California Court Broadens Student Speech Protections in Public Schools

*By Paul J. Beard, II**

For decades California has been a leader in protecting the free speech rights of students in public high schools. Last year, a state court issued a decision expanding California law's already broad protection of even the most offensive and politically incorrect student speech. In *Smith v. Novato Unified School District*, the California Court of Appeal decided that two politically charged student articles in a school paper that angered students and parents (one on immigration and the other on "reverse racism") were not unprotected incitement, as school officials argued, but rather protected speech that could not be restrained or punished.[1] In doing so, the court adopted a narrow interpretation of "incitement" under California law that confers on student speech perhaps the greatest protection of any state in the country—and much greater protection than the First Amendment provides.

Besides setting an important precedent for California students, *Smith* exemplifies federalism at work. While California law has become increasingly protective of student speech rights, the U.S. Supreme Court's First Amendment jurisprudence has become decreasingly so. This article explores this and other issues raised in *Smith*.

I. Background of Federal and California Law on Student Speech

In 1969, the U.S. Supreme Court issued its landmark decision on student speech in *Tinker v. Des Moines Independent Community School District*, where high school students claimed a First Amendment right to protest the Vietnam War by wearing black armbands on campus.[2] The Court declared that student speech enjoyed the full protection of the First Amendment, unless such speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[3] Justice Stewart, in his concurrence, identified the central premise of *Tinker*: "[S]chool discipline aside, the First Amendment rights of children are co-extensive with those of adults."[4]

Tinker forced state and local governments to review their student speech policies, and California was one of the first to codify its broad protections. In 1978, the California Legislature added Section 48907 to the Education Code, which protects student speech—including in school-sponsored forums, like school newspapers—against prior restraint or punishment. The statute recognizes only four broad categories of unprotected speech. It states, in relevant part, that public school officials may prohibit only student speech that is "obscene, libelous, or slanderous," or 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."[5]

The first published decision to interpret Section 48907 was the California Court of Appeal's 1988 opinion in *Leeb v. DeLong*.[6] By that time, however, the U.S. Supreme Court had substantially curtailed student speech protections under the First Amendment. While not expressly overruling *Tinker*, the Court created substantial exceptions to it, giving school officials broad authority to control student speech.[7] For example, in *Hazelwood School District v. Kuhlmeier*, the Court said that school officials could prohibit speech in school-sponsored activities, like school newspapers, if such prohibitions are "reasonably related to legitimate pedagogical concerns."[8]

Both *Leeb* and the court of appeal's 1995 decision in *Lopez v. Tulare Joint Union High School District Board of Trustees* made clear that Section 48907 remains unaffected by the Court's evolving First Amendment jurisprudence on student speech.[9] The *Leeb* court 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" under Section 48907.[10] The reason was that Section 48907 "constitutes a statutory embodiment of the *Tinker* and related First Amendment cases *at that time*."[11] Thus, Section 48907 was to be interpreted in light of the First Amendment jurisprudence existing at the time of its enactment in 1978. This interpretive view of Section 48907 would prove dispositive in *Smith*.

II. Smith v. Novato Unified School District

A. The Facts of the Case

Between 1998 and 2002, Andrew Smith was enrolled at Novato High School, a public school in the Novato Unified School District in Marin County, California. Following the 9/11 terrorist attacks, while a senior and student in a journalism class, Smith submitted an opinion-editorial on illegal immigration entitled "Immigration" for publication in the school newspaper *The Buzz*. "Immigration" expressed Andrew's objections to and ideas for addressing illegal immigration. The article also included some offensive remarks about immigrants in general.[12]

With the approval of the journalism advisor and the principal, "Immigration" was published in *The Buzz* and distributed at the high school the morning of November 13, 2001. No one complained about the article that day, but the following day a few parents arrived on campus to complain to the principal. Some students walked out of their classrooms in protest of the article as well. The principal called the district's superintendent to inform him of the reaction to the article. Without reading the piece, the superintendent immediately ordered that all remaining copies of *The Buzz* be retracted. Accordingly, the principal directed the journalism advisor to collect remaining copies of the paper.[13]

Later that morning, the principal invited upset parents and students to the campus lecture hall to vent their feelings about the article. At the meeting, which lasted the day, the principal apologized for "misinterpretation and misapplication of" the

* *Paul J. Beard, II, is a Principal Attorney with the Pacific Legal Foundation in Sacramento, California. He was one of the attorneys who represented the Smiths in this litigation, and argued the case before the California Court of Appeal.*

district's policies in allowing "Immigration" to be published.[14] That day, the principal and superintendent also sent a letter home with students. The letter stated, in relevant part:

> 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] . . . .*[15]

The district instructed teachers to review its speech policies in class and conducted a second meeting about "Immigration" the following evening. Approximately 200 students, parents, and staff expressed dismay over the article. Against this backdrop, Smith was assaulted and attacked on two separate occasions in November.[16]

The following month, the district's Board of Trustees held a public meeting, where the principal reiterated that "Immigration" should never have been published, because it violated the district's speech policies. She confirmed that she had retracted the remaining copies of *The Buzz* containing the article, and students and parents, along with the Smiths, spoke about their reactions to the piece.[17]

In February, 2002, Smith submitted a second opinion-editorial entitled "Reverse Racism." The article discussed Smith's views on so-called "reverse" discrimination—*i.e.,* government-based discrimination against white individuals in favor of racial minorities. Again, the journalism advisor and principal approved Andrew's article for publication. However, in light of the hostile reaction to "Immigration," the principal and superintendent decided that "Reverse Racism" would be published alongside a counter-viewpoint or not at all. The 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." Faced with this choice, a choice never before imposed on the journalism students, they voted to pull "Reverse Racism" from the issue in order to avoid delays in publication.[18]

B. The Smiths Sue the District for Violation of Andrew's Speech Rights

The Smiths filed suit in state court against the district, the principal, and the superintendent (collectively, "the District") on May 2, 2002.[19] The Smiths alleged violation of Andrew's speech rights under the state and federal constitutions, and under California Education Code § 48907.[20] They argued that both "Immigration" and "Reverse Racism" were protected speech under federal and state law. They argued further that the District's public condemnation of "Immigration" and its discipline of Andrew for publishing it violated his speech rights. They also argued that the District's imposition of a unique counterpoint requirement for "Reverse Racism" was a form of unlawful prior restraint.[21]

Shortly after the lawsuit was filed, "Reverse Racism" was published in the May 2002 issue of *The Buzz,* alongside a counterpoint. However, the Smiths still had a claim that the District's unique counterpoint requirement, along with the imposed delay on publication, constituted illegal prior restraint on speech. Following a bench trial, the trial court entered judgment against the Smiths, who appealed.[22]

C. The Court of Appeal Decision in Smith

In a unanimous opinion, the court of appeal held that both "Immigration" and "Reverse Racism" constituted protected speech under Section 48907, and that the District violated Andrew's speech rights with respect to the first.[23] The most significant aspect of the decision is its application of Section 48907's "incites" provision. The District argued that the articles constituted unprotected incitement because they contained offensive fighting words, and because of the disruption on campus in reaction to their publication. The Smiths argued that an objective evaluation of the articles revealed that they contained nothing urging or calling upon any student to break any law or school regulation, or to cause any disruption on campus. The Smiths contended that the unreasonable reaction is irrelevant to the question of whether such speech objectively incites.

The meaning of Section 48907's "incites" provision was an issue of first impression, but the court was not without substantial guidance. First, the lower court looked to the plain meaning of the term "incites" as defined in *Black's Law Dictionary*.[24] The court noted that the definition "focuses on conduct that is directed at achieving a certain result"—*i.e.,* the objective meaning and effect of speech, not the subjective feelings of the audience to that speech.[25] The court confirmed that this plain meaning of "incite" is consistent with the established meaning of the term in other areas of California law.[26]

Second, the court consulted federal cases existing at the time of Section 48907's enactment—cases decided on the question of whether *adult* speech constituted unprotected incitement.[27] For example, it considered the most important federal case on "incitement" in the adult speech context, *Brandenburg v. Ohio*,[28] which states 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."[29] The court 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."[30] The court 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."[31]

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 content of the ideas) is so inflammatory that the speech itself provokes the disturbance.[32]

The court concluded that, even assuming a substantial disruption occurred after "Immigration" was published, the opinion-editorial was still protected speech under Section 48907, because it did not incite disruption.[33] While the court considered the article to be "disrespectful" and "unsophisticated," it contained no "direct provocation or racial epithets."[34] As to "Reverse Racism," the court implicitly concluded that the opinion article was protected speech as well.[35]

Having applied Section 48907's "incites" provision to conclude that Smith's articles were protected, the court next considered whether the District violated his rights. It held that the District's actions with respect to "Immigration" did so infringe.[36] For the court, the District's repeated and public declaration that "Immigration" should never have been published, and its order retracting remaining copies of the paper, conveyed "the threat of censorship" and the "chilling" of the exercise of future protected speech, in violation of Section 48907:[37] "In the aftermath of 'Immigration' the District succumbed to the fear and disruption and discontent. While understandable, this was not permissible."[38] However, the court concluded that the District's response to "Reverse Racism" did not infringe Smith's speech rights, because the District had not required, but merely recommended, that Andrew's article be published with a counterpoint.[39]

The court of appeal unanimously reversed the trial court's judgment and remanded for proceedings consistent with its decision.[40] The California Supreme Court rejected the District's petition for review. However, in December 2007 the District filed a petition for writ of certiorari in the U.S. Supreme Court.[41] That petition is currently pending before the Court.

CONCLUSION

Smith is noteworthy for two reasons. First, it narrowly defines the "incites" provision of Section 48907, providing California public school students 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 students enjoy the same rights to express unpopular views as the adult on the street corner.

Second, *Smith* confirms what the Founding Fathers knew all along: federalism works well. At the time *Smith* was argued before the court of appeal, the U.S. Supreme Court issued its latest decision on student speech: *Morse v. Frederick*.[42] In *Morse*, the Court created yet another exception to *Tinker*, holding that a school official did not violate a student's First Amendment rights by confiscating a banner reasonably viewed as promoting illegal drug use. While *Morse* may be considered a blow to speech rights, the First Amendment provides only the *floor* of protection for student speech. States like California may continue to experiment in the area by providing greater protections for student speech than federal law. *Smith* did just that.

Endnotes

1 150 Cal. App. 4th 1439 (2007).

2 393 U.S. 503 (1969).

3 *Id.* at 509. At issue was the question of whether public high school students had a First Amendment right to wear black armbands while on campus, in protest of the Vietnam War.

4 *Id.* at 514-15 (Stewart, J., concurring).

5 Cal. Educ. Code § 48907.

6 198 Cal. App. 3d 47 (1988) (interpreting Section 48907's "slander" provision).

7 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).

8 *Hazelwood*, 484 U.S. at 273.

9 Lopez v. Tulare Joint Union High School District Board of Trustees, 34 Cal. App. 4th 1302, 1315, 1317-20 (1995); *Leeb*, 198 Cal. App. 3d at 54.

10 *Leeb*, 198 Cal. App. 3d at 54.

11 *Lopez*, 34 Cal. App. 4th at 1318 (emphasis added).

12 *Smith*, 150 Cal. App. 4th at 1446-47. For example, the article contained the following statements: "I'll bet that if I took a stroll through the Canal District in San Rafael that I would find a lot of people that would answer a question of mine with 'que?', meaning that they don't speak English and don't know what the heck I'm talking about…. Seems to me that the only reason why they can't speak English is because they are illegal…. 40% of all immigrants in America live in California … because Mexico is right across the border, comprende?"

13 *Id.* at 1447.

14 *Id.*

15 *Id.*at 1448-49 (emphasis added).

16 *Id.* at 1448.

17 *Id.*

18 Smith v. Novato Unified Sch. Dist., 150 Cal. App. 4th 1439, 1449 (2007).

19 Both Andrew and his father, Dale Smith, filed suit. Dale Smith's citizen and taxpayer standing was necessary to preserve the facial challenges to the District's speech policies, should Andrew graduate before termination of the suit.

20 The Smiths also challenged the facial constitutionality of the District's speech policies, on grounds of vagueness and overbreadth. But the Smiths did not prevail on that claim at any stage of the litigation.

21 *Id.*

22 *Id.*

23 *Id.* at 1457-59, 1465. The court did not need to consider whether the District's actions violated the First Amendment. The court correctly recognized that Section 48907 is more protective. *Id.* at 1452.

24 Smith v. Novato Unified Sch. Dist., 150 Cal. App. 4th 1439, 1455 (2007) (citing the dictionary's definition of "incite" as "[t]o arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion; as, to 'incite' a riot").

25 *Id.*

26 *Id.* (citing various speech cases, both civil and criminal).

27 *Id.* at 1457-1458.

28 *Brandenburg*, 395 U.S. 444.

29 *Smith,* 150 Cal.App.4th at 1457 (citing *Brandenburg*, 395 U.S. at 447).

30 *Id.*

31 *Id.* (citing, inter alia, *Tinker*, 393 U.S. at 508-09 and Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

32 *Id.* at 1457-1458.

33 *Id.* at 1458.

34 *Id.*

35 *Id.* at 1465.

36 *Id.* at 1461-1464.

37 *Id.*

38 *Id* at 1465.

39 *Id.* (unpublished portion).

40 *Id.* at 34 (unpublished).

41 The District alleges that the case presents a federal question: First, Section 48907 facially violates the First Amendment. Second, as applied, the statute violates students' "property interest" in public education, in violation of the Fourteenth Amendment.

42 127 S.Ct. 2618 (2007).