ART EXPRESSED ON A LIVING CANVAS: PROPOSING A BALANCE BETWEEN THE PROTECTION OF FREE EXPRESSION AND THE GOVERNMENTAL INTEREST IN REGULATING THE TATTOO INDUSTRY

I. INTRODUCTION

"If the Lord wanted you to have a tattoo, He would have put it on you."[1] Jake Knotts, former state Senator of South Carolina, uttered this statement during a legislative debate in an attempt to justify a state law effecting a complete ban on the practice of tattooing.[2] While the South Carolina legislature initially passed the law in response to a hepatitis outbreak in New York City in the early 1960s—blamed on the use of dirty needles in tattoo parlors—the justification for the law rested on religious grounds.[3] Although other states enacted similar prohibitions on tattooing, those laws were gradually lifted or struck down in court, primarily due to a substantial decrease in hepatitis cases resulting from effective vaccinations and the development of safe tattooing methods.[4] Prior to 2004, when South Carolina finally repealed its strict ban on tattooing, Mr. Knotts single-handedly quashed all attempts to challenge the law.[5]

Before the state legislature's decision to repeal the law, a tattoo artist named Ronald White was convicted of violating the South Carolina statute after he tattooed an individual on television.[6] He challenged the constitutionality of the law, claiming that a blanket prohibition on tattooing infringes on the right to free expression guaranteed by the First Amendment.[7] In 2002, the Supreme Court of South Carolina followed the majority of courts that had addressed whether tattooing is protected and

1. Bobby G. Frederick, Note, *Tattoos and the First Amendment-Art Should Be Protected as Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing*, 55 S.C. L. REV. 231, 245 (2003) (statement of Senator Jake Knotts).

2. *Id.*; Adam Beam, *The Buzz: Shake-ups loom in S.C. House caucuses*, STATE (Nov. 11, 2012), http://www.thestate.com/2012/11/11/2515045/shake-ups-loom-in-sc-house-caucuses.html.

3. Frederick, *supra* note 1, at 233, 244-46.

4. *See* Petition for Writ of Certiorari at 4-5, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859); *see also* Frederick, *supra* note 1, at 234-36.

5. *See id.* at 245; Matthew Alan Cherep, *Barbie Can Get a Tattoo, Why Can't I? First Amendment Protection of Tattooing in a Barbie World*, 46 WAKE FOREST L. REV. 331, 346 (2011).

6. State v. White, 348 S.C. 532, 534-35 (2002).

7. *Id.* at 535.

concluded the process of tattooing is merely conduct that is not sufficiently expressive to fall within the purview of the First Amendment.[8] The dissent argued that the majority opinion was based on a line of cases "decided in an era when tattooing was regarded as something of an anti-social sentiment."[9] The Supreme Court of the United States denied writ of certiorari in the case, and, to date, has declined to answer the question of whether tattooing, as a form of artistic expression, is entitled to the same level of protection as other recognized art forms.

Although Knotts's stance represented an extreme version of the negative connotations Americans associated with tattoos, the basis of his aversion—disagreement with a perceived message conveyed by tattooing—exemplified a content-based intent for a restriction on expression.[10] In other words, Knotts's reason for regulating the tattooing industry was to suppress what he believed to be an "immoral" and "ungodly" message communicated by tattooed individuals.[11] Such content-based regulations on expression are presumptively invalid because "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."[12]

8. State v. White, 348 S.C. 532, 538-39 (2002) (citing Yurkew v. Sinclair, 495 F. Supp. 1248 (D. Minn. 1980); State *ex rel.* Med. Licensing Bd. v. Brady, 492 N.E.2d 34 (Ind. Ct. App. 1986); People v. O'Sullivan, 409 N.Y.S.2d 332 (App. Term 1978)) ("As discussed, application of the Supreme Court's test to determine what conduct is protected requires some line drawing. Based on the record before us, we find that the act of tattooing falls on the unprotected side of the line. Appellant has not met his burden to show why tattooing, an invasive procedure, with inherent health risks, would fall within the First Amendment.")

9. *Id.* at 541-42 (Waller, J., dissenting) (quoting Hoag Levins, *The Changing Cultural Status of the Tattoo Arts in America*, TATTOO ARTS IN AMERICA (1997), http://tattooartist.com/history.html) ("Although the majority cites several cases which have held that tattooing is not 'speech,' those cases were decided in an era when tattooing was regarded as something of an anti-social sentiment. As noted in a recent synopsis, 'The cultural status of tattooing has steadily evolved from that of an anti-social activity in the 1960s to that of a trendy fashion statement in the 1990s. First adopted and flaunted by influential rock stars like the Rolling Stones in the early 1970s, tattooing had, by the late 1980s, become accepted by ever broader segments of mainstream society. Today, tattoos are routinely seen on rock stars, professional sports figures, ice skating champions, fashion models, movie stars and other public figures who play a significant role in setting the culture's contemporary mores and behavior patterns . . . .'").

10. Frederick, *supra* note 1, at 244-45.

11. *See id.*

12. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted).

This of course begs the question however of whether tattooing is in fact expression. Decades after this ban was first enacted, much of modern American society has embraced tattooing as a valid and pervasive art form.[13] Currently, one in five Americans has at least one tattoo—20% of the population.[14] Over the past fifty years, however, the majority of lower courts have held that tattooing is unprotected conduct devoid of expressive value.[15] But, in the groundbreaking 2010 case, *Anderson v. City of Hermosa Beach*, the United States Court of Appeals for the Ninth Circuit held that tattooing is an independent form of artistic expression entitled to the same level of full protection as any other form of pure expression.[16]

This Comment will propose that the Supreme Court should grant writ of certiorari in *Anderson* and find that tattooing is a partially-protected art form, as doing so will both protect artistic tattooing and allow for reasonable health regulations on the industry. Denying any level of protection to tattooing, and thus subjecting regulations on tattooing to mere rational basis review, would enable the states to pass laws foreclosing entire mediums of artistic expression—exemplified by the South Carolina statute.[17] However, the Court should extend partial, rather than full, protection due to the health hazards involved in tattooing and other invasive forms of body art.[18]

13. *See* State v. White, 348 S.C. 532, 541-42 (2002) (Waller, J., dissenting) (quoting Levins, *supra* note 9).

14. Samantha Braverman, *One in Five U.S. Adults Now Has a Tattoo*, HARRIS INTERACTIVE (Feb. 23, 2012), http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/970/ctl/ReadCustom%20Default/Default.aspx.

15. *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997); Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008); Yurkew v. Sinclair, 495 F. Supp. 1248, 1253-54 (D. Minn. 1980); State v. White, 348 S.C. 532, 538-39 (2002).

16. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060-61 (9th Cir. 2010).

17. Similar to the South Carolina ban, a prohibition on the tattoo industry was in effect in Oklahoma until 2006. Ron Jenkins, *Okla. Set to Lift Ban on Tattoo Industry*, WASH. POST (May 3, 2006, 7:50 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/03/AR2006050302115.html.

18. Extending full protection to tattooing could set a precedent based on which other forms of body art may be entitled to the same level of protection. For example, the recent law passed in Arkansas, effecting a reasonable ban on subdermal implants, an invasive surgical procedure, would not be able to survive judicial scrutiny. *See* Philip Obenschain, *Arkansas state legislature passes bill to ban certain body modifications, tattoo procedures*, ALTERNATIVE PRESS (Aug. 21, 2013), http://www.altpress.com/news/entry/arkansas_senate_passes_bill_to_ban_certain_tattoo_procedures_nontraditional; *see also infra* Section III(D).

Section II of this Comment will explore the broad scope of First Amendment protection developed in jurisprudence. First, Section II(A) will set forth the differing levels of protection accorded to pure expression and symbolic conduct. Section II(B) will then address the protection extended to artistic expression under the First Amendment. Section II(C) will discuss the body of case law confronting the issue of whether tattooing should receive protection as a form of art. Section III will propose a balanced solution to the policy concerns about extending full protection to tattooing and, conversely, denying protection to tattooing entirely. Specifically, Section III will propose that tattooing, and other potentially dangerous artistic practices, should fall within an exception to the general rule of according full protection to artistic expression. Artistic practices falling within this exception should receive partial protection under the First Amendment, allowing the states to regulate those practices for the well-being of the citizenry, while protecting the fundamental right of free expression.

The Court should only extend partial, and not full, protection to tattooing and other potentially dangerous art forms because regulations on tattooing based on health concerns should not be subject to strict scrutiny. Subjecting legitimate regulations to this exceedingly burdensome standard of review would impede the states from exercising their historic police power to enact laws for the health and well-being of the citizenry. According partial protection to potentially hazardous artistic practices, including tattooing, would render regulations on those practices subject to intermediate scrutiny, a balanced standard of review that would protect both the freedom of artistic expression and the states' interest in promoting the health of the citizenry.

II. BACKGROUND

The First Amendment, as applied to the states through incorporation in the Fourteenth Amendment, protects citizens of the United States against laws "abridging the freedom of speech."[19] While the original function of the free speech clause was to protect written and spoken words, jurisprudence has expanded the scope of constitutional protection to include myriad

19. U.S. CONST. amend. I; *see* Patrick Cronin, *This Historical Origins of the Conflict Between Copyright and the First Amendment*, 35 COLUM. J.L. & ARTS 221, 235-36 (2012).

forms of expression, subject to certain, well-established exceptions.[20] Unprotected exceptions include: obscenity,[21] fighting words,[22] defamatory speech,[23] and speech owned by others.[24] The first step in a First Amendment analysis is to discern whether the disputed activity constitutes pure expression, symbolic conduct, or non-expressive conduct.[25] Decades of First Amendment jurisprudence defining the limits between these three categories serve as the guidepost.

The following subsections will detail the background of First Amendment jurisprudence. Subsection A will address the evolution of the Supreme Court's distinction between pure expression and symbolic conduct. Subsection B will discuss the protection accorded to artistic expression under the First Amendment. Finally, Subsection C will examine the history of tattooing, its current status in American society, and the treatment of tattooing in First Amendment jurisprudence.

A. PURE EXPRESSION AND SYMBOLIC CONDUCT

Along the spectrum of protected speech, activity that constitutes "pure expression" is afforded full First Amendment protection; whereas, symbolic conduct that is not purely expressive, but has sufficiently communicative aspects, receives partial protection.[26] However, "all forms of expression involve some physical aspect," whether it be vocal cord vibrations associated with speech, flicking a pen across a sheet of paper, "the rumble of newspaper printing presses, the application of paint to canvas, [and] feet pounding the pavement during a march."[27]

20. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

21. Miller v. California, 413 U.S. 15, 23 (1973) (citing Roth v. United States, 354 U.S. 476 (1957); Kois v. Wisconsin, 408 U.S. 229, 354 (1972); United States v. Reidel, 402 U.S. 351, 485 (1971)).

22. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

23. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding a publisher of defamatory statements could not claim a constitutional privilege against liability regardless if the defaming statements concerned a public issue).

24. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (holding that a magazine's "verbatim copying of some 300 words of direct quotation" from another author's work constituted copyright infringement).

25. *See* Cohen v. California, 403 U.S. 15 (1971).

26. *See id.* at 18; *see also* Opening Brief of Appellant at 9, Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010) (No. 08-56914), 2009 WL 4921598, at *9.

27. Opening Brief of Appellant, *supra* note 26, at 9; *see* Hurley v. Irish-Am. Gay,

This subsection will discuss the evolution of the Supreme Court's distinction between pure expression, symbolic conduct, and unprotected conduct. Section II(A)(1) will set forth the distinction between pure expression and symbolic conduct developed in two important cases, *United States v. O'Brien*[28] and *Cohen v. California*.[29] Then, Section II(A)(2) will discuss the test formulated by the Supreme Court in *Spence v. Washington*[30]—a standard used to distinguish between protected symbolic conduct and unprotected conduct. Finally, Section II(A)(3) will address *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[31] a 1995 case in which the Supreme Court discussed the inadequacy of the *Spence* test, especially within certain contexts, including the realm of artistic expression.

1. SYMBOLIC CONDUCT: *O'BRIEN* AND *COHEN*

On March 31, 1966, David O'Brien stood on the steps of the South Boston Courthouse and set fire to his draft card—an overt protest in the midst of the Vietnam War.[32] The "charred remains" of his draft card were photographed by nearby Federal Bureau of Investigation agents, and O'Brien was convicted of violating the Universal Military Training and Service Act.[33] Alleging he had engaged in a protected form of "symbolic speech," O'Brien sought to have his conviction set aside and the federal statute declared an unconstitutional abridgement of the freedom of speech.[34]

The Supreme Court of the United States held O'Brien's protest fell within the scope of symbolic conduct, activity that combines speech and non-speech elements and therefore receives some, but not full, First Amendment protection.[35] In simpler terms, O'Brien's conduct was adequately expressive to warrant protection but not enough to deserve the same level of protection

Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995).

28. United States v. O'Brien, 391 U.S. 367 (1968).

29. Cohen v. California, 403 U.S. 15 (1971).

30. Spence v. Washington, 418 U.S. 405 (1974) (per curiam).

31. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, (1995).

32. *O'Brien*, 391 U.S. at 369-70.

33. *Id.*

34. *Id.* at 370.

35. *See id.* at 376-77.

accorded to written and spoken words—"pure speech."[36] Consequently, the Court formulated a four-factor intermediate scrutiny test to be applied in cases involving restrictions on symbolic conduct, an easier burden to satisfy than the strict level of scrutiny triggered by restrictions on pure speech.[37] Under the *O'Brien* standard, a regulation on symbolic conduct is justified if: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) it is unrelated to the suppression of free expression; and (4) the incidental restriction on expression is no greater than is essential to the furtherance of that interest.[38] Significantly, *O'Brien* 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."[39] Essentially, the Court acknowledged the necessity of line-drawing within the realm of protected conduct, but did not take the further step to declare where that line should be drawn.[40]

In *Cohen v. California*, however, the Court distinguished between pure expression and symbolic conduct.[41] In that case, the Court found a conviction based on the act of wearing a jacket bearing the words "Fuck the Draft" infringed on pure expression because the punished conduct was the act of communication itself, rather than any "separately identifiable conduct which allegedly was intended . . . to be perceived by others as expressive of particular views but which, on its face, d[id] not necessarily convey any message."[42] In other words, although the conviction was based on the physical act of wearing a jacket in a courthouse, this act served as the means of communicating pure expression—the words "Fuck the Draft."[43] Thus, the Court found pure expression, rather than symbolic conduct, was at issue.[44] While *Cohen* refined the line separating pure expression (conduct which constitutes an independent form of expression on its face) from symbolic conduct (conduct which, although intended to be

36. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
37. *Id.* at 377.
38. *Id.*
39. *Id.* at 376.
40. *See id.* at 376-77.
41. *See* Cohen v. California, 403 U.S. 15, 18 (1971).
42. *Id.* at 16-18.
43. *Id.* at 18.
44. *Id.*

expressive, does not convey a message on its face), the Court did not establish a bright-line rule distinguishing symbolic conduct from unprotected conduct until the 1974 landmark case, *Spence v. Washington*.[45]

2. THE *SPENCE* TEST: NARROWING THE SCOPE OF SYMBOLIC CONDUCT

Reacting to the Cambodian invasion and the killings at Kent State University, a college student hung an upside-down American flag adorned with a peace sign outside of his window.[46] The student, Harold Spence, was convicted of violating a Washington statute that prohibited improper use of the American flag.[47] In his First Amendment claim, Spence alleged that his intent was to spread the message that America stood for peace, rather than violence.[48]

Deciding whether Spence's actions were entitled to protection, the Court acknowledged the limiting statement from *O'Brien*—that a person's intent to express an idea through conduct is not, in and of itself, sufficient to warrant protection.[49] The *Spence* Court expounded on this point, finding that conduct is protected when activity of a certain nature is accompanied by expressive intent within a particular "factual context and environment," such that the combined circumstances "lead to the conclusion that [the actor] engaged in a form of protected expression."[50] Specifically, the context of war and violence rendered Spence's conduct an easily recognizable expression of peace advocacy.[51] Accordingly, the Court found Spence had engaged in symbolic conduct "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."[52] Succinctly stated, the *Spence* test requires, in addition to the conduct at issue: (1) "an intent to

45. *See* Spence v. Washington, 418 U.S. 405 (1974) (per curiam).

46. *Id.* at 405-08.

47. *Id.*

48. *Id.* at 408. The Appellant, Spence, testified: "I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace." *Id.*

49. Spence v. Washington, 418 U.S. 405, 409-10 (1974) (per curiam) (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

50. *Id.* at 410-12.

51. *Id.*

52. *Id.* at 409-10.

convey a particularized message" and (2) surrounding circumstances which produce a great likelihood "that the message would be understood by those who view[] it."[53]

The Court clarified that context is key in a First Amendment analysis of potentially symbolic conduct, because "the context in which a symbol is used for purposes of expression . . . may give meaning to the symbol."[54] Supporting the importance of context in symbolic conduct cases, in *Tinker v. Des Moines Independent Community School District*,[55] the Court found students who wore armbands in school to protest the Vietnam War had engaged in clearly symbolic conduct.[56] Through the bright-line rule under *Spence*, it appeared that the Court found its solution to the problem of overextending protection to a "limitless variety of conduct."[57] Years later, however, the Court recognized an inherent flaw in the *Spence* test.[58]

Indeed, the *Spence* requirements are easily satisfied within the context of overtly political symbolic conduct as the acts of (1) burning a draft card on the steps of a courthouse, (2) wearing an armband in school, and (3) hanging an American flag affixed with a peace sign were all deemed recognizable forms of symbolic conduct within the context of wartime and political unrest.[59] Yet, beyond this narrow class of politically-motivated symbolic conduct, the requirement of a narrowly articulable message denies protection to certain unquestionably-shielded forms of expression, as noted by the Court in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*.[60]

3. *HURLEY*: EXPOSING THE INADEQUACY OF *SPENCE*

In *Hurley*—a 1995 case about compelled speech, rather than restricted speech—the Court exposed the under-inclusive nature of the *Spence* test.[61] The issue before the Court was whether

53. Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam).

54. *Id.* at 410 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

55. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

56. *Id.* at 504-06.

57. *See Spence*, 418 U.S. at 409 (per curiam).

58. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

59. *See supra* text accompanying notes 46–53.

60. *Hurley*, 515 U.S. at 569.

61. *See id.*

Massachusetts could require a private group, the South Boston Allied War Veterans Council, to allow an openly gay, lesbian, and bisexual (GLIB) group of individuals to march in the Council's annual St. Patrick's Day parade.[62] By its own admission, the Council refused to include the GLIB group in its parade out of disagreement with the group's views on sexual orientation.[63] By mandating inclusion of the GLIB group, the state sought to prevent discrimination based on sexual orientation.[64] The Court found the state's mandate, albeit promoting a lofty goal, unconstitutionally compelled private citizens to promote a viewpoint with which they disagreed.[65] In the same way a government may not restrict speech based on content, a government may not compel speech based on content because an "important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."[66]

As a necessary prerequisite to reaching its ultimate conclusion, however, the Court faced the task of categorizing parades within the scope of protected expression.[67] In *Cohen*, the Court did not clarify whether its decision to classify the act of wearing a jacket bearing the words "Fuck the Draft" in a courthouse rested entirely on the presence of *written* words.[68] Thus, an unanswered question remained as to whether the Court would have reached the same conclusion—that pure expression was at issue, rather than symbolic conduct—had the jacket contained the image of a draft card beside the image of a hand with a raised middle-finger.

62. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559-61 (1995).

63. *Id.* at 562.

64. *Id.* at 571-73.

65. *Id.* at 574-76.

66. *Id.* at 573-74 (internal quotation marks omitted) (citing Pac. Gas & Electric Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1, 16 (1986)) ("Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." (citations omitted)).

67. *Hurley*, 515 U.S. at 568-70.

68. *See* Cohen v. California, 403 U.S. 15 (1971); *see also supra* text accompanying notes 41-44.

In *Hurley*, the Court shed light on this inquiry, finding parades constitute an independent form of expression—"not just motion"—despite the fact that onlookers generally do not perceive a particularized message from the inherently expressive activity.[69] The Court reasoned individuals march in a parade to make "some sort of collective point, not just to each other but to bystanders along the way."[70] Supporting the decision to extend protection to parades, the Court found the number of marchers in a parade, as speakers engaged in expression, did not impact the level of protection accorded to the activity because "a private speaker does not forfeit constitutional protection simply by combining multifarious voices."[71] Additionally, the Court stated: "First Amendment protection [did not] require a speaker to generate, as an original matter, each item featured in a communication."[72]

Significantly, the Court found the protection extended to a parade was "not limited to its banners and songs, . . . for the Constitution looks beyond written or spoken words as mediums of expression."[73] The Court emphasized that symbolism is a simple, effective means of communication and cited to several recognized examples of political symbolic speech: saluting or refusing to salute a flag, wearing an armband to protest a war, hanging a red flag, and marching in uniforms displaying the swastika.[74] Then, the Court stated a matter of profound significance:

> As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the

69. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995) ("Real '[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration.'" (quoting SUSAN G. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986)).

70. *Id.*

71. *Id.* at 569-70.

72. *Id.* at 570 (providing the example of cable operators—"speakers engaged in protected speech activities," despite the fact that "they only select programming originally produced by others").

73. *Id.* at 569.

74. *Hurley,* 515 U.S. at 569 (citing Nat'l Socialist Party of Am. v. Skokie, 432 U.S. 43 (1977); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Stromberg v. California, 283 U.S. 359 (1931)).

> unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.[75]

While the Court exposed the inadequacy of *Spence* in certain contexts, it failed to answer two glaring questions raised by this broad and ambiguous statement found in the Court's dicta. First, the Court failed to answer the question of when, if ever, the *Spence* test should be applied in a First Amendment analysis. Second, the Court failed to answer the question of how the courts are to decide what constitutes protected artistic expression, when such a determination is inherently subjective. All of the Court's examples of undeniably protected works of art—the famous nonsense poem of Lewis Carroll, the purely instrumental music of Arnold Schöenberg, and the splattered paintings of Jackson Pollock—fall within a narrow class of creative expression rendered by world-renowned artists. However, the Court did not indicate how this would apply in more commonplace circumstances with lesser known works of art.

B. ARTISTIC EXPRESSION UNDER THE FIRST AMENDMENT

Although the Court has not held that all forms of artistic expression are protected by the First Amendment, it pointed out three examples of "unquestionably" protected artworks in *Hurley*.[76] Although the Court juxtaposed those examples of protected artworks with examples of symbolic conduct,[77] earlier cases exhibit the Court's inclination to include artistic expression within the scope of fully protected forms of pure speech.[78] In 1952, the Court held motion pictures were entitled to full protection as an independent form of pure expression that "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."[79]

The Court has also considered serious artistic value as one of the factors to distinguish unprotected "obscenity" from protected sexual material.[80] In *Kaplan v. California*, the Court held: "As

75. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (citations omitted).

76. *Id.*

77. *See id.*

78. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

79. *Id.* at 501.

80. Miller v. California, 413 U.S. 15, 23-24 (1973).

with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution."[81] In 1989, the Court held music, with or without words, also deserved full protection because it is "one of the oldest forms of human expression" historically subjected to government censorship.[82]

With respect to dance as a medium of artistic expression, the Court has provided unique treatment. While the Court has not had the opportunity to discuss ballet or classical dance, it has considered the expressive nature of nude dancing.[83] In general, the Court has held nude dancing is expressive, albeit only entitled to a small degree of First Amendment protection in comparison to other performing arts.[84] Notably, the Court was willing to distinguish between expressive dance and non-expressive "recreational dancing" in *City of Dallas v. Stanglin*.[85] In that case, the Court held social dancing between teenagers at a dance hall was not sufficiently expressive to warrant First Amendment protection.[86]

Although the Supreme Court of the United States has not decided whether all forms of visual art are entitled to First Amendment protection, in *Bery v. City of New York*,[87] the United States Court of Appeals for the Second Circuit held visual art was fully protected as pure expression because it was "as wide ranging in its depictions of ideas, concepts and emotions as any book, treatise, pamphlet or other writing."[88] The Second Circuit concluded visual art was a universal mode of expression that transcended the limitations created by language barriers and illiteracy and was capable of reaching more people than written

81. Kaplan v. California, 413 U.S. 115, 119-20 (1973) (citing *Miller*, 413 U.S. at 23-25; Roth v. United States, 354 U.S. 476, 483-85 (1957)).

82. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

83. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000).

84. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991).

85. City of Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989).

86. *Id.* ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment.")

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

88. *Id.* at 695.

or spoken words.[89] Specifically, the court found:

> Indeed, written language is far more constricting because of its many variants—English, Japanese, Arabic, Hebrew, Wolof, Guarani, etc.—among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are a primitive but effective way of communicating ideas . . . a short cut from mind to mind.[90]

While the Second Circuit did not specifically address tattooing as a form of visual art, the majority of other courts faced with the issue have denied protection to tattooing.[91]

C. TATTOOING UNDER THE FIRST AMENDMENT

Even though fine-art tattooing is a pervasive form of artistic expression in American culture today, the majority of courts have denied the expressive nature of the practice and generally classified tattooing as artless conduct.[92] Consequently, regulations on the tattoo industry have been analyzed, for the most part, under rational basis review.[93] Under this standard, the proponent of the law need only assert a legitimate state interest that is rationally related to the challenged regulation—a remarkably easy burden to satisfy.[94] The purported interest in regulating the tattoo industry is the prevention of blood-born disease transmission, an irrefutably legitimate state interest.[95] However, acknowledging antiquated views of tattooing as an anti-social activity, both commentators and courts have questioned the legislative intent underlying particularly harsh tattoo restrictions imposed by certain states and municipalities which effect a de

89. Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996).

90. *Id.* (footnotes omitted) (internal quotations marks omitted).

91. *See* sources cited *supra* note 15.

92. *See* sources cited *supra* note 15.

93. *See, e.g.*, Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008); Yurkew v. Sinclair, 495 F. Supp. 1248, 1255 (D. Minn. 1980); State v. White, 348 S.C. 532, 539 (2002).

94. *See* Cherep, *supra* note 5, at 337-38.

95. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1056 (9th Cir. 2010); Cherep, *supra* note 5, at 332.

facto ban on tattooing businesses.[96]

The following subsections will discuss tattooing under the First Amendment. First, Section II(C)(1) will introduce the physical process of tattooing. Then, Section II(C)(2) will discuss the history of tattooing, its present status as an art form in American society, and the governmental interest in regulating tattoo businesses for the prevention of blood-born disease transmission. Section II(C)(3) will set forth the line of case law in which courts have denied protection to tattooing, finding the practice to constitute non-expressive conduct. Finally, Section II(C)(4) will introduce the Ninth Circuit's recent recognition of tattooing as an art form.

1. THE PROCESS OF TATTOOING

A tattoo is created by using a needle to inject ink into a person's skin.[97] In 1891, Samuel O'Reilly invented the electric tattooing machine, revolutionizing the industry.[98] A tattoo machine operates by moving a hollow needle filled with permanent ink up and down to pierce the skin between fifty and 3,000 times per minute.[99] The needle penetrates the skin at an approximate depth of one millimeter and deposits a drop of permanent ink with each puncture.[100] Ink is injected into the second layer of skin, referred to as the dermis.[101] Because the tattooing process involves piercing human skin, "the end result is essentially an open wound," providing an avenue for the transmission of blood-born diseases.[102] Nevertheless, when performed under properly sterilized conditions, "tattooing is a safe procedure."[103]

96. *See* State v. White, 348 S.C. 532, 541-42 (2002) (Waller, J., dissenting); *see also* Carly Strocker, Comment, *These Tats Are Made for Talking: Why Tattoos and Tattooing Are Protected Speech Under the First Amendment*, 31 LOY. L.A. ENT. L. REV. 175, 184, 203-06 (2011).

97. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1055 (9th Cir. 2010) (citing a declaration provided by the City of Hermosa Beach).

98. Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 519-20 (2013).

99. *Anderson*, 621 F.3d at 1055.

100. *Id.*

101. *Id.* at 1056.

102. *Id.*

103. Yurkew v. Sinclair, 495 F. Supp. 1248, 1252 (D. Minn. 1980); *Anderson*, 621 F.3d at 1056 (discussing safe practices of tattoo artists including "using sterile needles and razors, washing hands, wearing gloves, and keeping surfaces clean"

2. TATTOOING: A UBIQUITOUS ART FORM NECESSITATING SAFETY REGULATIONS

Today, tattooing is a pervasive art form displayed on the skin of numerous respected public figures in American culture, ranging from professional athletes to the stars of film and television.[104] In fact, more than twenty percent of American adults have at least one tattoo.[105] Tattoo art is also the subject of museum exhibits throughout the nation.[106] The history of tattooing as an art form predates its prominence in American society, as tattooing has held cultural significance across the globe for centuries as both a mode of artistic self-expression and a symbolic rite of passage.[107] The oldest known tattooed body—found frozen in the Austrian Alps—is 5,300 years old.[108]

The historical value of tattooing was not purely aesthetic, as tattoos once served as the nefarious tools of slavery and oppression.[109] Dark aspects of the history of tattooing likely contributed to the ebb and flow of negative connotations associated with tattoos over the passage of time.[110] While early American society viewed tattooing as a form of "poorly executed" and "degraded art" for lower class individuals, this perspective has evolved substantially over time.[111] The late 1800s gave rise to the establishment of tattoo artistry as a trade in numerous American cities and the emergence of several well-known artists

(quoting *Body Art: Tattoos and Piercings*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 21, 2008), *available at* http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Anderson_CDC.pdf)).

104. State v. White, 348 S.C. 532, 541-42 (2002) (Waller, J., dissenting) (quoting Levins, *supra* note 9).

105. Braverman, *supra* note 14.

106. Levins, *supra* note 9.

107. *See* Opening Brief of Appellant, *supra* note 26, at 5-6 ("The 'Iceman,' dating to 3300 B.C., and discovered in 1991 by tourists in the Italian Alps, has markings on his frozen and mummified remains that appear to be tattoos. Tattoos found in Egyptian and Nubian mummies date from about 2,000 B.C. Historical accounts of the Greeks, ancient Germans, Gauls, Thracians and ancient Britons reflect the use of tattoos . . . .").

108. *Tattooing: Earliest Examples*, AUSTRALIAN MUSEUM, http://Australian museum.net.au/Tattooing-Earliest-examples (last updated Oct. 26, 2010).

109. *Id.*; *see* Opening Brief of Appellant, *supra* note 26, at 6 ("The darkest aspect of tattoo history can be traced from Roman times, when slaves were tattooed to show their status and owner, to the use of tattooed numbers by the Nazis in the slave labor and death camps of the Second World War.")

110. *See* Opening Brief of Appellant, *supra* note 26, at 6.

111. Strocker, *supra* note 96, at 185.

in the field.[112] Widespread acceptance of tattooing as an art form led to numerous advances in the tattoo industry, including the invention of the electric tattoo machine.[113] But, public approval of tattooing was ephemeral, as "[c]onservative Americans began to perceive tattoos as immoral [and] vile," and the wake of World War I gave rise to conformity as a widely-shared societal value.[114]

After a hepatitis outbreak in New York in the 1960s—attributed to an unsanitary tattoo artist on Coney Island—many jurisdictions banned tattooing altogether.[115] Most states, however, gradually lifted those bans as the number of reported hepatitis cases continued to decrease substantially over the years, primarily due to the development of safe tattooing methods and the efficacy of the hepatitis vaccination.[116] The perception of tattooing changed drastically between the 1960s and 1980s, as the tattoo metamorphosed from a symbol of counterculture and anti-government expression to a legitimate art form in mainstream society.[117] Artists began using sophisticated tattooing techniques and designs, as well as enhanced hygienic standards.[118]

In 1985, the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) implemented guidelines for tattoo artists and other personal service workers who "come into contact with bloodborne pathogens."[119] Under the OSHA guidelines for "occupational exposure to blood and other potentially infectious materials," there are strict rules governing: (1) proper use, storage, and disposal of potentially contaminated needles; (2) routine hand-washing and other decontamination procedures; (3) proper use of protective equipment in the workplace; (4) mandatory availability of hepatitis B vaccinations provided by employers of employees

112. Strocker, *supra* note 96, at 185.

113. *Id.*

114. *Id.* at 185-86.

115. Petition for Writ of Certiorari, *supra* note 4, at 4.

116. *Id.* at 4-5; Stephen Gurr, *Future of tattoo ban in doubt*, AUGUSTA CHRON. (July 12, 2003), http://chronicle.augusta.com/stories/2003/07/12/met_380951.shtml.

117. State v. White, 348 S.C. 532, 541-42 (2002) (Waller, J., dissenting) (quoting Levins, *supra* note 9) ("The cultural status of tattooing has steadily evolved from that of an anti-social activity in the 1960s to that of a trendy fashion statement in the 1990s."); Petition for Writ of Certiorari, *supra* note 4, at 4-5.

118. *See* Strocker, *supra* note 96, at 186-87.

119. Petition for Writ of Certiorari, *supra* note 4, at 4; Frederick, *supra* note 1, at 233.

subject to occupational exposure; and (5) mandatory safety training provided to employees subject to occupational exposure.[120]

All of these technological, hygienic, and artistic advances in the field facilitated the evolution of society's view of tattooing as a safe and valid form of artistic expression.[121] Artistic tattooing is one of the most prevalent and accessible art forms in America—easily characterized as the people's art. Many tattoo artists are graduates of college art programs who seek the "intrinsic appeal of the medium" and strive to liberate themselves from the "limitations, distortions and irrelevance of conventional elitist modes of art production."[122] Yet, the majority of courts faced with First Amendment disputes about artistic tattooing have denied its expressive value and refused to extend protection to tattooists.[123]

3. JURISPRUDENCE DENYING PROTECTION TO TATTOO ARTISTS

Regarding the issue of whether tattooing is protected by the First Amendment, courts have rendered inconsistent opinions primarily due to application of the *Spence* test, an improper mode of analysis within the scope of artistic expression and other forms of purely expressive conduct.[124] Generally, those courts dismembered the creative process of tattooing from its product, finding that, even though the display of a tattoo may be sufficiently communicative, the process of creating a tattoo is not.[125]

a. 1980: *Yurkew v. Sinclair*

In 1980, the United States District Court for the District Minnesota upheld a local government agency's decision to

120. 29 C.F.R. § 1910.1030 (2012).

121. *See* Yurkew v. Sinclair, 495 F. Supp. 1248, 1252 (D. Minn. 1980) ("[T]attooing is a safe procedure if performed under appropriate sterilized conditions.").

122. Strocker, *supra* note 96, at 187 (quoting Arnold Rubin, *The Tattoo Renaissance*, *in* MARKS OF CIVILIZATION 233, 235 (Arnold Rubin ed., Regents of the Univ. of Cal. 1988)).

123. *See* sources cited *supra* note 15.

124. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995); *see also* Frederick, *supra* note 1, at 238.

125. *See, e.g.*, Yurkew v. Sinclair, 495 F. Supp. 1248, 1253-54 (D. Minn. 1980); State v. White, 348 S.C. 532, 538 (2002).

prohibit the plaintiff, a tattoo artist, from renting a booth at a state fair.[126] The court concluded that the process of injecting ink into skin was "undeniably conduct."[127] Consequently, and adhering to the *Spence* test, the court distinguished the means of creating a tattoo from the tattoo itself and found the process of tattooing was "not sufficiently communicative" to warrant First Amendment protection.[128] In its discussion, the court acknowledged the plaintiff's adherence to the safe and reliable autoclave method of sterilization and recognized that "tattooing is a safe procedure if performed under appropriate sterilized conditions."[129] Still, the court refused to analyze tattooing for its artistic value and instead settled that deciding what constitutes art is an inherently subjective determination beyond the purview of the courts.[130] Specifically, the court concluded "courts are ill equipped to determine such illusory and imponderable questions, and . . . the issue of whether certain conduct comes within the protection of the First Amendment should not invariably depend on whether the final product of the conduct can by some stretch of the imagination be characterized as art . . . ."[131] Since *Yurkew*, the majority of courts faced with a First Amendment analysis of tattooing have applied the same analysis to reach a similar conclusion.[132]

b. 2000s: *State v. White* and *Hold Fast Tattoo v. City of North Chicago*

Over twenty years after *Yurkew* was decided, the Supreme Court of South Carolina faced a challenge to the constitutionality of a state law criminalizing the act of tattooing by anyone other than licensed physicians specifically for reconstructive or medical purposes.[133] The court followed *Yurkew*, separating the process of creating a tattoo from the product and applying the *Spence* test to the process alone.[134] Consequently, the court concluded the

126. Yurkew v. Sinclair, 495 F. Supp. 1248, 1255-56 (D. Minn. 1980).

127. *Id.* at 1253.

128. *Id.*

129. *Id.* at 1252.

130. *Id.* at 1253-54.

131. Yurkew v. Sinclair, 495 F. Supp. 1248, 1254 (D. Minn. 1980).

132. *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997); Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656, 660 & n.1 (N.D. Ill. 2008); State v. White, 348 S.C. 532, 537-38 (2002).

133. *White*, 348 S.C. at 534-35.

134. *See id.* at 537-38.

process was "not sufficiently communicative" to warrant First Amendment protection.[135] The dissent, however, argued the majority opinion relied on several cases "decided in an era when tattooing was regarded as something of an anti-social sentiment."[136] Rejecting antiquated views of tattooing and embracing the modern American perception, the dissent concluded that the process of creating a tattoo is "a form of art which is entitled to the same protection as any other form of art."[137]

The real motive for the complete ban on tattooing in South Carolina was well documented. At trial, a witness who served as a lobbyist for eight years to repeal the tattooing prohibition testified that "ninety-nine percent of the legislative opposition to his efforts was based on religious and biblical implications" and the general notion that tattooing was "immoral."[138] The lobbyist further testified that he was forced to flee the state because his efforts resulted in violent attacks on his family.[139] Between 1994 and 2001, one state senator's continued efforts to lift the tattooing ban were quashed by the hand of former state Senator Jake Knotts—known for speaking out against the tattooing industry on radio talk shows, claiming "tattoo parlors are bad for South Carolina's image, unclean and even ungodly."[140] Knotts had also claimed the Bible expressly forbids tattooing and marking the human body in general.[141] Eventually, South Carolina repealed its strict prohibition on tattooing in 2004.[142]

135. State v. White, 348 S.C. 532, 538 (2002).

136. *Id.* at 541 (Waller, J., dissenting).

137. *Id.*

138. Frederick, *supra* note 1, at 244-45 (citing Record on Appeal at 53-54, State v. White, 348 S.C. 532 (2002) (No. 25421)).

139. *Id.* at 245.

140. *Id.* at 245.

141. *Id.* at 245-46 ("Knotts wants 'to keep the state free of seedy tattoo parlors,' saying that he will 'continue to fight unless he was brought a letter from the President of the South Carolina Southern Baptist Convention, [and] saying he'll oppose it because it [is] his belief that it is against God's will. The Washington Times reported that the opponents to the bill are motivated by the sentiment that tattoos are sinful and un-Christian. Knotts says, 'If the Lord wanted you to have a tattoo, He would have put it on you,' and that he is 'trying to make sure this state does not have a tattoo parlor on every corner.' He says that there is a biblical mandate to avoid marking the body, and that '[i]t's spelled out very vividly in the Bible that tattooing is taboo . . . I am opposed to it, and it ain't gonna pass. I'll do whatever I got to do to stop it." (alterations in original) (footnotes omitted)).

142. Cherep, *supra* note 5, at 346.

Another tattooing case arose in 2008, *Hold Fast Tattoo v. City of North Chicago*, where the United States District Court for the Northern District of Illinois analyzed the act of creating a tattoo without discussing the expressive qualities of a displayed tattoo.[143] The court found the act of tattooing failed the first prong of the *Spence* test because "the act itself is not intended to convey a particularized message."[144] The court reasoned: "The act of tattooing is one step removed from actual expressive conduct," comparing the service provided by a tattoo artist to that of a sound truck which enables customers to express their own messages without any creative input from the service provider itself.[145] To elaborate, the court found:

> The very nature of the tattoo artist is to custom-tailor a different or unique message for each customer to wear on the skin. The act of tattooing is one step removed from actual expressive conduct, which is similar to a sound truck, which enables each customer to express a particularized message, but the sound truck vehicle itself is not expressive . . . Similarly, the tattoo artist's daily work may be used by customers to convey a message, but it is not protected by the First Amendment in and of itself. Because the act of tattooing fails the first prong of the test for First Amendment protection, there is no 'message' to be understood by viewers and tattooing must also fail the second prong. Therefore, this court agrees with other courts that have held the act of tattooing is not an act protected by the First Amendment.[146]

Both *State v. White* and *Hold Fast Tattoo v. City of North Chicago* show—although *Yurkew* was decided over thirty years ago, prior to significant changes in the tattooing industry and the exposure of the inadequacy of *Spence* within the realm of artistic expression—courts have continued to mechanically apply *Spence* to find the process of tattooing constitutes non-expressive conduct. Until the Ninth Circuit decided *Anderson v. City of Hermosa Beach* in 2010, courts neglected to consider whether fine-art tattooing is purely expressive.[147]

143. Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656 (N.D. Ill. 2008).

144. *Id.* at 559-60.

145. *Id.* at 660.

146. *Id.*

147. *See, e.g.*, Yurkew v. Sinclair, 495 F. Supp. 1248, 1253-54 (D. Minn. 1980);

4. 2010: THE NINTH CIRCUIT RECOGNIZES TATTOOING AS AN ART FORM

In 2010, for the first time in jurisprudential history, the United States Court of Appeals for the Ninth Circuit classified tattooing as "purely expressive activity," indistinguishable from other forms of artistic expression entitled to full protection under the First Amendment.[148] Faced with a challenge to a zoning ordinance prohibiting the establishment of tattoo parlors in the City of Hermosa Beach, the Ninth Circuit held: (1) tattooing is a fully protected form of artistic expression and (2) the challenged ordinance—imposing a total ban on tattooing businesses—was "not a reasonable time, place, or manner restriction" on expression.[149]

Recognizing there are physical components involved in all forms of communication, the court broadened the analysis of pure expression to include fine-art tattooing.[150] The court reasoned that the sole distinction between fine art tattooing and other forms of visual art was the chosen medium, a distinction with no impact on the level of protection thereby accorded.[151] Instead, the court found the health implications underlying the tattooing process spoke only to whether there existed adequate justification for governmental regulation of the expression.[152] The court concluded the following testimony from Johnny Anderson, regarding the artistic value of his tattoo designs, clearly exhibited his entitlement to First Amendment protection as an artist:

> The tattoo designs that are applied by me are individual and unique creative works of visual art, designed by me in

Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997); State v. White, 348 S.C. 532, 538-39 (2002).

148. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1059 (9th Cir. 2010).

149. *Id.* at 1068 (quotation marks omitted).

150. *Id.* at 1060-62.

151. *Id.* at 1061 ("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." (emphasis omitted)).

152. *Id.*

> collaboration with the person who is to receive the tattoo. The precise design to be used is decided upon after discussion with the client and review of a draft of the design. The choices made by both me and by the recipient involve consideration of color, light, shape, size, placement on the body, literal meaning, symbolic meaning, historical allusion, religious import, and emotional content. I believe my designs are enormously varied and complex, and include realistic depictions of people, animals and objects, stylized depictions of the same things, religious images, fictional images, and geometric shapes and patterns . . . . Sometimes, several kinds of images are combined into a single tattoo or series of tattoos . . . . I have studied the history of tattooing, and I draw significantly on traditional Americana tattoo designs and on Japanese tattoo motifs in creating my images, while all the while trying to add my own creative input to make the designs my own.[153]

Dispelling the notion that collaborative works were entitled to a lesser degree of protection than works produced by one individual, the court likened the collaboration between Anderson and his customers to that of a journalist and editor.[154] Although a journalist writes articles based on specifically assigned topics and his work is subject to the revisions of an editor, the collective aspects of the writing process do not undermine the full shield of the First Amendment embracing the entire field of journalism—including both the writing process and the written product.[155] Perhaps more analogous, the court cited to a second example of protected collaborative works, "painting[s] by commission, such as Michelangelo's painting of the Sistine Chapel."[156] The court determined that collaborative works involve the rights of multiple speakers, which actually bolsters, rather than weakens, a First Amendment claim.[157] Specifically, the court found: "As with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity."[158]

Rejecting application of the *Spence* test, the court found the

153. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1057, 1062 (9th Cir. 2010).

154. *Id.* at 1062.

155. *See id.*

156. *Id.*

157. *See id.*

158. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1062 (9th Cir. 2010).

process of creating a tattoo was similar to writing and painting—undeniably physical processes that serve as the inextricably linked means of rendering pure expression.[159] The court reasoned the means of creating a form of pure expression is a constituent part of the expression itself, rather than conduct with independent symbolic meaning that is separable from the produced expression.[160] Moreover, the Ninth Circuit emphasized that the United States Supreme Court has never separated the means of creating pure expression—such as writing or painting—from the end product of the expression itself, as doing so would negate the purpose of the First Amendment.[161]

To support this statement, the court cited to *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, in which case the Supreme Court of the United States—refusing to separate the physical process of putting ink onto paper from the end product of the newspaper itself—struck down a special use tax levied on paper and ink used for newspaper publication.[162] Applying similar reasoning, the Ninth Circuit found as the activity of brushing paint onto canvas was inseparable and thus equally protected by the First Amendment as the final product of the painting itself, the process of injecting ink into skin was "inextricably intertwined" with the final product of the tattoo.[163] Supporting this conclusion, the court reasoned:

> Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation. Thus, we have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type. The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment

159. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061-62 (9th Cir. 2010).

160. *Id.*

161. *Id.*

162. *Id.*; *see* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582 (1983).

163. *Anderson*, 621 F.3d at 1062.

protection.[164]

Elaborating further on this point, the court noted how a "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."[165]

Recognizing tattoo art—the process, business, and product—as a form of pure expression, the Ninth Circuit analyzed the challenged zoning ordinance under the reasonable time, place, or manner standard applied to regulations on pure expression.[166] To survive under this mode of analysis, a regulation on expression must: (1) be "justified without reference to the content of the regulated [expression];" (2) be "narrowly tailored to serve a significant governmental interest;" and (3) "leave[] open ample alternative channels for communication."[167] The court found the ordinance—banning *all* tattoo businesses, not just those which conveyed a particular message—was "justified without reference to the content of the regulated expression," due to the City's health and safety concerns.[168] But, the court found the second and third requirements unsatisfied because: (1) the ordinance was "substantially broader than necessary to achieve the City's significant health and safety interests" and (2) "it entirely foreclose[d] a unique and important method of expression."[169] Pointing to the uniquely permanent and intimate nature of the medium of tattoo art, the court found a tattoo artist's ability to create the same designs on canvas does not constitute ample alternative channels for the artist's expression.[170]

164. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061-62 (9th Cir. 2010) (citations omitted).

165. *Id.* at 1062.

166. *Id.* at 1063-64.

167. *Id.* at 1064 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

168. *Id.* at 1064 (quoting *Clark*, 468 U.S. at 293).

169. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1068 (9th Cir. 2010).

170. *Id.* at 1066-67 ("Most importantly, a permanent tattoo often carries a message quite distinct from displaying the same words or picture through some other medium, and provide[s] information about the identity of the 'speaker.' A tattoo suggests that the bearer of the tattoo is highly committed to the message he is displaying: by permanently engrafting a phrase or image onto his skin, the bearer of the tattoo suggests that the phrase or image is so important to him that he has chosen to display the phrase or image every day for the remainder of his life. The relative permanence of the tattoo can also make a statement of autonomy and self-fashioning-of ownership over the flesh and a defen[se of] the embodied self against external impositions." (alteration in original) (citations omitted) (internal quotation

III. PROPOSING A PROPER BALANCE BETWEEN PROTECTING ARTISTIC EXPRESSION AND ENABLING STATES AND MUNICIPALITIES TO PROTECT THE HEALTH OF THE CITIZENRY

The Supreme Court of the United States should grant certiorari in *Anderson* and find that tattooing is an independent form of artistic expression entitled to protection under the First Amendment. In doing so, the Court would have the opportunity to clarify the extent of protection accorded to artistic expression. As a general rule, art should receive full protection.[171] But, in the broad spectrum of protected art, the Court should carve out an exception whereby potentially dangerous artistic practices, including tattooing, only receive partial protection to allow the states to enact reasonable regulations to promote the important governmental interest in public health. According partial protection to tattooing, and thus subjecting regulations on the tattooing industry to the intermediate scrutiny test set forth in *United States v. O'Brien*, would both allow for reasonable regulations on tattooing and prevent unduly strict regulations imposing a total ban on tattooing, such as the law struck down in *Anderson*.[172]

The following subsections will discuss the importance of striking a proper balance between protecting the artistic expression inherent in tattooing and allowing states and municipalities to enact laws protecting the health of the citizenry. Subsection A will discuss why *Spence* is the improper mode of analysis in the context of artistic expression. Subsection B will then address why the courts should extend protection to tattooing as an artistic medium, rather than to individual artists. Finally, Subsection C will propose a balanced solution to problems with the alternative approaches of extending full protection to tattooing and denying protection to tattooing entirely.

A. *SPENCE* SHOULD NOT BE APPLIED IN FIRST AMENDMENT ANALYSES OF ARTISTIC EXPRESSION

The Supreme Court should clarify the ambiguous dicta from *Hurley* and declare the inapplicability of *Spence* in First

marks omitted)).

171. *See* Kaplan v. California, 413 U.S. 115, 119-20 (1973).

172. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also supra* text accompanying notes 35–38.

Amendment analyses of artistic expression.[173] Because the narrowly articulable message requirement unduly denies protection to "unquestionably shielded" works—such as the splattered paintings of Jackson Pollock, instrumental music of Arnold Schöenberg, and the Jabberwocky verse of Lewis Carroll—*Spence* is the incorrect mode of analysis within the context of artistic expression.[174] In *Anderson*, the Ninth Circuit recognized that an artist need not articulate a precise and understandable message through his or her works of art to deserve First Amendment protection.[175] A fundamental characteristic of art is the artist's inability to precisely convey the expression through words.[176] Indeed, if words sufficed to render the ineffable emotive impact expressed through works of art, there would be no real purpose for the latter.

In the same way instrumental music expresses that which is beyond words, so do the various forms of visual art.[177] If the First Amendment only served to protect art forms that conveyed a specific message, most modern art would not be entitled to protection.[178] Modern artists frequently create works of art without a specific intent to communicate a message to viewers, and a viewer's interpretation of the meaning behind a piece of modern art is inherently subjective.[179] As the Supreme Court aptly stated: "[O]ne man's vulgarity is another's lyric."[180] A work of art perceived as beautiful and rich with meaning by one may be understood as drab and meaningless by another.[181] Therefore, the *Hurley* Court correctly exposed the inadequacy of *Spence* within the realm of artistic expression.[182] Requiring an artist to convey a specific and understandable message through works of

173. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995); *supra* Section II(A)(3).

174. *See Hurley*, 515 U.S. at 569; Frederick, *supra* note 1, at 238; *supra* Section II(A)(3).

175. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060-61 (9th Cir. 2010).

176. *See* Frederick, *supra* note 1, at 238-39.

177. *See Hurley*, 515 U.S. at 569; *Anderson*, 621 F.3d at 1060.

178. *See Hurley*, 515 U.S. at 569.

179. *See Anderson*, 621 F.3d at 1061; Yurkew v. Sinclair, 495 F. Supp. 1248, 1254 (D. Minn. 1980).

180. Cohen v. California, 403 U.S. 15, 25 (1971).

181. *See id.* at 18; Ryan J. Walsh, Comment, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063, 1094-95 (2011).

182. *Hurley*, 515 U.S. at 569; *see supra* Section II(A)(3).

art to receive constitutional protection conflicts with the nature and purpose of artistic expression.[183]

B. THE MEDIUM OF ARTISTIC TATTOOING DESERVES PROTECTION DESPITE THE EXISTENCE OF UNARTISTIC TATTOOISTS

In *Anderson*, the Ninth Circuit properly identified tattooing as a valid art form entitled to constitutional protection.[184] The practice of fine-art tattooing is an independent form of expressive art, which is more akin to writing, painting, and performing instrumental music than to recognized forms of symbolic conduct such as burning a flag or wearing an armband, activities that may be carried out for reasons unrelated to expression.[185] While a sculptor produces art by chiseling into marble or stone and a painter renders pure expression on canvas, a tattoo artist does so on human skin—a more intimate and permanent medium of artistic expression.[186] Debatably, the expressive nature of a tattooist's art exceeds that of a painter, as fine-art tattooing involves a profound connection between an artist and his living canvas, an individual who chooses to serve as the walking display of the artist's expression.[187]

However, considering the vast scope of tattooing in America, the Ninth Circuit incorrectly determined that all tattooists are artists who, based on individual merit, are entitled to the same level of protection.[188] A reasonable solution to this issue lies in the Supreme Court's willingness to extend protection to tattooing as an independent medium of artistic expression, instead of protecting individual artists on a case-by-case basis. Although the Court was willing to distinguish between protected expressive dance and unprotected recreational dance in *City of Dallas v. Stanglin*,[189] the Court need not distinguish between expressive tattooing and non-expressive tattooing to protect the artistic medium itself. Moreover, the Court's decision to afford protection

183. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060-61 (9th Cir. 2010).

184. *See Anderson*, 621 F.3d at 1060.

185. *Id.* at 1062; Walsh, *supra* note 181, at 1090-93 (discussing fine-art tattooing).

186. *Anderson*, 621 F.3d at 1061-62; Strocker, *supra* note 96, at 193-94, 206.

187. Strocker, *supra* note 96, at 190; *see Anderson*, 621 F.3d at 1061-62.

188. *See Anderson*, 621 F.3d at 1062.

189. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

to nude dancing—based on its debatable artistic value—should compel the Court to also grant protection to artistic tattooing.[190] Arguably, the latter holds greater artistic value than nude dancing and should receive a higher level of protection.

Despite a wide spectrum of tattooing—ranging from uncreative, stenciled tattoos, such as the infamous "I love mom" tattoo, to elaborate, freehand designs—the existence of unartistic tattooing does not justify denying protection to genuine tattoo art. Indeed, the purpose of the First Amendment is better served through over-inclusive, rather than under-inclusive, protection. In *Anderson*, the facts supporting the Ninth Circuit's decision to extend protection to Johnny Anderson as an artist served as clear evidence of Anderson's individual artistic ability.[191] In his testimony, Anderson referred to his tattoo designs as "individual and unique creative works of visual art designed by [himself] in collaboration with [his customers]."[192] Anderson further described the numerous creative aspects considered in his tattoo designs, the same considerations essential to painting and other traditional art forms—"color, light, shape, size, placement on the body, literal meaning, symbolic meaning, historical allusion, religious import, and emotional content."[193]

Through detailed testimony on the artistic quality of his work, Anderson successfully proved his status as an artist engaged in protected expression akin to the work of a commissioned painter—an artist who collaborates with clients to produce a final product, yet exercises a wide latitude of creative control throughout the artistic process.[194] The Ninth Circuit made this connection, comparing the collaborative tattooing process to Michelangelo's painting of the Sistine Chapel.[195] The court's determination—that collaboration in a creative process does not diminish the protections of the First Amendment—is supported by the Supreme Court's conclusion in *Hurley* that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices . . . ."[196]

190. *See* California v. LaRue, 409 U.S. 109, 118 (1972); *see also* Yurkew v. Sinclair, 495 F. Supp. 1248, 1255 (D. Minn. 1980).

191. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1057 (9th Cir. 2010).

192. *Id.*

193. *Id.*

194. *Id.* at 1057, 1062.

195. *Id.* at 1062.

196. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569-

While Anderson's artistic talent was clearly established, less convincing cases of tattooists claiming protection under the First Amendment give rise to the potential for arbitrary line-drawing. For example, consider a tattooist with no artistic background, who has never created an original design, and who only makes simple, stenciled tattoos on his customers without variation or creative influence. While it may be tempting to deny protection to that tattooist, consider next a tattooist with multiple advanced degrees in the visual arts and a large collection of original works, but who, unfortunately, never receives requests to tattoo customers with any of his original designs. As a solution to this problem, the courts need not undertake this type of factual analysis on an individualized basis to adequately protect artistic mediums. By extending protection to the medium, rather than specific artists, courts can safely avoid the impractical task of deciding which tattooists are true artists and which are not.

C. ADDRESSING THE PROBLEM CREATED BY EXTENDING FULL PROTECTION TO POTENTIALLY HAZARDOUS ART FORMS

In *Anderson*, the Ninth Circuit erroneously deemed the issue of whether tattooing is entitled to protection as separate and distinct from the issue of whether the health hazards of tattooing justify regulating the industry.[197] To the contrary, those legal issues are interwoven and cannot be neatly separated because of the impact the level of protection accorded to tattooing has on the level of scrutiny applied to such regulations.[198] Cases addressing the constitutionality of laws prohibiting the use of fighting words exhibit this notion of indivisibility.[199]

Because of the potentially harmful effect of fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—the Court has refused to extend protection to fighting words as a particular mode of expression.[200] Consequently, courts have upheld laws prohibiting

70 (1995).

197. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010).

198. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-73 (1942) (discussing the types of speech, such as fighting or lewd words, not afforded the same level of First Amendment protection as other types of speech); *see also* Strocker, *supra* note 96, at 203-04 (explaining how tattooing regulations will be affected by examining them under a strict scrutiny test).

199. *See, e.g.*, *Chaplinsky*, 315 U.S. at 572.

200. *Id.* at 571-72.

communication that, absent the potential for harm to human beings, would otherwise be classified as fully protected pure expression.[201] However, a law prohibiting the communication of fighting words must be content-neutral—that is, the regulation must even-handedly prohibit fighting words entirely, rather than fighting words with a specific content, such as racial or sexual discrimination.[202] Similarly, tattooing should receive a lesser degree of protection than other forms of artistic expression because of the health implications involved, subject to the requirement that tattooing regulations must be content-neutral and even-handedly impact tattooists for legitimate reasons unrelated to suppressing the expression of particular content.[203] States and municipalities frequently satisfy this standard through licensing and safety regulations.

Reasonable concerns arise over whether extending protection to tattooists may confer a precedential basis upon which other, more invasive forms of body modification may claim entitlement to constitutional protection.[204] From a policy standpoint, classifying artistic tattooing and other forms of invasive body art as purely expressive would subject reasonable regulations on potentially dangerous artistic procedures to a strict level of scrutiny, and as a result, hinder the states from enacting laws to protect the health of the citizenry. Comprehensive and detailed OSHA guidelines regarding occupational exposure to blood-borne pathogens exhibit the important state interest in effective enforcement of strict safety and hygienic standards in tattoo businesses.[205] For this reason, it would be prudent for the Court to establish a general rule to extend a lesser degree of First

201. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 573-74 (1942). In *Chaplinsky*, the Court upheld a New Hampshire statute providing that:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. at 569.

202. R.A.V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

203. *See Ward*, 491 U.S. at 791 ("The principal inquiry in determining content neutrality, . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" (citations omitted)).

204. *See supra* note 18.

205. *See* 29 C.F.R. § 1910.1030 (2012).

Amendment protection to potentially harmful artistic practices, which would include tattooing as well as other forms of body modification. For example, in 1994, a New Zealand man unknowingly started a trend in body art by implanting a bracelet underneath a woman's skin.[206] Thereafter, subdermal implants—usually Teflon or silicone-based implants surgically imbedded underneath human skin—became a rising trend.[207]

If the Court was to extend full protection to tattooing, theoretically entitling subdermal implants and other forms of invasive body art to the same degree of protection, regulations on those procedures would also be subject to the most burdensome standard of review. While safety standards in the tattooing industry have developed and improved substantially over several decades, this is not so with newer, untested body modification procedures.[208] For example, known risks involved with subdermal implants include "infection, . . . tissue resorption, contamination of the implant, nerve and muscle pressure, migration, and shifting of the implant."[209] Even though infection is also a possible risk of tattooing, the most drastic potential consequence unique to subdermal implants is the risk of tissue resorption—"constant and subtle rubbing," caused by the absence of a fuse connecting the implant, leading to the inevitable erosion of tissue located underneath or near the implant.[210] Particularly because damage can be sustained for decades before symptoms actually materialize, the states must be able to enact reasonable regulations on subdermal implant procedures, as well as any other hazardous trends in invasive body alteration. The Court should, therefore, avoid the potential consequences of extending excessive protection to tattoo art by according partial protection and declaring regulations on tattooing and future forms of body modification subject to intermediate scrutiny.

IV. CONCLUSION

Tattooing is undeniably an art form entitled to First Amendment protection as a unique and independent mode of expression. The Court's refusal to extend any degree of

206. *Horn Implants*, MED. BAG (Jan. 21, 2013), http://www.themedicalbag.com/bodymodstory/horn-implants.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

protection to tattooing would subject tattooing regulations to mere rational basis review and enable the states to foreclose entire mediums of artistic expression through legislation—as exhibited by South Carolina's ban. On the opposite end of the spectrum, however, extending full protection to tattooing would inevitably lead to the invalidation of even the most reasonable and necessary health regulations. Under strict scrutiny—reputed as strict in theory, but fatal in fact—regulations on the tattooing industry would seldom be upheld. A viable solution to this problem lies somewhere in between the two aforementioned alternatives. To both protect artistic expression and allow for reasonable health regulations, the Court should carve out an exception whereby potentially dangerous artistic practices receive only partial protection under the First Amendment, akin to the level of protection accorded to traditional forms of symbolic conduct.

Claire A. Noonan