Coates' Canons Blog: Yer Cheat'n Heart, Tattoos, the First Amendment, and Preemption

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"Where do you go in this town to get a tat, to find someone who can sling some ink? I wanna find somebody like they have on L.A. Ink that can do some real work on me. You know, a real artist. Might try one with my woman Marlene sitting on a fire-breathing dragon. Maybe in the ditch of my elbows. . . . . Whaddya mean there is no tattooing allowed around here? Well, that sure sucks. Isn't this supposed to be a free country? That's the kind of thing that violates my rights."

Well now, the federal 9th Circuit Court of Appeals may agree with you about one thing: a municipal ban on tattoo parlors can be an unconstitutional limitation of your rights and, by the way, also of the rights of the tattoo artist that you hope to find. Consider the situation of one such tattoo artist named Johnny Anderson, the co-owner of Yer Cheat'n Heart Tattoo in Gardena, California. Recently he has been repeatedly stymied in his bid to open a tattoo parlor in a building now housing a frozen yogurt store on a main street in the City of Hermosa Beach, a thriving southern California beach town in Los Angeles County. The Hermosa zoning ordinance, which allowed fortune tellers, adult businesses, and gun shops in several of its commercial zoning districts, did not, by implication, allow tattoo parlors, and city boards let die a proposal to add tattoo parlors to the list of permitted uses for certain districts. When sued, the city referred to various potential health hazards associated with tattoo parlors since many tattoo parlors in the area were never inspected. Los Angeles County's only tattoo parlor inspector acknowledged that some of the 850 tattoo artists working out of the 300 tattoo establishments in Los Angeles County were "unscrupulous or incompetent" and did not strictly follow proper sterilization processes.

The Ninth Circuit Court of Appeals, the consistently liberal federal circuit that serves the Pacific coastal states, held that both the display of tattoos and the art of tattooing itself were "forms of pure expression fully protected by the First Amendment." As a result, the Hermosa Beach prohibition of all tattoo parlors was unconstitutional on its face. The court held that tattooing and the display of tattoos were themselves forms of expressive activity and not conduct "imbued with elements of communication," which would be subject to less first Amendment protection. According to the 9th Circuit, "a form of speech does not lose First Amendment protection based on the kind of surface it is applied to."

The court also alluded to a 2006 survey by the Pew Research Center finding that 36 % of Americans aged 18-25, 40% of those aged 26-40, and 10% of those aged 41-64 had at least one tattoo.

The Hermosa Beach case is at variance with over a half dozen federal and state court cases from around the country. One of those cases is State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002), a South Carolina Supreme Court case in which a tattoo artist was convicted of violating a South Carolina statute prohibiting tattooing except by a licensed physician for cosmetic or reconstructive purposes. (At the time South Carolina was one of four states with a similar prohibition.) The South Carolina court concluded that tattooing was not a form of speech but instead was a form of conduct by the person applying the tattoo that was not sufficiently communicative in character to merit First Amendment protection.

What relevance does a federal case from California have for North Carolinians? Did the author of this blog spend too much time on vacation earlier this month on the southern California beaches? Tattooing has increased dramatically in North Carolina during the last decade. By one estimate the number of tattoo businesses in North Carolina increased 45% in 2009. Yet leaders and local government officials in some smaller towns remain uncomfortable with tattoo parlors and the culture that they represent. Hermosa Beach-style bans on tattooing are not uncommon in North Carolina.

If a zoning-based tattoo parlor ban were challenged in North Carolina, however, courts might not need to base a decision on constitutional grounds. A local ban in North Carolina on tattooing would be invalid because such a ban would be preempted by state law. G.S. 160A-174, which establishes standards for preemption, lists situations in which an ordinance is inconsistent with North Carolina (or federal) law and is thus preempted. G.S. 160A-174(b)(2) provides that an ordinance is inconsistent with state law if the ordinance "makes unlawful an act, omission, or condition which is expressly made lawful by State or federal law." Does North Carolina law make tattooing expressly lawful in our state? It certainly seems to. G.S. 130A-283 establishes a limited regulatory framework administered through the Department of Environment and Natural Resources, acting through local health departments. Tattooing permits are required for anyone who engages in the activity of tattooing, as defined in G.S. 130A-283. Technical, non-discretionary standards are set forth in sections of the North Carolina Administrative Code for obtaining a tattoo permit. Such a permit is personal to the holder and allows that person to engage in tattooing only at a particular location. Also, G.S. 14-400 makes it a misdemeanor in this state for anyone to tattoo anyone else who is under 18 years of age.

North Carolina's public policy as reflected in its regulatory framework is not intended "to provide a complete and integrated regulatory scheme to the exclusion of local regulation." (G.S. 160A-174(b)(5)). That suggests a different basis for state preemption and a more ambitious role for the state. Instead the state's limited regulatory scheme is one of authorizes tattooing, subject to various restrictions. A complete ban on tattooing, however, is thus in conflict with state law. Virginia courts have reached virtually identical conclusions under that state's law. Blue Horseshoe Tattoo, V, Ltd. V. City of Norfolk, 72 Va. Cir. 388 (Cir. Ct. 2007); Ancient Art Tattoo Studio v. City of Chesapeake, 56 Va. Cir 210, 210 (2001) (holding that Virginia Code § 15.2-912 allows for the regulation, not the banning of tattoo studios and remarking that "(h)ad the legislature intended to allow localities to prohibit the existence of tattoo studios, the legislature would have stated such."). *See* Lamar OCI South Corp. v. Stanly County Board of Adjustment, 186 N.C. App. 44, 650 S.E.2d 37 (2007), aff'd, 362 N.C.670 (2008) (zoning regulation that would not allow the relocation of a nonconforming outdoor advertising sign to a particular site invalid where state regulation would expressly allow it).

So, our friend ought to be able to find a North Carolina community where he can get a tattoo of his girlfriend Marlene. Now all he has to worry about is what happens later when he gets hitched and starts a family with Rita instead.

Links

- www.ca9.uscourts.gov/datastore/opinions/2010/09/09/08-56914.pdf.%20
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-174.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_130A/GS_130A-283.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-400.html
- appellate.nccourts.org/opinions/?c=2&pdf=1679