A Superintendent's Guide to Student Free Speech in California Public Schools

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Introduction

In 2007, a California Court of Appeal issued a groundbreaking decision that reaffirms California law's broad protection of student speech in K-12 public schools. In *Smith v. Novato Unified School District*[1] (hereinafter "*Smith*"), the Court considered whether a high school student's opinion editorials about illegal immigration and reverse racism—published in a student-run newspaper—constituted unprotected incitement under California Education Code Section 48907 (hereinafter "Section 48907").[2] With no state court precedent on point, *Smith* presented the Court with the challenge of defining the "incites" provision of Section 48907 for the first time.

In a published decision that is binding on all school districts in the State of California, the Court of Appeal adopted an objective test for defining incitement. The test focuses on the words of the speaker or writer, rather than the reactions of their intended audience. Under the Court's test, speech that offends, provokes, angers, or even provides the pretext for some to cause a disruption—without more—is still protected, so long as the words do not "specifically call[] for a disturbance [and] the manner of expression (as opposed to the content of its ideas) is [not] so inflammatory that the speech itself provokes the disturbance."[3] Under this narrow construction of incitement, the Court concluded that the student's opinion editorials, while provocative, nevertheless were protected speech and that official condemnation of one of the articles violated his rights under Section 48907.[4]

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[1] Smith v. Novato Unified School District, 150 Cal. App. 4th 1439 (2007).
[2] *Id.*
[3] *Id.* at 1457.
[4] *Id.* at 1445 ("The principal issue presented in this appeal is whether defendant Novato Unified School District (District) violated Education Code section 48907 which guarantees student free speech rights in public high schools. The trial court granted judgment for defendants, concluding that a student opinion editorial entitled 'Immigration,' was not protected speech under section 48907 because it constituted 'fighting words,' and that there was no infringement of the student's free speech rights because the opinion editorial was published. We reverse, holding that

The decision in *Smith* is significant for at least two reasons. First, with respect to incitement, *Smith* grants on-campus student speech substantially the same protection against government censorship as off-campus adult speech under the First Amendment. Given that political speech is often vulnerable to regulation and punishment under charges that it "incites" discontent or disturbance, the decision helps to guarantee that such speech—traditionally the *raison d'être* of speech protection—will flourish on campus. *Smith* requires school districts to reconsider and rewrite speech codes so that they are consistent with its broad protections of off-campus speech. Second, the decision represents California law's continued divergence away from federal First Amendment jurisprudence on student speech. While California law has become increasingly protective of student speech, federal First Amendment law has become decreasingly so, as evidenced most recently in the United States Supreme Court's decision in *Morse v. Frederick*.[5]

This article explores in greater detail these and other issues raised by the *Smith* decision. Part I provides a cursory background of California law on student speech up until the Court of Appeal's decision this year in *Smith*. This Part describes the steady divergence between California law and the First Amendment as they relate to the protection of student speech on public school campuses. Part II recounts the facts

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'Immigration' was not speech likely to incite disruption within the meaning of section 48907 and that the District infringed plaintiff's rights by stating that the publication of 'Immigration' violated the District speech policies.").

[5] Morse v. Frederick, 127 S.Ct. 2618 (2007) (holding that public school district officials do not violate a student's First Amendment rights by confiscating a banner, displayed by the student during school hours, when that banner "can reasonably be regarded as encouraging illegal drug use"). *But see* Hans Bader, *Bong Hits 4 Jesus: The First Amendment Takes a Hit*, 2006-07 CATO SUP. CT. REV. 133, 165 ("In creating a new 'drug exception' to free speech in the public schools, the Supreme Court's decision in *Morse v. Frederick* undermined fundamental First Amendment protections against viewpoint discrimination, and censorship based on speculative fears of harm. It did nothing to make schools safer or more orderly, since it is other legal mandates, not free speech rights, that have made schools less safe.").

and Court of Appeal decision in *Smith*, now the seminal student speech case in California. Part III offers some guidelines to school districts and officials for fashioning and implementing speech policies consistent with the "incitement" doctrine set forth in *Smith*.[6]

I. California Law on Student Speech Before *Smith*

A. California Enacts Statutory Protection for Student Speech

Article I, Section 2(a) of the California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right," and that "[a] law may not restrain or abridge liberty of speech or press."[7] However, prior to 1970, California law provided little protection for student speech in public schools. For example, then-Education Code Sections 9012 and 9013 broadly banned "partisan" and "propaganda" publications on public school campuses—i.e. pure political speech.[8] Thus, under California law, public school students' desire to express their political opinions had to yield to the primary mission of public education—i.e. to teach reading, writing, and arithmetic.

The tide turned dramatically in favor of student speech in 1969, when the United States Supreme Court recognized the right of students to freedom of expression on public school campuses under the First Amendment to the United States Constitution.[9] The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."[10] The United States Supreme Court had previously interpreted the Free Speech Clause of the First

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[6] The California Supreme Court recently denied both review and the District's request for depublication, *see* Smith v. Novato Unified Sch. Dist., 2007 Cal. LEXIS 9716 (Cal., Sept. 12, 2007), the United States Supreme Court denied certiorari, *see* Novato Unified Sch. Dist. v. Smith, 2008 U.S. LEXIS 1294 (U.S., Feb. 19, 2008).

[7] CAL. CONST., art. I, § 2.

[8] CAL. EDUC. CODE §§ 9012, 9013 (repealed); *see also* Lopez v. Tulare Joint Union High Sch. Dist., 34 Cal. App. 4th 1302, 1310 (1995).

[9] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

[10] U.S. CONST. amend. I.

Amendment to protect individuals against state and local government infringement, by incorporation through the Fourteenth Amendment.[11] However, it was not until the United States Supreme Court's decision in *Tinker v. Des Moines Independent Community School District* that these free speech rights were extended to public school students on public school campuses.[12]

In *Tinker*, a group of students planned to wear black armbands to their public schools in protest of the Vietnam War.[13] When school officials found out about the students' plan, they adopted a policy forbidding the wearing of armbands to school on pain of suspension.[14] The students carried out their plan and wore the armbands anyway and were

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[11] Gitlow v. New York, 268 U.S. 652, at 666 (1925). ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[12] *Tinker*, 393 U.S. at 503. For a persuasive originalist argument that the First Amendment, even as applied to state and local entities, should not be interpreted to protect student speech in public schools, see Justice Clarence Thomas's concurrence in *Morse*. *Morse*, 127 S.Ct. at 2630 (Thomas, J., concurring). ("I write separately to state my view that the standard set forth in *Tinker* is without basis in the Constitution. In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools. If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not."). Of course, whatever the merits of the arguments regarding the propriety of affording First Amendment protection to student speech in public schools may be, those arguments are inapposite when interpreting state-law protections of the same.

[13] *Tinker*, 393 U.S. at 504 ("The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve.").

[14] *Id*. ("The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.").

suspended after they refused to remove their armbands.[15] The students sued to challenge the policy as a violation of their free-speech rights under the First Amendment.[16]

The United States Supreme Court agreed with the students and struck down the policy.[17] First, it concluded that the wearing of armbands was a "symbolic act" akin to "pure speech," and therefore protected under the First Amendment.[18] The Court also recognized a general right of students to freely express themselves on campus: Student speech enjoyed the full protection of the First Amendment, unless it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[19] Because school authorities "had [no] reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students," the Supreme Court declared the ban unconstitutional.[20]

Importantly, the *Tinker* Court distinguished between speech and conduct. While student speech enjoyed substantial First Amendment protection, student conduct remained subject to official control and regulation.[21] The Court recalled "the

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[15] *Id*. ("On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.").

[16] *Id*. ("This complaint was filed in the United States District Court by petitioners, through their fathers, under Sec. 1983 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages.").

[17] *Id*. at 514. ("We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.").

[18] *Id*. at 505-06.

[19] *Id*. at 509.

[20] *Id*.

[21] *Id*. at 508. *See also* Edward L. Carter, et al., *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S.*

comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[22] Thus, *Tinker* did not affect the power of school authorities to regulate what students may and may not *do*, but rather the power to regulate what they may and may not *say*. The Court has on numerous occasions recognized this distinction between speech and conduct.[23]

As the first case explicitly to recognize a student's right to freedom of expression on campus,[24] *Tinker* was remarkably bold. The decision's central premise was that on-campus student speech enjoyed substantially the same protections as the off-campus speech of adults. According to the *Tinker* Court, "[s]tudents in school as well as out of school

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Court of Appeals, 48 S. TEX. L. REV. 157, 164 (2006). ("One of the keys to the outcome of the *Tinker* case was the distinction between conduct and speech; Tinker and Eckhardt had not engaged in 'aggressive, disruptive action or even group demonstrations,' the Court said, but instead they had merely exercised 'direct, primary First Amendment rights akin to 'pure speech.'" (citing *Tinker*, 393 U.S. at 508)).

[22] *Tinker*, 393 U.S. at 507.

[23] *See*, *e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding a National Park Service regulation prohibiting citizens from engaging in the conduct of camping within the confines of Lafayette Square as a means of raising awareness about homelessness); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 60 (2006) ("As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do–afford equal access to military recruiters–not what they may or may not say.").

[24] According to the *Tinker* Court, it was the "unmistakable holding of [the] Court for almost 50 years" that the First Amendment protects students' and teachers' free-speech rights. *Tinker*, 393 U.S. at 506 (citing Meyer v. Nebraska, 262 U.S. 390 (1923), Bartels v. Iowa, 262 U.S. 404 (1923), and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)). In *Meyer* and *Bartels* the Court struck down laws banning the teaching of foreign languages under the Due Process Clause of the Fourteenth Amendment, not on free-speech grounds. *Barnette* struck down a policy of coerced speech (the saluting of the American flag in class), primarily on freedom-of-religion grounds—not the Free Speech Clause of the First Amendment. Thus, *Tinker* was in fact the first decision of the Supreme Court to apply recognize students' speech rights on campus under the First Amendment.

are 'persons' under our Constitution"[25] and, as such, "are entitled to freedom of expression of their views."[26] It famously observed that "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[27] In his concurrence, Justice Stewart highlighted the Court's central premise that "school discipline aside, the First Amendment rights of children are co-extensive with those of adults."[28]

In holding that the First Amendment protects public school students, the *Tinker* Court conferred to those students a floor of constitutional protection.[29] State and local laws could, of course, provide greater protection for student speech, but those laws had to afford students at least as much protection as the First Amendment. California was required to bring its laws into compliance with the demands of the First Amendment as interpreted by *Tinker*. By 1971, only two years after *Tinker*, California began a decades-long process of accomplishing this goal.

Until that time, California statutes[30] banned "partisan" or "propaganda" publications by students on public school campuses.[31] After *Tinker* was decided, those statutes were challenged in *Rowe v. Campbell Union High School District*.[32] In *Rowe*, a California federal district court declared that

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[25] *Tinker*, 393 U.S. at 511.
[26] *Id*.
[27] *Id*. at 506.
[28] *Id*. at 514-15 (Stewart, J., concurring).
[29] The authors find Justice Thomas's concurrence in *Morse* persuasive—i.e., that the First Amendment, as originally understood, does not afford students free-speech rights in public schools. *See supra*, note 12. That said, the authors agree that the individual States properly may provide students with free-speech protections.
[30] In contrast to the statutes, the California Constitution provides that every person "may freely speak, write and publish" his or her "sentiments on all subjects, being responsible for the abuse of this right." CAL. CONST. art. I § 2 (2008). However, no case existing at the time of the statutes held the constitutional provision to apply to students in the public school setting.
[31] CAL. EDUC. CODE §§ 9012, 9013 (repealed); *see also Lopez*, 34 Cal. App. 4th at 1310.
[32] *Lopez*, 34 Cal. App. 4th at 1310-11 (discussing Rowe v. Campbell Union High Sch. Dist., No. 51060 (N.D. Cal. 1970) (unpublished)).

California's restrictive student speech laws were unconstitutional under *Tinker*.[33] The *Rowe* court concluded that the laws were overbroad because they prohibited even speech that did not substantially interfere with the work of the school or impinge upon the rights of other students.[34] The *Rowe* court noted that school officials could still institute "a simple prohibition against the distribution of certain categories of material," such as obscenities or incitement to law breaking.[35]

The California Legislature responded by repealing the offending statutes found unconstitutional in *Rowe* and adding, in their stead, Section 10611 to the Education Code.[36] Section 10611 constituted the "the nation's first statutory scheme for protecting students' free expression on school campuses."[37] Section 10611 stated, in relevant part:

> "Students of the public schools have the right to exercise free expression including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, and other insignia, except that expression which is obscene, libelous, or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the

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[33] *Id*.; *see also* Note, Jeri Christine Okamoto, *Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal and California Constitutions*, 20 LOY. L.A. L. REV. 1055, 1130 (1987) ("Relying on *Tinker*, the court concluded that sections 9012 and 9013 were impermissibly overbroad since they prohibited expression whether or not it created a disruption of legitimate educational activities.").

[34] *Lopez*, 34 Cal. App. 4th at 1310-11.

[35] *Id*. at 1335-36.

[36] *Id.* at 1311.

[37] *Id*.

> orderly operation of the school, shall be prohibited."[38]

While Section 10611 provided substantial protections consistent with *Tinker*, it was silent on the question of whether student speech in official student newspapers enjoyed the same level of protection as other student speech on campus. In response to this and other deficiencies, Section 10611 evolved into Section 48907 of the Education Code, which the Legislature enacted in 1978.[39] Section 48907 provides, in relevant part:

> "Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. . . . There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section. . . ."[40]

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[38] *Id.* (quoting CAL. EDUC. CODE § 10611).
[39] *Id.*
[40] CAL. EDUC. CODE § 48907 (2008).

Section 48907 is a codification of *Tinker*.[41] Like *Tinker*, the statute provides broad protections for expression by public school students on campus, regardless of whether the expression occurs in a school-sponsored venue, like an official student publication.[42] Moreover, there are only three narrow categories of expression over which school officials may exercise prior restraint or that may be punished: (1) "obscene" speech, (2) "libelous" or "slanderous" speech, and (3) speech that "so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school."[43]

Since its adoption in 1978, there have been only three published opinions—all by California courts of appeal—concerning the interpretation and application of Section 48907: *Leeb v. DeLong*[44] in 1988, *Lopez v. Tulare Joint Union High School District Board of Trustees*[45] in 1995, and *Smith*[46] in 2007. But by the time *Leeb* was decided in 1988, the United States Supreme Court had issued three decisions that cut back on the broad student speech protections of *Tinker* and curtailed student speech protections under the First Amendment.[47] As the following sections explain, when deciding *Leeb*, *Lopez*, and *Smith*, the California courts had to decide whether to conform Section 48907—created to comply with the mandates of *Tinker*—to a First Amendment

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[41] *Smith*, 150 Cal. App. 4th at 1452 ("After reviewing the history of the enactment of section 48907, the *Lopez* court concluded that the statute constitutes a statutory embodiment of the *Tinker* and related First Amendment cases at that time." (internal quotation marks omitted; citing *Lopez*, 34 Cal. App. 4th at 1318)).

[42] CAL. EDUC. CODE § 48907 (2008).

[43] *Id*.

[44] 198 Cal. App. 3d 47 (1988).

[45] 34 Cal. App. 4th 1302 (1995).

[46] *See supra*, note 1.

[47] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986); New Jersey v. T.L.O, 469 U.S. 325 (1985). While *T.L.O.* was not a free-speech case, it was the first case in which the Supreme Court modified its central premise in *Tinker* that the speech rights of students are co-extensive with those of adults.

jurisprudence that had moved away from *Tinker* and become increasingly hostile to student speech.

B. The United States Supreme Court Narrows the Scope of Protection for Student Speech

A number of decisions released by the Supreme Court in the 1980s scaled back the protections afforded by *Tinker* to student speech in public schools. The first of these decisions—*New Jersey v. T.L.O.*[48]—was a search-and-seizure case. Although *T.L.O.* did not involve student speech rights, the decision paved the way to gradual erosion of *Tinker*'s premise that "the First Amendment rights of children are co-extensive with those of adults."[49]

In *T.L.O.*, a teacher caught two students smoking a cigarette in the public high school restroom, in violation of a school rule.[50] When brought before the vice principal for questioning, one student admitted that she had violated the rule, and the other—T.L.O.—denied it.[51] The vice principal took T.L.O. into his private office, searched her purse, and discovered a pack of cigarettes, cigarette rolling papers, marijuana, and other drug paraphernalia.[52] T.L.O. was taken

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[48] *T.L.O.*, 469 U.S. 325 (1985).

[49] *Tinker*, 393 U.S. at 514-15 (Stewart, J., concurring).

[50] *T.L.O.*, 469 U.S. at 328 ("Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick.").

[51] *Id*. ("In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.").

[52] *Id*. ("Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that

to police headquarters, where she confessed to selling marijuana on campus.[53] On the basis of the confession and the evidence seized by the vice principal, which was admitted over T.L.O.'s Fourth Amendment objections, a juvenile court found T.L.O. delinquent and sentenced her to probation.[54] Subsequent appeals focused on the motion to suppress the evidence obtained from the vice principal's search of T.L.O.'s purse.[55]

The Supreme Court held that the vice principal's search and seizure did not violate the Fourth Amendment.[56] The Court recognized that school officials are subject to the dictates of the Fourth Amendment, as applied to state and local government entities via the Fourteenth Amendment; the Court also recognized that students are entitled to protection against "encroachment by public school officials."[57] Additionally, the Court recognized that schoolchildren have "legitimate expectations of privacy" while on campus.[58] However, the Court concluded that students on campus do not enjoy the same level of protection against government searches and seizures as adults: "It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[59] Thus,

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appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.").

[53] *Id*. at 328-29 ("At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school.").

[54] *Id.*at 329-30 ("Having denied the motion to suppress, the court on March 23, 1981, found T.L.O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.").

[55] *Id*. at 330-31.

[56] *Id*. at 332-333 ("Having heard argument on the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.").

[57] *Id*. at 334 ("It is now beyond dispute that 'the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials.").

[58] *Id*. at 338 n.5.

[59] *Id*. at 340.

the "warrant requirement . . . is unsuited to the school environment,"[60] as is "strict adherence to the requirement that searches be based on probable cause."[61] Instead, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[62]

The Court's decision in *T.L.O.* set the stage for its decision the following year in *Bethel School District No. 403 v. Fraser*,[63] which conferred on school officials the power to regulate non-political student speech.[64] Matthew Fraser, a student at the public Bethel High School, delivered a speech nominating a fellow student for elective office at an assembly of about 600 students.[65] During his speech, Fraser referred to the candidate in "an elaborate, graphic, and explicit sexual metaphor."[66] While some students in the audience "hooted and yelled," and others reportedly looked "bewildered and embarrassed," the speech caused no material or substantial disruption.[67] Nor was there any evidence that students in the

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[60] *Id*.
[61] *Id*. at 341.
[62] *Id*.
[63] *Fraser*, 478 U.S. 675 (1986).
[64] *Id.* at 679.
[65] *Id*. at 677.
[66] *Id*. at 677-78. In his speech, Fraser made the following lewd remarks about his candidate: "I know a man who is firm–he's firm in his pants, he's firm in his shirt, his character is firm–but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts–he drives hard, pushing and pushing until finally–he succeeds. Jeff is a man who will go to the very end–even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president–he'll never come between you and the best our high school can be." *Id*. at 687 (Brennan, J., concurring).
[67] *Id*. at 678 (describing reactions of some students to the speech, but describing no material disruption). In dissent, Justice Stevens observed that "[b]ased on the findings of fact made by the District Court, the Court of Appeals concluded that the evidence did not show that the speech had a materially disruptive effect on the educational process." *Id*. at 693 (Stevens, J., dissenting) (internal citation and quotation marks omitted). The Court did not contest the district court's finding, or the court of appeals' conclusion, that Fraser's speech produced no material disruption.

audience found the speech offensive.[68] Nevertheless, school officials suspended Fraser and removed him from the graduation speakers list on the grounds that he violated a school rule prohibiting "[c]onduct which materially and substantially interferes with the educational process . . ., including the use of obscene, profane language or gestures."[69]

Fraser sued the school district and officials, alleging *inter alia* a violation of his First Amendment right to free speech.[70] The district court found in favor of Fraser, and the Ninth Circuit affirmed on the grounds that his speech was constitutionally indistinguishable from the wearing of armbands in *Tinker*.[71] The Supreme Court reversed.[72]

The Court acknowledged that, under *Tinker*, students do not entirely "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[73] However, the Court decided that *some* shedding of speech rights did occur once students stepped foot on campus. Citing its decision a year earlier in *T.L.O.*, the Court reaffirmed—contrary to *Tinker*'s central premise—that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[74]

The result of the *Fraser* Court's gloss on *Tinker* was the creation of a balancing test for student speech cases arising under the First Amendment: "The undoubted freedom to advocate unpopular and controversial views in schools and

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[68] *Id*. at 692 n.2 (Stevens, J., dissenting) ("As the Court of Appeals noted, there is no evidence in the record indicating that any students found the speech to be offensive." (internal citations and quotation marks omitted)).
[69] *Id*. at 678.
[70] *Id*. at 679. Fraser also challenged the school rule pursuant to which he was disciplined as unconstitutionally vague and overbroad, along with the school's decision to remove his name from the graduation speakers list as a violation of due process. *Id*.
[71] *Id*. at 679-80.
[72] *Id*. at 680.
[73] *Id*. (quoting *Tinker*, 393 U.S. at 506).
[74] *Fraser*, 478 U.S. at 682 (citing *T.L.O.*, 469 U.S. at 340-42); *cf*. *Tinker*, 393 U.S. at 514-15 (Stewart, J., concurring) ("[S]chool discipline aside, the First Amendment rights of children are co-extensive with those of adults.").

classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior,"[75] including "consideration for the personal sensibilities of the other participants and audiences."[76] In other words, speech that is "highly offensive or highly threatening to others" receives little protection under the *Fraser* Court's test;[77] if such speech is also devoid of any political message, then it is almost guaranteed no protection.[78] Thus, First Amendment protection over student speech would turn in large part, not on the message as objectively read or heard, but on the reactions of the message's readers or hearers.

The *Fraser* Court concluded that Fraser's speech found no protection in the First Amendment and that the school had constitutionally punished him for it.[79] This, despite the fact (undisputed by the Court) that the speech caused no material disruption to school discipline[80]—the only basis under *Tinker* for suppressing or punishing student speech. Applying its new balancing test, the Supreme Court decided that the school's interest in protecting audience sensibilities outweighed Fraser's speech interests, because the offending portions of the speech expressed no real political message or viewpoint.[81] Worse, the speech's sexual innuendo was "plainly offensive to both teachers and students," "acutely insulting to teenage girl students," and could very well have been "seriously damaging to its less mature audience."[82] The Court curiously ignored the fact that, at least with respect to students in attendance,

[75] *Fraser*, 478 U.S. at 681.
[76] *Id*.
[77] *Id*. at 683.
[78] *Id*. at 680.
[79] *Id*. at 685-86.
[80] *Id*. at 678 (describing reactions of some students to the speech, but describing no material disruption); *id*. at 693 (Stevens, J., dissenting) (describing the district court's findings, and the Ninth Circuit's conclusion, that Fraser's speech had no materially disruptive effect).
[81] *Id*. at 680-83.
[82] *Id*. at 683.

there was no evidence in the record that any of them had been offended, insulted, or otherwise damaged by Fraser's speech.[83]

Fraser marked a significant departure from *Tinker*, which made no distinction between political and nonpolitical speech. The *Fraser* decision also stood in stark contrast to the Court's controlling First Amendment cases dealing with adult speech, none of which has ever made the content or scope of free-speech rights dependent upon an audience's reactions.[84] But the Court's remaking of student-speech law was not over. Two years later, the Court continued to chip away at *Tinker* with its decision in *Hazelwood School District v. Kuhlmeier*.[85]

In *Kuhlmeier*, journalism students at a public high school wrote two articles for the school-sponsored newspaper.[86] The articles described the experiences of students at the school with pregnancy and divorce,[87] but the real names of those students were not used.[88] Nevertheless, upon review, the principal pulled the controversial articles from the newspaper.[89] The principal was concerned that the articles did not adequately protect the identities of students and parents, and that the subject matter of the pregnancy article was inappropriate for some of the younger students in the school.[90]

The student authors sued the school district and its officials for violation of their free-speech rights under the First Amendment.[91] The district court ruled against the student authors, but the Eighth Circuit reversed.[92] The Supreme Court, in turn, reversed the Eighth Circuit, holding that school

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[83] *Id*. at 692 n.2 (Stevens, J., dissenting) ("As the Court of Appeals noted, there is no evidence in the record indicating that any students found the speech to be offensive." (internal citations and quotation marks omitted)).
[84] *See*, *e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).
[85] *Kuhlmeier*, 484 U.S. at 260.
[86] *Id*. at 263.
[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 264.
[92] *Id*. at 264-66.

officials could constitutionally control the content of speech in school-sponsored fora, like newspapers.[93]

While the Court made passing reference to *Tinker* and student speech rights, its analysis centered on the broad qualifications to those rights set out in *Fraser*.[94] The Court iterated the view it expressed in *Fraser*—i.e., that student speech rights are substantially more limited than adult speech rights, and that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."[95] But the Court went further and created a two-tier system for assessing alleged violations of student speech rights: If political speech occurs outside a school-sponsored forum, school officials are governed by the *Tinker/Fraser* standard of "material and substantial disruption."[96] On the other hand, if political speech does occur within an a school-sponsored forum, school officials may "exercis[e] editorial control over the style and content of [that] student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[97] Non-political speech continued to receive almost no protection at all under the First Amendment.

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[93] *Id*. at 266, 276.
[94] *Id*. at 266-67.
[95] *Id*. at 266.
[96] *Id*. at 265.
[97] *Id*. at 273. When confronted with litigating against deferential standards, such as the "pedagogical purposes" standard at issue in public school student speech cases, advocates often struggle persuading courts to implement the appropriate standard of constitutional review. *See* S. Elizabeth Wilborn, *Teaching the New Three Rs: Repression, Rights, and Respect: A Primer for Student Speech Activities*, 37 B.C. L. REV. 119, 122 (1995) (referring to, and criticizing, the U.S. Supreme Court's test for student speech under *Fraser* and *Kuhlmeier* as "essentially a rational basis test"); *see generally* R. George Wright, *Free Speech Values, Public Schools, and the Role of Judicial Deference*, 22 NEW ENG. L. REV. 59 (1987); *see also* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 898, 900 (2005) (explaining the obstacles and offering strategies for advocates confronted with deferential standards of review within the economic liberties realm of constitutional litigation).

In 2007, the Supreme Court again chipped away at federal speech rights for students in *Morse v. Frederick*.[98] In *Morse*, a public high school student sued school officials for violation of his First Amendment speech rights after they suspended him for waiving a banner with the phrase "Bong Hits 4 Jesus" at an off-campus, school-approved activity during school hours—the Olympic Torch Relay, which was passing by the high school.[99] The federal district court entered judgment for the officials, and the Ninth Circuit vacated.[100]

The Supreme Court ruled in favor of the school officials.[101] First, the Court concluded that the *only* plausible interpretation for the banner was that it promoted illegal drug use.[102] Then, the Court built upon *Fraser*[103] to conclude that school officials had the power to suppress and punish such a message. Citing *Fraser*, the Court reaffirmed that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[104] On this premise, the Court carved out a special exception to *Tinker*: Officials may "restrict student expression that they reasonably regard as promoting illegal drug use."[105] In his concurrence, Justice Thomas summed up well the Court's consistent chipping away of *Tinker*:

> "[T]he Court has since scaled back *Tinker*'s standard, or rather set the standard aside on an ad hoc basis. Signaling at least a partial break with *Tinker*, *Fraser* left the regulation of indecent student speech to local schools. Similarly, in . . . *Kuhlmeier*, . . . the Court made an exception to *Tinker* for school-

[98] 127 S.Ct. 2618.
[99] *Id*. at 2622-23.
[100] *Id*. at 2622.
[101] *Id*.
[102] *Id*. at 2624-26.
[103] The Court concluded that *Kuhlmeier* did "not control this case because no one would reasonably believe that [the student's] banner bore the school's imprimatur." *Id*. at 2627.
[104] *Id*. at 2622 (citing *Fraser*, 478 U.S. at 682).
[105] *Id*. at 2629.

> sponsored activities. . . . [T]he Court expressly refused to apply *Tinker*'s standard. Instead, for school-sponsored activities, the Court created a new standard that permitted school regulations of student speech that are reasonably related to legitimate pedagogical concerns. Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't—a standard continuously developed through litigation against local schools and their administrators."[106]

C. Blazing Their Own Trail: California Courts Interpret Section 48907 Without Regard to the More Restrictive First Amendment Jurisprudence

When the California Court of Appeal in *Leeb v. DeLong*[107] had to interpret Section 48907 immediately following the *Kuhlmeier* decision that same year, it was forced to reconcile the following First Amendment jurisprudence on student speech: (1) inoffensive speech received near-absolute protection,[108] and (2) offensive speech could be restrained or punished in different degrees, depending upon the venue (e.g., school-sponsored paper)[109] and the subject matter (advocacy of illegal drug use).[110]

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[106] *Id*. at 2634. Justice Thomas concurred in the result, but he would have found for the school on the basis that, originally understood, the First Amendment does not give students in public schools a right to free speech.

[107] 198 Cal. App. 3d 47.

[108] *See Tinker*, 393 U.S. 503.

[109] *See Kuhlmeier*, 484 U.S. 260; *Fraser*, 478 U.S. 675.

[110] *See Morse*, 127 U.S. 2618. The authors believe that it makes little sense for public school districts to be able to suppress student speech for "pedagogical purposes" when such speech often reflects political views—as was the case in *Smith*. *See* Summum v. Pleasant Grove City, (10th Cir.

In *Leeb*, public high school officials refused to run a student article in a school-sponsored newspaper on the grounds that the article was defamatory.[111] Student Leeb

499 F.3d 1170, 1179, 2007) (Tacha, J., Chief Circuit Judge, dissenting from denial of rehearing *en banc*) ("No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text."). *See* also Wilborn, *supra* note 97, at 120 (remarking that in public schools, "core political speech is no more protected in the public schools than a dirty limerick scrawled in a bathroom stall"). Ironically, under the current jurisprudence, students are afforded less First Amendment protection for their political speech during school than public school teachers. *See* Pickering v. Board of Education, 391 U.S. 563 (1968) (holding that a public school teacher had First Amendment right to speak on issues of public concern). *Compare*, Paul J. Beard II, *The Legacy of Grutter: How the Meredith and PICS Courts Wrongly Extended the "Educational Benefits" Exception to the Equal Protection Clause in Public Higher Education*, 11 TEX. REV. L. & POL. 1, 26-27 (2007) ("Notions of institutional 'academic freedom' and 'educational autonomy' as a basis for judicial deference have no place in the context of K-12 public schools."). In sum, it is clear that student speech may be left without a voice regardless of whether a court applies the "pedagogical purposes" understanding of *Kuhlmeier*, or the "government speech" understanding of *Kuhlmeier*, which professes that the government need not adhere to viewpoint neutrality since it has provided the forum for the speech. *See* Robert Luther III & David B. Caddell, *Breaking Away from the 'Prayer Police': Why the First Amendment Permits Sectarian Legislative Prayer and Demands a 'Practice Focused' Analysis*, 48 SANTA CLARA. L. REV. 569, 594 (2008) ("While the 'government speech' doctrine is a relatively new phenomenon in constitutional jurisprudence . . .[in essence, it argues] that when actors and events are cloaked with government authority, the speech reflects the views of the government . . . Because of the sweeping scope of the 'government speech' doctrine and the threat that it raises to free speech concerns across the board, this doctrine must be reconsidered….") (referring generally to Rust v. Sullivan, 500 U.S. 173 (1991) (interpreted as suggesting that when the government supplies the funds for a particular activity, or forum, it may also control the content of the speech disseminated at that activity, or forum, without engaging in viewpoint discrimination)).

[111] *Leeb*, 198 Cal. App. 3d at 50-51 ("On the third page [of the high school's 'April Fool's' edition] an article appeared under the headline 'Nude Photos: Girls of Rancho.' Prepared with the advice and consent of the journalism instructor, it was nonetheless the catalyst for the present controversy. According to the article, the July issue of Playboy magazine would carry nude photographs of distaff Rancho students and those interested in posing should sign up at the school darkroom. The photos would be taken on April 23 in 10- to 15- minute sessions, followed by

claimed that, to the extent they authorized prior restraint of speech, Section 48907 and the school's administrative regulations facially violated the California Constitution.[112] Leeb sought an injunction to require publication and distribution of the allegedly defamatory article. [113] The trial court found for the school, and the court of appeal affirmed.[114]

The Court of Appeal held that "Section 48907 of the Education Code and California decisional authority confer editorial control of official student publications on the student editors alone, with very limited exceptions."[115] It observed that "[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is not available to this state's educators," but that prohibiting actionable defamation was well within their power.[116] The court concluded Section 48907 did not offend the California Constitution, because "[a] school district in this state may censor expression from official school publications which it reasonably believes to contain an actionable defamation . . . but not as a matter of taste or pedagogy."[117] The Court of Appeal did not reach the question of whether the article was in fact defamatory—and therefore unprotected speech—because the issue had not been briefed by the parties and because it was moot.[118]

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short interviews. The article was accompanied by a photograph of five fully clothed female students standing in line with their school books, purportedly with applications in hand. [The Principal] recognized each of them…. On April 2, he prohibited distribution of the newspaper.").

[112] *Id*. at 51.

[113] *Id*. ("Claiming section 48907 of the Education Code and the district's administrative regulation adopted pursuant to that section—both of which provide for prior restraints with respect to official student publications in certain limited situations—violate the free press provision of the California Constitution, article I, section 2, Leeb unsuccessfully sought a temporary restraining order and a preliminary injunction.").

[114] *Id*. at 51, 63.

[115] *Id*. at 54.

[116] *Id*.

[117] *Id*. at 60.

[118] *Id*. at 63.

Leeb's affirmation of California law's broad speech protections—even in spite of the United States Supreme Court's ever-restrictive First Amendment jurisprudence—was buttressed by the California Legislature's enactment in 1992 of Section 48950 of the Education Code.[119] That statute was enacted to prohibit school officials from making or enforcing any rule subjecting any high-school student to disciplinary sanctions "solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from government restriction by the First Amendment to the United States Constitution or § 2 of Article I of the California Constitution."[120] Importantly, the Legislature expressed its conviction "that a student shall have the same right to exercise his or her right to free speech on campus as he or she enjoys when off campus."[121] By expressly equating on-campus student speech with off-campus speech, the California Legislature made a clean break with the First Amendment jurisprudence that held just the opposite.

In 1995, seven years after *Leeb*, the Court of Appeal in *Lopez* again endorsed California law's broad protections of student speech.[122] In *Lopez*, three public high school students wrote and produced a film for their film arts class on the

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[119] CAL. EDUC. CODE § 48950 (2008).
[120] *Id*.
[121] *Id.*, cmt (b).
[122] The California Legislature's early legislative actions in favor of student speech may have provided guidance to a number of other states. *See* Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 458-459 (2000) (By the year 2000, "[s]ix states, Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts, ha[d] passed laws that provide free speech rights to students greater than those contained in the First Amendment as interpreted by *Kuhlmeier*. Of the six enacted student free expression laws, four (Colorado, Iowa, Kansas, and Massachusetts) provide that student expression shall never be attributed to the school . . . ."); *see also* Jeff Horner, *Student Free Speech Rights: "The Closing of the Schoolhouse Gate" and Its Public Policy Implications*, 33 S. TEX. L. REV. 601, 613-615 (1992) (tracing early state legislative responses to *Kuhlmeier*); Robert J. Shoop, *States Talk Back to the Supreme Court: "Students Should Be Heard As Well As Seen*," 59 ED. L. REP. 579 (1990) (also tracing early state legislative responses to *Kuhlmeier*).

problems of teenage pregnancy.[123] The film contained profanity and other explicit material.[124] Upon reviewing a draft of the film's script, the school principal and superintendent required the students to remove the profanity and explicit sexual content.[125] The students sued for declaratory and injunctive relief under the California Constitution and under Section 48907.[126] The trial court sided with the school, holding, *inter alia*, that students' speech rights under Section 48907 and the First Amendment were the same, and that Section 48907 properly allowed schools to prohibit speech that is obscene.[127]

The Court of Appeal affirmed.[128] The court first considered the question of the relationship between Section 48907 and the First Amendment's Free Speech Clause, concluding that the former was independent of the latter.[129] The legislative history of Section 48907, the court found, "constitutes a statutory embodiment of the *Tinker* and related First Amendment cases at that time"—i.e., the federal standard protecting student speech as it existed in 1978.[130] Moreover, "[t]he statutory language cannot reasonably be construed to indicate any legislative intent that the rights protected by the statute would expand or contract according to subsequent developments in federal law."[131] The court went on to explain that "neither the legislative history of Section 48907 nor California case law supports the conclusion that a student's free speech rights under section 48907 are only coextensive with those guaranteed by the First Amendment and federal case law."[132] Instead, "Section 48907 provides greater free speech protection than does the United States Constitution."[133]

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[123] *Lopez*, 34 Cal. App. 4th at 1306.
[124] *Id*.
[125] *Id.*
[126] *Id*. at 1308.
[127] *Id*. at 1309.
[128] *Id*. at 1306.
[129] *Id*. at 1309-19.
[130] *Id* at 1318.
[131] *Id*.
[132] *Id*. at 1319.
[133] *Id*. at 1317.

The *Lopez* court then considered whether the film's profanity and sexually explicit content violated Section 48907 and could, therefore, be prohibited on that basis. The court avoided the issue of whether the offending material was "obscene," deciding instead that the school's restraint of that material was a reasonable regulation of the *form*—as opposed to the *content*—of speech. Because the form of speech violated the "professional standards of English and journalism" under Section 48907, it could be restrained.[134] The court was quick to note that "censorship of 'four-letter words' does not unduly hinder the students' ability to express their ideas or opinions on any subject," but simply "enjoins the indecent manner in which an idea is expressed."[135]

Both *Leeb* and *Lopez* set the stage for *Smith*. There was no longer any doubt that students' speech rights were substantially the same as the rights of individuals to speak off campus. The question for the *Smith* court was how—in light of that principle—to interpret perhaps the most significant category of unprotected speech under Section 48907: incitement.

II. *Smith v. Novato Unified School District*: Defining Section 48907's "Incites" Provision

Smith centered on the provision of Section 48907 excepting from protection speech that "so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school."[136] With no clear guidance from the statute's legislative comments or history, or case law interpreting the "incites" provision, the Court of Appeal had to look elsewhere. Ultimately, it relied significantly on the long line of federal First Amendment cases involving adult "incitement" and the power of government to restrain or

[134] *Id*. at 1306.
[135] *Id.* at 1325.
[136] CAL. EDUC. CODE § 48907 (2008).

punish it.[137] Before recounting the facts and holding of *Smith*, it is useful to consider this line of federal case law.

A. The Federal "Incitement" Doctrine

Federal case law has evolved to the point where controversial, politically-incorrect adult speech enjoys substantial, if not impenetrable, protection under the First Amendment.[138] But speech that calls for violence or law-breaking—what the courts have referred to as "incitement"—has not enjoyed the same level of protection against government suppression or punishment.[139] Although the

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[137] *Smith*, 150 Cal. App. 4th at 1454-59.

[138] *Barnette*, 319 U.S. at 642 (Jackson, J., dissenting) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *see also* Cohen v. California, 403 U.S. 15, 26 (1971) ("The government cannot choose the words that an individual uses to criticize the government or opine on a public issue.").

[139] Generally, the case law considers the scope of protection for alleged incitement occurring in traditional public fora. "Public forums are government-owned properties that the government is constitutionally obligated to make available for speech. Sidewalks and parks are paradigm examples of the public forum. The government may regulate speech in public forums only if certain [stringent] requirements are met." Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1127 (Aspen 2006). Speech in traditional public fora enjoys substantial protection against suppression or punishment by government actors, who may only impose reasonable time, place, and manner restrictions–but not content or viewpoint restrictions. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."). *But see Clark*, 468 U.S. at 293 (upholding a National Park Service regulation prohibiting camping in Lafayette Square); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (upholding a state fair rule prohibiting the distribution of literature on fair grounds unless distributed at a particular location) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("We have often approved [time, place, and manner] restrictions . . . provided that they are justified without reference to the

controlling case defining the contours of inciting speech is the Supreme Court's 1969 decision in *Brandenburg v. Ohio*,[140] a number of earlier cases laid the requisite foundation for this landmark decision.

In *Schenck v. United States*,[141] the United States Supreme Court considered the convictions of defendants who had conspired to violate the Espionage Act of 1917 by printing and distributing anti-war leaflets.[142] In affirming the conviction, Justice Holmes, for the Court, recognized that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[143] Despite the unfavorable result for free speech, the Court effectively articulated an objective test for determining incitement—a test that focused on the words of speech, not on the speaker's or hearer's subjective state of mind.

Later that year in *Abrams v. U.S.*,[144] the Supreme Court upheld convictions for sedition under certain amendments to the Espionage Act.[145] This time voting *against* conviction,[146] Justice Holmes iterated the view he expressed in *Schenck*—the idea that "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain

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content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.")); U.S. v. O'Brien, 391 U.S. 367 (1968) (holding that defendant's conviction for burning his draft card should be upheld because a compelling state interest existed in preserving administrative efficiency).

[140] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[141] Schenck v. United States, 249 U.S. at 47 (1919).

[142] *Id*. at 48.

[143] *Id*. at 52.

[144] Abrams v. U.S., 250 U.S. 616 (1919).

[145] *Id*. at 616-617.

[146] For extensive coverage of the possible reasons behind Justice Holmes' decision not to affirm the convictions of the defendants in this case, *see generally* Yogal Rogat & James O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion–The Free Speech Cases*, 36 STAN. L. REV. 1349 (1984).

substantive evils that the United States constitutionally may seek to prevent."[147] The Supreme Court would not come to a consensus that resembled Justice Holmes's standard until fifty years later.[148] But it was within the soil of these early decisions that the seed of the federal "incitement" doctrine was planted.

Over the next half century, the United States Supreme Court struggled in its attempts to define the scope of First Amendment protection of provocative political speech. In *Whitney v. California*,[149] the Court considered whether a provision of the Criminal Syndicalism Act was unconstitutional.[150] The Act forbade individuals from "advocating, teaching, aiding and abetting the commission of crime, sabotage, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change."[151] Ms. Whitney, as a Communist, was convicted for violating the Act and the Court affirmed the conviction.[152] The Court explained that "the freedom of speech which is secured by the Constitution does not confer an absolute right to speak."[153] The Court then held that government may punish speech considered "inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means."[154] While the scope of unprotected speech was quite broad, the Court continued to articulate an objective test.

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[147] *Abrams*, 250 U.S. at 627.
[148] *Brandenburg*, 395 U.S. 444.
[149] Whitney v. California, 274 U.S. 357 (1927).
[150] *Id*. at 359.
[151] *Id*. at 360.
[152] *Id*.
[153] *Id*. at 371. The Supreme Court has included justices among its ranks that have disagreed with this statement. As Justice Black said, the "First Amendment's unequivocal command shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Konigsberg v. State Bar, 366 U.S. 36, 81 (1961) (Black, J., dissenting).
[154] *Whitney*, 274 U.S. at 371 (citation and internal quotation marks omitted).

Fifteen years later, in *Chaplinsky v. New Hampshire*[155] the Supreme Court reached a similar conclusion. In *Chaplinsky*, members of Jehovah's Witnesses were convicted of inciting breaches of the peace on the basis of their use of language that the government characterized as highly offensive.[156] While on a public street corner, they called a passer-by a "damned racketeer" and "damned Fascist" to his face and in a belligerent manner.[157] The Court observed that, even assuming the defendants' speech had some social value, any such value was clearly outweighed by society's interest in order and morality.[158] The *Chaplinsky* Court upheld the convictions on the grounds that the defendants' insults were "fighting words" that enjoyed no First Amendment protection.[159] Although *Chaplinsky* has never explicitly been overruled by the Court,[160] a number of respected constitutional law scholars have questioned whether "fighting words" lack First Amendment protection today.[161]

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[155] 315 U.S. 568 (1942).

[156] *See generally id.*

[157] *Id*. at 569.

[158] *Id*. at 572.

[159] *Id*. at 571-572 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or intend to incite an immediate breach of the peace.").

[160] *See* Note, *The Demise And Of The* Chaplinsky *Fighting Words Doctrine: An Argument For Its Interment*, 106 HARV. L. REV. 1129 (1993) ("In the fifty years since *Chaplinsky*, the Court has never upheld another speaker's conviction under the 'breach of the peace' prong of the fighting words doctrine. . . . In addition, the prong of Chaplinsky that exempted words 'which by their very utterance inflict injury' – dictum in that opinion – has never been used by the Court to uphold a speaker's conviction. The jurisprudential history of the *Chaplinsky* doctrine has led some commentators to conclude that the Court has sub rosa overruled the entire fighting words doctrine. . . .").

[161] *See* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundation Paradigms of Free Expression*, 40 UCLA L. REV. 103, 159 n. 237 (1992) ("There is even less reason to suppose that *Chaplinsky* is still good law.'; *see also* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510 (*Chaplinsky* is "no longer good law"); Thomas C. Grey, *How To Write a Speech Code*

Seven years after *Chaplinsky*, the Supreme Court decided *Terminiello v. City of Chicago*.[162] In that case, Father Terminiello, a Roman Catholic priest delivered a speech containing anti-Semitic and other inflammatory language to a crowd of about eight hundred gathered in an auditorium.[163] A second crowd of about a thousand individuals simultaneously protested the speech outside.[164] Police were assigned to the meeting to maintain order, but they were unable to prevent several disturbances.[165] Terminiello was found guilty under a city ordinance that stated that any person "who shall make, aid, countenance, or assist in making any . . . breach of the peace, or diversion tending to a breach of the peace, within the limits of the city shall be deemed guilty of disorderly conduct . . . ."[166]

The Supreme Court struck down the ordinance as unconstitutional and reversed Terminiello's conviction.[167] The Court observed that "a function of free speech under our system of government is to invite dispute"[168] and that such speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[169] The Court went on to say that speech will often "strike at

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Without Really Trying: Reflections on The Stanford Experience, 29 U.C. DAVIS L. REV. 891 (1996) ("Though the Supreme Court has not sustained a conviction with full opinion under the 'fighting or insulting words' doctrine since *Chaplinsky*, the Court has often restated the doctrine in unqualified terms . . . ."); *But see* Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179 (1994) (discussing in part how *Chaplinsky* continues to set the stage for hate speech regulations); Burton Caine, *The Trouble With "Fighting Words":* Chaplinsky v. New Hampshire *Is A Threat To First Amendment Values And Should Be Overruled*, 88 MARQ. L. REV. 441 (2004).

[162] Terminiello v. City of Chicago, 337 U.S. 1 (1949).

[163] *Id*. at 3.

[164] *Id*.

[165] *Id*.

[166] *Id*.

[167] *Id*. at 6.

[168] *Id*. at 4.

[169] *Id*. at 3.

prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[170] However, unless "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest," such speech is "nevertheless protected against censorship or punishment."[171]

While perhaps not immediately apparent, *Chaplinsky* and *Terminiello* are reconcilable. In each case, a speaker uttered offensive language—in the one case, to a passerby, and in the other, to a crowd. The constitutional difference appears to lie in the speech's risk of harm or disruption, as measured in part by the proximity of the speaker to the hearer. When the speaker's offensive words are directed at the person of the hearer, a greater risk of harm or disruption exists than when the same words are undirected or uttered at a significant distance from the hearer.

In *Brandenburg*, a leader of the Ku Klux Klan was convicted under an Ohio statute for advocating "revengeance," and the return of the "nigger" to Africa and the "Jew" to Israel.[172] The statute at issue punished individuals who

> "advocate or teach the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform; or who publish or circulate or display any book or paper containing such advocacy; or who justify the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or who voluntarily assemble with a group formed to teach or advocate the doctrines of criminal syndicalism."[173]

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[170] *Id*. at 4.
[171] *Id*.
[172] *Brandenburg*, 395 U.S. at 446.
[173] *Id*. at 448.

Brandenburg challenged the conviction, along with the constitutionality of the statute under the First Amendment.[174] The United States Supreme Court had to consider whether the mere advocacy of a law violation was enough to strip speech of its First Amendment protection. The Court answered "no," articulating what is now known as the modern "incitement" test:

> "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. '[T]he mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments."[175]

The test is objective, focusing on the content of the speech, rather than the subjective state of mind of the speaker or his audience. Under this test, the Court struck down the statute and overturned the conviction.[176] The Court simultaneously overruled its earlier decision in *Whitney*[177] which had found a statute that criminalized "mere advocacy not distinguished from incitement to imminent lawless action" to be constitutional.[178]

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[174] *Id*. at 445.
[175] *Id*. at 447-48.
[176] *Id*, at 448.
[177] Because *Whitney* controlled the outcome in *Abrams*, *Brandenburg* overruled *Abrams* as well.
[178] *Brandenburg*, 395 U.S. at 449. The reasoning articulated in the *Brandenburg* decision rests firmly within the framework that the Supreme Court had established a dozen years earlier in *Yates v. United States*, 354 U.S. 298 (1957). As it had done many times before, in *Yates*, the Court

Since the *Brandenburg* decision almost thirty years ago, the Supreme Court has applied the test for incitement a number of times, only to conclude each time that the elements of *Brandenburg* were not met and that the speech in question was protected under the First Amendment.[179]

B. The California Court of Appeal in Smith *Adopts the Federal Incitement Doctrine Applicable in Adult Speech Cases*

1. Facts and Procedural Background of the Case

Between 1998 and 2002, Andrew Smith was enrolled at Novato High School, a public school within the Novato Unified School District.[180] Following the 9/11 terrorist attacks, while a senior in high school and a student in the journalism class, Andrew submitted an opinion-editorial on illegal immigration entitled "Immigration" for publication in the school newspaper, *The Buzz*.[181] "Immigration" expressed the view that illegal immigration to the United States should not be tolerated.[182]

After the student editors and the journalism advisor for *The Buzz* approved "Immigration," the article was placed in the layout for the November, 2001, issue.[183] The principal of

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reconsidered the criminal convictions of members of the Communist Party. However, unlike the previous cases it had adjudicated, this time the Court, through Justice Harlan, drew an important distinction "between advocacy of unlawful action, on one hand, and advocacy of abstract doctrine or general discussion of the policies and ideas, on the other." GEOFFREY R. STONE, THE FIRST AMENDMENT 57 (Aspen 2003). As such, the Court reversed Yates' conviction.

[179] *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (reversing disorderly conduct conviction of defendant who shouted "[w]e'll take the fucking street later" or "[w]e'll take the fucking street again" during an anti-war demonstration). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (reversing judgment that held speaker responsible for damage caused at the behest of speech containing the statement "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck").

[180] *Smith*, 150 Cal. App. 4th at 1446.

[181] *Id*.

[182] *Id*. at 1446-47.

[183] *Id*. at 1447.

the school, Lisa Schwartz, reviewed the layout for spelling and grammar, and for violations of the District's speech policies.[184] The layout—including Andrew's opinion-editorial—was approved by Principal Schwartz.[185]

"Immigration" was published in *The Buzz* and distributed at the high school the morning of November 13, 2001.[186] No one complained about "Immigration" that day.[187] The following day, on November 14, a few parents arrived on campus and complained to Principal Schwartz about the content of "Immigration."[188] Some students walked out of their classrooms in protest of the article as well.[189] Principal Schwartz called the District's superintendent, John Bernard, to inform him of the adverse reaction to "Immigration."[190] Without reading the opinion-editorial, Superintendent Bernard immediately ordered all remaining copies of *The Buzz* retracted.[191] Accordingly, Principal Schwartz directed the journalism teacher to collect remaining copies of the student paper.[192]

Principal Schwartz thereafter invited upset parents and students to the campus lecture hall where they could vent their feelings about "Immigration."[193] At the meeting, which lasted throughout the school day, the principal apologized for "misinterpretation and misapplication of" the District's policies in allowing "Immigration" to be published.[194] The same day, Principal Schwartz and Superintendent Bernard sent a letter home with students.[195] The letter stated, in relevant part:

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[184] *Id*.
[185] *Id*.
[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *Id*.
[192] *Id*.
[193] *Id*.
[194] *Id*.
[195] *Id*.

> Yesterday the November issue of our school's student newspaper, *The NHS Buzz*, was distributed. This issue included an opinion article representing the beliefs of one student that negatively presented immigrants in general and Hispanics in particular. We are writing to express our deepest regrets for the hurt and anger this article has generated for both students and their parents. This article should not have been printed in our student newspaper, as it violates our District's Board Policy . . . [and Human Relations and Respect Mission Statement] . . . .[196]

Subsequently, the District instructed teachers to review the District's speech policies in class and conducted a second meeting about "Immigration" the evening of November 15, 2001.[197] Approximately 200 students, parents, and staff expressed their dismay about the article.[198] Against this backdrop, Andrew was assaulted and attacked on two separate occasions in November for writing "Immigration."[199]

On December 4, 2001, the District's Board of Trustees held a public meeting, where Principal Schwartz iterated that "Immigration" should never have been published, because it violated the District's speech policies.[200] She confirmed that she had retracted the remaining copies of *The Buzz* containing the article.[201] Students and parents, along with Andrew and his father, spoke about their reactions to "Immigration" at the meeting.[202]

Andrew did not submit an opinion editorial for the second issue of *The Buzz*.[203] However, in February, 2002, he

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[196] *Id*. at 1448.
[197] *Id*.
[198] *Id*.
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Id*.
[203] *Id*. at 1449.

submitted a second opinion-editorial entitled "Reverse Racism."[204] The article discussed Andrew's views on affirmative action and other forms of "reverse" discrimination.[205] The student editor-in-chief of *The Buzz*, the journalism teacher, and Principal Schwartz approved the article for publication.[206] However, in light of the reaction to "Immigration," both Principal Schwartz and Superintendent Bernard decided that "Reverse Racism" would be published alongside a counter-viewpoint—or not at all.[207] Principal Schwartz and her assistant principal directed the journalism students to vote on whether (1) to delay publication of the February, 2002, issue to wait for a counterpoint to "Reverse Racism" to be produced or (2) to publish the February, 2002, issue without "Reverse Racism."[208] Faced with this choice imposed by the District, students voted to pull "Reverse Racism" from the February issue in order to avoid delays in publication.[209] Shortly thereafter, *Novato Advance*, a paper of general circulation in Marin County, published "Reverse Racism" with the notation: "This opinion piece was removed from *The Buzz*."[210]

The Smiths filed suit on May 2, 2002, alleging that the District's actions with respect to both "Immigration" and "Reverse Racism" violated Andrew's rights under the state and federal constitutions, and under California Education Code Section 48907.[211] The Smiths also challenged the facial constitutionality of the District's speech policies.[212] Shortly after the lawsuit was filed, "Reverse Racism" was published in the May, 2002, issue of *The Buzz* alongside a counterpoint opinion.[213] Following a bench trial, the trial court found in favor of the District and the individual defendants on all

[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] *Id*.
[212] *Id*.
[213] *Id*.

causes of action.[214] The trial court based its interpretation of Section 48907, and therefore its decision, entirely on the *Federal* Constitution and case law which,[215] as previously explained, is the absolute minimal amount of protection that student speech is afforded; the trial court ignored the fact that California provides greater protection to student speech than the federal minimum.[216] The trial court's judgment included an award of litigation costs to the District.[217]

2. The Court of Appeal Decision

The Smiths appealed the trial court's decision. The appeal centered on the statutory interpretation of Section 48907, as applied to the actions the District took with respect to "Immigration" and "Reverse Racism."[218] In a unanimous opinion, the Court of Appeal held that both "Immigration" and "Reverse Racism" constituted protected speech—not unprotected incitement—under Section 48907.[219] Moreover, the court held that the District's response to "Immigration" infringed on Smith's exercise of his free-speech rights under Section 48907,[220] but that its response to "Reverse Racism" did not.[221] The District's speech policies were held to be facially valid.[222]

In deciding that "Immigration" and "Reverse Racism" were protected speech, and that the District's actions with respect to "Immigration" violated Andrew's rights, the Court of Appeal surveyed the relevant state and federal precedents

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[214] *Id*.
[215] *Id*. at 1445 (The trial court decided that Andrew Smith's opinion-editorial "Immigration" was not protected speech under Section 48907 because it constituted constitutionally unprotected "fighting words" under the U.S. Constitution). As discussed above, *see supra* Part II.A, the "fighting words" doctrine of unprotected speech evolved under the Federal Constitution.
[216] *See supra*, Part I.C.
[217] *Smith*, 150 Cal. App. 4th at 1449.
[218] *Id*. at 1445.
[219] *Id*. at 1457-1459, 1465.
[220] *Id*. at 1462-1464.
[221] *Id*. (unpublished portion).
[222] *Id*. (unpublished portion).

on student expression on public school campuses.[223] Relying upon the language and legislative history of Section 48907, as interpreted and applied in *Leeb* and *Lopez*, the court affirmed that Section 48907 provides more protection than the First Amendment to on-campus student speech.[224] Importantly, the court rejected the District's contention that Section 48907's broad protections had been altered by federal decisions, like *Kuhlmeier*, which limited on-campus student speech under the First Amendment.[225] In other words, the court expressly rejected the notion that merely because Section 48907 initially tracked the federal standard for student speech as it stood in 1978, California law under Section 48907 *continued* to track federal interpretation of student speech.

The District argued that the articles were not protected because they violated the "incites" provision of Section 48907.[226] The Court of Appeal had to therefore decide what the "incites" provision actually meant under California law. No California court had construed the term "incites" under Section 48907, but the Court of Appeal was not without substantial guidance.

First, the Court of Appeal looked to the plain meaning of the term "incites" as defined in Black's Law Dictionary.[227] The court noted that the definition "focuses on conduct that is directed at achieving a certain result."[228] In other words, assessing whether speech is incitement requires an objective evaluation of the purpose of the speech—not the subjective intent of the speaker, or the subjective reaction of the hearer. The court confirmed that this plain meaning of "incite" is consistent with the established meaning of the term in California law.[229]

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[223] *Id*. at 1450-1453.
[224] *Id*. at 1451-1453.
[225] *Id*. at 1451.
[226] *Id*. at 1458.
[227] *Id*. at 1455 (citing the source's definition of "incite" as meaning "[t]o arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion; as, to 'incite' a riot").
[228] *Id*.
[229] *Id*. (citing various speech cases, both civil and criminal).

Second, the Court of Appeal consulted federal speech cases on incitement existing at the time of Section 48907's enactment—i.e., in 1978.[230] Notably, it did not consult any of the federal speech cases occurring after 1978. One of the cases that the court relied upon for defining Section 48907's "incites" provision was *Brandenburg*.[231]

As discussed above, in *Brandenburg*, the United States Supreme Court held that "incitement" is speech that "advocate[s] or encourage[s] violent acts" or that is "directed to incit[e] or produc[e] imminent lawless action."[232] The court in *Smith* observed that the "incitement" cases were clear on one fundamental point: The focus is on "inciting speech, rather than speech that may result in disruption or other harm."[233] The Court of Appeal therefore made certain that its interpretation of Section 48907's "incites" provision observes the long-established "heckler's veto rule"—i.e., the rule that "speech that seeks to communicate ideas, even in a provocative manner, may not be prohibited merely because of the disruption it may cause due to reactions by the speech's audience."[234]

Having considered the plain meaning of the term "incites," federal cases existing at the time of Section 48907's enactment, and relevant California case law, the Court of Appeal articulated the test for identifying speech that "so incites" under Section 48907:

> [A] school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption. Schools may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the

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[230] *Id*. at 1457-1458.
[231] *Id*. at 1457 n. 6.
[232] *Id*. at 1457 (citing *Brandenburg*, 395 U.S. at 447).
[233] *Id*.
[234] *Id*. (citing, *inter alia*, *Tinker*, 393 U.S. at 508-09, and *Terminiello*, 337 U.S. at 4).

> content of the ideas) is so inflammatory that the speech itself provokes the disturbance.[235]

The Court of Appeal concluded that, even assuming a substantial disruption had occurred after "Immigration" was published, the opinion-editorial was still protected speech under Section 48907 because it did not incite disruption.[236] While the court considered the article to be "disrespectful" and "unsophisticated," it contained no "direct provocation or racial epithets."[237] As to "Reverse Racism," the court implicitly concluded that the opinion article was protected speech as well.[238]

The Court of Appeal also held that the District's actions with respect to "Immigration" infringed Smith's free-speech rights, observing that the District had "succumbed to the fear of disruption and discontent."[239] The court held that the District's declaration that "Immigration" should never have been published and the District's order retracting remaining copies of *The Buzz* constituted a "threat of censorship" and the "chilling" of the exercise of future protected speech, in violation of Section 48907.[240] Again, the court adopted an objective test for determining the deterrent or chilling effect of a government act on speech, stating that "[a] violation of free speech rights may be established where a governmental response to speech would chill or silence a person of ordinary firmness from future First Amendment activities."[241] In this case, the "person of ordinary firmness" was a "teenager, still developing self-confidence and intellectual independence, still subject to peer pressure and more likely to be intimidated by authority."[242] The court explained that a subjective standard—based on the plaintiff's level of persistence in expressing his or her views—would be

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[235] *Id*. at 1457-1458.
[236] *Id*. at 1458.
[237] *Id*.
[238] *Id*. at 1465.
[239] *Id*.
[240] *Id*. at 1462.
[241] *Id*. at 1459 (internal citations and quotation marks omitted).
[242] *Id*. at 1463.

"unjust" because it would "allow [government] to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity."[243] Thus, the fact that Andrew was "stubborn and persistent" in "test[ing] the school's resolve" was irrelevant.[244]

By contrast, the Court of Appeal held that the District's meetings for protesting students and parents did not facilitate a "heckler's veto," in violation of Andrew's free speech rights.[245] To the contrary, the court concluded that by providing a forum for the expression of views opposed to "Immigration," "the District modeled the civil discourse education should foster."[246] To hold otherwise, the court admonished, would be "to adopt a rule contrary to our nation's traditions of open debate."[247] Nor did the court consider the November 14th letter to be a form of discipline against Andrew for authoring "Immigration."[248] The court recognized that "[a] school response expressing strong disapproval of the content of a student's speech may in some circumstances amount to censure of the student and thereby constitute infringement of free speech."[249] Here, the court concluded, the letter did not "directly criticize" Andrew by name, but simply cast "some degree of attention" on him—a result that Andrew could not complain about after having decided to exercise his right to publish such a controversial piece as "Immigration."[250] Finally, in an unpublished part of its decision, the Court of Appeal concluded that the District had not violated Andrew's rights with respect to "Reverse Racism."[251]

Concluding that Andrew's rights were violated, the Court of Appeal unanimously reversed the trial court's

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[243] *Id*. at 1459.
[244] *Id*. at 1464.
[245] *Id*. at 1460.
[246] *Id*.
[247] *Id*.
[248] *Id*. at 1461.
[249] *Id*.
[250] *Id*.
[251] *Id*. (unpublished portion).

judgment and remanded for proceedings consistent with its decision.[252] The California Supreme Court and the United States Supreme Court rejected the District's petition for review, preserving a victory for Andrew Smith and student free speech rights under California law.[253]

III. The "Dos" and "Don'ts" of Student Speech Regulation: A Guide for School Officials

Smith represents a groundbreaking decision in favor of student speech in public schools. While it was decidedly pro-speech in its analysis and conclusion, the Court of Appeal was sensitive to the difficult decisions that public school officials must make when students seek to express controversial views. The decision is replete with guidance as to how these officials should handle difficult speech issues. Some of those guidelines follow.

Public school officials should always begin an analysis of student speech with the presumption that the speech is protected. Legally, this is a much safer way of approaching student speech issues. If an official starts with the presumption that the speech is not protected and can be censored, that official is more likely to run afoul of the student's free speech rights.

From the outset, public school officials should recognize that some speech, while highly offensive or insulting, is nevertheless protected under California law.[254] With regard to student publications, as a general rule Section 48907 demands that the student have the final say on the

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[252] *Id*. (unpublished portion).

[253] *Smith*, 2007 Cal. LEXIS 9716; *Smith* 2008 U.S. LEXIS 1294.

[254] *See*, *e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984), and Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Both articles argue that the principle at the heart of free speech is that value generated from speech is to be measured solely by the utility to the individual form of "individual self-realization," and not by the assessment of the aggregate benefits bestowed upon society as a consequence of the speech. These articles further reject the collectivist notion that speech has value because it aids the perpetuation of the democratic process.

content of his or her article, provided that the article meets the appropriate standards of professionalism as adopted by the publishing journal.[255] *Leeb* and *Lopez* affirm a public school's power under Section 48907 to prohibit obscenities and actionable defamation—in whatever medium of communication they occur.

Smith affirms a school's power under Section 48907 to prohibit speech that incites, but it severely restricts the kind of speech that constitutes legal incitement. School officials must realize that unless the words of a speech, objectively evaluated, (1) call upon students to disrupt school operations, break school rules, or violate the law *and* (2) present a clear and present danger of such an outcome, that speech is protected against claims of incitement, regardless of the subjective state of mind of the speaker or the audience.[256] Importantly, when speech calls simply for political change or political action—however offensive or unpopular—it is almost guaranteed to be protected.[257]

Despite the decision's pro-speech language, school officials do not remain at the mercy of students. *Smith* offers a variety of methods that school officials may adopt to address disruptive responses to protected speech. For example, to defuse any hostile reaction to a controversial article, officials may organize an assembly where students can discuss the article's merits and demerits, as well as the speech protections that the law affords.[258] Officials may opine on the merits and

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[255] *Smith*, 150 Cal. App. 4th at 1439.

[256] *Id*. at 1457-58.

[257] *Id*. ("'Immigration' ends with such a call to political action.").

[258] *Id*. at 1460 ("By enabling the protestors to respond to the offensive speech with their viewpoint, the District modeled the civil discourse education should foster. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. It is the classroom and academic institutions which are the marketplace of ideas and where the exchange of ideas and arguments are to be fostered, not curtailed." (internal citations and quotation marks omitted)); *id*. at 1464 ("The District attempted to ease the distress of the protestors by distancing itself from Smith's opinion editorial and by providing the protestors opportunities to express their views on 'Immigration.' This was wholly consistent with free speech values and it is likely that, viewed as a whole,

demerits of a student's speech or article.[259] Officials may even distance themselves or openly disavow a student's views—so long as they do not deny students' broad speech rights and do not in any way discourage the expression of unpopular or offending opinions.[260] Officials should be aware that "[a] school response expressing strong disapproval of the content of a student's speech may in some circumstances amount to censure of the student and thereby constitute infringement of free speech."[261] Furthermore, officials should avoid making public statements regarding the *propriety* of uttering or publishing certain speech—whether it should or should not have been expressed in the first place—without consulting counsel or an expert in the field of student speech rights.[262] After all, Section 48907 still prohibits obscenities, actionable defamation, and inciting speech, along with speech in an official school publication that does not meet

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the publication of 'Immigration' resulted in a useful exchange regarding how different persons and communities might view the sensitive topic of illegal immigration.").

[259] *Id*. at 1461.

[260] *Id*. School administrators should consult legal counsel before making a judgment as to the protections provided to a potentially controversial student-author's article.

[261] *Id*. (citing Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1268-1269 (11th Cir. 2004)). In *Holloman*, the plaintiff, a student in a public school, refused to say the Pledge of Allegiance in class. In response to plaintiff's refusal, his teacher singled him out and reprimanded him in front of the entire class, "subjecting him to embarrassment and humiliation." The court concluded that the teacher's response violated the plaintiff's First Amendment rights.

[262] *Smith*, 150 Cal. App. 4th at 1465 ("In the aftermath of 'Immigration' the District succumbed to the fear of disruption and discontent. While understandable, this was not permissible."); *id*. at 1464 ("To conclude otherwise, would permit a school to suppress future protected speech by characterizing past speech as unprotected as long as the school did not actually censor the past speech. The effect would be to limit students' right to free speech on controversial topics to a one-time event, or at least to suppress the controversial speech until a particularly stubborn and persistent speaker (like Smith when he submitted 'Reverse Racism') comes along to test the school's resolve, or until the passage of enough time to diminish the power of the school's admonition. The right of free speech is not subject to such manipulation and diminishment.").

professional standards of English and journalism.[263] And Section 48907 gives school officials the power to regulate the time, place, and manner of speech.[264]

School officials may not censor their students' opinions on controversial issues of the day by contriving proxies for viewpoint discrimination. As one court has said, officials may not

> "throw up their hands, declaring that because misconceptions are possible it may silence its pupils [and] that the best defense against misunderstanding is censorship. [It is f]ar better to teach [students] about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to become partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker."[265]

The proper role of school officials is to implement and conduct a curriculum through classroom instruction. It is not the role of school officials to prevent students from expressing politically incorrect views. Fortunately, due to Andrew's desire to speak his mind, California public high school students in the future now have even greater freedom to express their controversial, politically incorrect views on issues of the day.

Conclusion

Smith narrowly defined the "incites" provision of Section 48907, providing California public school students

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[263] CAL. EDUC. CODE § 48907 (2008).
[264] *Id.*
[265] Hedges v. Wauconda Community Unif. Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993).

with broad protection of politically incorrect speech. By creating a clear and objective test for incitement, which ignores the heckler's veto, *Smith* confirmed that under California law public school students enjoy the same rights to express unpopular views as they or any adult would have on a street corner.

Smith also confirms what the Founding Fathers knew all along: Federalism works. At the time *Smith* was argued before the court of appeal, the U.S. Supreme Court had just issued its latest decision on student speech in *Morse*. While *Morse* may be considered a blow to speech rights, the First Amendment provides only the *floor* of protection for student speech. States may continue to experiment in the area by providing greater protections for student speech than federal law. *Smith* did just that for California, providing a model for other states as well.