Welcoming Remarks

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I want to join Dean Perschbacher in welcoming all of you to the UC Davis Law Review Symposium, titled "First Amendment Rights in America's Public Schools: From the Schoolhouse Gate to the Courthouse Steps." I want to thank Dean Perschbacher and Dean Johnson for the support the Law School has provided for this event. I also want to thank the distinguished scholars who will be participating in today's program: Vikram Amar, Steven Green, Joan Howarth, Gia Lee, Melissa Rogers, Steven Smith, Dean Kenneth Starr, and R. George Wright. Finally, I want to thank everyone in the audience for joining us for this program.

I should also add one note of regret. Erwin Chemerinsky, who was scheduled to speak on the second panel, is ill and will not be able to participate in the program today.

Let me just say a few words of introduction about why we selected this topic, "First Amendment Rights in America's Public Schools," as the subject for this year's Law Review symposium. In 1965, several junior high school and high school students wore black arm bands to their school to express their disagreement with the Vietnam War. They were suspended for doing so. The students challenged the school's decision to discipline them on First Amendment grounds.

In 1969, their lawsuit, *Tinker v. Des Moines Independent Community School District*, reached the United States Supreme Court. The Court ruled in favor of the students. It stated in ringing terms that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court held that the students' rights to express themselves could not be abridged by school authorities unless their speech materially disrupted the school's educational program or invaded the rights of other students.

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The Court had applied the First Amendment to the public schools prior to its decision in *Tinker*. But those cases involved challenges to teacher-directed school prayer or the mandated recitation of the pledge of allegiance. Those cases involved the school directing or requiring students to say certain things. *Tinker* was the first Supreme Court case in which the Court protected a student's own speech against the attempt by school authorities to suppress or punish the student's message.

The *Tinker* case opened a doctrinal Pandora's box for the lower federal courts. The *Tinker* standard was easy to state, but difficult to interpret and apply.

Seventeen years later, the Supreme Court distinguished and limited *Tinker* in a case called *Hazelwood School District v. Kuhlmeier*. *Hazelwood* involved the censorship of a school newspaper. The Court explained that the question of whether the First Amendment required a school to tolerate particular student speech — the question addressed in *Tinker* — was different than the question of whether the First Amendment required a school to affirmatively promote particular student speech — the issue raised in the *Hazelwood* case. When student speech was part of a school-sponsored activity, such as a school newspaper, school authorities could direct and control a student's speech as long as their reasons for doing so were reasonably related to legitimate pedagogical concerns.

Hazelwood did not mitigate the difficulties lower federal courts experienced when they adjudicated student speech cases. If anything, it aggravated their problems. Now courts had two indeterminate and confusing standards of review to apply instead of just one — and they had the additional problem of trying to decide which rule to apply in a given case.

But the problems courts are struggling with in adjudicating student speech cases extend far beyond the Supreme Court's decisions in *Tinker* and *Hazelwood*. There is both a doctrinal and a social background that helps to explain the difficulty of these cases. From a doctrinal perspective, free speech case law has progressively increased in its complexity over the last thirty years or so. Courts have to locate the *Tinker* and *Hazelwood* holdings in this increasingly complex legal regime, and they have to determine how changes in doctrine should inform and influence their understanding of the *Tinker* and *Hazelwood* decisions.

More important than doctrinal change, American society has become increasingly polarized politically and is immersed in an aggressively contested culture war. One of the central battlegrounds of America's culture wars is the public schools, and First Amendment doctrine is part of the rules of engagement for this conflict.

So the stakes are high. The terrain is difficult. We thought that this would be a good time to invite a cross section of distinguished constitutional scholars to join us in a symposium discussing First Amendment rights in America's public schools.