the image through neural patterns by repeating the images in the early sensory cortices.

Consider, for example, the way you remember your Aunt Maggie. She does not exist in one place in your mind as a being, acting out the events from which you remember her. Rather, each sensory input you had of her is recalled from a different place. For example, the "dispositional representations for Aunt Maggie's voice in auditory association cortices … can fire back to early auditory cortices and generate momentarily the approximate representation of Aunt Maggie's voice."[44] The dispositional representations wait, in a dormant potential state, until they are called upon to activate the recalled images they hold of Aunt Maggie. If Aunt Maggie, or any other thought, such as a word or an abstract symbol, "did not become images, they would not be anything we could know."[45] The processes that lead to these images are necessary for our thinking, but they are not the content of our thoughts.[46]

Our memories are, therefore, sensory. This includes memories of what some consider to be abstract ideas. The brain, in fact, does not depart from its fundamental nature as a receiver and replayer of sensory information when it creates ideas we think of as abstractions or rational

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[44] *Id.* at 102.

[45] *Id.* at 106.

[46] DAMASIO, *supra* note 41, at 108.

ideas. The people we consider to be gifted in abstract thinking are really just gifted in their use of these recalled images to craft desired outcomes. How do we "know" the future and make decisions about hypotheticals? In other words, how can we "know" what we have not actually perceived with our senses? We know from our own experiences that we can reason abstractly about the future and the present, but the knowledge and process we use to do this is actually based on recalled images from the past. If you are making a plan for the future, or predicting a future event, you form images of the objects and movements while "consolidating a memory of that fiction in your mind. Images of something that has not yet come to pass are no different in nature from the images you hold of something that has already happened. They constitute the memory of a possible future rather than the past that was."[47] These future images are stored in the convergence zones in the same way recalled images are stored, and they can be both formed and recalled during the decision making process.

2. Emotions: How Images Impact the Body

"The factual knowledge required for reasoning and decision making comes to the mind in the form of images."[48] In the process of decision-making, the brain first responds to images – perceptual, recalled, and imagined future images – with emotions. These are triggered by the brain in a complex – so complex that even most brain scientists choose to avoid studying this tangled web – set of neural and chemical responses that change the physical state of the body. The mind then receives sensory inputs of the body's physical changes in response to the emotion. The mind's perceptions of the physical communications of the body's emotional state are called feelings.

[47] Id at 97.

[48] Id at 96.

a. Primary Emotions

The brain has innate, or hard-wired responses to stimuli called primary emotions. These are not based on mindful evaluation, but emerge when certain stimuli are captured by the senses and then detected by a part of the brain's limbic system. For example, when a baby bird detects a large body overhead, it would not need to recognize that body as a predator based on past experience to react in fear. This connection between the stimuli of a large body overhead and an emotion are "hard wired" into the brain.[49]

The emotional response to an image takes place throughout the body:

> [T]here are changes in a number of parameters in the function of viscera (heart, lungs, gut, skin), skeletal muscles (those that are attached to your bones), and endocrine glands (such as the pituitary and adrenals). A number of peptide modulators are released from the brain into the blood stream. The immune system also is modified rapidly. The baseline activity of smooth muscles in artery walls may increase, and produce contraction and thinning of blood vessels (the result is pallor); or decrease, in which case the smooth muscle would relax and blood vessels dilate (the result is flushing).[50]

b. Feelings

The brain's perceptions of these body responses (emotions) are called feelings. If your body responds to the image of your house shaking in an earthquake, your body tenses and your body changes in other ways that you would call a state of fear. When your brain gets the message that your body is responding in this way, you "feel" fearful. The brain receives this message through neural and chemical signals, specifically signals from the viscera, the muscles and joints, and from neurotransmitter nuclei and chemical signals such as through the endocrine system.

The consciousness of the emotion, along with the awareness of the stimulus that excited it, allows you to realize the nexus between the body state and the object. It emerges through your

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[49] *Id.* at 131–32.

[50] *Id.*

process of continuously monitoring your body state: you experience what your body is doing while the images roll through your mind.[51] This consciousness is " an enlarged protection policy," for it allows you to avoid such objects in the future, to generalize this feeling of fear and be cautious with anything that resembles this object, or to analyze the situation and focus on whether the fear-inspiring object has any vulnerabilities you might be able to use to defend yourself in the future.[52] "In short, feeling your emotional states, which is to say being conscious of emotions, offers you *flexibility of response based on the particular history of your interactions with the environment*. Although you need innate devices to start the ball of knowledge rolling, feelings offer you something extra."[53]

c. Secondary Emotions

Awareness of feelings and the stimuli give rise to the power of the human mind to experience secondary emotions. These occur "once we begin experiencing feelings and forming *systematic connections between categories of objects and situations, on the one hand, and primary emotions, on the other*."[54] This process cannot be operated by the limbic system alone, but consists of the interplay between the automatic responses of the limbic system and the images that arise through the work of the mind – the prefrontal and somatosensory cortices.

As the images arise in the mind, the mind also responds nonconsciously, through the prefrontal cortex, to these images. It recalls, through dispositional representations, its knowledge of "how certain types of situations usually have been paired with certain emotional responses, in

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[51] *Id.* at 145.

[52] DAMASIO, *supra* note 41, at 133.

[53] *Id.* at 133.

[54] *Id.* at 134

your individual experience."[55] These are not innate, for they are based on your stored images of outside stimulus and your stored images of feelings that accompanied such stimulus.

Next, the recalled images are signaled to the limbic system. The limbic system acts on the body to create the "emotional body state," similar to the effect of primary emotions in response to stimuli. In other words, the emotional response to thoughts – recalled and future images – follows the same neurobiological mechanism as the emotional response to immediate stimuli. The thought process is controlled by the same processes as automatic, survival-based reactions because "both the records of experiences and the responses to them, if they are to be adaptive, must be evaluated and shaped by a fundamental set of the organisms that consider *survival* paramount."[56]

3. Somatic Marking: How Thoughts and Emotions Become Decisions

Damasio presents his "somatic-marker hypothesis" to counter what he calls the "high-reason view" of decision-making. The high-reason view assumes that decisions are made with abstract logic, which can independently guide us to the best available solution by weighing the pros and cons of each possible action. In other words, emotions and passions – anything removed from the ideal of crisp rationality – must be kept out of ideal decision-making, which can operate without them.[57] Under Damasio's somatic-marker hypothesis of decision-making, the brain relies on image and emotions to do what we call reasoning. The brain brings forth images of past and imagined future actions; but rather than carefully calculating the pros and cons of each possible

[55] Id at 136.

[56] *Id.* at 111 (emphasis added).

[57] *Id.* at 171.

future action, the brain chooses or rejects possible actions based on the emotional markings the brain has made for these images based on past experiences.[58]

a. The Weaknesses of the High-Reason View of Decisions

Consider what would be required to make a decision under the high-reason view. You decide what you want maximize and decide what is good and bad based on what will achieve a goal. Specifically, "you consider the consequences of each option at different points in the projected future and weigh the ensuing losses and gains."[59] The range of consequences for any decision makes this a very complex calculation, "set at diverse imaginary epochs, and burdened with the need to compare results of a different nature which somehow must be translated into a common currency for the comparison to make any sense at all."[60]

If we made decisions this way, it would be sufficient to protect as speech only those aesthetic expressions that had a particularized message that was likely to be understood by the audience. If an image communicated a message, idea, or fact, it would participate in this calculus and be necessary for decision-making. If not, it would be irrelevant to the process and could be excluded from protection. It would be clean, simple, and "the pride and joy of Plato, Descartes and Kant."[61]

But to conclude that this is actually how we make our decisions, we would have to have a very high opinion of our minds' ability to perform these calculations. In contrast, Damasio argues that "if this strategy is the *only* one you have available, rationality, as described above, is

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[58] DAMASIO, *supra* note 41, at 180–81.

[59] *Id.* at 171.

[60] *Id.*

[61] *Id.* at 171.

not going to work."[62] First, it would be too difficult to hold in memory every one of these possible gains and losses that would be needed to make these comparisons. Second, the reasoning strategies necessary for this task are themselves quite weak; we don't perform statistics and probability theory well enough to explain why we can come up with the *right* decision in the moment we ask our mind to perform this reasoning task. According to Damasio, this "marvelous job" *must* be performed with more than pure reasoning and cost/benefit calculation.

b. Emotions as Biasing Devices: The Somatic Marker Hypothesis of Decision-Making

How, then, is reason performed? Under the somatic-marker hypothesis, "somatic" refers to the state of a body, for "soma" is Greek for body; "marker" refers to images that "mark" the emotional consequences of a proposed action in the mind. Damasio's work is a study of the experience we know as the "gut response," the automated alarm signal our body operates for us. This type of brain work – creating the gut response – increases the accuracy and efficiency of our decision process by highlighting with emotional markers the dangerous or favorable outcomes of proposed solutions.

How does this work? Where the "high-reason view" presumes that the images of possible solutions arise in the mind and are followed only by more images – thoughts, if you will – of possible consequences, in Damasio's view, the images trigger not only more images, but emotional responses to the images at each stage of the process. The images include recalled images, future images of proposed solutions, and future images of consequences of proposed solutions. But instead of charting each image and possible rational/image-based outcome, which

[62] *Id.* at 172.

would lead to more and more images, the emotional responses help the mind screen the choices.[63]

Somatic markers act on the images to narrow the choices by instituting an adverse or positive reaction to the images. This reaction comes through the subcortical part of the brain, the same system that instigates the body's emotional response to immediately perceived images and that instigates the automatic survival reactions to perceptual images. "When the bad outcome connected with a given response option comes into mind, however fleetingly, you experience an unpleasant" feeling in the body associated with the emotional response you would have to that image as an actual perceptual image.[64] This emotional response "marks" that choice by forcing "attention on the negative outcome to which a given action may lead, and functions as an automated alarm signal which says: Beware of danger ahead if you choose the option which leads to this outcome."[65] This may lead you to immediately reject the proposed action, or at least

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[63] *See* Jonah Lehrer, *The Eureka Hunt: Why Do Good Ideas Come to Us When They Do?,* 84 THE NEW YORKER 22, page 40. Lehrer presents the recent neuroscience on the difference between traditionally-understood rational decision-making, which requires a careful cost-benefit analysis of choices, and insights, which require our brain "to make a set of distant and unprecedented connections" and lead to faster, better choices. *Id.* He explains that drugs like caffeine and Ritalin that enhance concentration and might be expected to encourage insight or innovation actually discourage creativity; they "make insights less likely, by sharpening the spotlight of attention and discouraging mental rambles. Concentration, it seems, comes with the hidden cost of diminished creativity." *Id.*

[64] DAMASIO, *supra* note 41, at 173.

[65] *Id.* at 173.

weigh it so heavily in the following analysis that it is not a valid option. This process gives you dramatically fewer alternative courses of action than you would have without the help of these emotional markers in a world in which images of outcomes led only to more images of outcomes.

Damasio summarizes the theory as follows:

> In short, *somatic markers are a special instance of feelings generated from secondary emotions*. Those emotions and feelings *have been connected, by learning, to predicted future outcomes of certain scenarios*. When a negative somatic marker is juxtaposed to a particular future outcome the combination functions as an alarm bell. When a positive somatic marker is juxtaposed instead, it becomes a beacon of incentive."[66]

The next step of the process, the reasoning through the options that are left, closely resembles the "high-reason view" described above. As Damasio explains, the somatic marker process does not finish the job of decision making, "since a subsequent process of reasoning and final selection will take place in many though not all instances."[67]

Rather than "infecting" the reasoning process with emotional content, as some might argue, the emotional content of this process "probably increase the accuracy and efficiency of the decision process. Their absence reduces them."[68] In fact, the emotional screening is necessary to make decision-making not only effective, but *possible*. Patients with prefrontal damage in their brains, the part of the brain that ties the images to the emotional responses to activate the somatic markers, are unable to reach a decision that a normally functioning brain could make. The damaged reasoning process looks far more like the "high-reason view:" they weigh the consequences of each action and possible consequences far into the future. In other words, they

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[66] Id at 174.

[67] *Id.* at 173.

[68] *Id.* at 174.

reason through all the outcomes, just as the normal mind does after its choices are screened with the somatic markers. However, there is one key difference between a normally-functioning brain and those with prefrontal damage: the damaged brains never come to a conclusion. They can do the work of thinking, but not deciding. Without emotional screening, there are just too many choices and not enough incentives or disincentives to perform the act of deciding.

c. The Bear in the Woods: Applying the Somatic-Marker Hypothesis to Everyday Experience

Consider an example of decision-making, such as the experience of facing a bear in our campground and the decision of whether or not to flee. Like any other decision-making process which is not automatic, we make this decision through the steps of discernment: we hold the priority of survival as our goal, and we look to the possible solutions to the problem. Our recalled perceptual images might include a bear acting in real life or on a video or hearing a camp counselor describe what to do, and our recalled future images might include what we imagined the bear might do to our bodies if we were caught by one or what we imagined the bear might do if we climbed up a tree when our camp counselor told us to do so. Both types of images and our emotional reactions to them contribute to our decision in the present moment, and we eventually decide what to do. (In this case, your camp counselor should have told you that it should depend on whether the bear is a black bear or a grizzly bear.)

The bear calculus is complicated, but consider this in comparison to the difficulty of answering the questions of who to vote for, how to invest our savings, how to design a building, or whether a new law follows the letter or spirit of the constitution.[69] These "stimulus situations have many more parts to them; the response options are more numerous; their respective

[69] *Id.* at 167.

consequences are more numerous; their respective consequences have more ramifications and those consequences are often different, immediately and in the future, thus posing conflicts between possible advantages and disadvantages over varied time frames. Complexity and uncertainty loom so large that reliable predictions are not easy to come by."[70]

Some might consider that the complexity of these decisions would require them to be performed by different processes than would be automatic survival choices. However, the neurobiology of the process is identical: stimuli becomes image, image leads to recall of other images and development of future images, somatic marking limits the pool by discerning among the infinite possibilities the emotionally appealing choices, and the mind selects the discretionary act. Somatic markers are "your own thing, related to your own experience, relative to events that vary with the individual."[71] Although our brains are wired with the ability to process images and then connect them with the old part of the brain, to pair them with the most adaptive somatic responses, the content of these images is constructed by our experiences.

B. Support for Neurobiology's Understanding of Decision-Making in Symbology and Communications Theories

For some readers, intuition will support neurobiology's understanding that human decision-making relies on all sensory inputs rather than only on linguistic or on linearly rational expressions of ideas that can be expressed in language. This corresponds with their past experiences, of having a hunch that guided them toward their car in a parking lot, toward a presidential candidate, or toward an opinion on the proper economic analysis of an antitrust case. Other academic disciplines, or rationalities, also support this understanding of human decision-

[70] DAMASIO, *supra* note 41, at 167–68.

[71] *Id.*

making. This section discusses support from scholars who write in the field of symbology and in the field of communications.

1. Symbology: Symbols Have Power Beyond Allegory

Neurobiology tells us that we use images to make decisions despite the fact that the meaning of those images could not be reduced to words or a particularized message. The field of symbology – as an interpretation of art, literature, and the history of ideas – has been building this idea for centuries. J.E. Cirlot's work, *A Dictionary of Symbols*, is a commentary on the symbolist ethos of modern art and argues that symbols have a power outside of the "meaning" that the critic or academic or court can provide them.[72] He explains that:

> The basic ideas and suppositions which allow us to conceive of 'symbolism', together with the creation and vitality of each symbol, are the following:
>
> (a) Nothing is meaningless or neutral: everything is significant. (b) Nothing is independent, everything is in some way related to something else. (c) The quantitative becomes the qualitative in certain essentials which, in fact, precisely constitute the meaning of the quantity. (d) Everything is serial. (e) Series are related one to another as to position, and the components of each series are related as to meaning.[73]

For an example of the power of symbols beyond their ability to be represented in stories or linguistic expressions, consider those who study Green myths. They might assign meanings to each figure, making Mars the symbol of "war" and Hercules of "strength." However, these allegories come after the fact and lose a great deal of meaning that the symbols, stories, and visual representations themselves hold, for "those who really believed in ancient deities and heroes, Mars had an objective reality, even if this reality was quite different form that which we

[72] J.E. CIRLOT, A DICTIONARY OF SYMBOLS ix (Jack Sage, trans., Philosophical Library 2d ed. 1971) (1962).

[73] *Id.* at xxxvi.

are groping for today."[74] The symbolist ethos, in contrast, resists the categorical and restrictive nature of allegory, the "mechanical and restricting derivative of the symbol, whereas the symbol proper is a dynamic and polysymbolic reality, imbued with emotive and conceptual values: in other words, with true life."[75]

Symbols, and the meaning that the Court or any other observer assigns to them, do not become part of our decision-making process in the way the Court explains in *Johnson v. Texas*.[76] The burning of the flag may be translated into this idea or set of words: "The U.S. government is bad." However, it would be frighteningly arrogant for the Court to conclude that the ability to transform into this idea within one's mind constitutes the full power of the symbol. The Court seems to conclude that the meaning it infers from the symbol *is* the meaning of the symbol, rather than one piece of its power to impact consciousness and decision-making.

The Court's understanding misses the difference that Cirlot defines between the allegory and the symbol. Allegory is "a lifeless image, a concept which has become over-rationalized;"[77] it is "a limited kind of symbol reduced to the pointer, designating only one of the many potential series of dynamic meanings."[78] In contrast, "the essential function of the symbol is to explore the unknown and—paradoxically—to communicate with the incommunicable, the partial discovery of these unfathomable truths being achieved through symbols."[79] This distinction reinforces the

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[74] Caro Baroja, quoted in CIRLOT, *supra* note 72, at xi.

[75] *Id.* at xi.

[76] Texas v. Johnson, 491 U.S. 397 (1989).

[77] CIRLOT, *supra* note 72, at xli, citing Bachelard.

[78] *Id.* at xli, citing Jung.

[79] *Id.* at xli, citing Wirth.

work of modern neurobiology, which teaches that a brain that has perceived an aesthetic representation does not assign it a linguistic meaning and chronicle it away in the file cabinet of the brain; rather, the brain calls forth its images and applies them to our decision-making process in a far more dynamic way.

2. Communication Theory: Moving Beyond Language to Understand Communication

Communication theorists, including Marshall McLuhan and Walter Lippmann, have for decades been discovering aspects of on our process of decision-making that support neurobiology's conclusions. Specifically, they argue that our culture over-emphasizes written communication and relies on it *as reason* in spite of the fact that reason and decision-making are far more rich and complicated than literacy itself.

In McLuhan's work, including *The Medium is the Message*,[80] he argues that thought is non-verbal. He explains that in Western, especially American, cultures rational "has long meant 'uniform and sequential.' … We have confused reason with literacy, and rationalism with a single technology."[81] For example, McLuhan describes how the protagonist in E.M. Forster's novel, *A Passage to India*, "is stunned by the collision of her Western sensibilities with those of India: [t]he moment of truth and dislocation from the typographic trance of the West comes [to her, and her] reasoning powers cannot cope with the total inclusive field of resonance that is India."[82] Our culture, he argues, overemphasizes linguistic expression as the product of thought

[80] Marshall McLuhan, *The Medium is the Message*, *in* THE PROCESS AND EFFECTS OF MASS COMMUNICATION 100 (Wilbur Schramm & Donald F. Roberts eds., 1974).

[81] *Id.* at 108.

[82] *Id.* at 108.

at its own detriment: "It is in our I.Q. testing that we have produced the greatest flood of misbegotten standards. Unaware of our typographic cultural bias, our testers assume that uniform and continuous habits are a sign of intelligence, thus eliminating the ear man and the tactile man."[83]

Walter Lippmann's works in the field of communication resonate surprisingly closely with the work of modern neurobiologists. "The only feeling that anyone can have about an event he does not experience," he argues, "is the feeling aroused by his mental image of that event. That is why until we know what others think they know, we cannot trust or understand their acts."[84] Lippmann's perceptions of the role of mass communication and the importance of images in politics tell the same story we explored above, for the images in the minds of the people, rather than isolated, abstract, and linguistically presented ideas, dominate their decision-making: "The analyst of public opinion must begin, then, by recognizing the triangular relationship between the scene of action, the human picture of that scene, and the human response to that picture working itself out upon the scene of action. … The moving picture often emphasizes with great skill this double drama of interior motive and external behavior."[85]

Lippmann's understanding of communication is so close to our understanding of neurobiology that one might imagine that his work could be cited in a Supreme Court case

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[83] *Id.* at 110. Readers may recognize similarity of this idea to the works of Howard Gardner on multiples intelligences. *See generally* HOWARD GARDNER, MULTIPLE INTELLIGENCES (1994).

[84] Walter Lippmann, *The World Outside and the Pictures in Our Heads*, *in* THE PROCESS AND EFFECTS OF MASS COMMUNICATION 273 (Wilbur Schramm & Donald F. Roberts eds., 1974).

[85] *Id.* at 275.

upholding aesthetic expression as free speech based on its primary rule in human decision-making:

> The world that we have to deal with politically is out of reach, out of sight, out of mind. It has to be explored, reported, and imagined. Man is no Aristotelian god contemplating all existence at one glance. He is the creature of an evolution who can just about span a sufficient portion of reality to manage his survival, and snatch what on the scales of time are but a few moments of insight and happiness. Yet this same creature has invented ways of seeing what no naked eye could see, of hearing what no ear could hear, of weighing immense masses and infinitesimal ones, of counting and separating more items than he can individually remember. He is learning to see with his mind vast portions of the world that he could never see, touch, smell, hear, or remember. He is learning to see, touch, smell, hear, or remember. Gradually he makes for himself a trustworthy picture inside his head of the world beyond his reach."[86]

As the following analysis relies upon neurobiology's conclusions to expand the political thinker's understanding of the limits of "speech" under the First Amendment, it can do so with the assurance that the ideas of the neurobiologists reinforce similar views from other decades and disciplines. These disciplines all return to a central point: our ideas and the content of our decision-making process is not linear and linguistic, but rather contains the full range of our sensory experiences.

III. Applying Neurobiology to First Amendment Jurisprudence on Aesthetics

From the previous discussion, it should be clear that decision-making is not based only on factual, informational material. The reasonable person who is able to gather knowledge from precise facts and make a decision on the best possible outcome, divorced from images and emotional content, is a myth. Perhaps it is no accident that the Supreme Court, which perpetuates

[86] *Id.* at 284.

this myth,[87] is made up of those trained in the law. This profession is dominated by those who are gifted in language, so perhaps the individuals on the Court have thoughts and memories dominated by images in the form of linguistic expressions. Consider, in contrast, the thought process of Albert Einstein:

> The words or the language, as they are written or spoken, do not seem to play any role in my mechanism of thought. The psychical entities which seem to serve as elements in thought are certain sights and more or less clear images which can be "voluntarily" reproduced and combined. . . . The above mentioned elements are, in my case, of visual and … muscular type. Conventional words or other signs have to be sought for laboriously only in a secondary stage, when the mentioned associative play is sufficiently established and can be reproduced at will.[88]

The Supreme Court should protect aesthetic expressions as "speech" on the same terms as speech in the traditional sense of written and spoken words. In other words, the word "speech" in the First Amendment should be defined to include aesthetic expressions that reach any of the five senses to create "images" in the brain, for these images create the content of our decisions as citizens. The traditional limits to freedom of speech – such as incitement, obscenity, expressions of government employees, fighting words, true threats, and libel – would apply to aesthetic expressions as well, for they are simply "speech" under the First Amendment. This section analyzes past Supreme Court precedents under this proposed test and discusses where the Supreme Court improperly limited freedom of aesthetic expression and properly upheld it under

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[87] Symbol is "a primitive but effective way of communicating ideas;" the flag is protected because it is a substitute for "some system, idea, institution, or personality, is a short cut from mind to mind." Texas v. Johnson, 491 U.S. 397 (1989).

[88] Albert Einstein, *cited in* J. HADAMARD, THE PSYCHOLOGY OF INVENTION IN THE MATHEMATICAL FIELD (1945) (*quoted in* DAMASIO, *supra* note 41, at 107).

this proposed test. It also provides an example of how two lower courts, the Northern District of New York and the Second Circuit, recently applied rationales similar to the proposed test to uphold the freedom of aesthetic expression under the First Amendment under the same terms as the Supreme Court would uphold written expression.

A. Where the Supreme Court Got it Wrong

While the Supreme Court's decisions have sometimes been in line with the proposed rule, it does not always include aesthetic expression as speech on the same terms as linguistic expressions. For example, the Court has frequently asserted that "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[89] Although it did not allow the State of Texas to punish the expressive act of flag-burning in *Texas v. Johnson*, [90] it did not apply the same standard to flag burning as it would have to linguistic expressions about the flag. Instead, it introduced the troublesome standard that is the subject of this Article: expression is speech only if (1) it is intended to deliver a particularized message (2) and there is a great likelihood that the audience is likely to understand that

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[89] Texas v. Johnson, 491 U.S. 397, 406 (1989) (also quoted in City of Erie v. Pap's A.M. 529 U.S. 277, 299 (2000) & R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 429 (1992) (Stevens, J., joining in Part I and concurring in the judgment) (explaining that "[t]he character of expressive activity also weighs in our consideration of its constitutional status").

[90] Johnson's act of flag burning "constituted expressive conduct, permitting him to invoke the First Amendment. ...Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent." Texas v. Johnson, 491 U.S. 397 (1989).

message.[91] The Court itself substitutes its "own view of the flag" through its justification for its decision – to protect a specific message against the United States government it sees in this expression. Therefore, when the Court recognizes symbols – aesthetic expressions – as speech, it is because they stand for a "particularized message."[92]

Other language in *Texas v. Johnson* further undermines the power of aesthetics independent of a particularized message; it explains that a symbol is "a *primitive* but effective way of communicating ideas"; the flag is protected because it is a substitute for "some system, idea, institution, or personality." [93] It "is a short cut from mind to mind."[94] Describing a symbol as a "short cut" for transferring a distinct idea from one mind to another and as a substitute for the word "America" limits the power of the symbol to the role of allegory.

In another free speech case, the Court asserts that while "the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[95] It does not assert that while the law is

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[91] *Id.*

[92] *Id.* Compare to Justice White's dissent in the nude dancing case, which would extend the protection of speech beyond the linguistic, reason-based framework to the "thoughts, ideas, and emotions" that make up "the essence of communication." Barnes v. Glen Theatre, Inc., 501 U.S. 560, at 592 (White, J., dissenting).

[93] Texas v. Johnson, 491 U.S. 397 (1989) (emphasis added)

[94] *Id*.

[95] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 579 (1995).

not free to interfere with aesthetic expression for no better reason than promoting an alternative aesthetic expression, and the Court has reinforced that it has no such analogous rule for aesthetic expression lacking a distinct and particularized message in *National Endowment for the Arts v. Finley*.[96]

In *Finley*, the Court found that discrimination within the National Endowment for the Arts' role as a patron of the arts did not violate the freedom of speech of those who were rejected for funding, perhaps on the basis of the Congress or the committee's dissatisfaction with the message they perceived in the artwork. The Court justified the *Finley* decision by explaining that it recognized, "as a practical matter, that artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[97] It would be very hard to imagine an analogous decision if the government was in the role of sponsoring speeches or written content. What if we substituted the word "speech" for the word "art" in some of the discussions of artistic works in *Finley*: "In the context of [speech] funding, in contrast to many other subsidies, the Government does not indiscriminately "encourage a diversity of views from private speakers" …. The NEA's mandate is to make esthetic judgments …." It would be hard to imagine the discriminations upheld in Finley in the context of the written word.

B. Where the Supreme Court Got it Right

The Court does not always miss the point that aesthetics should be protected as speech. The Court in *Texas v. Johnson* did uphold the right to burn a flag and also pointed out the many

[96] National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

[97] *Id.* at 598.

cases in which the Court has found that "speech" under the First Amendment is not limited to the spoken and written word. These cases include the Court's protection of the "expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam;[98] … of a sit-in by blacks in a "whites only" area to protest segregation,[99] of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam,[100] and of picketing about a wide variety of causes." [101]

The Court in *Texas v. Johnson* also rejected the idea that the State of Texas could justify its suppression of this speech for the purpose of protecting its own ideal of the meaning of the flag. It explained that "nothing in our precedents suggests that a State may foster its *own view* of the flag by prohibiting expressive conduct relating to it …[;][102] "[p]regnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America." The Court recognized that there are many meanings that could be drawn from the flag, and, in essence, that the brains of those who perceive the image of the flag could make countless associations and decisions based on that image.

Similarly, the Court in *Virginia v. Black* found that there many, many connections that a viewer could make in his mind when he registers the image of a burning cross, based on the long

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[98] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969).

[99] Brown v. Louisiana, 383 U.S. 131, 141–142 (1966).

[100] Schacht v. United States, 398 U.S. 58, 90 (1970).

[101] Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 313–14 (1968); United States v. Grace, 461 U.S. 171, 176 (1983).

[102] Texas v. Johnson, 491 U.S. 397, 415 (1989) (emphasis added).

history of this powerful aesthetic expression.[103] In fact, the Court applied – essentially – the proposed test in that case. It found that the First Amendment did not protect citizens from a Virginia statute that banned the act of cross burning with the intent to intimidate.[104] It did not, however, exclude cross burning from the definition of "speech." Instead, it found that the act was speech (although with many possible meanings), but was not protected by the First Amendment

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[103] Virginia v. Black, 538 U.S. 343 (2003). The Court explained:

> Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. Sir Walter Scott used cross burnings for dramatic effect in The Lady of the Lake, where the burning cross signified both a summons and a call to arms. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.
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> The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, . . . [s]oon the Klan imposed "a veritable reign of terror" throughout the South. The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. . . .
>
> The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. Cross burning thereby became associated with the first Ku Klux Klan. . . .
>
> From the inception of the second Klan [in 1915], cross burnings have been used to communicate both threats of violence and messages of shared ideology. . . . These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.
>
> According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." And the Klan has often published its newsletters and magazines under the name The Fiery Cross.
>
> For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who "were married in full Klan regalia beneath a blazing cross."

Id. at 353–57.

[104] *Id.*

when used as an act of intimidation, just as words of intimidation are not protected by the First Amendment.

The Court found that the jury instruction used in the case at issue, which allowed the jury to *infer an intent* to intimidate from the act of burning a cross in public view, was unconstitutional. Just as a prosecutor of an act of verbal or written intimidation would have to make out the elements of the charge – that the speaker intended to intimidate with the words – the prosecutor of the speech of intimidation by cross burning must make out the same case.

Free speech proponents might disagree with the outcome of the decision if they believe that the act of burning a cross is not sufficiently dangerous to the peace – not the direct threat of violence that the Court finds it to be. However, the Court's understanding of symbols is commendable and directly in line with the proposed test. It understands that over time, the symbol of the burning cross has gained power as a threat through its association with the acts that it accompanied – its palpable relationship with acts of violence and intimidation. It has become an allegory, taken on a meaning outside the visual presentation of an aesthetic expression. It can be used as a threat because of this history. However, the symbol itself is not a threat, does not take on one particular meaning:

> To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. . . . The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

> In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.[105]

C. Proposed Test: Aesthetic Expression is Speech

The Supreme Court should apply the same logic it applied in *Virginia v. Black* to future cases: an aesthetic expression is speech. If First Amendment jurisprudence on written or verbal expressions would allow the aesthetic expression, it should be protected. If First Amendment jurisprudence on written or verbal expressions would allow a government to restrict it, the same restrictions could apply to aesthetic expressions. Two recent cases in the lower courts have applied this logic to find that governments may not restrict aesthetic expressions in contexts in which the First Amendment would not allow it to restrict written expressions.

The first case, from the Northern District of New York, overturned a county bar association's restrictions on attorney advertising. Although the Supreme Court has held that a state may not ban all illustrations in attorney advertising,[106] the county bar association tried to test the limits of this requirement by banning means of getting attention in advertising that are not clearly related to the rational selection of counsel. The bar had tried to limit visual and musical elements of attorney advertising with the following restriction:

> An advertisement shall not … rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence.[107]

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[105] *Id.* at 357.

[106] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985).

[107] Alexander v. Cahill, (N.D.N.Y. 2007), not reported, *available at* 2007 WL 2125286 (N.D.N.Y.) (quoting N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6).

The court applied the Supreme Court's test for commercial speech and found that the restriction was an impermissible because it did not materially advance the interest of preventing misleading advertising and protecting the reputation of the bar.[108]

The court suggested that it would approve a restriction on jingles, illustrations, and visual portrayals that was clearly founded in these state interests by noting that the restrictions that the bar association originally proposed to achieve this interest were more specifically tailored. The comparable provision of the proposed rules, which the court implied would be acceptable under the First Amendment, read:

> Advertising that recreates, dramatizes or simulates situations or persons should fairly represent the underlying facts and properly disclose that they have been staged. … Pictures and other stylistic elements should be used to reinforce traditional considerations, and should not unduly frighten, inflame or otherwise manipulate viewers into ignoring rational considerations. Lawyer advertising should not be likely to shock or offend a substantial segment of the community or to foster disrespect for the law, the legal profession or the judicial system.[109]

Comparing the two sets of restrictions, it is clear that the proposed restriction was narrowly tailored to avoid misleading and offensive advertising, while the challenged restriction classified all aesthetics, besides factual, linguistic information, as misleading. By rejecting one and implicitly approving the other, the court made a clear statement that aesthetic representations – those "techniques that obtain attention" – are speech and are protected on the same terms as linguistic speech. Just as it is acceptable to limit words in commercial speech if those limits are narrowly tailored to advance the interests of avoiding misleading materials or diminishing the

[108] *Id.* at *7.

[109] *Id.* at *7.

reputation of the bar, it would be acceptable to limit aesthetic expressions that do so – but not all aesthetic expressions.

The second case, from the Second Circuit, overturned a lower court ruling upholding a New York City ordinance restricting the sale of artworks on public ways without a permit. [110] The crux of the case was that the restriction did not apply to the sale of written materials. There, the court explicitly united the protection of written speech with the protection of aesthetic expression:

> written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. As appellants point out, Chinese characters are both narrative and pictorial representations. Nahuatl, a language used by Aztec peoples in Central America, also incorporates pictures in its written language. Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.[111]

The court overturned and expressed distaste for the lower court's decision that the restriction of aesthetic expression, and even the distinction between written and aesthetic expression, could be upheld under the First Amendment.[112] It held that the "requirement that appellants' art cannot be sold or distributed in public areas without a general vendors license, while written material may be sold and distributed without a license, must fall …."[113] The Second Circuit's holding and discussion provide an excellent example of how courts could apply the proposed test to First Amendment jurisprudence to protect aesthetic expression on the same terms as written expression.

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[110] Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996).

[111] *Id.* at 695.

[112] *Id.* at 699.

[113] *Id.* at 699.

IV. Conclusion

As neuroscience has shown, there are many "conversations," or relationships with our surroundings through our perception of aesthetic expression, that make up our decision-making processes as American citizens. If one significant purpose of free speech is to protect this process of decision-making from government intrusion to protect our democracy, speech should include all those expressions that contribute to decision-making. Therefore, Supreme Court jurisprudence in the context of free speech must strive to keep as many of these conversations as open as possible, and should recognize aesthetic expression as "speech" to be protected on the same terms as linguistic expression.