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Smith v. Novato Unified School District: Free Speech Victory or Civil Setback

Diane Bang

SMITH v. NOVATO UNIFIED SCHOOL DISTRICT: FREE SPEECH VICTORY OR CIVIL SETBACK?

*Diane Bang**

In Smith v. Novato Unified School District, *the California Court of Appeal significantly limited the discretion that public school authorities have to censor on-campus student speech. The court found that an inflammatory editorial in the school newspaper was protected speech and could not be retracted by the school district because it did not incite disruption, despite its disrespectful and unsophisticated take on immigration issues. This Comment argues that this decision opens the door for free expression of all types of prejudice and bigotry in California school newspapers. Rather than being allowed to err on the side of caution, school officials will be forced to accept controversial speech and whatever disruption that may follow because of the fear of litigation. This Comment proposes that California courts should allow greater deference to school administrators' decisions regarding controversial student speech because the administrators are in the best position to gauge its propriety and impact.*

I. INTRODUCTION

The American public education system strives to instill in students the "'habits and manners of civility' essential to a democratic society,"[1] including tolerance of divergent views and "consideration of the sensibilities of others."[2] Educators are faced with the great challenge of allowing the nation's youth to enter into that "marketplace of ideas" and take a stand on hot-button issues

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1. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

2. *Id.*

while protecting the interests of other students and ensuring the overall safety of the school community.[3] In the past few decades, California has diverged from federal law, providing greater protection for student speech.[4]

Under federal law, although students retain their First Amendment right to freedom of speech within the school,[5] this constitutional right is not equivalent to the corresponding right accorded to adults.[6] Educators have the authority to regulate speech that is contrary to the school's educational mission[7] or that creates a disruption in its operation.[8] Because public schools are expected to provide a safe learning environment, school officials are occasionally required to predict the effects that certain types of speech may have on the audience. This predictive behavior can result in prior restraint.[9]

While a number of U.S. Supreme Court decisions narrowed the scope of protection for student speech throughout the 1980s,[10] the California legislature endorsed broad protections of student speech.[11] The California Court of Appeal concurred:

> [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.

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3. *See id.* ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) ("The classroom is peculiarly the 'marketplace of ideas.'"); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176 (9th Cir. 2006) ("The courts have construed the First Amendment as applied to public schools in a manner that attempts to strike a balance between the free speech rights of students and the special need to maintain a safe, secure and effective learning environment."), *vacated as moot*, 549 U.S. 1262 (2007).

4. Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trs., 40 Cal. Rptr. 2d 762, 771 (Ct. App. 1995).

5. *Tinker*, 393 U.S. at 506.

6. *See* New Jersey v. T.L.O., 469 U.S. 325, 340–42 (1985) (noting that students' Fourth Amendment rights are not equivalent to those of adults).

7. *Fraser*, 478 U.S. at 685.

8. *Tinker*, 393 U.S. at 513.

9. A prior restraint is "[a] governmental restriction on speech or publication before its actual expression [that] . . . violate[s] the First Amendment unless the speech is obscene, is defamatory, or creates a clear and present danger to society." BLACK'S LAW DICTIONARY (POCKET) 562 (3d ed. 2006).

10. Paul J. Beard II & Robert Luther III, *A Superintendent's Guide to Student Free Speech in California Public Schools*, 12 U.C. DAVIS J. JUV. L. & POL'Y 381, 392–400 (2008).

11. CAL. EDUC. CODE § 48950 (Deering 2008) (stating that the legislative intent is such 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").

> . . . Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .[12]

But is this really a risk worth taking with children in our schools? The opinions of our youth cannot be completely discounted; the youth are recognized as the "vanguard of social change."[13] However, offensive comments make a minimal contribution to the marketplace, and the school has an undeniable interest in protecting its students.[14]

In *Smith v. Novato Unified School District*,[15] the principal and superintendent of Novato High School chose to retract an offensive editorial on illegal immigration that was published in the school newspaper after students began walking out of class.[16] The school's officials were prompted to act "because the uproar among students was disrupting school."[17] The U.S. Supreme Court has held that the authority to make such decisions "properly rests with the school board,"[18] whose members are in a better position than the courts to determine whether restricting speech is appropriate.[19] However, the California Court of Appeal held that the editorial was protected speech under California Education Code section 48907.[20] This section "confer[s] editorial control of official student publications on the student editors alone, with very limited exceptions."[21]

In this Comment, I contend that under federal law, the Novato Unified School District officials did not violate the student author's free speech rights by censoring his editorial. Part II presents a

12. Smith v. Novato Unified Sch. Dist., 59 Cal. Rptr. 3d 508, 526 (Ct. App. 2007) (quoting *Tinker*, 393 U.S. at 508).

13. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 677 (7th Cir. 2008) (Rovner, J., concurring).

14. *Id.* at 671 (majority opinion).

15. 59 Cal. Rptr. 3d 508 (Ct. App. 2007), *cert. denied*, 128 S. Ct. 1256 (2008).

16. *Id.* at 511–12.

17. Peter Fimrite, *Censorship Suit at Novato High: Racial Writings Stifled, Student Says*, S.F. CHRON., May 3, 2002, at A17.

18. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

19. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 527 (9th Cir. 1992).

20. *Smith*, 59 Cal. Rptr. 3d at 511.

21. Leeb v. DeLong, 243 Cal. Rptr. 494, 497 (Ct. App. 1988).

summary of federal precedents concerning student speech. Part III reviews the facts in *Smith*, and Part IV discusses the court's reasoning. Part V provides an analysis of the likely outcome of this case under federal law.

II. FIRST AMENDMENT PROTECTION OF STUDENT SPEECH

When determining the First Amendment rights of students in public schools, the U.S. Supreme Court has held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[22] Beginning in 1969 with the landmark case *Tinker v. Des Moines Independent Community School District*,[23] the Supreme Court held that while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[24] any conduct by the student that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[25] In *Tinker*, high school administrators suspended a small number of students for wearing black armbands in protest of the Vietnam conflict.[26] The Court held that in this particular case, wearing armbands to school was a form of "pure speech" entitled to comprehensive First Amendment protection because the speech did not disrupt classwork or create substantial disorder in the school.[27]

Then in 1986, in *Bethel School District No. 403 v. Fraser*,[28] the Supreme Court held that the First Amendment does not prevent a school from suspending a student in response to his or her vulgar and lewd speech if that speech undermines the school's educational mission.[29] In *Fraser*, a high school student delivered a speech nominating a fellow classmate for a student government office, using

22. *Fraser*, 478 U.S. at 682; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

23. 393 U.S. 503 (1969).

24. *Id.* at 506.

25. *Id.* at 513.

26. *Id.* at 504.

27. *Tinker*, 393 U.S. at 505–06.

28. 478 U.S. 675 (1986).

29. *Id.* at 685.

sexually explicit metaphors to refer to that classmate throughout the speech.[30] The school suspended the student even though his speech did not cause a substantial disruption.[31] The Court concluded that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[32]

Two years later, in *Hazelwood School District v. Kuhlmeier*,[33] the Supreme Court held that educators were not precluded from regulating student speech by exercising editorial control over school-sponsored publications as long as their actions were "reasonably related to legitimate pedagogical concerns."[34] In *Hazelwood*, three student staff members of a high school newspaper were barred from publishing a story that described the experiences of three other students with pregnancy, sexual activity, and birth control.[35] The Court's decision emphasized that school officials retain broad authority to regulate student speech when "members of the public might reasonably perceive [the speech] to bear the imprimatur of the school."[36]

Finally, in *Morse v. Frederick*,[37] decided just two months prior to *Smith*, the Supreme Court once again reaffirmed a school's authority to restrict certain forms of student expression, especially speech that promotes something as dangerous and harmful as drugs.[38] In *Morse*, a high school student was suspended after unfurling a large banner that read "BONG HiTS 4 JESUS" at an event sanctioned and supervised by the school.[39] The Ninth Circuit found the student's First Amendment rights had been violated

30. *Id.* at 677–78.

31. *Id.* at 690 (Marshall, J., dissenting).

32. *Id.* at 685–86 (majority opinion).

33. 484 U.S. 260 (1988).

34. *Id.* at 273.

35. *Id.* at 262–63.

36. *Id.* at 271 ("[A] school may in its capacity as publisher of a school newspaper . . . 'disassociate itself' not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.") (alterations in original) (citations omitted).

37. 127 S. Ct. 2618 (2007).

38. *Id.* at 2629.

39. *Id.*

because the school had not satisfied the *Tinker* disruption test by "demonstrating that his speech gave rise to a 'risk of substantial disruption.'"[40] The Supreme Court reversed, noting that the "rule of *Tinker* is not the only basis for restricting student speech."[41] The government's interest in preventing student drug use entitled school administrators "to protect those entrusted to their care."[42]

III. FACTS OF *SMITH*

In November 2001, Andrew Smith was a senior at Novato High School.[43] He was enrolled in a journalism class that published the school's newspaper, the *Buzz*.[44] Smith wrote an editorial for the first issue titled *Immigration* in which he portrayed illegal immigrants as criminals and stereotyped those who cannot speak English as undocumented immigrants.[45] In the editorial, Smith stated:

> There should be no tolerance for anyone to be an illegal immigrant. . . .
>
> I'll even 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. . . . [Forty percent] of all immigrants in America live in California . . . because Mexico is right across the border, comprende? . . . [I]f they can't legally work, they have to make money illegal way [sic]. This might include drug dealing, robbery, or even welfare. Others prefer to work with manual labor while being paid under the table tax free. . . .
>
> [The INS] should treat these people the way the cops would treat a suspected criminal. . . . If a person looks suspicious then just stop them and ask a few questions, and if they answer "que?", detain them and see if they are legal.

40. *Id.* at 2623 (citation omitted).

41. *Id.* at 2627.

42. *Id.* at 2628.

43. Smith v. Novato Unified Sch. Dist., 59 Cal. Rptr. 3d 506, 511 (Ct. App. 2007).

44. *Id.*

45. *Id.* at 511–12, 521.

> . . . People like this make our ancestors look like fools. They became American and earned it. . . . I am sick of these people insulting us and our ancestors by just waltzing in and abusing our country. There should be no reason for this and America shouldn't be taking this while bending over.[46]

The day after the paper was distributed, parents and students began to complain about the content of the editorial; some students were so upset that they left class.[47] Novato High School's principal notified the district superintendent,[48] who ordered the collection of all remaining copies of the newspaper.[49] That same day, the principal met with all the students who had left class, along with the parents who were already on campus.[50] The principal apologized for misinterpreting the school board's policy and allowing *Immigration* to be published.[51] The principal also sent a letter to all the parents, stating that the article should not have been printed because it violated the board's policy of limiting student expression "in order to maintain an orderly school environment and to protect the rights, health, and safety of all members of the school community."[52] Two days after *Immigration* was published and distributed, the school district held another meeting where approximately 200 students, parents, and staff gathered to express their dismay over the editorial.[53] The day after distribution, a Latino student threatened Smith for writing the editorial.[54] Later that same month, another Latino student confronted Smith and chipped Smith's tooth in a fight.[55]

Then in January 2002, Smith submitted a second editorial for the *Buzz*, titled *Reverse Racism*, which contained "provocative statements about race relations."[56] Wary of the incidents following

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46. Andrew Smith, *Immigration*, THE BUZZ, Nov. 13, 2001, *available at* http://www.splc.org/pdf/novatoeditorials.pdf.

47. *Smith*, 59 Cal. Rptr. 3d at 512.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 513.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 513–14.

the first editorial, the principal suggested that a counter viewpoint to Smith's editorial should be published to produce a "balanced," "top quality" product.[57] However, there was insufficient time to write a counter-viewpoint, so the students voted to delay publication of *Reverse Racism* until the next issue.[58] This delay led Smith and his father to file a lawsuit seeking an injunction to force publication.[59] *Reverse Racism* appeared in the next edition of the *Buzz*, but Smith continued to pursue an action against Novato Unified School District for violating his free speech rights.[60]

The trial court found for the school district, holding that its actions did not violate Smith's rights under California Education Code section 48907.[61] Section 48907 states, "Pupils . . . have the right to exercise freedom of speech and of the press . . . and the right of expression in official publications, whether or not the publications . . . are supported financially by the school . . . except that expression shall be prohibited which is obscene, libelous, or slanderous."[62] The statute goes on to prohibit "material that so incites pupils 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."[63] The trial court found that *Immigration* was not protected speech because it constituted "fighting words."[64]

The California Court of Appeal reversed, "holding that 'Immigration' was not speech likely to incite disruption within the meaning of section 48907."[65] Although Smith expressly stated that "his purpose in writing the opinion editorial was to get people 'pissed off' and [that] he wanted a 'response . . . that would cause action,'"[66] the Court of Appeal held that *Immigration* was protected

57. *Id.* at 514.

58. *Id.*

59. Lydia Hailman King, *Calif. High Court Lets Stand Student Journalist's Free-Speech Victory*, FIRST AMENDMENT CENTER, Sept. 27, 2007, http://www.firstamendmentcenter.org/news.aspx?id=19101.

60. *Id.*

61. *Smith*, 59 Cal. Rptr. 3d at 511.

62. CAL. EDUC. CODE § 48907(a) (Deering 2008).

63. *Id.*

64. *Smith*, 59 Cal. Rptr. 3d at 511.

65. *Id.*

66. *Id.* at 521.

speech under section 48907.[67] Although the school district appealed the decision, both the California Supreme Court and the U.S. Supreme Court denied the petition for review.[68]

IV. REASONING OF THE COURT

The California Court of Appeal's analysis of *Immigration* as protected speech began with a survey of relevant state and federal law.[69] First, the court discussed the *Tinker* holding and the legislative history of California Education Code section 48907.[70] Prior to *Smith*, the California Court of Appeal in *Lopez v. Tulare Joint Union High School District Board of Trustees*[71] concluded that section 48907 is "a statutory embodiment" of *Tinker* and other related First Amendment cases available at the time the statute was enacted.[72] Second, the court discussed *Fraser* and *Hazelwood*, noting that "[a]lthough [*Hazelwood*] remains the controlling standard under the First Amendment for school-sponsored speech, California courts have held that section 48907 provides broader protection for student speech in California public school newspapers."[73] While federal courts have moved away from protecting student speech in high schools,[74] California courts have moved in the opposite direction, becoming increasingly protective of student speech.[75]

The court then focused on Smith's argument that *Immigration* was not speech likely to incite disruption in the school.[76] To resolve this issue, the court had to determine the meaning of the word *incite* as used in the statute.[77] The first step was giving *incite* a "plain and commonsense meaning."[78] The court examined the *Black's Law*

67. *Id.* at 511.

68. *Id.* at 508.

69. *Id.* at 514–18.

70. *Id.* at 515.

71. 40 Cal. Rptr. 2d 762 (Ct. App. 1995).

72. *Id.* at 771.

73. *Smith*, 59 Cal. Rptr. 3d at 516 ("The broad power to censor expression in school sponsored publications for pedagogical purposes recognized in [Hazelwood] is not available to this state's educators." (quoting Leeb v. DeLong, 243 Cal. Rptr. 494, 498 (Ct. App. 1988))).

74. *See* Beard & Luther, *supra* note 10, at 392–400.

75. *See id.* at 400–05.

76. *Smith*, 59 Cal. Rptr. 3d at 518.

77. *Id.*

78. *Id.* at 518 (quoting Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist., 927 P.2d 1175, 1177 (Cal. 1997)).

Dictionary definition of *incite* and concluded that the definition—"[t]o arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion"—focuses on conduct aimed at achieving a particular result.[79]

Second, the court looked to the established meaning of *incite* according to how it has been defined in California case law. "[T]he Court of Appeal . . . [u]ltimately . . . relied significantly on the long line of federal First Amendment cases involving adult 'incitement' . . . ."[80] The court drew on the meaning of the word in the criminal context, comparing a person who "urges others to commit acts of force or violence"[81] with one whose speech "merely stirs to anger, invites public dispute, or brings about a condition of unrest."[82]

Ultimately, the court concluded that under section 48907, a school "may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression . . . is so inflammatory that the speech itself provokes the disturbance."[83] The court found the opinion "disrespectful and unsophisticated," but it did not incite disruption.[84] Even though Smith stated that he wanted a response that would cause action, the Court of Appeal held that *Immigration* was protected speech.[85] No evidence existed to suggest that Smith's intention was to cause "[a] substantial disruption of the school, as opposed to other action, such as enforcement of the immigration laws."[86] According to the court, *Immigration* was simply a call to political action, not a call to incite disruption.[87]

V. ANALYSIS OF THE COURT'S DECISION

Paul J. Beard, Smith's lead attorney, described the appellate court's decision as a "precedent-setting victory against any attempt

79. *Id.* at 519.

80. Beard & Luther, *supra* note 10, at 405–06.

81. *Smith*, 59 Cal. Rptr. 3d at 519 (quoting CAL. PENAL CODE § 404.6(a) (Deering 2008)).

82. *Id.* (quoting People v. Davis, 439 P.2d 651, 653 (Cal. 1968)).

83. *Id.* at 520.

84. *Id.* at 521.

85. *Id.*

86. *Id.*

87. *Id.*

to impose 'politically correct' thought codes on student journalists in California."[88] Whether the court's decision in *Smith* should be recognized as a victory remains debatable, but there is little doubt that under federal law the case would have come out differently.

In *Chandler v. McMinnville School District*,[89] the Ninth Circuit distilled three distinct areas of student speech from Supreme Court precedent: "(1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories."[90] The court held that "the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*."[91] This part provides analysis of the facts in *Smith* under these three standards.

A. Vulgar, Lewd, Obscene, and Plainly Offensive Speech

As discussed above, in *Fraser*, the Supreme Court held that a school district acted within its proper authority when it suspended a student for making a lewd speech.[92] The Supreme Court laid out a balancing test for regulating student speech: "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[93] Part of the mission of a public education is to teach young people how to conduct themselves in a civil manner.[94] The Supreme Court noted that students learn not only from books and curriculum but also from the conduct of their teachers and classmates.[95] It is therefore appropriate for the school to determine what type of conduct would be ineffectual in conveying those lessons of civility and maturity.[96] "Surely it is a highly appropriate function

88. Press Release, Pac. Legal Found., U.S. Supreme Court Won't Review Ruling Against Novato School District's Censorship of Student Journalist (Feb. 19, 2008), *available at* http://community.pacificlegal.org/Page.aspx?pid=313&srcid=264.

89. 978 F.2d 524 (9th Cir. 1992).

90. *Id.* at 529.

91. *Id.* (citations omitted).

92. *See supra* Part II; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 689–90 (1986).

93. *Fraser*, 478 U.S. at 681.

94. *See id.*

95. *Id.* at 683.

96. *See id.*

of public school education to prohibit the use of vulgar and offensive terms in public discourse."[97]

Fraser's sexual innuendos during his speech about his classmate being "firm" and "taking it to the climax"[98] were deemed "plainly offensive to both teachers and students—indeed to any mature person."[99] The Court went on to note that "[b]y glorifying male sexuality, . . . the speech was acutely insulting to teenage girl students."[100] Although Fraser's speech did not disrupt the educational process, the Court nevertheless concluded that the school's interest in teaching the "values of a civilized social order"[101] outweighed the student's freedom to convey plainly offensive speech during a high school assembly.[102] "[I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[103]

Likewise, in *Smith*, the school's interest in teaching the boundaries of socially appropriate behavior outweighed the student's freedom to convey offensive speech. Adults and students alike found *Immigration* plainly offensive. In his editorial, Smith asserted that people who cannot speak English are illegal immigrants, that illegal immigrants have to make money illegally by engaging in criminal activity, and that they are criminals who have come to the United States to escape their punishment.[104] Smith also refers to Mexico and uses Spanish words in a derogatory and inflammatory manner, such that his editorial was acutely insulting to those of Mexican descent.[105] Therefore, under *Fraser*, even if *Immigration*

97. *Id.*

98. DAVID L. HUDSON JR., STUDENT EXPRESSION IN THE AGE OF COLUMBINE: SECURING SAFETY AND PROTECTING FIRST AMENDMENT RIGHTS 4 (2005), http://www.firstamendmentcenter.org/PDF/First.Report.student.speech.pdf.

99. *Fraser*, 478 U.S. at 683.

100. *Id.*

101. *Id.*

102. *Id.* at 685.

103. *Id.* at 685–86.

104. *See* Smith, *supra* note 46.

105. This particular conclusion is buttressed by evidence that the students who threatened Smith with violence were Latinos and that the principal was confronted "by four or five Latino parents" the day after the article was published. Smith v. Novato Unified Sch. Dist., 59 Cal. Rptr. 3d 506, 512 (Ct. App. 2007). Although the record does not disclose the complete racial profile of all the distressed students, based on these examples, it is likely that a substantial number of those disturbed by the article were of Mexican ancestry. *See id.*

did not disrupt the school, it would have been "perfectly appropriate for the school to disassociate itself" with such plainly offensive speech.[106]

One clear distinction between *Fraser* and *Smith* lies in the setting of the respective student's speech. Fraser delivered his speech to a captive audience during a school assembly,[107] whereas Smith's editorial appeared in the school newspaper for distribution.[108] However, the test set out by the Court in *Fraser* was whether the school's *educational mission* had been disrupted.[109] The Court concluded that a high school assembly or classroom was an inappropriate place for the sexually explicit speech in question; the same speech delivered in a newspaper would have been deemed just as inappropriate if it undermined the school's educational mission.

B. School-Sponsored Speech

According to *Hazelwood*, a school can "disassociate itself" from student publications that contain an entire range of speech, including "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[110] Not only does the school have the right to set high standards for speech bearing the school's imprimatur, but the school must also "be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics."[111] Furthermore, "[a] school must also retain the authority to refuse . . . to associate [itself] with any position other than neutrality on matters of political controversy."[112] In general, federal courts should defer to certain types of censorship decisions by school officials, provided that they are "reasonably related to legitimate pedagogical concerns."[113]

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106. *Fraser*, 478 U.S. at 685.

107. *Id.* at 677.

108. *Smith*, 59 Cal. Rptr. 3d at 512.

109. *Fraser*, 478 U.S. at 688–89.

110. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

111. *Id.* at 272.

112. *Id.*

113. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (quoting *Hazelwood*, 484 U.S. at 273).

In *Hazelwood*, the high school barred students from publishing a story in its school newspaper *Spectrum*.[114] *Spectrum* was written and edited by a journalism class and published by Hazelwood East High School.[115] The Board of Education allocated funds from its annual budget to print the paper every few weeks. The paper was then distributed to students and faculty.[116] The district court upheld the principal's censorship of the offending articles because of his "concern that the . . . students' anonymity would be lost and their privacy invaded."[117] Similarly, the court endorsed the principal's desire to "avoid the impression that [the school] endorses the sexual norms of the subjects and to shield younger students from exposure to unsuitable material."[118] The Court found the district court's rationale persuasive and upheld its decision, finding no violation of the First Amendment.[119] Likewise in *Smith*, the Novato High School journalism class published the *Buzz*.[120] There is no question that the newspaper bore the school's imprimatur. The decision by the school officials to censor the editorial because of the disruption that ensued would likely have been considered legitimate and reasonable, considering that students were walking out of class and tensions were high.

C. All Other Speech and the Rule in Tinker

The third category of student speech justifies censorship according to the rule set out in *Tinker*. *Tinker* set forth two instances when student speech, including political speech, is "not immunized by the constitutional guarantee of freedom of speech."[121] The first is speech that "materially disrupts classwork or involves substantial

114. *Hazelwood*, 484 U.S. at 262.

115. *Id.*

116. *Id.*

117. *Id.* at 264.

118. *Id.* at 264–65 (quoting Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1466 (E.D. Mo. 1985), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988)).

119. *Id.* at 276.

120. Smith v. Novato Unified Sch. Dist., 59 Cal. Rptr. 3d 506, 511 (Ct. App. 2007).

121. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969); *see also* Brian J. Bilford, Harper*'s Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J. C.R. & C.L. 447 (2008) (quoting *Tinker*, 393 U.S. 503).

disorder."[122] The second is speech that is an "invasion of the rights of others."[123]

1. Speech That Materially Disrupts the Operation of the School

Although the rule in *Tinker* was stated simply, applying the rule has proved difficult because *Tinker* did not involve speech that materially disrupted the function of the school or caused substantial disorder.[124] In *Tinker*, wearing armbands was a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [the students]."[125] It did not disrupt any classes or the work of the school.[126] "Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises."[127] There was nothing that might have reasonably led school authorities to "forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."[128] All the students did was wear the armbands to school.[129]

In *Karp v. Becken*,[130] the Ninth Circuit Court of Appeal laid out a spectrum of disruptive conduct that might reasonably lead authorities to forecast a substantial disruption at school.[131] An observer's "mild curiosity" would not justify censoring speech,[132] but "an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of

122. *Tinker*, 393 U.S. at 513.

123. *Id.*

124. Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973).

125. *Tinker*, 393 U.S. at 508.

126. *Id.*

127. *Id.*

128. *Id.* at 514.

129. The Supreme Court also found it relevant that the school authorities were engaging in a type of viewpoint discrimination. The school did not ban students from wearing all political symbols, but only black armbands signifying opposition to the country's involvement in Vietnam. *Id.* at 510. Nevertheless, the Court seemed to indicate that viewpoint discrimination might be permissible if "necessary to avoid material and substantial interference with schoolwork or discipline." *Id.* at 511.

130. 477 F.2d 171 (9th Cir. 1973).

131. *Id.* at 175.

132. *Id.* at 174–75 (quoting Burnside v. Byars, 363 F.2d. 744, 748 (5th Cir. 1966)).

order, discipline and decorum"[133] certainly would. The court inquired whether "incidents falling between the two extremes might also permit the imposition of restraints."[134] The court held that they would.[135] According to the Ninth Circuit Court of Appeal, a material interference exists in a scenario like the following: a newspaper article calling for a walkout during a school assembly, student athletes threatening to stop the proposed demonstration, an atmosphere of excitement and expectation, as if something was about to happen, students actually walking out of class, someone pulling the school fire alarm, and fifty students gathering and talking amongst themselves and with the news media that had appeared.[136]

Unlike the speech in *Tinker*, *Immigration* was not a silent, passive expression of opinion that resulted in "mild curiosity." Unlike the armbands that communicated mere disapproval of the Vietnam conflict, *Immigration* was not a mere call to immigration reform. More like the incidents in *Karp*, *Smith* presented a scenario in which a material interference was present. The editorial specifically stated that "[t]here should be no tolerance" for illegal immigrants and "America shouldn't be taking this while bending over."[137] Although Smith himself may not have called for a student walkout, he expressly stated that his purpose in writing the editorial was to upset people and to elicit a reaction.[138] And that is exactly what happened. The day after its publication, about one hundred students "walked out of class and refused to return."[139] Some students were crying, and "racial tensions at the school ran high."[140] Classes were interrupted because teachers had to address the tension

133. *Id.* (quoting Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966)).

134. *Karp*, 477 F.2d at 175.

135. *Id.*

136. *Id.* at 175–76.

137. Smith, *supra* note 46.

138. Smith v. Novato Unified Sch. Dist., 59 Cal. Rptr. 3d 508, 521 (Ct. App. 2007). Smith also admitted "he 'hated' all illegal aliens because 'some Mexicans' beat up his father." Petition for Writ of Certiorari at 18, *Smith*, 59 Cal. Rptr. 3d 508 (No. 07-783). He specifically "chose harsh, derogatory words and phrases that he knew would be offensive to the Hispanic community." *Id.* Smith actually testified: "[He wanted to] make people angry, provoke a reaction, get under their skin. [He] wanted 'people to have their own opinions, to pair off and *go at it.*'" Rehearing Petition at 26, *Smith*, 59 Cal. Rptr. 3d 508 (No. A112083). What Smith really wanted was to watch "[whites and Latinos] 'square off' in violent confrontations." *Id.*

139. Petition for Writ of Certiorari, *supra* note 138, at 18.

140. *Id.*

by allowing students who stayed in class to talk about their feelings.[141] These acts reasonably led school authorities to "forecast substantial disruption" of school activities, and disturbances on the school premises did in fact occur. When the superintendent heard of the events at the school, he immediately called for the remaining copies of the paper to be collected.[142]

Furthermore, one Latino student threatened to "kick [Smith's] ass," and another Latino student actually threatened to kill him.[143] Prior to the threat, Smith and the student who threatened his life had been in a fight in which Smith suffered a chipped tooth.[144] A few community meetings were also held in order to relieve all the tension from this one article.[145] *Immigration* may have been a political call to immigration reform, but the court could still have easily found that the school's action in response to the publication of the article was appropriate to avoid any further interference with the educational function of the school.

2. Speech That Invades the Rights of Others

Tinker's reference to the rights of others came from the Fifth Circuit Court of Appeal's decision in *Blackwell v. Issaquena County Board of Education*.[146] In *Blackwell*, the students' freedom of speech collided with the rights of others when the speakers "accosted other students by pinning [freedom buttons] on them even though they did not ask for one."[147] The court held that the regulation forbidding students from wearing these buttons was reasonable because the speakers created a disturbance and completely disregarded the "rights of their fellow students."[148]

Speech involving physical attacks is not the only type of speech that infringes on the rights of another "to be secure and let alone."[149] The Ninth Circuit Court of Appeals held that "vulgar, lewd, obscene,

141. *Id.*

142. *Smith*, 59 Cal. Rptr. 3d at 512.

143. *Id.* at 513.

144. *Id.*

145. Petition for Writ of Certiorari, *supra* note 138, at 18.

146. 363 F.2d 749 (5th Cir. 1966).

147. *Id.* at 751.

148. *Id.* at 753.

149. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177 n.16 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

indecent, and plainly offensive speech "by definition, 'may well "impinge[] upon the rights of other students"' even if the speaker does not directly accost individual students with his remarks." [150]

For example, in *Harper v. Poway Unified School District*, [151] the Ninth Circuit Court of Appeal held that a school could prevent a student from wearing a T-shirt that condemned homosexuality. [152] The court cited various studies on the negative effects of peer harassment on gay students. [153] The court concluded that wearing the T-shirt collides with the rights of others to be secure and left alone because the speech attacks "members of minority groups that have historically been oppressed [and] . . . serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn. [154] Publicly degrading gay teenagers by calling them immoral and shameful destroys their self-esteem and interferes with their educational performance. [155] Thus, the court evaluated the speech based on its harmful effects and held that it was unprotected.

In the same way, the speech in Smith's editorial collides with the rights of undocumented immigrant students to be left alone and interferes with their sense of security. As an illustration, in Roswell, New Mexico, an eighteen-year-old senior at Roswell High School was deported when a school security officer discovered she was in the country illegally. [156] The school suffered a sudden drop in attendance as parents who were in the country illegally kept their children at home. [157] Schools were no longer deemed safe. [158] The threat of being deported has a direct negative effect on students who are in the country without legal status—often through no fault of their own—and interferes with their right to receive an education. [159]

150. *Id.* at 1177; Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).

151. *Harper*, 445 F.3d at 1177.

152. *Id.* at 1178–79.

153. *Id.*

154. *Id.* at 1178.

155. *Id.* at 1178–81.

156. Nicholas Riccardi, *Deportation of Student Stirs Up City*, L.A. TIMES, Feb. 18, 2008, at A17.

157. *Id.*

158. *Id.*

159. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that where a state elects to provide a free public education to its residents, it cannot withhold that education from undocumented children absent a substantial state interest).

VI. CONCLUSION

The California Court of Appeal's holding in *Smith* reaffirmed California's broad protection of student speech and the importance of allowing unpopular ideas to enter the marketplace of ideas. But, this was done at the risk of jeopardizing the safety of the school environment and disrupting educational programs. Arguably, an analysis of the facts of the case under federal law would have led to a different result; the school's interest in maintaining a safe learning environment would have outweighed the interest in preserving the student's freedom to express an unpopular view.

The *Smith* decision has opened the door for free expression of all types of prejudice and bigotry in school newspapers. Rather than being allowed to err on the side of caution, school officials are forced to tolerate controversial speech and whatever disruption may follow from it because of a fear of litigation in response to its censorship. In a time when students are likely to come in contact with others who are different from them in a variety of ways, the type of overtly offensive speech communicated in *Immigration* will only fuel prejudice and hatred.

California courts should allow greater deference to school administrators' decisions regarding controversial student speech because the administrators are in the best position to gauge its impact at the school. Unless and until the California legislature specifically defines the boundaries of a substantial disruption of the operation of the school, school officials' decisions ought to be overturned only if they reflect an abuse of discretion. After all, they are the ones who face the great challenge of cultivating tolerant citizens who are able to engage in civil discourse without being rude and offensive. And they are the ones who must ensure the overall safety and well-being of everyone on campus.