# THE HUMAN BODY: THE CANVAS FOR TATTOOS; THE PUBLIC WORKPLACE: AN EXHIBIT FOR A NEW FORM OF ART?


## ABSTRACT

*For thousands of years, people throughout the world have been subjects of the art of tattooing. This unique form of art, which originated in the ancient Egyptian, Greek, and Roman cultures, is more popular today than ever before. The necessity for and prevalence of tattoos can be attributed to a tattoo's inherent ability not only to depict the message or image desired but to simultaneously communicate the close personal regard in which the tattooed person holds that message or image. In most cases, a person who desires a tattoo will not be satisfied with owning a refrigerator magnet, bumper sticker, or t-shirt in lieu of the tattoo. This is because, by their nature, tattoos are exceptionally personal; they are permanently drawn onto a person's skin, thus becoming a part of the person and communicating something about who that person is.*

*The Supreme Court has stated that pictures and drawings are entitled to First Amendment protection, and there seems to be no reason to offer tattoos fewer protections than these analogous forms of art. Tattoos are essentially paintings or drawings applied to the human skin rather than an inanimate object, but they nonetheless stand alone as pieces of art. The fact that tattoos are worn and displayed by a person when the person so chooses does not mean that tattoos only speak when the tattooed individual is displaying the tattoo for the purpose of conveying a message. Tattoos, standing alone, speak when their meanings are interpreted by each individual who views them and through the insight they provide about who the tattoo owner is as a person. Thus, this Note asserts that tattoos are a form of art that should be classified as speech (as opposed to expressive conduct) and entitled to the protections of the First Amendment.*

*While tattoos are an exceptional artistic medium for both speech and self-identification, that does not mean their display is necessarily appropriate at all times and in all places. Workplaces have a long history of using personal-appearance policies to promote a desired public image, maintain professionalism, or appeal to customer preference. This Note asserts that even if tattoos were declared speech entitled to the full protections of the First Amendment, public employers should still have the ability to enforce personal-appearance policies. Blanket policies requiring all tattoos to be covered serve the legitimate purposes just explained and only provide one place in which people may not freely display their tattoos—the workplace. As for individualized requests for a particular tattoo to be covered when it is determined to be inherently offensive, the privacy interest of other employees and the employer's need to prevent a hostile work environment*

*justify the employer's regulation of normally protected speech. Thus, while tattoos deserve to receive the protections for speech under the First Amendment, government employees should not gain the ability to say whatever they please via their skin when they would not even be allowed to say it with their mouths.*

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## I. INTRODUCTION

Tattoos have become an increasingly common part of our society.[1] Many people have tattoos or, at the very least, know someone who does. In fact, 36 percent of young adults in the United States have at least one tattoo, and the annual amount of spending on tattoos in the United States is $1,650,500,000.[2] The words or images that make up tattoos are as diverse and complex as the people they are imprinted upon. Likewise, the purpose behind and the message intended to be communicated by each tattoo varies depending on the person and the tattoo itself. A tattoo may commemorate the loss of a loved one, in which case there is deep personal meaning attached to the tattoo, and how the tattoo is received by others is less of a concern. In other cases, a tattoo may represent the strong moral, religious, or political views of the person, and it may serve as both vindication of the person's beliefs and a way to communicate a desired message to the public. The

1. Kelly-Ann Weimar, Note, *A Picture Is Worth a Thousand Words: Tattoos and Tattooing Under the First Amendment*, 7 ARIZ. SUMMIT L. REV. 719, 747 (2014).

2. *Tattoo Statistics*, STAT. BRAIN, http://www.statisticbrain.com/tattoo-statistics (last visited Jan. 12, 2017).

choice to get a tattoo is a personal one. When and where a person displays a tattoo is usually also a personal choice, subject only to the private judgments, criticisms, or opinions of those who view it. However, there has been one place in which tattoos have routinely been subject to censorship: the workplace.[3]

At first glance, this appears to be a relatively uncontroversial practice. There are countless jobs that require a "professional" appearance or employers who try to maintain and exude a specific image.[4] Requirements in the workplace for employees to dress, or not dress, in certain ways have been common in modern U.S. society, and many issues surrounding items of "dress" such as women's clothing, facial hair, uniforms, and hairstyles have been previously settled.[5] Recently, however, there has been an increasing amount of resistance to dress codes requiring employees to cover tattoos.[6] This resistance has given rise to an argument with much more bite than the argument for the right to freedom of expression: tattoos as speech or expressive conduct protected by the First Amendment.[7] This argument has given new ammunition to those who would like to more freely display their tattoos, especially in the public workplace.[8] It has also left questions of how exactly tattoos should be classified and how to balance a public employer's desire to enforce dress codes with an employee's desire to have freedom of this particular form of speech.[9] In addition, in jurisdictions where tattoos have been considered a form of protected speech under the First Amendment,[10] there are also questions about how tattoos which are inherently offensive to other employees should be handled.[11]

This Note begins in Part II and Part III by reviewing how the U.S. Supreme Court has defined speech, specifically the distinction between "pure speech" and expressive conduct and what types of speech the Court

3. *See infra* Parts VII, VIII.

4. *See* Weimar, *supra* note 1, at 747.

5. *Id.*

6. *Id.*

7. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010); Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

8. *See, e.g.*, Riggs v. City of Fort Worth, 229 F. Supp. 2d 572, 580 (N.D. Tex. 2002) (discussing plaintiff's claim that his tattoos should be considered expressive speech).

9. *See* Alicen Pittman, Note, *Tattoos and Tattooing: Now Fully Protected as "Speech" Under the First Amendment*, 38 W. ST. U. L. REV. 193, 201 (2011).

10. *See Anderson*, 621 F.3d at 1061.

11. *See infra* Part VII.

has determined are, or are not, entitled to the full protections of the First Amendment.[12] In Part IV, this Note addresses the current circuit split that is occurring in the United States about whether tattoos should qualify as speech fully protected by the First Amendment.[13] Part V discusses the role of tattoos in society throughout history and the purposes that cause people to get them.[14] In Part VI, this Note explains the assertion that tattoos constitute "pure speech" entitled to full First Amendment protection.[15] Finally, Part VII and Part VIII discuss tattoos and personal-appearance policies in the workplace, followed by an explanation of why tattoos having full First Amendment protections should not affect a public employer's ability to implement policies requiring tattoos to be covered.[16]

## II. PURE SPEECH VERSUS EXPRESSIVE CONDUCT

The First Amendment of the U.S. Constitution explicitly protects the freedom of speech and the freedom of the press.[17] This protection thus clearly extends to both oral and written speech, which are frequently referred to as "pure speech."[18] As defined, "[P]ure speech is the term used for ideas expressed verbally or through written words. In order to achieve the status of pure speech, the speech must be 'relatively pure[,]' consisting mainly of verbal and written utterances as opposed to conduct."[19] For example, an article in a newspaper would be considered pure speech because it consists of words that convey its message without the need for any conduct.[20] Picketing, on the other hand, would not be considered pure speech because it is conduct that can communicate a message without any spoken or written words.[21]

The protections of the First Amendment, however, do not stop at pure

12. *See infra* Parts II, III.
13. *See infra* Part IV.
14. *See infra* Part V.
15. *See infra* Part VI.
16. *See infra* Parts VII, VIII.
17. U.S. CONST. amend. I.
18. *See id.*; Carly Strocker, Note, *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, 181 (2011).
19. Strocker, *supra* note 18, at 181 (citation omitted).
20. *Id.*
21. *Id.*

speech.[22] The Supreme Court has stated, "The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."[23] However, the Court also made clear that there must be a way to determine what conduct can constitute speech because potentially limitless varieties of conduct can be considered speech if the only requirement is that the person engaged in the conduct intends to express an idea.[24] The Court noted, "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [it is] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[25]

The Supreme Court has declined to extend the full protections of the First Amendment to expressive conduct.[26] However, "[t]his is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional."[27] If the object of the regulation is to suppress communication, it will not stand, but "where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons," the regulation has been allowed.[28] Thus, when a form of expression that does not constitute oral or written speech in the formal sense is hindered, the First Amendment analysis to be applied is the inquiry into whether the purpose of the law or regulation is to suppress communication.[29] If the purpose is to suppress communication, then there must be a substantial justification for the prohibition of speech.[30] If the purpose is not to suppress communication, then the First Amendment cannot provide protection to the conduct in question.[31] Essentially, expressive conduct concerns both speech and nonspeech elements. The government has more freedom in restricting expressive conduct, as it may have an interest in regulating or prohibiting the conduct itself in order to

22. Texas v. Johnson, 491 U.S. 397, 404 (1989).
23. *Id.*
24. *Id.* (citations omitted).
25. *Id.* (citation omitted).
26. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring).
27. *Id.* at 577 (citations omitted).
28. *Id.*
29. *Id.* at 578 (citations omitted).
30. *Id.* (citations omitted).
31. *Id.* at 577 (citations omitted).

protect the public or address certain "evils."[32] In these cases, the conduct is the source of the problem, not the communicative element or its message; therefore, the higher protections of the First Amendment are not involved.[33]

Amidst the many conversations defining and comparing pure speech and expressive conduct, different forms of artistic expression have frequently been the source of the speech in question.[34] In these cases, the U.S. Supreme Court has provided First Amendment protection for artistic means of communication as well.[35] The Court has held that pictures, films, paintings, drawings, and engravings are all entitled to First Amendment protection.[36] When discussing the famous paintings of Jackson Pollock,[37] the Court describes the art as "unquestionably shielded" by the First Amendment despite the lack of any one clearly articulated message to those who view the paintings.[38] While the Supreme Court has not yet heard a case specifically involving the First Amendment and visual art, it has held that other forms of expression are protected, and the examples and analogies it has used seem to support an inclusion of visual art amongst the other established types of protected expression.[39]

## III. LESS PROTECTED SPEECH UNDER THE FIRST AMENDMENT

Issues with tattoos in the workplace often arise when coworkers or supervisors find another employee's tattoo offensive. Before discussing the topic of offensive tattoos specifically, it will be helpful to review where the Supreme Court stands on the protection provided by the First Amendment to offensive or threatening speech. A famous case in this area is *Cohen v. California*, which concerned a man, Cohen, who was arrested after he was seen in a courthouse wearing a jacket that said, "Fuck the Draft."[40] The

32. *See id.* at 570–71 (majority opinion).

33. *See id.* at 571.

34. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting) (citation omitted).

35. *Id.* (Souter, J., dissenting).

36. Kaplan v. California, 413 U.S. 115, 119–20 (1973).

37. *Jackson Pollock and His Paintings*, JACKSON-POLLOCK.ORG, http://www.jackson-pollock.org/ (last visited Jan. 12, 2017). Jackson Pollock was a famous American abstract expressionist painter who was most well-known for his "drip paintings." *Id.*

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

39. Strocker, *supra* note 18, at 187–88.

40. Cohen v. California, 403 U.S. 15, 16 (1971).

Supreme Court determined that Cohen could not be punished for the underlying content of the message the words on the jacket communicated.[41] The Court determined, as long as there was no evidence to show that Cohen intended to cause disobedience or disturbance to the draft, he could not, under the First Amendment, be punished for expressing his opposition to the draft.[42] Cohen's speech could be restricted "only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys."[43]

Thus, the Court turned its attention to the nature of the words on Cohen's jacket and the manner in which he delivered them.[44] First, the Court noted that the ban of "the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction[,]" should not be allowed.[45] It was determined that while the word *fuck* is usually used in a provocative fashion, in this particular situation where the word was printed on a jacket, it was not directed at any particular person.[46] The Court stated, "No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[47] State courts have followed this rule, even when dealing with arguably more offensive speech; this occurred in *Village of Skokie v. National Socialist Party of America* when the Illinois Supreme Court was asked to decide whether the public display of swastikas was protected by the First Amendment.[48] The court acknowledged that the swastika is an admittedly offensive symbol that creates strong feelings and reactions from many who view it but found that the use did not constitute fighting words because it was "symbolic political speech intended to convey to the public the beliefs of those who display it."[49]

In *Cohen*, the Court also noted this was not a case in which Cohen's

41. *Id.* at 18.
42. *Id.* (citing Yates v. United States, 354 U.S. 298 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978)).
43. *Id.* at 19.
44. *Id.* at 19–21.
45. *Id.* at 20 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).
46. *Id.*
47. *Id.*
48. Village of Skokie v. Nat'l Socialist Party of Am. 373 N.E.2d 21, 23 (Ill. 1978).
49. *Id.* at 24.

arrest was warranted because his arrest prevented him from intentionally provoking a given group to a hostile reaction; there was no evidence that anyone who saw the jacket was violently aroused or that Cohen intended that result.[50] Despite the lack of a hostile or violent reaction from the people present in the courthouse, the prosecution next asserted that the offensive language on the jacket was "thrust" upon the unwilling viewers who encountered Cohen.[51] The Court stated, "[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."[52] The Supreme Court has previously held the government can act to prohibit the intrusion of unwelcome views or ideas in a person's private home, including ideas that would be allowed to be expressed or discussed in public settings.[53] In public locations, however, the Court has "consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'"[54] Thus, the Court concluded, "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[55] In determining whether a substantial privacy interest is being invaded, the Court considers whether there is evidence to show the person objecting to the speech or conduct in question is unable to avoid it.[56]

Another landmark U.S. Supreme Court case dealing with a claim for First Amendment protection for speech outside the strictly spoken or written word had its origins in Iowa.[57] In *Tinker v. Des Moines Independent Community School District*, students were punished when they wore black armbands to school in protest of the Vietnam War.[58] The Supreme Court determined that wearing armbands to communicate this sort of message was within the Free Speech Clause of the First Amendment, and it was "closely akin to 'pure speech.'"[59] The Court famously stated, "It can hardly be argued

50. *Cohen*, 403 U.S. at 20.
51. *Id.* at 21.
52. *Id.* (citation omitted).
53. *Id.* (citation omitted).
54. *Id.* (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970)).
55. *Id.*
56. *See id.* at 22.
57. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
58. *Id.*
59. *Id.* at 505.

that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[60] Additionally, the Court noted that the students were punished for a "silent, passive expression of opinion," which neither caused any disorder or disturbance that interfered with the school's work nor infringed upon the right of other students to be left alone.[61] For prohibition of a particular expression of opinion to be justified, it must be shown that the action "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[62] There was no showing in this case that students wearing black armbands materially or substantially interfered with the appropriate discipline required for the operation of the school.[63] The Court concluded, "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. . . . We properly read [the First Amendment] to permit reasonable regulation of speech-connected activities in carefully restricted circumstances."[64]

## IV. CIRCUIT SPLIT: ARE TATTOOS PROTECTED BY THE FIRST AMENDMENT?

As apparent from the discussion above, laws and practices restricting less pure forms of speech have been challenged for over 40 years.[65] Consequently, the U.S. Supreme Court has made it clear that the First Amendment protects far more than the spoken or written word explicitly provided for in the First Amendment.[66] Much of the debate surrounding the level of First Amendment protection that should be afforded to tattoos stems from the fact that strong arguments can be made for tattoos to be classified as art, pure speech, or expressive conduct.[67] Further, the increasing popularity and prevalence of tattoos in U.S. society has led employers to adopt personal-appearance policies to restrict their employees' ability to display tattoos in the workplace.[68] Resistance to these policies can occur both

60. *Id.* at 506.
61. *Id.* at 508.
62. *Id.* at 509.
63. *Id.*
64. *Id.* at 513.
65. *E.g.*, *id.* at 508.
66. Texas v. Johnson, 491 U.S. 397, 404 (1989).
67. *See, e.g.*, Weimar, *supra* note 1, at 728–29.
68. *Id.* at 747.

when an employee disapproves of the requirement for tattoos to be covered in general and when an employee is asked to cover up a specific tattoo.[69] For a determination to be made regarding whether an employer has an absolute right to create these policies or, in the alternative, to what extent these policies can be made, there must be a determination of whether tattoos are speech fully protected by the First Amendment or some sort of expressive conduct that will only be protected under the right circumstances.[70] Cases involving tattoos have made their way into appellate courts in a few circuits,[71] but there remains disagreement about the First Amendment classification of tattoos.[72]

### A. *Circuits Classifying Tattoos as Speech*

The Ninth Circuit has given tattoos full protection under the First Amendment.[73] The court stated:

> 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.[74]

The Ninth Circuit further noted that tattoos are generally made up of words, images, or symbols, which are all types of pure expression protected by the First Amendment.[75] The court acknowledged that tattoos can express a countless variety of messages and serve a variety of functions.[76] Tattoos can communicate personal or religious messages or serve as an indication of a person's identity, status, or occupation—just to give a few examples.[77] The Ninth Circuit explicitly stated, "The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely

69. *See, e.g.*, Riggs v. City of Fort Worth, 229 F. Supp. 2d 572, 577 (N.D. Tex. 2002).
70. *See id.* at 580.
71. The Eighth and Ninth Circuits are the most notable.
72. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010); Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).
73. *Anderson*, 621 F.3d at 1061.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* (citations omitted).

expressive activity fully protected by the First Amendment."[78]

In *Buehrle v. City of Key West*, the Eleventh Circuit joined the Ninth Circuit, stating that both the process of tattooing and the tattoos themselves were protected by the First Amendment.[79] The Second Circuit has not yet had the opportunity to specifically address the classification of tattoos,[80] and while arguments could be made both ways, it appears that the Second Circuit would likely follow the Ninth Circuit's and Eleventh Circuit's approach. The counterargument to this assertion could be supported by the Second Circuit's own statement that "paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection."[81] This statement was arguably the court's discrete list of the four types of art that receive First Amendment protection. However, in the subsequent case of *Mastrovincenzo v. City of New York*, the court stated that if an item of art does not fall within one of the four categories—"paintings, photographs, prints, and sculptures"—then the items must be classified as potentially expressive.[82] The Second Circuit described the work of jewelers, potters, and silversmiths as belonging to this potentially expressive category.[83] This analysis leaves room for the argument that, because tattoos fall outside of the four listed categories, the Second Circuit would thus classify tattoos as only potentially expressive.[84] The court's explanation of its classifications in *Mastrovincenzo*, however, seems to suggest more strongly that if the court was faced with a case involving a tattoo, it would place tattoos in the former category receiving full First Amendment protections.[85]

The court explained that the dominant purpose of the art must be identified in order to determine the category (fully protected by the First Amendment or potentially expressive) in which a medium of art falls.[86] Items in the fully protected group always have dominant expressive purposes,

78. *Id.* at 1060.

79. Buehrle v. City of Key West, 813 F.3d 973, 976 (11th Cir. 2015).

80. *See, e.g.*, Inturri v. City of Hartford, 165 F. App'x. 66, 68–69 (2d Cir. 2006) (dismissing a First Amendment challenge to a police department dress code restricting tattoos without addressing the question of speech classification).

81. Bery v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996).

82. Mastrovincenzo v. City of New York, 435 F.3d 78, 93–94 (2d Cir. 2006).

83. *Id.*

84. *See id.*

85. *See id.* at 95–96.

86. *Id.* at 95.

while items in the less protected group have dominant nonexpressive purposes.[87] Tattoos seem to fall in the former category because they have a dominant expressive purpose.[88] In fact, tattoos really serve no other purpose than expressing the artistic talent and vision of the tattoo artist and the message, memory, or feeling of the person receiving the tattoo. Unlike clothing with graffiti drawn on it or expensive china with intricate designs, there is no other functional, nonexpressive purpose of a tattoo.[89] Therefore, even though the Second Circuit has not specifically addressed its classification of tattoos, it appears under the analytical framework the court has laid out thus far that tattoos would receive the full protection of the First Amendment due to their dominant expressive purpose.[90]

### B. *Circuits Classifying Tattoos as Expressive Conduct*

Unlike the Ninth and Eleventh Circuits, the Eighth Circuit has ruled tattoos are not a form of speech that receives the full protections of the First Amendment.[91] In *Stephenson v. Davenport Community School District*, the petitioner was suspended from school when she displayed a tattoo that was deemed by school officials to be gang related.[92] The court treated the tattoo in question as a form of "self-expression."[93] Thus, to determine whether the tattoo was entitled to First Amendment protections, the court considered "whether 'an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[94] Ultimately, it was determined the tattoo in the case was nothing more than self-expression, so it was not entitled to First Amendment protections.[95] Consequently, under the Eighth Circuit's analytical framework, a large portion of tattoos would be deemed to be only self-expression and would not receive First Amendment protection.

The Fifth Circuit, similar to the Second Circuit, has not specifically addressed tattoos, but its discussion of visual arts seems to suggest it may

87. *Id.*
88. *See id.* at 95–96.
89. *See id.*
90. *See id.*
91. *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).
92. *Id.* at 1305.
93. *See id.* at 1307 n.4.
94. *Id.* (alteration in original) (quoting Texas v. Johnson, 491 U.S. 397, 404 (1989)).
95. *Id.*

lean in the direction of the Eighth Circuit.[96] In *Kleinman v. City of San Marcos*, the Fifth Circuit discussed the *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* decision by the U.S. Supreme Court and concluded that the comment in *Hurley* about Jackson Pollock's paintings referred only to great works of art.[97] The court further commented that the Supreme Court has not discussed the extent of First Amendment protection for "non-speech objects or artworks" since the *Hurley* case.[98] Based on the language used by the Fifth Circuit Court, namely "non-speech," and the Fifth Circuit's narrowing of the definition of protected artwork previously used in *Hurley*, it seems likely that the Fifth Circuit will find tattoos as possible expressive conduct, as opposed to automatically protected speech.[99] Additionally, the Fifth Circuit will likely follow the Eighth Circuit's logic because the Fifth Circuit referred to an Eighth Circuit case when determining a First Amendment claim involving visual art.[100] Finally, it seems the Fifth Circuit did ultimately acknowledge that the artwork in question had an expressive component, but the court did not employ the First Amendment test for speech and instead used the test for expressive conduct.[101] To the contrary, the court also mentioned the logic of the Second Circuit, so an argument could be made that the Fifth Circuit will follow the Second Circuit and deem that tattoos only have an expressive purpose; thus, tattoos would receive full First Amendment protections.[102] However, the Fifth Circuit Court is likely unwilling to go that far:

> We share the *Mastrovincenzo* court's skepticism that the heavy machinery of the First Amendment is to be deployed in every case involving visual non-speech expression. Protected expression takes many forms, but *Hurley's* reference to works of fine art did not sweep so broadly as to require a judicially crafted hierarchy of artistic expression.[103]

96. *See* Kleinman v. City of San Marcos, 597 F.3d 323, 326–27 (5th Cir. 2010).

97. *Id.* at 326 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)).

98. *Id.*

99. *See id.* at 327.

100. *Id.* (referencing Davis v. Norman, 555 F.2d 189 (8th Cir. 1977)) (holding a wrecked car on the side of the road reminding the public of how the owner's son was killed did not violate the First Amendment).

101. *Id.* at 328.

102. *Id.* at 327.

103. *Id.*

This is where the Fifth Circuit digresses from the Second Circuit, as it narrows the group of protected art as defined in *Hurley* to only great works of art and does not adopt the Second Circuit's method for adding other forms of art to the protected class.[104] It is unlikely any individual tattoo will be universally considered a great work of art, as a tattoo only lasts as long as the life of the person who wears it and is not available for permanent public display. Thus, it is likely when the Fifth Circuit is confronted with visual, nonspeech expression with an expressive component, such as a tattoo, it will follow the Eighth Circuit and employ the balancing test for expressive conduct.[105]

Finally, the Sixth Circuit would likely follow in the Eight Circuit's footsteps if the specific question of tattoos and the First Amendment were to come before it.[106] In a case involving workplace-appearance policies and tattoos, the court stated, "[A]n individual's decision to display a tattoo . . . is not a clearly established right."[107] While the court in *Roberts v. Ward* did not have the need to get into more detail, it is likely the Sixth Circuit would follow the Eighth Circuit's view that tattoos are expressive conduct protected only in certain circumstances.[108]

## V. HISTORY AND PURPOSE OF TATTOOS

The Parts above have gone into great detail about how courts throughout the country have explained, classified, and analyzed tattoos. The insights and viewpoints from these varying judges and justices are absolutely important, as judges and justices are in the best position to interpret the Constitution and decide what the First Amendment was designed to protect. Yet, often times these judges and justices do not have tattoos of their own or are not familiar with the history or progression of tattooing in modern society. This more personal perspective is important to have when evaluating how to classify tattoos and deciding what level of First Amendment protection tattoos should be afforded.

The art of tattooing has existed for thousands of years with some of its

104. *Id.* at 326–27; Mastrovincenzo v. City of New York, 435 F.3d 78, 93 (2d Cir. 2006).

105. *Kleinman*, 597 F.3d at 328; Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997) (quoting Texas v. Johnson, 491 U.S. 397, 404 (1989)).

106. *See* Roberts v. Ward, 468 F.3d 963, 969 (6th Cir. 2006).

107. *Id.*

108. *See id.*; *Stephenson*, 110 F.3d at 1307 n.4 (quoting *Johnson*, 491 U.S. at 404).

earliest traces being found on Egyptian female mummies from around 2100 B.C.[109] The modern theory is that Egyptians engaged in the art of tattooing for ritualistic and therapeutic purposes.[110] The ancient Greek and Roman cultures also engaged in the art of tattooing but for very different purposes than the Egyptian culture.[111] The Greeks and Romans actually used tattooing for punitive purposes, such as to punish or mark slaves or prisoners of war.[112] There was a brief shift in Roman culture from tattooing for punitive purposes to tattooing for religious purposes, but that quickly ended with the rise of Christianity.[113] Constantine, the first Christian Roman emperor, banned tattoos with his claim that they ruined a body made in God's image.[114] These schools of thought caused the practice of tattooing to begin to disappear from Western culture from about 1066 until the nineteenth century.[115] Colonialism was the source of a reemergence of tattooing with the culture of Polynesian countries being exposed to the West.[116] Still however, tattoos were frowned upon by much of the Western upper-class as barbaric, so they were originally most popular amongst sailors who then integrated tattoos into the European working class.[117]

The United States originally had the same view of tattoos as the upper-class Europeans, but the invention of the first electric tattoo machine in 1891 helped to spur an increase in the popularity of tattoos.[118] During World Wars I and II, tattoos became popular on soldiers and developed a reputation for being signs of patriotism.[119] After World War II, however, tattoos began to decline in popularity again.[120] Tattoos began to be associated with bikers, criminals, and rebellion. [121] Additionally, the 1961 outbreak of hepatitis in New York was attributed to an unsanitary tattoo artist, which further increased the skepticism surrounding tattoos.[122] In the 1970s, tattoo artists

109. Weimar, *supra* note 1, at 722.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 722–23.
115. *Id.* at 723.
116. *Id.*
117. *Id.* at 724.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

began to change the style, color, and imagery found in tattoos in order to make them more appealing to the middle class, and there were efforts to increase healthcare regulation for the business of tattooing.[123] By the 1990s, public opinion of tattoos became more positive, and the growth in popularity has continued into the present day.[124] Today, not only are tattoos a common feature of U.S. society seen on people from all walks of life—with nearly one in four U.S. adults under 50 having at least one tattoo—but tattoos have also begun to be recognized as art, with some tattoos even being displayed in museums and art shows.[125]

While tattoos have been around for thousands of years, today tattoos have become more popular than ever before.[126] While some get tattoos for reasons similar to those of the early days of tattooing, such as for religious or patriotic purposes,[127] there are new forces driving the tattoo surge, particularly within the millennial generation.[128] Recent studies have shown that one use of modern day tattoos is for people to be able to express their past and present selves or to establish an understanding of who the tattoo recipient is.[129] In a world of constant and unpredictable change, tattoos can provide some people with an anchor for their identity—a way to satisfy the need for stability, predictability, and permanence.[130] As tattoos have become increasingly popular, clients have started to get more creative, have demanded perfection in their tattoo designs, and have demanded that "tattoo artists prove the artist part of their titles."[131] Why is it so important for people to get intricate, unique, and high-quality tattoos? One explanation is that body art, as opposed to art on other canvases, takes on a greater significance to the person wearing the tattoo; it is a piece of art permanently worn on the person's body intended to say something about who that person is.[132]

123. *Id.* at 725.

124. *Id.*

125. *Id.*

126. Chris Weller, *The Identity Crisis Under the Ink*, ATLANTIC (Nov. 25, 2014), https://www.theatlantic.com/health/archive/2014/11/the-identity-crisis-under-the-ink/382785/.

127. *See* Weimar, *supra* note 1, at 724.

128. Weller, *supra* note 126.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

## VI. PROPOSED FIRST AMENDMENT CLASSIFICATION OF TATTOOS

It is not all that surprising that there is currently disagreement about the classification and protection of tattoos. After all, tattoos have only become a common part of society within the last 20 to 30 years, and cases involving tattoos are only beginning to make their way into appellate courts throughout the United States.[133] The first step in the classification and subsequent determination of protection afforded to tattoos is to determine what tattoos are exactly. The strongest protection will be given to pure speech, while expressive conduct can be protected only under the right circumstances.[134] Ultimately, the classification of tattoos as pure speech is the best fit. While there are a wide variety of reasons that can cause someone to get a tattoo, a common denominator is that some sort of message is being conveyed.[135] Whether it is a message about religious or political affiliation, a message of tribute to a lost loved one, or a message about a love for animals, tattoos communicate something. However, an argument can be made that not all tattoos communicate something; some tattoos may just be for aesthetic purposes of self-expression.[136] Yet, even if a person chooses to get something such as a large pattern tattooed on his or her arm for no other reason than thinking it is beautiful, in the context of a tattoo, it likely still communicates a message. Tattoos are meant to be permanent markings on a person's body. Unlike clothing or other accessories, they cannot be easily taken off or changed when a person gets bored or moves on to a new style or phase. Tattoos become a part of a person's story and identity that stays with him or her over time, and they require a commitment not demanded of other forms of speech—tattoos are painful to receive and difficult to remove.[137] Thus, even someone who receives a tattoo without a specific message to the public in mind is communicating a message about that person's identity in a way arguably more drastic than dying one's hair or wearing a "Fuck the Draft" jacket.[138]

The acknowledgement that tattoos are always communicating

133. *E.g.*, Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1055 (9th Cir. 2010); *see* Weimar, *supra* note 1, at 725.

134. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576–77 (1991) (Scalia, J., concurring); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969).

135. Weller, *supra* note 126.

136. *See* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

137. Weller, *supra* note 126.

138. *See* Cohen v. California, 403 U.S. 15, 16 (1971); Weller, *supra* note 126.

something—whether it is the intended message of the person with the tattoo, the artistic vision of the tattoo artist, or an expression of identity—is what makes it difficult to follow the Eighth Circuit and classify tattoos as expressive conduct that are only sometimes afforded First Amendment protection.[139] Expressive conduct exists when some sort of conduct, not consisting of spoken or written words, occurs and is meant to express a message likely to be understood.[140] Tattoos are not conduct. Tattoos are always engrafted in ink and 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."[141] Removed from the process of tattooing, the tattoo itself is nothing other than art drawn onto the skin rather than on canvas or paper.[142] There is no conduct necessary to communicate the message of a tattoo; the tattoo itself is the message. There is an argument that the conduct connected to the tattoo is the person's display of it, and there would only be an expressive component if the tattoo was specifically and clearly intended to communicate a message.[143] This argument fails for two reasons. First, simply walking into public somewhere with a visible tattoo does not constitute conduct.[144] Just as wearing a "Fuck the Draft" jacket or a black armband has been considered speech, a tattoo consisting of words, pictures, or symbols "worn" by a person should be considered speech, as the only difference is that tattoos cannot be taken off.[145] In fact, in the case of the black armbands in *Tinker*, the Court stated, "[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech . . . .'"[146] The permanency of the medium on which the speech is displayed should not affect how the speech is classified; speech is speech, whether a person wants to wear the message only on an armband at school or chooses to wear it permanently on his or her skin wherever the person goes.[147]

139. *See Stephenson*, 110 F.3d at 1307 n.4.
140. Texas v. Johnson, 491 U.S. 397, 404 (1989) (citation omitted).
141. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010).
142. *Id.*
143. *See Stephenson*, 110 F.3d at 1307 n.4.
144. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).
145. *See* Cohen v. California, 403 U.S. 15, 18 (1971); *Tinker*, 393 U.S. at 505.
146. *Tinker*, 393 U.S. at 505.
147. *Anderson*, 621 F.3d at 1061.

With no conduct that can be separated from the tattoo as the source of the communication, again, a classification of pure speech seems the most appropriate for tattoos. Assuming, however, the Eighth Circuit's expressive-conduct test for tattoos is used, the second flaw to its argument appears. In order to get First Amendment protections under this test, there must be an intent to convey a specific message that will be understood by those who view it.[148] In the case of tattoos, which can be seen as a type of visual art, this analysis would be flawed for a few reasons.[149] First, the Supreme Court stated in *Hurley*: "[A] narrow, succinctly articulable message is not a condition of constitutional protection . . . ."[150] Someone who sees a tattoo may not be able to correctly ascertain the message the person with the tattoo was trying to convey, but that does not take away from the fact that the tattooed person was expressing something. Second, following the comment quoted above, the Court in *Hurley* continued to state that if a particularized message was a prerequisite to First Amendment protection, then protection "would never reach the *unquestionably shielded* painting of Jackson Pollock."[151] As discussed above, Jackson Pollock was an abstract painter whose paintings consisted of drips and swirls of paint.[152] Since his paintings were abstract, two different people standing side-by-side could find two completely different messages conveyed by his work.[153] Additionally, a third person viewing the painting could conclude there is no message conveyed at all and the painting is nothing other than a product of Pollock's self-expression.[154] Nevertheless, the Supreme Court has explicitly stated that this work of art is protected by the First Amendment.[155] While there has not been a Supreme Court case explicitly providing First Amendment protections to visual art, the Court has protected various art forms in other cases and given examples of visual art works that would be protected with no concern for the preciseness or clarity of the message the art sends.[156] Thus, the expressive-conduct analysis is inappropriate for the classification and determination of whether tattoos should receive First Amendment protections, because the display of tattoos

148. *Stephenson*, 110 F.3d at 1307 n.4 (citations omitted).

149. *See supra* Part II.

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

151. *Id.* (emphasis added).

152. *Jackson Pollock and His Paintings*, *supra* note 37.

153. Strocker, *supra* note 18, at 191.

154. *Id.*

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

156. Strocker, *supra* note 18, at 188–91.

lacks any accompanying conduct or need for conveyance of a particularized message.

## VII. TATTOOS IN THE WORKPLACE

A discussion about tattoos and the Constitution is very interesting, but it may seem irrelevant to day-to-day life, especially for a person who does not have or plan on getting any tattoos. However, the workplace has already become one place where the conversation about tattoos and the First Amendment is becoming common.[157] Policies regarding employees' appearance and clothing are a regular practice in the workplace and have commonly been upheld by courts.[158] In the context of private employment, if tattoos were to receive the full protection of the First Amendment, there would be no change because private employers are not subject to the First Amendment.[159] Grievances about personal-appearance policies by private employers must be addressed by other means than the First Amendment, such as religious discrimination, harassment, or hostile work environment claims.[160]

This leaves public employers subject to the biggest impact of tattoos gaining full First Amendment protection, especially for employers in the Eight Circuit where courts have not been offering full protection to tattoos.[161] In general, even in cases where the employer is a government entity, personal-appearance policies have been upheld.[162] In *Roberts v. Ward*, the court noted, "Where the speech is unrelated to the job of the employee and involves a matter of public concern, it appears to be entitled to greater protection, as it is less likely to disrupt the efficient functioning of the workplace."[163] In *Roberts*, though, the government employer's personal-appearance policy was upheld because the tattoo did not involve a matter of public concern, and the court determined the right to display a tattoo was not a clearly established right.[164] It is easy to see how a case such as this would

157. Weimar, *supra* note 1, at 747–48.

158. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 135 (1st Cir. 2004).

159. Weimar, *supra* note 1, at 747.

160. *See generally Cloutier*, 390 F.3d at 126; Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976 (N.D. Ind. 2000).

161. *See* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997) (citations omitted).

162. *See* Roberts v. Ward, 468 F.3d 963, 969 (6th Cir. 2006).

163. *Id.* at 968.

164. *Id.* at 969.

differ if the Supreme Court decided to confirm the Ninth Circuit's ruling in *Anderson v. City of Hermosa Beach*.[165] The right to display a tattoo would be a clearly established right, regardless of whether the tattoo involved a matter of public concern.[166] Thus, the public employer would be required to have more than a rational basis for restricting the display of tattoos and would instead be required to meet the higher standards of strict or intermediate scrutiny before restricting the display of tattoos.[167]

If the Supreme Court confirmed an established right to display a tattoo, a similar change in results would likely be seen in a case like *Riggs v. City of Fort Worth*, which involved a police officer who was required to cover the extensive tattoos he had on his arms and legs.[168] The court followed the *Stephenson* court's ruling and stated that tattoos are not a protected form of expression, so the employer attempting to succeed in a constitutional challenge regarding its prohibition of a tattoo only needs some minimal justification for the prohibition.[169] Typically, the justification required is that the policy is business related and promotes the employer's image.[170] In this case, the police department's reason for wanting Riggs's tattoos covered was that his tattoos were considered intolerably unprofessional.[171] The court held that this demand did not violate the Constitution because the department had legitimate, nondiscriminatory reasons for wanting the tattoos covered.[172] Again, if the Supreme Court decided to follow the Ninth Circuit, the police department would have needed more than just a legitimate purpose to restrict the display of tattoos, and the assumption would be that employees have the right to display their tattoos unless the tattoos fall within one of the categories of unprotected or less protected speech.[173]

## VIII. PROPOSED EFFECT ON PUBLIC EMPLOYERS IF TATTOOS ARE DECLARED PURE SPEECH

The popular answer to what would happen if tattoos were declared pure speech fully protected by the First Amendment is that it would prevent

165. *See* Weimar, *supra* note 1, at 748.
166. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010).
167. Weimar, *supra* note 1, at 748.
168. Riggs v. City of Fortworth, 229 F. Supp. 2d 572, 577 (N.D. Tex. 2002).
169. *Id.* at 581.
170. Weimar, *supra* note 1, at 747.
171. *Riggs*, 229 F. Supp. 2d at 581.
172. *Id.* at 581–82.
173. Weimar, *supra* note 1, at 748.

public employers from being able to require an employee to cover visible tattoos.[174] However, when examining precedent from cases involving personal-appearance policies in the workplace and cases dealing with the First Amendment, it seems that another conclusion is possible.[175] As explained above, this Note asserts that tattoos should be classified as pure speech and given the protection of the First Amendment.[176] In addition, this Note now asserts, despite that new classification for tattoos, public employers should still be able to enforce personal-appearance policies under the right circumstances.[177]

Before getting into more detail about why tattoos becoming protected speech should not affect public employers, it is important to note that, regardless of whether tattoos are protected speech, there are specific circumstances in which public employers will, and will not, have a harder time restricting speech. Let's start with the situations in which employers will have a harder time restricting speech. If an employee's tattoo conveys a political message or some message of public concern, it will be more difficult for a public employer to restrict that speech.[178] Even in *Roberts v. Ward*, where the court directly stated that tattoos are not explicitly protected forms of expression, the courts still considered whether the tattoo in question involved a matter of public concern.[179] Ultimately, courts will always be wary of letting a government employer silence political speech since standardization of ideas by the government, courts, or dominant political groups is one of the core concerns the Constitution and First Amendment were designed to prevent.[180]

Next are the situations in which, no matter how tattoos are classified, it will be easy for an employer to require the employee to cover a tattoo. This scenario occurs when the tattoo depicts something making the tattoo fall within an area of less protected or unprotected speech.[181] The First Amendment does not apply to categories of unprotected speech, so regulation of unprotected speech by the government must only be rationally

174. *Id.*
175. *See id.* at 747.
176. *See supra* Part VI.
177. *See* Pittman, *supra* note 9, at 201.
178. *See id.* at 202.
179. Roberts v. Ward, 468 F.3d 963, 969 (6th Cir. 2006).
180. *See* Weimar, *supra* note 1, at 743.
181. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 406 (1992) (White, J., concurring).

related to a legitimate interest.[182] If tattoos were to be declared pure speech, they would be treated the same as any other speech and could be unprotected in some circumstances. The first category of unprotected speech that would likely be asserted by the opponents of an offensive tattoo at work would be that the tattoo consisted of fighting words.[183] This argument seems unlikely to be successful based on the precedent set forth in *Cohen*.[184] Just as it was determined that words on a jacket could not be directed at any one person, it is unlikely that words or images printed on someone's skin would be determined to be directed at any one person.[185] The most likely unprotected speech category a tattoo could successfully fall into would be the "obscene."[186] If a tattoo was deemed to be obscene,[187] it could be restricted by the government for legitimate purposes just like any other speech.[188]

With exception to the situations described in the previous paragraph, many have taken the stance that if tattoos were to become speech protected by the First Amendment, there would be no way for public employers to enforce personal-appearance policies restricting tattoos.[189] However, even in the situations in which the tattoo in question is not obscene or political in nature, this Note asserts that public employers would still be able to enforce personal-appearance policies requiring tattoos to be covered.[190] Personal-appearance policies are important to employers for many reasons. These policies help employees appeal to customer preference, maintain professionalism, and promote a desired public image; additionally, these policies are sometimes necessary due to safety concerns.[191] The court has stated, "It is axiomatic that, for better or for worse, employees reflect on their employers[,]" and there is often a desired public image or need for

182. *Id.*

183. *See* Cohen v. California, 403 U.S. 15, 20 (1971).

184. *See id.*

185. *See id.*

186. Weimar, *supra* note 1, at 748.

187. *See* Miller v. California, 413 U.S. 15, 24 (1973) (discussing the test to determine if speech is obscene).

188. *See* Weimar, *supra* note 1, at 748.

189. *Id.*; Pittman, *supra* note 9, at 201.

190. This paragraph assumes personal-appearance policies requiring tattoos to be covered apply to all employees. The next paragraph discusses the situation in which a single employee may be required to cover a tattoo.

191. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 135–36 (1st Cir. 2004).

professionalism in the case of government employees.[192] Additionally, even in the context of public employment, courts have considered whether the speech would affect the efficient functioning of the workplace.[193] It is easy to imagine countless varieties of tattoos that fall short of unprotected speech but are still offensive to others and thus cause conflict that is disruptive to the workplace. Unlike armbands worn for a couple days or weeks at school, a tattoo will be displayed for as long as the tattooed person is employed.[194] The counterargument could be made that the Court in *Tinker* rejected the assertion that the students' armbands interfered with the operation of the school or the other students' right to be left alone.[195]

However, work and school environments are very different due to both the goals of the establishment and the people found inside. The workplace is filled with adults who have presumptively already formed most of their views and opinions and whose first priority is to meet the demands of their job.[196] Schools, on the other hand, are filled with children, and one of the goals of education is to foster open thought and communication amongst the students so they can be exposed to new ideas that help them shape their own views and opinions.[197] This Note asserts that the need for free-flowing communication as described in *Tinker* is not needed in the workplace.[198] Thus, the disruption prevented and the benefits provided by personal-appearance policies are enough to satisfy the requirement laid out by the Supreme Court that the employer must meet the demands of intermediate scrutiny in cases of regulation of pure speech.[199] Intermediate scrutiny would be appropriate in cases involving blanket personal-appearance policies

192. *Id.*; *see* Riggs v. City of Fort Worth, 229 F. Supp. 2d 572, 581–82 (N.D. Tex. 2002).

193. Roberts v. Ward, 468 F.3d 963, 968 (6th Cir. 2006).

194. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

195. *Id.*

196. *See* Päivi Fadjukoff et al., *Identity Formation in Adulthood: A Longitudinal Study from Age 27 to 50*, TAYLOR & FRANCIS OPEN SELECT (Jan. 2, 2016) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4784503/ ("At age 36, moratorium was rare because the majority of participants had made identity commitments in the domains of occupational identity, intimate relationships, and lifestyle either through foreclosure or achievement."). Moratorium is defined as "actively ongoing identity exploration," and achievement is defined as "where identity commitments were made after a period of exploration." *Id.*

197. *Tinker*, 393 U.S. at 512–13.

198. *See supra* Part VII.

199. Weimar, *supra* note 1, at 748.

because the restriction is content-neutral—all tattoos are being banned regardless of their content.[200] The restriction only regulates the time and place where a tattoo may be displayed, a significant government interest exists,[201] and alternative channels of communication exist—namely the tattooed employee can display the tattoo everywhere but at work.[202]

The disruption of the workplace and the infringement of coworkers' privacy interests provide the justification needed for public employers to be able to prevent an employee from offending or making other coworkers uncomfortable with inherently offensive tattoos, even if there is not a blanket appearance policy and tattoos are protected by the First Amendment. In First Amendment cases involving offensive speech, an argument is often made that the government should prevent offensive speech from being "thrust" upon unwilling listeners or viewers.[203] In *Cohen*, the Court rejected that argument, stating people are often "captives" outside the safety of their homes and "subject to objectionable speech."[204] However, the Court went on to say that one circumstance in which courts can stop speech for the sole purpose of preventing others from hearing it is when "substantial privacy interests are being invaded in an essentially intolerable manner."[205] To determine whether a substantial privacy interest is being invaded, a court determines whether the person opposed to the speech is able to avoid it.[206]

Previously the Supreme Court has held these privacy interests exist in the home,[207] but this Note asserts that these privacy interests exist to some extent in the workplace as well. As the Court pointed out in *Cohen*, the people who saw Cohen's jacket could avert their eyes, leave the courthouse, or at the very least know that they would only be forced to be around the language on the jacket for a limited amount of time.[208] Unlike the people exposed to Cohen's jacket, coworkers of someone with an offensive tattoo would be forced to view it on a regular basis.[209] While a coworker can attempt

200. *See id.* at 727.
201. *See supra* text accompanying note 191.
202. Weimar, *supra* note 1, at 727.
203. *See* Cohen v. California, 403 U.S. 15, 21 (1971).
204. *Id.* (citation omitted).
205. *Id.*
206. *See id.* at 21–22.
207. *Id.*
208. *Id.*
209. *See id.* at 22.

to avoid the person with the tattoo, it is inevitable that the coworker will run into or have to speak about work-related issues with the tattooed person on a relatively consistent basis. Unlike the patrons of the courthouse or park who can leave when faced with offensive speech they do not like,[210] people at work cannot leave without potentially facing consequences for abandoning their work prematurely. The Court in *Cohen* recognized that a person has a more legitimate claim to a privacy interest in a courthouse than in Central Park, and thus, it is asserted that people have a much greater privacy interest in their workplace than in any other public location, even when the employer is a government agency.[211] Just as people should be able to carry on comfortably in their home, they should be able to work comfortably at their job. When faced with an employee with an inherently offensive tattoo, a public employer should be able to act similarly to a private employer by demanding that the tattoo be covered so other employees do not have their rights infringed upon and so the employer is not accused of creating a hostile work environment by allowing the display of the tattoo to continue.[212]

## IX. CONCLUSION

Tattoos have had a long history during which their popularity has ebbed and flowed with people seeking tattoos for a variety of purposes.[213] Despite a rocky past, tattoos are more popular now than ever before.[214] The increased popularity of tattoos and the restriction of the ability to show them in some circumstances has caused First Amendment claims for infringement of free speech to make their way into courts throughout the country.[215] The current circuit split is not surprising as courts wrestle with the level of protection afforded to visual art and whether tattoos should be classified as pure speech or expressive conduct.[216] The Ninth Circuit has ruled that tattoos should be classified as pure speech,[217] and the Eighth Circuit has ruled that

210. *See id.*

211. *Id.* at 21–22.

212. *See* Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 981 (N.D. Ind. 2000).

213. *See* Weimar, *supra* note 1, at 722–25.

214. Weller, *supra* note 126.

215. Weimar, *supra* note 1, at 747–48.

216. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

217. *See, e.g.*, Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010).

tattoos should be classified as expressive conduct.[218] This Note asserts that tattoos should be classified as pure speech because they are best classified as a type of visual art and are always communicating some sort of message.[219] The rising popularity of tattoos has recently brought disputes to the courts when employees are denied the ability to display their tattoos at work.[220] It has been asserted that despite the classification of tattoos as pure speech, public employers should still be able to enforce personal-appearance policies.[221] When dealing with blanket personal-appearance policies, the benefits of maintaining a desired public image, accommodating customer preferences, maintaining professionalism, and avoiding conflict and disturbance in the workplace satisfy the requirements of intermediate scrutiny.[222] When dealing with a specific tattoo that depicts something inherently offensive, the privacy interests of other employees and the need for an employer to prevent a hostile work environment provide the requisite justification for the demand of covering the tattoo to be constitutional.[223] For now the status and treatment of tattoos are uncertain and lack uniformity, but that has done nothing to knock their popularity; it appears that tattoos are an art form that is here to stay.[224] Thus, a Supreme Court decision recognizing a new form of speech should be on the horizon with more clarity in the workplace hopefully to follow.

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218. *See, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

219. *See Anderson*, 621 F.3d at 1061; Weller, *supra* note 126.

220. Weimar, *supra* note 1, at 747–48.

221. *Id.* at 747.

222. *See id.* at 747–48.

223. *See* Cohen v. California, 403 U.S. 15, 21–22 (1971); Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 981 (N.D. Ind. 2000).

224. Meredith Newman, *Report: More Young People Have Tattoos and Piercings than Ever Before*, U.S.A. TODAY (Sept. 20, 2017), https://www.usatoday.com/story/news/nation-now/2017/09/20/young-people-tattoos-and-piercings-report/686360001.

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