AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter11: The Contemporary Era—Democratic Rights/Free Speech

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Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir., 2010)

The state of California requires tattoo artists to register with the county health department and be subject to regular inspections and health regulations. The City of Hermosa Beach, within the county of Los Angeles, adopted a land use ordinance that effectively banned tattoo artists from operating within the city. Johnny Anderson owned a tattoo parlor in Los Angeles and wanted to expand his business into Hermosa Beach but was blocked by the town's ordinance. He filed suit in federal district court, arguing that the ban infringed on his rights of free expression, but lost. He appealed to the U.S. Court of Appeals for the Ninth Circuit, which unanimously reversed the trial court and struck down the ordinance as a violation of the U.S. Constitution.

JUDGE BYBEE,

We address a question of first impression in our circuit: whether a municipal ban on tattoo parlors violates the First Amendment. Although courts in several jurisdictions have upheld such bans against First Amendment challenges, we respectfully disagree. We hold that tattooing is purely expressive activity fully protected by the First Amendment, and that a total ban on such activity is not a reasonable "time, place, or manner" restriction.

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The First Amendment, applied to the states through the Fourteenth Amendment, prohibits laws "abridging the freedom of speech." The First Amendment clearly includes pure speech, but not everything that communicates an idea counts as "speech" for First Amendment purposes. The Supreme Court has consistently rejected "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." *United States v. O'Brien* (1968).

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. . . Our first task is to determine whether tattooing is (1) *purely expressive activity* or (2) *conduct* that merely contains an expressive component. In other words, we must determine whether tattooing is more akin to writing (an example of purely expressive activity) or burning a draft card (an example of conduct that can be used to express an idea but does not necessarily do so). If tattooing is purely expressive activity, then it is entitled to full First Amendment protection and the City's regulation is constitutional only if it is a reasonable "time, place, or manner" restriction on protected speech. *Ward v. Rock Against Racism* (1989). . . .

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There appears to be little dispute that the tattoo itself is pure First Amendment "speech." The Supreme Court has consistently held that "the Constitution looks beyond written or spoken words as mediums of expression." . . .

Tattoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection. . . .

The principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper. This distinction has no significance in terms of the constitutional protection afforded the tattoo; a form of speech does not lose First Amendment protection based on the kind of surface it is applied to. It is true that the nature of the surface to which a tattoo is applied and the procedure by which the tattoo is created implicate important health and safety concerns that may not be present in other visual arts, but this consideration is relevant to the governmental interest *potentially justifying* a restriction on protected speech, not to whether the speech is constitutionally protected. We have little difficulty recognizing that a tattoo is a form of pure expression entitled to full constitutional protection.

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Tattooing is a process like writing words down or drawing a picture except that it is performed on a person's skin. As with putting a pen to paper, the process of tattooing is not intended to "symbolize" anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink. Thus, as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection.

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Finally, the fact that the City's ban relates to tattooing *businesses* rather than the tattooing process itself does not affect whether the activity regulated is protected by the First Amendment. In *City of Sparks,* we held that even "an artist's *sale* of his original artwork constitutes speech protected under the First Amendment." *White v. City of Sparks*, 500 F.3d 953, 954 (9th Cir., 2007). . . .

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A regulation that restricts protected expression based on the content of the speech is constitutional only if it withstands strict scrutiny, meaning that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." However, Anderson does not contend that Hermosa Beach Municipal Code is a content-based restriction on speech. Rather, he argues that the City's regulation is an unconstitutional restriction on a *means* of expression.

Accordingly, we must determine not whether the City's regulation survives strict scrutiny but whether the City's regulation is a reasonable "time, place, or manner" restriction on protected speech.

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Anderson does not dispute that the City has a significant interest in regulating tattooing because of the health and safety concerns implicated by this process. Rather, Anderson argues that the regulation is substantially broader than necessary to achieve this interest because the interest could be achieved by regulations ensuring that tattooing is performed in a sanitary manner rather than outright prohibition of tattooing. The City disagrees, pointing out that Los Angeles County has only one health inspector for nearly 300 tattoo establishments and over 850 tattooists, and that there are no statewide regulations relating to sterilization, sanitation, and standards for tattooists. "Put simply," the City argues, "there are insufficient resources to monitor the 850 tattooists operating in Los Angeles County, including the many who, like Plaintiff, are self-taught and operating in backrooms and basements."

. . . The City has presented no evidence that tattooing in the City *could not* be regulated in such a way that addresses the City's legitimate public health concerns. Rather, it simply argues that currently, there are insufficient resources *in place* to address these concerns. But the provision *vel non* of such resources is a matter within the City's control. Without more, we cannot approve a total ban on protected First Amendment activity simply because of the government's failure to provide the resources it thinks are necessary to regulate it.

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The City analogizes this case to *Kovacs v. Cooper* (1949), the only case in which the Supreme Court has upheld a total ban on a medium of communication. In *Kovacs,* the Court upheld a Trenton, New Jersey, ordinance banning sound trucks—vehicles with attached sound amplifiers—on public streets. . . .

The analogy to sound trucks is flawed. [A] tattoo is not merely a "more effective" means of communicating a message; rather, the tattoo "often carries a message quite *distinct*" from other media. . . . Seeming to recognize that its reasoning was in some tension with its earlier cases, the *Kovacs* Court explained that its judgment also rested on the fact that no one within range of the sound truck could avoid the broadcast. . . .

In this sense, the case at hand is easily distinguishable from *Kovacs* and indistinguishable from the Court's other cases involving total bans on modes of expression. A tattoo does not force "unwilling listener[s]" to heed its message any more than the expletive-laden jacket at issue in *Cohen.* A tattoo is displayed passively on the person's body, such that a member of the general public can simply avert his eyes if he does not wish to view the tattoo (assuming the tattoo is visible to the public at all). In other words, a tattoo effects no additional intrusion of privacy on members of the public beyond other types of expression clearly protected by the First Amendment. . . .

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Reversed.

JUDGE NOONAN, CONCURRING.

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