

THE FIRST AMENDMENT AND THE COMMENCEMENT PROVOCATEUR

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ABSTRACT

This Article explores an untheorized area of First Amendment doctrine: students' graduation speeches at public or private universities that embrace free speech principles, either by state statute, state constitutional law, or internal policy. Responding to recent graduation speech controversies, it develops a two-tier theory that reconciles a multiplicity of values, including students' expressive interests, universities' institutional interests in curating commencement ceremonies and preventing reputational damage and political reprisals, and the interests of captive audiences in avoiding speech they deem offensive or profane. The Article challenges the prevailing view that university students' graduation speeches implicate individual First Amendment rights. It develops a site-specific understanding of the ritualistic sociology of the university commencement speech, which the Article argues is firmly within the managerial purview of the university. But it also argues that heavy-handed administrative regulation of student graduation speeches has the potential to undermine the academic freedom of students and professors. Reflecting on the history of the university commencement speech in the American intellectual tradition, it urges university administrators to exercise their authority to regulate speeches through transparent standards, a longitudinal view, and collaborative negotiation with student speakers. It concludes by discussing the conceptual dangers of turning the First Amendment into a metonym for every instance of speech abridgment within a managerial sphere.

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INTRODUCTION

Drawn by ceremonial obligation
up from sleep I woke and stepped
into the borrowed black robes
all ghost bureaucrats trained
to redirect dreaming pretend
we do not like to wear. I drove
my black car to the stadium
to sit on stage and be watched
watching young expectant spirits
one by one with dread certainty
pass before me, clouded
in their names. Then listened
to no one in their speeches say
you're welcome for allowing
us not to tell you it's already
too late to learn anything
or defend whatever accidental
instrument in us causes
all these useless thoughts.

—Matthew Zapruder¹

In March 2024, the University of Southern California (USC) selected a senior named Asna Tabassum as its valedictorian.² By all accounts, Tabassum was an exemplary student and engaged community member. But USC's choice quickly proved controversial. Shortly after the announcement, pro-Israel groups objected to Tabassum's Instagram biography, which linked to a website deploring Zionism as a "racist settler-colonial ideology."³ Claiming Tabassum "openly traffics antisemitic

¹ MATTHEW ZAPRUDER, *Graduation Day*, in *FATHER'S DAY* 17, 17 (2019).

² *Meet USC Valedictorian Asna Tabassum: School Cancels Commencement Speech by Pro-Palestinian Student*, DEMOCRACY NOW! (Apr. 18, 2024), https://www.democracynow.org/2024/4/18/asna_tabassum_censored [<https://perma.cc/79K3-Q6DT>].

³ David French, *When a Mob Gets to Veto a Valedictorian's Speech*, N.Y. TIMES: THE

and anti-Zionist rhetoric,” they urged the university to “reconsider this selection” and deny her the “platform” of a valedictory speech.⁴ Within days, USC canceled her address, citing vague safety concerns.⁵

In the tumult that followed, Tabassum quickly became a “national symbol of free speech.”⁶ Her supporters argued USC’s cancellation violated free speech principles⁷ and the First Amendment.⁸ Among them were law professors.⁹ Simultaneously, the law professor who announced the cancellation—Provost Andrew Guzman—made his own appeal to free speech. “There is no free-speech entitlement to speak at a

POINT (Apr. 17, 2024, 10:00 AM), <https://www.nytimes.com/live/2024/04/16/opinion/the-point> [<https://perma.cc/2UFM-QYRJ>].

⁴ See Trojans for Israel (@trojansforisrael), INSTAGRAM (Apr. 11, 2024), https://www.instagram.com/p/C5oPPbWtgom/?img_index=4 [<https://perma.cc/MK5J-NXUL>].

⁵ Marisa Kabas, *USC’s Decision to Pull Asna Tabassum’s Speech Should Be a Cautionary Tale*, MSNBC (Apr. 18, 2024, 4:59 PM), <https://www.msnbc.com/opinion/msnbc-opinion/usc-asna-tabassum-valedictorian-speech-barred-effect-rcna148031> [<https://perma.cc/U2CL-53AS>].

⁶ Jonathan Wolfe, *U.S.C. Valedictorian Graduates Without a Speech, but With Cheers*, N.Y. TIMES (May 10, 2024), <https://www.nytimes.com/2024/05/10/us/usc-valedictorian-speech-graduation.html> [<https://perma.cc/23JK-MZH2>].

⁷ See, e.g., Kabas, *supra* note 5 (objecting to the cancellation on “free speech” grounds); Ingrid Jacques, *Not a Good Look, USC: Cancel Culture Comes for Colleges as Graduation Season Begins*, USA TODAY (Apr. 23, 2024, 4:59 PM), <https://www.usatoday.com/story/opinion/columnist/2024/04/23/usc-valedictorian-commencement-speech-cancelled-first-amendment/73412903007/> [<https://perma.cc/UNH2-T9MR>] (“USC’s decision [is] an affront to free speech . . .”); Mohammad Tajsar, *ACLU Statement on USC’s Revocation of Valedictory Invitation to Asna Tabassum*, ACLU S. CAL. (Apr. 18, 2024), <https://www.aclusocal.org/en/press-releases/aclu-statement-usc-revocation-valedictory-invitation-asna-tabassum> [<https://perma.cc/QNS5-HUMU>] (arguing USC “betray[ed]” free speech).

⁸ See, e.g., Mohammed Zain Shafi Khan, *USC Vetoed a Muslim Student’s Graduation Speech for Her Pro-Palestinian Views. Why?*, THE GUARDIAN (Apr. 26, 2024, 9:49 AM), <https://www.theguardian.com/commentisfree/2024/apr/26/usc-cancelled-speech-asna-tabassum-muslim-student> [<https://perma.cc/3A8B-WFGW>] (invoking the First Amendment and free speech); *Editorial: USC’s Barring of Valedictorian Commencement Speaker Infringes upon Free Expression*, DAILY BRUIN (Apr. 21, 2024, 8:29 PM), <https://dailybruin.com/2024/04/21/editorial-usc-barring-of-valedictorian-commencement-speaker-infringes-upon-free-expression> [<https://perma.cc/SH5D-QXXW>] (invoking First Amendment); Jacob Schwessinger & Jacob Lind, *The Choice Between Safety and Free Speech Is a False One*, DAILY TROJAN (Apr. 16, 2024), <https://dailytrojan.com/2024/04/16/the-choice-between-safety-and-free-speech-is-a-false-one/> [<https://perma.cc/9Q3U-8992>] (same).

⁹ See, e.g., Stephanie Saul, *U.S.C. Cancels Valedictorian’s Speech After Pro-Israel Groups Object*, N.Y. TIMES (May 5, 2024), <https://www.nytimes.com/2024/04/16/us/usc-valedictorian-speech-gaza-war.html> [<https://perma.cc/JEC2-2ZCB>] (“Anuj Desai, a professor at the University of Wisconsin–Madison Law School, suggested that Ms. Tabassum could have legal grounds to sue, particularly in light of California law that supports students’ First Amendment rights.”); David Kaye, *What USC Got Wrong When It Canceled Its Valedictorian’s Speech*, SLATE (Apr. 18, 2024, 5:45 AM), <https://slate.com/human-interest/2024/04/usc-cancelled-valedictorian-speech-what-wrong.html> [<https://perma.cc/VA8A-865B>] (arguing the cancellation was “clearly an interference with free speech” with “risks to campus free speech”).

commencement,”¹⁰ he wrote. The cancellation, he claimed, had “nothing to do with freedom of speech.”¹¹

This Article develops a nuanced framework for understanding why there were elements of truth in both accounts. As a matter of doctrinal law, Guzman correctly summarized free speech principles. This Article contends that students do not have a First Amendment right to speak at the graduation ceremonies of public universities and private universities that commit to the First Amendment, like USC.¹² Universities—and especially public universities—have compelling reasons to curate commencement speakers and prevent graduation ceremonies from becoming fora for divisive and incendiary student speech. If they so choose, universities can regulate the content and even the viewpoint of student graduation addresses without violating the First Amendment.

Yet even if “free speech” is an inapt analytic lens, this Article sympathizes with those troubled by USC’s cancellation. It does so because of an independent but related value: the academic freedom of students and professors. Tabassum’s selection as a valedictory speaker signaled to the university community that she had something valuable to say. By withdrawing her speaking invitation after an organized campaign targeted her extramural speech, and doing so before Tabassum had even drafted a speech administrators could review, USC endangered academic freedom in other domains of the university. Although Tabassum’s supporters may have been imprecise by invoking the First Amendment, their concerns reflected something inherent in a diverse and vibrant research university.

L’affaire Tabassum was a flashpoint during an especially febrile year on college campuses. Yet controversies over university students’ graduation speeches recur every May, fueled in recent years by populist cultural and political backlash against expertise. Despite the periodicity of this conflict, few legal scholars have grappled with the constitutional issues posed by university regulation of student commencement

¹⁰ Andrew T. Guzman, *Important Update on 2024 Commencement*, USC OFF. PROVOST (Apr. 15, 2024, 3:47 PM), <https://www.provost.usc.edu/important-update-on-2024-commencement/> [https://perma.cc/8CLN-W4GE].

¹¹ *Id.*

¹² Hereinafter, this Article refers to this type of university as “the university.” A public university is “without question . . . a state actor,” see *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192 (1988), to which the First Amendment applies, see, e.g., *Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 667–68 (2010). A private university is not a state actor and thus has no First Amendment obligation to endorse free speech principles, even though many private universities voluntarily commit to doing so. See generally Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 145–47 (2010). Many private universities are bound by the First Amendment or some form of free speech mandate by state statute or state constitutional law, regardless of the university’s internal policy. See, e.g., CAL. EDUC. CODE § 94367 (West 2024) (extending free speech protections weaker than the First Amendment to private colleges); *State v. Schmid*, 423 A.2d 615, 630 (N.J. 1980) (applying the “rights of speech” under the state constitution to Princeton University despite its status as a private university).

speeches. And the few scholars to engage with this subject have expressed uncertainty about the extent of permissible regulation.¹³ The lack of sustained intellectual engagement has fostered conceptual confusion over the application and meaning of the First Amendment. It has also left students and administrators without an articulated understanding of their dueling and symbiotic rights and responsibilities during a period of immense peril for the modern American university.

This Article proposes a novel framework for addressing the complex and unauthorized issue of regulating student graduation speeches in higher education. It challenges the one-size-fits-all approach that equates commencement addresses with public discourse or other forms of campus speech. By examining the curious genre of student commencement speeches—considering its traditional anthropological function and contemporary role in polarizing conflicts—this Article uncovers legitimate university interests in speech regulation. Simultaneously, it wrestles with the profound implications such regulation may have for academic freedom. While primarily theoretical in nature, this Article aims to offer practical guidance to university administrators navigating this politically combustible terrain.

This Article proceeds in four Parts. Section I.A documents how federal courts have left university students and administrators without guidance about the scope of permissible speech regulation. Analogizing from *Hazelwood*,¹⁴ they have found that elementary and secondary school administrators are “entitled to review the content of speeches in an effort to preserve neutrality on matters of controversy within a school environment.”¹⁵ But Section I.A argues this consensus does not transpose neatly onto the university environment. In short, “the special characteristics of the school environment” that can justify regulation of the elementary and secondary school student graduation address should not necessarily extend to the university.¹⁶ Section I.B illustrates how legal commentators do not reason from *Hazelwood* and derivative principles when analyzing university students’ commencement speeches. Instead, they frequently argue that the First Amendment’s protections for “public discourse” also cover university students’ commencement speeches.¹⁷

Reasoning from a pluralistic understanding of First Amendment values, Part II argues that university students’ commencement speeches do not embody the same constitutional values as “public discourse” and can be subject to significant managerial regulation. Section II.A demonstrates the importance in First Amendment analysis

¹³ See, e.g., Eugene Volokh, *Graduation Speeches, “Hate Speech,” and the CUNY Law Controversy*, REASON: VOLOKH CONSPIRACY (June 2, 2023, 1:01 PM), <https://reason.com/volokh/2023/06/02/graduation-speeches-hate-speech-and-the-cuny-law-controversy/> [<https://perma.cc/AK3Y-XP2>] (stating he is “not sure” whether universities can “require . . . graduation speakers to be relatively mild in their rhetoric” under the First Amendment).

¹⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

¹⁵ *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1230 (10th Cir. 2009) (citing *Hazelwood*, 484 U.S. at 272).

¹⁶ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁷ See *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (recognizing the First Amendment protects “contribution[s] to public discourse”).

of separating speech based on the site of its delivery within a university to determine the degree of constitutional protection warranted. Section II.B explores the ritualistic sociology of a commencement ceremony, the preservation of which can offer the university a compelling reason to regulate. Section II.C articulates two additional grounds for university regulation of commencement speeches in an age of polarization: the maintenance of political support for higher education and the maintenance of community ties.

Part III considers how maladroit and overbearing use of this managerial authority can endanger academic freedom. It argues that universities must guard against exercising this regulatory power in ways that shut down open-minded and vigorous learning, research, and teaching or in ways that validate retaliatory backlash to extramural speech. The potential harm of high-handed administrative regulation of speeches, Part III contends, does not lie in the violation of an individual right to speak, but rather in the broader academic community's freedom of inquiry. This Article reasons from an implicit premise that academic freedom extends to both the student body and the professoriate.¹⁸

Part IV offers actionable advice to university administrators seeking to balance student expression with institutional interests and obligations. Rejecting mechanical and monolithic rules, it proposes that administrators regulate speech to avoid disruption to the ceremony or serious risks to the institution, not merely to avoid content that some may find controversial. Regulation should be guided by their institution's principles and the communities it serves, a longitudinal perspective on the potential value of controversial speeches, and a recognition that not regulating speeches is a viable option. Universities should be transparent about regulatory standards and work collaboratively with students to find compromises.

Because graduation ceremonies involve an interplay of competing and complex interests, this Article argues that the absolutist fixtures characteristic of First Amendment doctrine and theory are not conducive to reconciling students' expressive interests with universities' institutional ones. The dialectic of individual First Amendment rights can obscure the university's serious obligations and foreclose the accommodationist bargaining necessary for navigating difference. When students view university speeches through a free speech paradigm, the language of individual rights can foster a hyper-individualistic, insular, and legalistic recalcitrance that burdens the university with untenable obligations.¹⁹ Conversely, the collaborative and reciprocal negotiation proposed in this Article can lead to mutually beneficial, or at least satisfactory, outcomes regarding commencement speeches.

¹⁸ This assumption accords with the German understanding of *Lernfreiheit*. In the American intellectual tradition, academic freedom has developed around the rights of professors, not those of students. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1270–74 (1988).

¹⁹ MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991).

I. THE EXISTING FIRST AMENDMENT FRAME

Section I.A summarizes the state of constitutional jurisprudence concerning regulation of graduation speeches at the K–12 level and demonstrates the legal limits in applying this case law to the university. Section I.B documents that legal commentators frame controversial student speeches at university commencement ceremonies as coterminous with adult speech in public discourse. It illustrates this point by introducing a specific graduation speech delivered in 2023 at the City University of New York (CUNY) School of Law, to which the Article repeatedly returns.

A. Elementary and Secondary School Commencement Speeches: Hazelwood and Its Limits

At the elementary and secondary school level, federal courts have provided a clear answer to whether school administrators can regulate student graduation speeches: Yes. Because the First Amendment does not “requir[e] a school affirmatively to promote particular student speech,” *Hazelwood* establishes that administrators can exercise control over “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school” to ensure that “participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”²⁰ As long as their “actions are reasonably related to legitimate pedagogical concerns,” schools “do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities.”²¹

Federal courts have characterized student speeches at public school commencement ceremonies as “clearly a school-sponsored event” that satisfies *Hazelwood*’s imprimatur prong.²² Drawing on *Hazelwood*’s holding that a school must “retain the authority to sponsor student speech that might reasonably be perceived to advocate . . . conduct otherwise inconsistent with ‘the shared values of a civilized social order,’” or “associate the school with any position other than neutrality on matters of political controversy,”²³ federal courts have also found that schools are “entitled to

²⁰ 484 U.S. at 270–71.

²¹ *Id.* at 273; *see also* 67B AM. JUR. 2D *Schools* § 294 (2024) (“A school district does not violate the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as its actions are reasonably related to legitimate pedagogical concerns.”).

²² *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009); *see also* William C. Nevin, *Neither Tinker, Nor Hazelwood, Nor Fraser, Nor Morse: Why Violent Student Assignments Represent a Unique First Amendment Challenge*, 23 WM. & MARY BILL RTS. J. 785, 847 (2015) (listing “commencement speeches” as a type of “student expression that generally bear the school’s imprimatur”).

²³ *Corder*, 566 F.3d. at 1230 (quoting *Hazelwood*, 484 U.S. at 272); *see also* *Fleming v.*

review the content of speeches in an effort to preserve neutrality on matters of controversy within a school environment.”²⁴ Likewise, legal scholars have had little difficulty identifying the public school graduation speech as a nonpublic forum²⁵ or even a “nonforum”²⁶ where First Amendment protection is at its nadir.

Yet *Hazelwood* does not provide a definitive framework for university commencement speeches. The *Hazelwood* Court explicitly declined to decide “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level,”²⁷ and lower courts have split over the force of the *Hazelwood* framework for this higher level.²⁸ And while the

Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 925–26 (10th Cir. 2002) (collecting cases for the proposition that the pedagogical test may be satisfied “simply by the school district’s desire to avoid controversy within a school environment”).

²⁴ *Corder*, 566 F.3d at 1230; *see also* A.M. *ex rel.* McKay v. Taconic Hills Cent. Sch. Dist., 510 F. App’x 3, 7–8 (2d Cir. 2013) (finding that the school officials acted reasonably under the First Amendment in requiring a middle school student remove language in her graduation speech); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1093 (9th Cir. 2000) (holding regulation of a proselytizing graduation speech to be permissible); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003) (upholding restriction of proselytizing graduation speech in graduation address). Courts have upheld the authority of school administrators to regulate other forms of student expression at the graduation ceremony over First Amendment speech objections. *See, e.g.*, *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009) (upholding regulation of student musical performances at a high school graduation); *Peña Villasano v. Garfield Cnty. Sch. Dist.* 16, No. 23-CV-01317-RMR, 2023 WL 3687441, at *7 (D. Colo. May 26, 2023) (upholding regulation of wearing a sarape-style sash at graduation ceremony); *Griffith v. Caney Valley Pub. Schs.*, 157 F. Supp. 3d 1159, 1164 (N.D. Ok. 2016) (upholding regulation of graduation cap). *But see* *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1163 (9th Cir. 2022) (finding, at the motion to dismiss stage, that a plaintiff plausibly alleged a school enforced its facially neutral policy on commencement paraphernalia selectively, thereby implicating the Free Speech Clause).

²⁵ *See, e.g.*, Erwin Chemerinsky, *Are Student Delivered Graduation Prayers and Religious Speeches Constitutional?*, 5 NEXUS 3, 6 (2000) (“There seems little doubt that public school graduations are non-public forums.”).

²⁶ *See, e.g.*, Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 786 (2009) (identifying “the selection of a graduation speaker at a public high school commencement program” as a “nonforum,” a “government property, or a government activity, where the conventional protection provided to private speakers under the Free Speech Clause does not exist”).

²⁷ *Hazelwood*, 484 U.S. at 273–74 n.7.

²⁸ *Compare, e.g.*, *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc) (extending *Hazelwood* to the university setting), *with* *Student Gov’t Ass’n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (citing to *Hazelwood*’s footnote seven for proposition it is “not applicable” to college newspapers). For greater discussion of the application of *Hazelwood* to the university, see Vikram David Amar & Alan E. Brownstein, *A Close-Up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1946 (2017) (collecting cases and finding “the majority of lower courts considering the issue have agreed that *Hazelwood* applies to the regulation of school-sponsored student speech at a public university at least in some circumstances”).

Supreme Court has “offered a series of informative decisions on what secondary schools may do” in regulating speech, it has not developed doctrine for universities to the same extent.²⁹ As this Article conceives it, reflexively transposing *Hazelwood* onto universities for the purpose of evaluating regulation of commencement speeches runs into three problems.

The first is the different constitutional status of students at the university level compared to elementary and secondary school,³⁰ which can justify a “broader authority to regulate the activities of children than of adults.”³¹ The most important status distinction is age. College students are older and rarely minors, especially by the time they reach graduation.³² This age difference can manifest in heightened maturity,³³ “sophistication,”³⁴ and capacity to contribute to public discourse.³⁵

²⁹ Cass R. Sunstein, *Free Speech on Campus? Thirty-Seven Questions (and Almost as Many Answers)* 1, 6 (Jan. 3, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4674320 [<https://perma.cc/84HP-9UVM>]; *see also* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) (noting the Court’s many “cases dealing with the right of teaching institutions to limit expressive freedom of students” at “high schools” but observing these “students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education”).

³⁰ *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (“The Court long has recognized that the status of minors under the law is unique in many respects.”).

³¹ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *see also* *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (“University students are, of course, young adults. They are less impressionable than younger students . . .”).

³² *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) (observing that university “[s]tudents—who, by reason of the Twenty-[S]ixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university”); *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 194 n.2 (2021) (Alito, J., concurring) (stating that “[f]or several reasons, including the age, independence, and living arrangements of such students, regulation of their speech may raise very different questions from those presented” at the public school level); *Bystrom v. Fridley High Indep. Sch. Dist.* No. 14, 822 F.2d 747, 750 (8th Cir. 1987) (noting that “[f]ew college students are minors, and colleges are traditionally places of virtually unlimited free expression”).

³³ *See, e.g., Oyama v. Univ. of Haw.*, 813 F.3d 850, 863 (9th Cir. 2015) (citing to the different “level of maturity” between children in elementary school students and “adults” in graduate school); *Bellotti*, 443 U.S. at 635 (“[M]inors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”). *Hazelwood* itself turned to the varying “emotional maturity of the intended audience” as justification for censoring the relevant newspaper article. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). These age-maturity distinctions can also be relevant when evaluating speech and the appropriateness of regulation between the elementary and secondary level. *See, e.g., Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416–17 (3d Cir. 2003) (distinguishing between speech “acceptable for seven-year-old grammar school students” and “speech appropriate for eighteen-year-old high school students”).

³⁴ *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).

³⁵ *See, e.g., Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 671 (7th

Accordingly, it is plausible that censoring commencement speeches at the university level could implicate heightened constitutional considerations compared with censoring those at elementary and secondary schools.

The second comes in the different pedagogical goals of the university. Elementary and secondary schools socialize children to cultural values, both national democratic ones³⁶ and local communal ones.³⁷ Universities, as a constitutional matter, have other animating aims³⁸ and a different constitutional status.³⁹ Among these aims are equipping students with the analytic skills to engage with discomfiting ideas, a form of inquiry that requires active interrogation (rather than passive distillation) of what *Hazelwood* and *Fraser* called the “shared values of a civilized social order.”⁴⁰ While the Supreme Court has given deference to school administrators to

Cir. 2008) (Posner, J.) (stating that the “contribution that kids can make to the marketplace in ideas and opinions is modest” and contrasting children with adults in this capacity).

³⁶ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (commenting on school education as “a principal instrument in awakening the child to cultural values”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 685 (1986) (holding one of the “basic educational mission[s]” of K–12 schools to be “teaching students the boundaries of socially appropriate behavior” and the inculcation of “fundamental values” and “habits and manners of civility”); *Hazelwood*, 484 U.S. at 272 (quoting *Fraser* for the proposition that schools retain the authority to regulate school-sponsored speech that is inconsistent with the “shared values of a civilized social order”).

³⁷ See, e.g., *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (noting America’s decentralized system of secondary education allows local input into the formation of schools’ pedagogical values); *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (observing that “[t]he ‘educational mission’ of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty,” and accordingly can include “inculcation of whatever political and social views are held by the members of these groups”).

³⁸ See, e.g., *Gerard V. Bradley, Religion at a Public University*, 49 WM & MARY L. REV. 2217, 2257 (2008) (“Academic exchanges [at the university level] operate according to norms of relentless, perpetual inquiry.”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (emphasizing the connection between the university’s truth-seeking function and the production of knowledge); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” (alteration in original)).

³⁹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (noting that “universities occupy a special niche in our constitutional tradition,” which includes an “educational autonomy” that is “grounded in the First Amendment”); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (stating that “university is a traditional sphere of free expression so fundamental to the functioning of our society that the [g]overnment’s ability to control speech within that sphere by means of conditions attached to the expenditure of [g]overnment funds is restricted by the vagueness and overbreadth doctrines of the First Amendment”).

⁴⁰ *Hazelwood*, 484 U.S. at 272 (quoting *Fraser*, 478 U.S. at 683). For discussion of this discomfiting pedagogy of the university, see *Oyama v. University of Hawaii*, 813 F.3d 850, 864 (9th Cir. 2015) (“[T]he progress of our professions . . . may depend upon the ‘discord

regulate offensive curricular speech within the *in loco parentis* environment of K–12 schools, it has recognized that the “mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency’”⁴¹ and even analogized the state university campus to a “marketplace of ideas.”⁴²

These divergent pedagogical missions call into question one of the primary grounds that federal courts have cited to justify regulation of student graduation speeches at elementary and secondary schools: the “promot[ion of] unity, discipline, and respect for authority.”⁴³ Graduation ceremonies at the university level occur within a sphere where discipline and respect for authority are not central, or even permissible, institutional goals. As a result, it is plausible that controversial graduation speeches at the university level have a different constitutional value than those at the elementary and secondary level.

Third, there are compelling reasons to question the blanket application of *Hazelwood* to K–12 graduation speeches notwithstanding the state of federal court jurisprudence. *Hazelwood* gives educators greater control over “activities [that] may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members

and dissent’ of [university] students training to enter them: it is by challenging the inherited wisdom of their respective fields that the next generation of professionals may develop solutions to the problems that vexed their predecessors.” (quoting *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010)); MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 81 (2009) (arguing that universities cannot fulfill their pedagogical purpose “merely by conveying information or transmitting commonly accepted truths,” but rather must inculcate an “[i]ndependence of mind” that “must be drawn out” of students).

⁴¹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973). *But see id.* (Burger, C.J., dissenting) (“[A] university is not merely an arena for the discussion of ideas . . . [but] is also an institution where [students] . . . learn the self-restraint necessary to the functioning of a civilized society . . .”).

⁴² *Healy v. James*, 408 U.S. 169, 180 (2d Cir. 1972). Lower courts have also drawn on this metaphor. *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232, 244 (3d Cir. 2010) (“[Modern] public universities are intended to function as marketplaces of ideas . . .”); *Hosty v. Carter*, 412 F.3d 731, 741 (7th Cir. 2005) (Evans, J., dissenting) (stating the “purpose” of the “university” is “to expose students to a ‘marketplace of ideas’”).

⁴³ *See Griffith v. Caney Valley Pub. Schs.*, 157 F. Supp. 3d 1159, 1164 (N.D. Okla. 2016); *see also Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002) (“The universe of legitimate pedagogical concerns is by no means confined to the academic . . . [for it includes] discipline, courtesy, and respect for authority.” (alterations in original) (quoting *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989))). Other courts have grappled with these different institutional objectives when conducting First Amendment analysis of various proposed speech restrictions. *See, e.g., Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 260 (3d Cir. 2002) (citing the “special needs of school discipline” for why “public secondary and elementary school administrators are granted more leeway than public colleges and universities” under the First Amendment to regulate speech).

and designed to impart particular knowledge or skills to student participants and audiences.”⁴⁴ Student graduation speeches can be unsupervised by faculty members. And it is arguable whether they should be viewed as imparting *particular* knowledge or skills, especially given that speeches are delivered to an audience primarily of nonstudents when official learning has concluded.

Likewise, a school could theoretically structure a graduation ceremony in ways in which the public cannot reasonably perceive the student graduation speech as bearing the imprimatur of the school. Imagine two schools, A and B. School A solicits speeches from the graduating high school seniors, selects the speech based on its own criteria, and revises the content after selection. School B lets students nominate and vote on a speaker, declines to review the speech at any point, introduces the student speaker with an attributive disclaimer describing the selection process and the lack of school review of the speech, and prints a conspicuous notice in graduation programs that any student speech “is the private expression of the individual student speaker and does not necessarily reflect any official position of the school district, administrators, graduates, or students.”⁴⁵ The speech at School A bears the imprimatur of the school; the speech at School B does not appear to. Given varying practices, determination of whether the graduation speech bears the imprimatur of the school can require a fact-contingent inquiry.

B. First Amendment Funneling at the University Level

While federal courts have accepted that educators can regulate student graduation speeches in the elementary and secondary school context, legal commentators have instead framed controversial student speeches at university commencement as “automatically coextensive with the rights of adults in other settings.”⁴⁶ The Article

⁴⁴ *Hazelwood*, 484 U.S. at 271.

⁴⁵ This disclaimer is drawn from one used by the Butte School District, which the Montana Supreme Court cited in holding that no reasonable observer could perceive that a student’s religious reference in a graduation speech as bearing the imprimatur of the school district. *See* Griffith v. Butte Sch. Dist. No. 1, 244 P.3d 321, 334 (Mont. 2010).

⁴⁶ *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (rejecting this frame in a case involving a high school); *see also* Morse v. Frederick, 551 U.S. 393, 394 (2007) (same). The reaction to commencement speeches is consistent with the maximalist First Amendment view of some legal academics of protections on campus. *See, e.g.,* ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 62 (2017) (asserting that universities can have either “complete protection for the expression of all ideas and views, or there is an orthodoxy of belief”); Nadine Strossen, *Don’t Silence Graduation Speakers: Fight Hate Speech with More Speech*, USA TODAY (May 1, 2018, 10:23 AM), <https://www.usatoday.com/story/opinion/2018/05/01/censorship-hate-speech-freedom-first-amendment-column/564868002/> [<https://perma.cc/TT9W-44BU>] (analyzing “graduation season” and “commencement speakers” from the analytical lens of protecting speech that some find “offensive”); John K. Wilson, *In Defense of Steven Thrasher*, ACADEME BLOG (May 28, 2019), <https://academeblog.org/2019/05/28/in-defense-of-steven-thrasher/> [<https://perma.cc/77EG>].

rejects this view, but before doing so offers a recent example of this “coextensive” free speech perspective. It considers the speech delivered by student speaker Fatima Mousa Mohammed at the CUNY School of Law’s 2023 graduation, and the reaction to it.⁴⁷ While Mohammed’s graduation speech consisted of political rhetoric on matters of public concern, her supporters and detractors positioned it within public discourse—bypassing consideration of the special environment in which she delivered the speech. In focusing on substance, they lost sight of the site of delivery.

Because the Article repeatedly returns to Mohammed’s speech, it summarizes the speech with some granularity here.⁴⁸ The 12-minute address began conventionally, offering the typical pleasantries and plaudits that mark graduation speeches.⁴⁹ It then turned polemical. Denouncing the “fascist NYPD” and America’s military, Mohammed described the United States as an “empire with a ravenous appetite for destruction and violence” whose law is a “manifestation of white supremacy.”⁵⁰ She argued all work and education must stem from a “critical-imperialism-settler-colonialism lens” and urged her classmates to fight for “revolution” and against “capitalism,” “Zionism,” and the “depraved” “oppressors.”⁵¹ Large portions of the speech criticized Israel, including “Israeli settler colonialism” and the importance of boycotting, divesting from, and sanctioning this “murder[ous]” state that “encourages lynch mobs” and “indiscriminately” kills Palestinians.⁵² She also condemned the American imprisonment of “Palestinian political prisoners” convicted of providing material support to Hamas.⁵³

The ensuing debate over Mohammed’s speech revolved around the First Amendment. Hundreds of CUNY faculty signed a letter stating that Mohammed’s remarks were in the “heartland” of the First Amendment,⁵⁴ a narrative repeated by influential free speech groups.⁵⁵ Some supporters reimagined the site in which

-X73U] (comparing student commencement speeches to public discourse and advocating for NYU to “assert that commencement ceremonies represent the core values of a university—including the willingness to hear opposing viewpoints”).

⁴⁷ ZOA, *CUNY School of Law Commencement 2023 Fatima Mohammed Full Speech*, YOUTUBE (June 5, 2023), <https://www.youtube.com/watch?v=6uznDTUz3xA> [<https://perma.cc/3HVE-FZRU>].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Letter from City University of New York Faculty to Board of Trustees, https://docs.google.com/document/d/e/2PACX-1vQB4RD0UAOsVYdStwxX6NcuZRLszDVPiArRnYlsGV7GzdVzLdU9H0_Ets8Ro43O5c6NCStyvopm8KHD/pub [<https://perma.cc/RS5Y-6EKC>] (last visited Apr. 17, 2025).

⁵⁵ FIRE, an influential free speech group, wrote that Mohammed’s graduation remarks “are protected by the First Amendment, which binds CUNY.” Letter from Sabrina Conza, FIRE, to Félix V. Matos Rodríguez, C., City Univ. of N.Y. (May 31, 2023), <https://www>

Mohammed delivered the speech to foreground the First Amendment's centrality. On the *CUNY Law Review* blog, for example, Nick Leiber claimed that "there are arguably few CUNY spaces that provide more of a public forum than a school's commencement ceremony," ignoring the cases from the K–12 context that concluded the exact opposite about the graduation ceremony.⁵⁶ Mohammed's critics, for their part, could have challenged this invocation of the First Amendment. Instead, they conceded the relevance of the First Amendment to the debate, choosing to object to the speech on other grounds.⁵⁷

At CUNY and beyond, conceptualizing of the university commencement speech as the "heartland" of public discourse has emboldened students to make increasingly audacious First Amendment claims concerning graduation speeches. Consider a lawsuit brought in April 2024 by CUNY Law students challenging the institution's decision, following Mohammed's 2023 speech and a similar one given the preceding year by another graduate, to curtail its annual tradition of student speakers at commencement. Characterizing the policy change as "First Amendment [r]epression of [the] [g]raduation [c]eremony,"⁵⁸ the complaint brings all its claims under the

.thefire.org/research-learn/fire-letter-city-university-new-york-may-31-2023 [https://perma.cc/KGL7-ZTJP]; see also FIRE, *This Commencement Speech Shocked Listeners*, YOUTUBE (June 4, 2023), https://www.youtube.com/watch?v=JYQQxmm6pPg [https://perma.cc/LK3S-3RAB] (FIRE First Amendment attorney Zach Greenberg describing Mohammed's graduation speech as "core political expression protected by the First Amendment," "the core of what the First Amendment protects," and "her platform").

⁵⁶ See Nick Leiber, *Free Speech, Bullying, and a CUNY Law Grad Who Dared to Criticize Power*, CUNY L. REV. (Aug. 28, 2023), https://www.cunylawreview.org/free-speech-bullying-and-a-cuny-law-grad-who-dared-to-criticize-power/ [https://perma.cc/H48E-Q69K].

⁵⁷ See, e.g., Alexis Grenell, *Does Fatima Mousa Mohammed Oppose Israel's Very Existence?*, THE NATION (June 8, 2023), https://www.thenation.com/article/politics/fatima-mousa-mohammed-cuny-israel/ [https://perma.cc/56E8-AGZZ] (a pro-Israel pundit criticizing Mohammed but stating her speech "made ample use of her First Amendment rights, offensive as her speech may have been"); Letter from Inna Vernikov, N.Y.C. Councilmember, to Muriel Gennosa, Counsel, Comm. on Character & Fitness of the N.Y. Bar (June 7, 2023), in @InnaVernikov, X (June 7, 2023, 2:50 PM), https://x.com/InnaVernikov/status/1666517921487618048?mx=2 [https://perma.cc/TQ7P-Q3CH] ("Recognizing that Ms. Mohamed [sic] may very well be within her First Amendment right to say the things she said, the hate and intolerance we saw on display from her address demonstrates that she is unfit for admission to the New York Bar."). Critics also coalesced around a narrative that her remarks crossed from "free speech" into "hate speech," despite the remarks not meeting the formal legal definition of hate speech. See, e.g., Carl Campanile & Emily Crane, *Majority of CUNY Trustees Remain Silent as Disgust Mounts over Law Grad's 'Hate Speech'*, N.Y. POST (June 1, 2023, 9:03 AM), https://nypost.com/2023/05/31/many-cuny-trustees-stay-silent-about-hate-speech-uproar/ [https://perma.cc/SMC4-BE3Q] (statements of Angelo Vivolo and Una Clarke).

⁵⁸ *CUNY Law Students Sue University for First Amendment Repression of Graduation Ceremony*, MUSLIM ADVOCES. (Apr. 23, 2024), https://muslimadvocates.org/2024/04/cuny-law-students-sue-university-for-first-amendment-repression-of-graduation-ceremony/ [https://perma.cc/D9NP-GTU2].

First Amendment.⁵⁹ It describes the student graduation speeches as “First Amendment protected expression on matters of public concern.”⁶⁰ The complaint’s core legal argument is a tautology cloaked in First Amendment rhetoric.⁶¹

As discussed in Section II.A, the students cannot be correct, but their misunderstanding of what their complaint calls “bedrock First Amendment principles” is understandable.⁶² Despite federal courts consistently upholding the authority of public schools to regulate K–12 student graduation speeches, prominent academics have expressed a deep aversion to this practice—a social fact the CUNY Law students’ lawsuit tapped into, even if it was unmoored from blackletter First Amendment law. Professor Justin Driver, for example, has argued it “deeply distressing” that high schools “are censoring students for bringing up controversial ideas” in graduation speeches.⁶³ According to Professor Driver, high schools that “stop[] students even before they deliver the speech” engage in a functional “prior restraint” that is “especially frowned upon in First Amendment circles.”⁶⁴

This is an odd objection as a First Amendment doctrinal matter,⁶⁵ but Professor Driver is hardly alone in this belief. Academic freedom commenter John Wilson says, “Prior review [of a graduation speech] is deplorable when imposed at a grade school.”⁶⁶ “To have it happening at [the university level] is scandalous.”⁶⁷ It’s not a far logical jump from Driver’s and Wilson’s position to that of the plaintiffs in the CUNY suit—especially considering the heightened speech interests of college students.

II. THE UNIVERSITY’S MANAGERIAL AUTHORITY AND RESPONSIBILITY

Rejecting both the *Hazelwood* and the “coextensive” approaches, Part II develops a framework for understanding the unique sociological and cultural site of the

⁵⁹ Complaint ¶ 1, *Hammad v. Thompson*, No. 1:24-CV-03099 (S.D.N.Y. Apr. 23, 2024).

⁶⁰ *Id.* ¶ 93.

⁶¹ Because “[t]he First Amendment roundly protects freedom of speech within public institutions like CUNY, irrespective of viewpoint,” the complaint states that the denial of “access to the same [graduation] customs their predecessors enjoyed” constitutes “viewpoint discrimination and retaliation in violation of the First Amendment.” *Id.* ¶ 12.

⁶² *Id.* ¶ 65.

⁶³ Jasmine Aguilera, *High School Students’ Graduation Speeches Keep Getting Censored. But They’re Seen by Millions Anyway*, TIME (June 10, 2019, 6:14 PM), <https://time.com/5603056/high-school-graduation-speeches-censored/> [<https://perma.cc/Y8EU-UC7E>].

⁶⁴ *Id.*

⁶⁵ Schools deploy “prior restraints” pervasively to accomplish basic pedagogical goals. See Robert Post, *Theorizing Student Expression: A Constitutional Account of Student Free Speech Rights*, 76 STAN. L. REV. 1643, 1647 (2024). Notably, the facts in *Hazelwood* involved a classic prior restraint against “controversial” ideas on teen pregnancy, then a hot-button topic. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–64 (1988).

⁶⁶ Wilson, *supra* note 46.

⁶⁷ *Id.*

graduation speech that can justify regulation of student addresses. Section II.A explains why, as an analytical matter, the First Amendment requires differentiating among the spheres of a university when determining the appropriate degree of constitutional protection speech should be accorded. Section II.B then considers the sphere of student graduation speeches in depth, challenging the perspective that “there is no reason why commencement addresses should be considered a ‘special’ category of speech that requires prior vetting.”⁶⁸ Section II.C elaborates on two additional reasons in our age of polarized politics, contextualizing commencement within the broader university, its goals, and its contemporary challenges.

A. Separating the Sites of University Life

The Supreme Court has made it clear that “First Amendment protections” do not “apply with less force on college campuses than in the community at large.”⁶⁹ It does not follow, though, that all speech on all sites of college campuses should be treated the same for First Amendment purposes. To achieve the mission of higher education, universities treat speech differently based on what it is and where it arises.⁷⁰ As explained most eloquently by Professor Robert Post, universities must discriminate between good and bad ideas to create and inculcate disciplinary knowledge.⁷¹ Whereas the First Amendment demands an “equality of political status of citizens who attempt to make the government responsive to their views” within public discourse, the social practices that generate and transmit disciplinary knowledge necessarily depend on the rejection of egalitarianism and the embrace of expertise within academic communities.⁷²

Critics of university regulation of student commencement speeches argue for a form of equality between commencement speeches and other speech. Their core

⁶⁸ N.Y. Univ. Chapter of the AAUP, *NYU AAUP Statement on Steven Thrasher Case*, ACADEME BLOG (May 30, 2019), <https://academeblog.org/2019/05/30/nyu-aaup-statement-on-steven-thrasher-case/> [<https://perma.cc/KBY9-ZT7B>].

⁶⁹ *Healy v. James*, 408 U.S. 169, 180 (1972); *see also id.* (“[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American [college campuses].” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))).

⁷⁰ The Supreme Court has repeatedly made a similar point in the K–12 context. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021) (reiterating that the “special characteristics” of schools give “special leeway when schools regulate speech that occurs under its supervision” and quoting *Tinker*’s language that “schools have a special interest in regulating speech that ‘materially disrupts classwork or involves substantial disorder or invasion of the rights of others’”).

⁷¹ *See, e.g.*, Robert Post, *Academic Freedom and the Constitution*, in *WHO’S AFRAID OF ACADEMIC FREEDOM?* 123, 128–34 (Akeel Bilgrami & Jonathan R. Cole eds., 2015) (developing this point); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 25–26 (2012).

⁷² Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484–85 (2011).

argument is that regulation will inevitably lead to censorship across all realms of the university. “When administrators publicly declare that a commencement ceremony . . . is off limits to controversial speech, it sends . . . a chilling effect across the entire campus,” says Wilson.⁷³ “If the principle of inclusion demands censorship at a commencement, why doesn’t the principle also apply to every other decision made on campus?”⁷⁴

The answer is straightforward: universities routinely declare many areas of campus “off limits” to controversial or untrue speech without begetting a chilling effect. The college campus is not a singular place, but a tapestry of different fora where speech protection varies.⁷⁵ An aspiring statistics professor who plans to devote class to lectures on the Middle East will not be hired; ditto for an aspiring statistics professor who insists on insulting students or misstating the definition of the central limit theorem. A hired statistics professor will not get tenure or grants from authorities in her discipline if her research focuses on Rafah rather than regressions. Wilson’s claim that “[t]he university must stand for academic freedom and intellectual debate at all times,” including within student graduation speeches, simply does not map on to actual practice at universities, where content and viewpoint discrimination are rife in certain settings and barred in others.⁷⁶

Return, briefly, to the recently filed First Amendment lawsuit against the CUNY School of Law for curtailing student graduation speeches. The legal director of the main organization representing the students, Golnaz Fakhimi, defended the lawsuit on the grounds that “I think for these plaintiffs and their peers, to speak out about the injustices, the catastrophic state violence that Palestinians in Gaza are facing is critical.”⁷⁷ If CUNY categorically banned students from talking about the crisis in Gaza, the university would violate the First Amendment. But this proposition does not require giving students a constitutionally enshrined right “to speak out” about

⁷³ Wilson, *supra* note 46.

⁷⁴ *Id.*

⁷⁵ See, e.g., *Bowman v. White*, 444 F.3d 967, 976–77 (8th Cir. 2006) (surveying the “variety of fora” of the “modern university” and the varying degrees of speech protection they have and observing that “labeling the campus as one single type of forum is an impossible, futile task”); *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (“A university campus will surely contain a wide variety of fora on its grounds.”); David Cole, *Free Speech on Campus: An Exchange*, N.Y. BOOKS (Mar. 7, 2024), <https://www.nybooks.com/articles/2024/03/07/free-speech-on-campus-an-exchange/> [<https://perma.cc/3X59-54D5>] (“Speech is appropriately subject to much greater control in the classroom than on the campus lawn.”).

⁷⁶ See Hank Reichman, *More on Commencement Speakers and Honorary Degrees (Response to John Wilson)*, ACADEME BLOG (June 27, 2019), <https://academeblog.org/2019/06/27/more-on-commencement-speakers-and-honorary-degrees-response-to-john-wilson/> [<https://perma.cc/RW4H-5D2G>] (quoting Wilson).

⁷⁷ Maia Coleman, *After Anti-Israel Speeches, a Law School Curtails Graduation Traditions*, N.Y. TIMES (May 21, 2024), <https://www.nytimes.com/2024/05/21/nyregion/cuny-law-school-commencement-address-canceled.html> [<https://perma.cc/9VRW-FPQ6>].

this topic of public concern everywhere and at all times. If a student enrolled in Math 20900: Elements of Calculus and Statistics “spoke out” about Gaza in that classroom, the university would have an obligation to sanction that speech to preserve the pedagogical environment and honor its commitments to other students.

The central question is not whether “censorship” occurs at a university, but whether content and viewpoint discrimination are appropriate when evaluating the speech with reference to the site of expression and institutional goals. The same human language that is inappropriate for a statistics class may be suitable for a Middle Eastern politics class and fully protected in a dorm-room conversation between friends and at a rally in a central quad. To answer that question for a student graduation speech, a legal observer must carefully study the sociological and pedagogical attributes of commencement speeches with reference to the university’s aims.

B. The Sociological and Pedagogical Context of a Graduation Ceremony

This Article contends that the university graduation ceremony is best understood as a ritualistic and symbolic social performance.⁷⁸ Rather than further public discourse or the research and teaching missions of the university, the graduation ceremony is a quintessential “*rite de passage*,” transitioning students through a period of liminality and uncertainty.⁷⁹ It embodies what anthropologist Victor Turner called an “ontological transformation,” deploying “*sacra*” to signal the graduates’ new identities, status, and station.⁸⁰ Virulent, provocative, and antagonizing student speeches have the potential to disrupt this carefully orchestrated social ritual.

Like many *rites de passage*, the graduation ceremony is dispensable. While no university can thrive without research or teaching, it can function without graduation ceremonies. During the COVID-19 pandemic, many universities canceled graduation ceremonies entirely; although surely disappointing for community members, these cancellations did not negate the core goals of the universities. But that does not mean the ceremony is unimportant. It serves as a literal and metaphorical “stage of reflection” where “ideas, sentiments, and facts that had been hitherto for the neophytes bound up in configurations and accepted unthinkingly are, as it were, resolved into their constituents.”⁸¹

Rites de passage are highly structured to ensure the successful transition—and the communal recognition of this transition—of neophytes from one state to another.

⁷⁸ See, e.g., *Bear v. Fleming*, 714 F. Supp. 2d 972, 988 (D.S.D. 2010) (“A graduation proceeding is a theatrical production in a sense—the actors, director, and stage crew, or rather the students, administrators, teachers, and staff members, hope to convey a message the audience will understand and appreciate.”).

⁷⁹ See generally ARNOLD VAN GENNEP, *LES RITES DE PASSAGE* (1960).

⁸⁰ Victor W. Turner, *Betwixt and Between: The Liminal Period in Rites de Passage*, in *MAGIC, WITCHCRAFT & RELIGION: AN ANTHROPOLOGICAL STUDY OF THE SUPERNATURAL* 46, 51 (Arthur C. Lehmann & James E. Myers eds., 2000) (emphasis omitted).

⁸¹ *Id.* at 53.

American graduations remain, as social critic Jason Farago has observed, a rare place in American life that “still has rules.”⁸² The tradition’s rules, tracing back to the earliest American universities and their predecessors in Europe, rarely change and are enforced through established standards refined through tradition.

This strict regimentation and codification contrasts sharply with the evolving and “rough-and-tumble” nature of public discourse,⁸³ where speech is “uninhibited, robust, and wide-open.”⁸⁴ Since the 1930s, American First Amendment doctrine has shielded the “world of debate about public affairs” from the imposition of civility rules, creating instead “a sphere of public discourse in which communities themselves develop through competition for the allegiance of individual adherents.”⁸⁵ Within public discourse, First Amendment doctrine bars a dominant community from imposing its cultural traditions and modes of expression on society. Within the sphere of a graduation ceremony, that is precisely what occurs. Because graduation ceremonies are not “labile and evolving” spheres, they can convey culturally defined symbolism.⁸⁶

The graduation ceremony is also removed from research and teaching missions of the university. Dramatic pageantry takes priority over ideas and knowledge expansion. As Farago puts it, graduation remains “one of the very last venues in which Americans show a commitment to *how* we do things” rather than *what* we think.⁸⁷ Serious and provocative academic discussion—the *sine qua non* of the university—is unwelcome. In fact, academic instruction would frustrate the ritual. In Math 20900, one would expect the statistics instructor to orate on covariance and hypothesis testing. At commencement, the same speech on these subjects would be undesirable. Commencement, as one scholar has analogized, is more liturgy than lecture.⁸⁸

⁸² Jason Farago, *Graduation’s Pomp Goes on, No Matter the Circumstance*, N.Y. TIMES (May 23, 2024), <https://www.nytimes.com/2024/05/23/arts/graduation-commencement-protests.html> [<https://perma.cc/2EPM-WR85>].

⁸³ Owen M. Fiss, *The Right Kind of Neutrality*, in *FREEDOM OF EXPRESSION: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION* 79, 81 (David S. Allen & Robert Jensen eds., 1995).

⁸⁴ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

⁸⁵ Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 629–30 (1990).

⁸⁶ *See id.* at 630.

⁸⁷ Farago, *supra* note 82; *see also* Keith E. Whittington, *Should We Care About College Commencement Speakers?*, REASON: VOLOKH CONSPIRACY (May 29, 2019, 8:00 AM), <https://reason.com/volokh/2019/05/29/should-we-care-about-college-commencement-speakers/> [<https://perma.cc/MS45-LJPL>] (describing commencement speakers as “window dressing” who add “a patina of seriousness, or maybe simply glitz, to a graduation ceremony”).

⁸⁸ *What Is the Blueprint for the Perfect Commencement Speech?*, HIGHEREDJOBS (June 13, 2019), <https://www.higheredjobs.com/HigherEdCareers/interviews.cfm?ID=1969> [<https://perma.cc/2BRB-YNFB>].

While the commencement addresses may celebrate research and teaching, they are not a deep site of either. As Professor Keith Whittington has explained, commencement speeches are “a somewhat unusual feature of the intellectual environment of most American college campuses” because the speaker is “expected to add to a celebratory occasion and not necessarily elevate the intellectual discourse on campus”; she “lifts up, but does not unsettle.”⁸⁹ Professor John Thelin envisions it similarly; the speaker is to “be inspirational rather than confrontational or controversial.”⁹⁰ Some speeches lift up with inspirational pabulum at the expense of intellectual substance. A particularly vivid example of this phenomenon is the persistence of the Latin salutary address at Harvard, Princeton, and other universities, in which student orators deliver a speech in a “dead” but historically revered language.⁹¹ Connecting the graduates to the classical roots of Western higher education, the content of the speech is inaccessible to nearly all graduating students and family members.⁹² To achieve a ritualistic end, the Latin salutary speeches places tradition and spectacle over practical communication and intellectual interchange.

Across other domains of the university, research and teaching expressly function to elevate intellectual discourse, thereby creating the conditions for disciplinary advancement and individual maturation. These processes that fuel disciplinary knowledge creation and personal academic growth require unsettling. Ideational confrontation is prized; intellectual advancement comes through the searing, rigorous, and uncomfortable processes of inquiry and confrontation with divergent perspectives. These communicative exchanges occur through disciplinary vernacular, rather than abstruse and archaic languages. In many disciplines, they play out through dialogic back-and-forth and sustained engagement, rather than short and singular encounters.

⁸⁹ Keith E. Whittington, *Free Speech and Ideological Diversity on American College Campuses*, in *THE VALUE AND LIMITS OF ACADEMIC SPEECH: PHILOSOPHICAL, POLITICAL, AND LEGAL PERSPECTIVES* 47, 50–51 (Donald Alexander Downs & Chris W. Surprenant eds., 2018); see also Steven Mintz, *Caps Off to a New Beginning*, *INSIDE HIGHER ED* (May 15, 2024), <https://www.insidehighered.com/opinion/blogs/higher-ed-gamma/2024/05/15/commencement-address-distinctive-literary-genre> [<https://perma.cc/NS83-TC56>] (describing the commencement address as a “distinctive literary genre” which aims to “inspire and motivate” through an “uplifting and optimistic” tone).

⁹⁰ *What Is the Blueprint for the Perfect Commencement Speech?*, *supra* note 88. There are famous exceptions. Alexander Solzhenitsyn, a nonstudent speaker and Soviet dissident writer, gave an intellectually challenging and iconoclastic speech as Harvard’s commencement speaker in 1978. See *Solzhenitsyn Flays the West*, *HARV. MAG.* (Apr. 25, 2011), <https://www.harvardmagazine.com/2011/04/greatest-hits-solzhenitsyn/> [<https://perma.cc/W4R2-ZKKU>].

⁹¹ Peter Jacobs, *Harvard and Princeton Commencements Feature Student Speeches Entirely in Latin*, *BUS. INSIDER* (May 29, 2014, 4:14 PM), <https://www.businessinsider.com/harvard-princeton-commencement-student-speeches-latin-2014-5> [<https://perma.cc/H6H8-FUJS>].

⁹² See *id.*

While confrontational and controversial speech based on one's personal beliefs can be valuable in classroom discussions, academic dialogue, and public discourse,⁹³ it lacks the same value and role in a graduation ceremony. The ceremony shifts attention from individual expression to collective experience. Through rituals like the ceremonial processional, the successive conferral of degrees, and the moving of the tassel, this *rite de passage* fosters a "mystical solidarity" among students, which "contrasts sharply with the hierarchical rank-dominated structure of ordinary [American] life."⁹⁴ By bringing together diverse students to celebrate in the same space, it creates "comradeship transcend[ing] distinctions" at a moment of shared vulnerability and "nakedness."⁹⁵ Academic regalia similarly functions as a "reduction to a uniform condition," homogenizing appearance to convey the synergic and interconnected journey of students.⁹⁶ The stylized and formalized academic dress originates in the early universities of the Middle Ages and connects students to an intergenerational academic community, as does the visible totem of medieval mace.

The protagonist of First Amendment doctrine is the individual. Mohammed, for example, defended her graduation speech by invoking "*my* First Amendment speech rights."⁹⁷ Yet graduation ceremonies center *our* over *my*. While the graduation speaker receives a privileged position by virtue of her selection as a speaker, the ceremony is not about her. "[A] speaker will be secondary in importance to the awarding of degrees and celebrating by graduating students and their families," Professor Thelin posits, "[a]part from blatant, deliberate[ly] volatile statements intended to fan controversy."⁹⁸ The graduates and audience, to put it succinctly, have not converged to hear deliberately volatile statements from an individual speaker. Just as a toast should not overshadow a wedding, a student speech should not overshadow the graduation.⁹⁹

C. Excavating the University's Interest in Regulation

Universities have an interest in regulating this collective ritual to allow for marking the significant milestone in students' academic and personal lives. Yet this

⁹³ For a judicial articulation of this idea in context of the purpose of the modern university, see *Doe v. Rector & Visitors of George Mason University*, 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) (arguing "controversial and sometimes offensive ideas and viewpoints are central to the educational mission of universities").

⁹⁴ Turner, *supra* note 80, at 55.

⁹⁵ See *id.* at 49–50.

⁹⁶ See *id.* at 50.

⁹⁷ Alex Kane, *Fatima Mohammed Has No Regrets*, JEWISH CURRENTS (June 21, 2023) (emphasis added), <https://jewishcurrents.org/fatima-mohammed-has-no-regrets> [<https://perma.cc/Z8LE-GG3K>].

⁹⁸ *What Is the Blueprint for the Perfect Commencement Speech?*, *supra* note 88.

⁹⁹ A.O. Scott, *Why Bad Commencement Speeches Are a Good Thing*, N.Y. TIMES (May 24, 2024), <https://www.nytimes.com/2024/05/24/books/review/commencement-speeches-david-foster-wallace.html> [<https://perma.cc/4C2X-Y69B>].

Article identifies two other compelling reasons for regulating commencement speeches. The first is the maintenance of political support for higher education, and the second is maintenance of community ties within the university.

1. Maintenance of Political Support

Academic freedom demands administrators to resist pressure from donors and politicians to curb the university core: research and teaching. These are the autonomous zones which administrators must zealously guard from the interference of private capital and the state. But universities are also vulnerable to broader political and financial backlash, especially when they veer from research and teaching. These threats are particularly acute today, with the rise of right-wing populism targeting expertise,¹⁰⁰ growing partisan polarizations in educational attainment¹⁰¹ and confidence in higher education,¹⁰² and sweeping efforts to meddle in higher education in states like Florida and Texas,¹⁰³ as well as the federal government under President Trump.¹⁰⁴

Public universities are especially at risk of reprisals. Unlike private colleges organized around a particular normative ethos or tribal identity, they definitionally serve the heterogeneous citizenry, creating fertile grounds for conflict among different groups that stake claims on their institutional mission. Public universities are also accountable and responsive to legislators in ways private colleges are not, most saliently through budgetary appropriations and administrative appointments.

This Article argues that administrators at universities have a legitimate interest in regulating commencement speeches to maintain political support for higher

¹⁰⁰ See, e.g., Nicholas Confessore, *How a Proxy Fight over Campus Politics Brought Down Harvard's President*, N.Y. TIMES (Jan. 3, 2024), <https://www.nytimes.com/2024/01/02/us/harvard-president-campus-antisemitism-conservatives.html> [<https://perma.cc/LFV9-C85P>] (discussing broad criticisms of and backlash to academia).

¹⁰¹ See, e.g., Eric Levitz, *How the Diploma Divide Is Remaking American Politics*, N.Y. MAG.: INTELLIGENCER (Oct. 19, 2022), <https://nymag.com/intelligencer/2022/10/education-polarization-diploma-divide-democratic-party-working-class.html> [<https://perma.cc/GS3Y-XNHF>] (commenting on consequences of polarization in educational attainment).

¹⁰² See, e.g., Jeffrey M. Jones, *U.S. Confidence in Higher Education Now Closely Divided*, GALLUP (July 8, 2024), <https://news.gallup.com/poll/646880/confidence-higher-education-closely-divided.aspx> [<https://perma.cc/WG27-N3HT>].

¹⁰³ See, e.g., Nicholas Confessore, *'America Is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), <https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html> [<https://perma.cc/AHA5-YRWP>] (documenting efforts to undermine public universities' programming on diversity and inclusion).

¹⁰⁴ See, e.g., Alan Blinder & Stephanie Saul, *Trump Orders Could Drain Millions from Universities, But Few Protest Openly*, N.Y. TIMES (Feb. 4, 2025), <https://www.nytimes.com/2025/02/04/us/trump-executive-orders-universities.html> [<https://perma.cc/3LRF-8KHV>] (documenting early initiatives of the second term of the Trump Administration to reduce funding and autonomy of higher education institutions).

education. Commencement ceremonies represent a rare interface between the university and the broader public, offering a glimpse into the institution's values, actions, and achievements. As such, they provide an opportunity for universities to showcase their contributions to society and reinforce their importance to a diverse audience, including families, donors, and policymakers. Fiery student speeches at this public-facing event can provide ammunition for politicians and interest groups seeking to undermine higher education, reinforcing narratives that paint universities as out of touch with public and pluralistic values. The repercussions of these controversies can extend far beyond the ceremony itself, inciting opportunistic policymakers to retaliate with punitive measures that curb research and teaching. Pragmatic administrators will be aware of the possibility of recriminations and seek to mitigate the risk of external intrusion into the university's core functions.

Consider the fallout from Mohammed's speech. She delivered it in a sensitive moment for CUNY, with New York's Governor and New York City's Mayor recently having proposed steep budget cuts.¹⁰⁵ Politicians, ranging from local Democrats like Mayor Eric Adams¹⁰⁶ and Congressman Ritchie Torres¹⁰⁷ to distant Republicans like Senator Ted Cruz,¹⁰⁸ quickly denounced the speech. In short order, politicians and interest groups demanded the city and state execute on the budget cuts as a reprisal against CUNY for Mohammed's speech. Pro-Israel groups pressed the Internal Revenue Service to revoke CUNY's tax-exempt status.¹⁰⁹ Congressman Lee Zeldin, then the Republican candidate for New York governor, demanded "taxpayer funding [for CUNY] must be immediately suspended," as did multiple sitting members of Congress.¹¹⁰

¹⁰⁵ See, e.g., Jen Smith, *Growing Calls for CUNY to Be Stripped of \$2.8 Billion It Gets from Taxpayers After Law Student's Anti-Israel, Cop-Bashing Commencement Speech . . . As It's Revealed the 2022 Speaker Was Also a Pro-Palestine Activist*, DAILY MAIL (May 30, 2023, 5:54 PM), <https://www.dailymail.co.uk/news/article-12139473/Growing-calls-CUNY-stripped-government-funding-commencement-speech.html> [<https://perma.cc/FQ5R-RCLM>].

¹⁰⁶ Bernadette Hogan & Allie Griffin, *Mayor Adams Condemns CUNY Grad's 'Hate Speech': 'We Cannot Allow it to Happen'*, N.Y. POST (May 31, 2023, 11:21 PM), <https://nypost.com/2023/05/31/mayor-adams-condemns-cuny-grads-hate-speech/> [<https://perma.cc/F5RC-33JS>].

¹⁰⁷ Kane, *supra* note 97.

¹⁰⁸ See Ginia Bellafante, *She Attacked Israel and the N.Y.P.D. It Made Her Law School a Target.*, N.Y. TIMES (June 2, 2023), <https://www.nytimes.com/2023/06/02/nyregion/cuny-law-speech-mohammed.html> [<https://perma.cc/LHT6-MEUD>].

¹⁰⁹ Adam Kredo, *IRS Pressed to Revoke CUNY's Tax-Exempt Status Following Anti-Semitic Hate Speech*, WASH. FREE BEACON (June 2, 2023), <https://freebeacon.com/campus/irs-pressed-to-revoke-cunys-tax-exempt-status-following-anti-semitic-hate-speech/> [<https://perma.cc/35P5-ZA8J>]; see, e.g., Smith, *supra* note 105.

¹¹⁰ Lee Zeldin, *Gov. Kathy Hochul Is AWOL as CUNY Is in Crisis*, N.Y. POST (May 31, 2023, 7:32 PM), <https://nypost.com/2023/05/31/gov-kathy-hochul-is-awol-as-cuny-is-in-crisis/> [<https://perma.cc/B8TF-UFCA>]; Arno Rosenfeld, *Behind CUNY Graduation Speech Furor*,

Numerous Republican state lawmakers, who vote on funding for CUNY, demanded Governor Hochul cut off funds not just for CUNY but the *entire* State University of New York system as retaliation for Mohammed's "hate-filled" speech.¹¹¹ Backlash was not cabined to the Empire State. From his perch in Washington, D.C., Republican Congressman Mike Lawler introduced a bill to "defund" CUNY in response to the "antisemitic graduation speaker."¹¹²

Following the speech, Mayor Adams's budget made significant cuts to CUNY, which resulted in sweeping professor layoffs and reductions in university programming.¹¹³ The causality for these budget cuts is multifactorial and cannot be blamed solely, or even primarily, on Mohammed's speech. But at a perilous moment for the university, her speech bolstered CUNY's critics and their depiction of CUNY as a hotbed of radical and intolerant ideology. It is also possible that Mohammed's speech reduced private donations to the university system. Of note, Mohammed's speech outraged Ronald Lauder,¹¹⁴ an heir to the Estée Lauder fortune whose brother, Leonard, had made the largest donation to a CUNY college ever, just months before Mohammed's speech.¹¹⁵

As CUNY sought to defuse the intense backlash to Mohammed's speech, her supporters accused administrators of "prioritizing their standing in the eyes of politicians and media at the expense of student-organizers."¹¹⁶ Yet an essential part of administrators' job is preserving CUNY's reputation in the "eyes of politicians"

a University Divided over Zionism, FORWARD (June 30, 2023), <https://forward.com/news/552586/fatima-mohammed-cuny-graduation-speech-controversy-israel-zionism/> [https://perma.cc/4KKJ-VRZU].

¹¹¹ See, e.g., Emily Crane & Zack Williams, *Republican Lawmakers Demand Gov. Hochul To Cut CUNY Funding After 'Hate-Filled' Commencement Speech*, N.Y. POST (June 1, 2023, 6:56 PM), <https://nypost.com/2023/06/01/republican-lawmakers-demand-gov-kathy-hochul-to-cut-cuny-funding-after-hate-filled-commencement-speech/> [https://perma.cc/MP9P-5PPU].

¹¹² Sahar Tartak, *What Would Happen If We Defunded Antisemitic Schools?*, NAT'L REV. (June 5, 2023, 11:26 AM), <https://www.nationalreview.com/corner/what-would-happen-if-we-defunded-antisemitic-schools/> [https://perma.cc/M9UU-H9CB].

¹¹³ See, e.g., Noorulain Khawaja, *CUNY Professor Layoffs in Middle of Academic Year amid Budget Cuts*, SPECTRUM NEWS NY1 (Feb. 12, 2024, 10:30 PM), <https://ny1.com/nyc/queens/education/2024/02/13/cuny-professor-layoffs-in-middle-of-academic-year-amid-budget-cuts> [https://perma.cc/MWM8-J64S].

¹¹⁴ @Lauder_Ronald, X (June 1, 2023, 10:13 AM), https://x.com/lauder_ronald/status/1664273924820176898 [https://perma.cc/5S59-5LUA].

¹¹⁵ See, e.g., Michael T. Nietzel, *Leonard Lauder Gives Hunter College \$52 Million, Its Largest Gift Ever*, FORBES (Nov. 17, 2022, 1:47 PM), <https://www.forbes.com/sites/michaeltnietzel/2022/11/17/leonard-lauder-gives-hunter-college-52-million-its-largest-gift-ever/> [https://perma.cc/WXC7-78SV].

¹¹⁶ Robert McCoy, *The 'Palestinian Exception' to College Campus Free Speech*, DAILY BEAST (June 12, 2023, 10:47 PM), <https://www.thedailybeast.com/the-palestinian-exception-to-college-campus-free-speech> [https://perma.cc/46DZ-DGEQ].

who fund it so they can preserve other university functions. And administrators protected Mohammed's rights as a "student-organizer." They never regulated her pro-Palestinian speech on CUNY's public fora or gave into pressure campaigns from external organizations to punish her for inflammatory social media posts that she wrote as a student, including a demand for "every Zionist [to] burn in the hottest pit of hell," and "[I] pray upon the death of the USA."¹¹⁷

While CUNY administrators had obligations to Mohammed, they also have important responsibilities to maintain the conditions that allow for research and teaching. The consequences of cutting funds or reducing private capital donations to CUNY, even marginally, are significant. Contrast CUNY to USC. While USC boasts gleaming new buildings and school-sponsored trips to exotic locales, bathrooms at CUNY run out of toilet paper and ceilings seep out water.¹¹⁸ CUNY professors, including star faculty members like political theorist Corey Robin, report buying rudimentary classroom supplies themselves.¹¹⁹ With its multibillion-dollar endowment, USC can weather losing a donation from the billionaire scion of a cosmetics company. CUNY is not similarly situated.

Importantly, the consequences of budget cuts were not directly burdened by the student commencement speaker, but rather diffusely by a large group disproportionately of low-income backgrounds who were enrolled or would enroll at CUNY in the future.¹²⁰ CUNY enrolls nearly ten times as many undergraduates as USC.¹²¹ And the colleges that make up CUNY dominate the list of American colleges with the highest social mobility rate.¹²² The median family income of a student at the City

¹¹⁷ See *Fatima Mohammed*, CANARY MISSION, https://canarymission.org/individual/Fatima_Mohammed [<https://perma.cc/44VK-CHP7>] (last visited Apr. 17, 2025).

¹¹⁸ Compare Jennifer Medina, *What's Life Like as a Student at U.S.C.? Depends on the Size of the Bank Account*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/usc-admissions-scandal-students.html> [<https://perma.cc/HZ4J-9YM5>], with David W. Chen, *Dreams Stall as CUNY, New York City's Engine of Mobility, Sputters*, N.Y. TIMES (May 28, 2016), https://www.nytimes.com/2016/05/29/nyregion/dreams-stall-as-cuny-citys-engine-of-mobility-sputters.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0 [<https://perma.cc/63VR-PLJV>].

¹¹⁹ See @CoreyRobin, X (Mar. 18, 2024, 1:46 PM), <https://x.com/CoreyRobin/status/1769782425406652666> [<https://perma.cc/6WLP-45Z5>]; see also Corey Robin, *The Relentless Shabbiness of CUNY: What Is to Be Done?*, COREY ROBIN (May 29, 2016), <https://corey-robin.com/2016/05/29/the-relentless-shabbiness-of-cuny-what-is-to-be-done/> [<https://perma.cc/7BQS-NTJT>] (documenting conditions).

¹²⁰ *New Study Confirms CUNY's Power as National Engine of Economic Mobility*, CITY UNIV. N.Y., <https://www.cuny.edu/news/new-study-confirms-cunys-power-as-national-engine-of-economic-mobility/> [<https://perma.cc/UW7C-F2CQ>] (last visited Apr. 17, 2025).

¹²¹ Compare *Undergraduate Admissions*, CITY UNIV. N.Y., <https://www.cuny.edu/admissions/undergraduate/> [<https://perma.cc/L78D-WBBA>] (last visited Apr. 17, 2025), with *Facts and Stats*, USC, <https://usc.edu/we-are-usc/the-university/facts-and-stats/> [<https://perma.cc/23SQ-TQ9X>] (last visited Apr. 17, 2025).

¹²² *Some Colleges Have More Students from the Top 1 Percent Than the Bottom 60. Find*

College of New York, CUNY's founding institution, is \$40,200; out of 2,137 American colleges, it is ranked second in the overall mobility index, a measurement that looks at the likelihood that a graduate will move up 2 or more income quintiles.¹²³ For comparison, the median family income of a student at USC is \$161,400; it is ranked 832nd on the same social mobility metric.¹²⁴

It is solipsistic for students to assert their unfettered freedom to say whatever they want in a farewell speech takes priority over sustaining the political conditions that buttress this spectacular engine of social progress, class mobility, and knowledge creation. Individual students come and go; administrators' obligations do not. In my view, the "nearly nonstop, consistently furious international tabloid coverage" that stalked Mohammed and the reprisals against CUNY were dangerous and cynical.¹²⁵ The chasm between rich, private universities and poor, public ones in the United States is scandalous. But the backlash to Mohammed's graduation speech was hardly surprising, and it was foreseeable that the reprisals would exacerbate educational inequalities.

2. Maintenance of Community Ties

University administrators, especially those at public institutions, have a responsibility to build an inclusive community free from discrimination. This "community maintenance" objective, while distinct from research and teaching, creates the trust and mutual respect that furthers the institution's overall health and function.¹²⁶ Regulating student speeches at commencement ceremonies may be necessary to ensure that all graduating students can participate equally in the ceremony and that the captive audience receives a celebratory experience for which they assembled.

While we tolerate speech that ostracizes based on identity or ideology in public discourse and in some spheres of the university life,¹²⁷ speech of this kind functions

Yours, N.Y. TIMES: UPSHOT (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html> [<https://perma.cc/YLQ4-MJW9>].

¹²³ *Economic Diversity and Student Outcomes at the City College of New York*, N.Y. TIMES: UPSHOT, <https://www.nytimes.com/interactive/projects/college-mobility/city-college-of-new-york> [<https://perma.cc/9SYB-2QMR>] (last visited Apr. 17, 2025).

¹²⁴ *Economic Diversity and Student Outcomes at the University of Southern California*, N.Y. TIMES: UPSHOT, <https://www.nytimes.com/interactive/projects/college-mobility/university-of-southern-california> [<https://perma.cc/3Q5Z-4QFS>] (last visited Apr. 17, 2025).

¹²⁵ Bellafante, *supra* note 108.

¹²⁶ See, e.g., Ira C. Lupu & Robert W. Tuttle, *The Cross at College: Accommodation and Acknowledgment of Religion at Public Universities*, 16 WM. & MARY BILL RTS. J. 939, 971 (2008) (observing that "[m]any universities attempt to create a comprehensive community for students, one that stretches beyond the basics of education, shelter, and food").

¹²⁷ *Compare Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."), *with* Defoe

differently in a graduation ceremony. It is a singular, celebratory event that provides no mechanism for rebuttal or colloquy. For illustration, turn again to Mohammed's speech. Some Jewish students defended it.¹²⁸ Others found it anti-Semitic and hateful.¹²⁹ What were graduating students in the latter camp supposed to do? If Mohammed had delivered the harsh condemnation of Zionism at a rally on CUNY's quad, students could boycott the gathering, walk away from the speech, or organize a counterprotest. Public discourse allows for dissent and counter-speech. If Mohammed delivered them in a seminar focused on contemporary Middle Eastern politics, students could respond with counter-arguments; a professor could lead a guided exchange structured by academic norms. Teaching allows for debate, dialogue, and critical analysis.

But in the unusual site of a graduation ceremony, the objecting students had few options. Within the confines of the ceremony, the elevation of one student speaker entails the disempowerment of others. Was it reasonable to expect the objecting students to walk out of their own graduation ceremony, before receiving their diplomas? And because their graduation included a speech they viewed as anti-Semitic, is it fair that they were denied full participation in the ritual? As discussed in Part IV, some offense from speeches is unavoidable; universities should not regulate to prevent everyone from feeling uncomfortable and censor all potentially controversial topics or language. Instead, the goal should be to find a balance that allows for meaningful student expression while preserving a ritual with a celebratory spirit and full participation by all community members. Fervent speeches decrying Israel, Palestine, the "fascist" police, or "fascist" Black Lives Matter protestors are unlikely to reflect this balance.

Harm from incendiary speech falls not just on graduating students. As Turner recognized, *rites de passage* involve the community at large as much as the individuals conspicuously participating in the ritual.¹³⁰ When a student uses a commencement speech to air personal or political grievances divorced from the ritualistic function of the event, it denies the captive audience the experience they converged for. Unlike attending a political rally or religious convocation, where consent to hear specific views can be assumed and an audience member can exit freely, graduation

ex rel. Defoe v. Spiva, 625 F.3d 324, 340 (6th Cir. 2010) (Rogers, J., concurring) (observing that "racial contempt can be advocated on the streets and in the public square, but not necessarily in the public schools"), and Denno v. Sch. Bd. of Volusia Cnty., 218 F.3d 1267, 1271 (11th Cir. 2000) (upholding the banning of Confederate flag in public school and stating that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").

¹²⁸ See Statement in Support of Fatima from CUNY Jewish Law Students Association (May 21, 2023), <https://docs.google.com/document/d/1YuEmcjfra01kftXhi9Ui4Yb0-8v1uF9MO3asayp7rq0/edit> [<https://perma.cc/KMD5-C62S>].

¹²⁹ See, e.g., Rosenfeld, *supra* note 110.

¹³⁰ See Turner, *supra* note 80, at 47 ("[A]ll societies ritualize and publicly mark with suitable observances to impress the significance of the individual and the group on living members of the community.").

attendees come to participate in a communal celebration of academic achievement and may feel compelled to stay.¹³¹ The attendees have come for the antithesis of “enlightenment and provocation”: to “cheer their friends and relatives.”¹³²

Graduation ceremonies can hold particular significance to the friends and relatives of first-generation students and those from marginalized backgrounds. The ceremonies accentuate the rich familial, social, and cultural networks that fuel individual achievement and higher education’s catalyzing effect on social mobility. By physically inviting family members and friends onto campus normally shielded from view and acknowledging them through structured formalism, the ceremony testifies to the sacrifices others have made to support a student’s intellectual growth and new station. To an affluent and fourth-generation Princetonian, this social significance may be invisible. To Justice Sotomayor, who grew up in a housing project in the Bronx, it was powerful and inescapable; graduation represented the “alter[ing of] that old image of a Princeton alumnus long cherished by some.”¹³³

Inflammatory and self-aggrandizing speeches, in short, do not harm all communities in the same way. Intemperate remarks in this unique social ritual are a stark reminder of Professor Post’s trenchant admonition that more speech is not intrinsically desirable, that the uninhibited failure to exercise self-control in speech may reflect “narcissism” rather than the animating “democratic legitimation” values of the First Amendment.¹³⁴ Impassioned graduation speeches about one’s specific political beliefs can disguise vanity as public discourse.

¹³¹ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 298, 302–04 (1974) (holding that “First Amendment forum[s],” much like “park[s],” are “where First Amendment values inalterably prevail”); *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting) (“One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try not to listen.” (emphasis omitted)); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (noting a school’s interest in protecting children from sexually explicit speech “especially in a captive audience”); *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring) (“[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”). In the Establishment Clause context, Justices have recognized that graduation ceremonies constitute a “captive audience of public school students and their families.” See *Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J., concurring).

¹³² Steve Lubet, *Why It Is Wrong to Harangue a Captive Audience at Graduation*, ACADEME BLOG (June 3, 2019), <https://academeblog.org/2019/06/03/why-it-is-wrong-to-harangue-a-captive-audience-at-graduation/> [<https://perma.cc/BAL5-7SJY>].

¹³³ SONIA SOTOMAYOR, *MY BELOVED WORLD* 162 (2013).

¹³⁴ See, e.g., Ronald K.L. Collins, *Robert Post: ‘There Is Growing Pessimism About the Future of Free Speech in the United States’—First Amendment News 407*, FIRE (Jan. 10, 2024), <https://www.thefire.org/news/blogs/ronald-kl-collins-first-amendment-news/robert-post-there-growing-pessimism-about-future> [<https://perma.cc/BQ2F-SMZX>]. For an eloquent and early judicial articulation of “democratic legitimation,” see *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917).

III. THE COUNTERVAILING ACADEMIC FREEDOM VALUE

Administrators have legitimate interests in regulating student commencement addresses. But just because regulation is permissible does not mean all regulation is desirable. If wielded indiscriminately, universities can exercise this regulatory power in ways that endanger academic freedom. The potential harm of heavy-handed university regulation of commencement speeches and speakers attaches not only to the violation of an individual's right to speak, but also to the right of inquiry of the broader academic community and even society as a whole.¹³⁵

While the American concept of "academic freedom" has many elements,¹³⁶ this Article focuses on two bedrock and related dimensions of academic freedom. First, universities must protect the systems that allow for students and professors to engage in open-minded and vigorous learning, research, and teaching. And second, universities cannot validate retaliatory backlash to "extramural utterance and action."¹³⁷ As illustration of these twin harms, it considers USC's cancellation of Tabassum's speech, as cancellation is perhaps the most draconian form of regulation. The popular and legal commentariat responded to USC's cancellation by focusing on Tabassum's speech rights; few centered the rights and interests of the broader academic community as the principal casualty.¹³⁸

On the first principle, universities must avoid creating an institutional "orthodoxy" that communicates to faculty and students that they will be "favored in some way—or will think that they may be favored—by taking the 'right' position on a controversial question."¹³⁹ Achieving this principle does not require the vogueish

¹³⁵ See, e.g., FINKIN & POST, *supra* note 40, at 39 (noting, in context of the AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, that "[i]f the First Amendment protects the interests of individual persons to speak as they wish, academic freedom protects the interests of society in having a professoriat that can accomplish its mission"). As Finkin and Post acknowledge, while academic freedom's intellectual development in the United States focused on the "professoriat," academic freedom could be conceptualized in ways focused on the student body. See *id.* at 79, 157; see also Metzger, *supra* note 18. Other scholars have more thoroughly developed the concept of student academic freedom. See generally Amar & Brownstein, *supra* note 28, at 1944–70 (commenting on the "scope and meaning of the academic freedom of public university students").

¹³⁶ The most convincing account frames the American, professional idea of academic freedom in four parts: freedom of research and publication, freedom of teaching, freedom of extracurricular speech, and freedom of intramural speech. See generally FINKIN & POST, *supra* note 40 (chapters 3, 4, 5 & 6, respectively).

¹³⁷ See AM. ASS'N UNIV. PROFESSORS, APPENDIX I: 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 292, <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> [<https://perma.cc/Z435-TPDX>].

¹³⁸ See *supra* notes 3–9 and accompanying text.

¹³⁹ *President Eisgruber's Annual State of the University Letter, 2021*, PRINCETON UNIV. (Feb. 4, 2021, 2:00 PM), <https://www.princeton.edu/news/2021/02/04/president-eisgrubers>

“institutional neutrality,”¹⁴⁰ but it does require a university committed to being “an impartial forum for vigorous, high-quality discussion, debate, scholarship, and teaching.”¹⁴¹ Students and professors should not be rewarded or punished for staking out particular political or ideological positions on matters of public concern.

Strict regulation of commencement speeches and speakers can violate this commitment. USC’s decision to cancel Tabassum’s speech risked creating an “orthodoxy” on the complicated and emotionally resonant geopolitical issue. If Tabassum had taken a different position on Israel-Palestine, few doubt she would have been “favored” to retain the valedictory platform and the status as a student speaker with valuable remarks to give. By rescinding her speaking invitation following public criticism of her views, USC implicitly suggested that her pro-Palestinian perspective was incorrect and perhaps unacceptable within university forums.

This tacit implication of viewpoint discrimination and an institutional position now permeates the entire institution, hindering open and vigorous dialogue on a significant matter of public concern on which reasonable people disagree. It creates an atmosphere where students and faculty may feel hesitant to express certain viewpoints, lest they lose certain privileges or benefits. This potential self-censorship or self-modulation is antithetical to higher education’s mission to foster critical thinking and robust, diverse perspectives, but it rationally responds to a university that doles out prizes and punishments based on political litmus tests. As a petition signed by tens of thousands of USC community members stated, the cancellation “sen[t] a terrible message to not only Muslim students at USC and all students who dare to express support for Palestinian humanity.”¹⁴²

Crucially, USC’s cancellation had nothing to do with Tabassum’s ability to deliver a suitable graduation speech aligned with the ritualistic goals of graduation. USC administrators denied Tabassum the opportunity to even present a speech that they could review, citing amorphous and implausible “safety” concerns.¹⁴³ And there

-annual-state-university-letter-2021 [https://perma.cc/DR9J-HXYE] (quoting William G. Bowen, *At a Slight Angle to the World*, reprinted in WILLIAM G. BOWEN, *EVER THE TEACHER* 5, 10 (1987)).

¹⁴⁰ See generally Robert Post, *The Kalven Report, Institutional Neutrality, and Academic Freedom*, in *REVISITING THE KALVEN REPORT: THE UNIVERSITY’S ROLE IN SOCIAL AND POLITICAL ACTION* (Keith E. Whittington & John Tomasi eds., forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4516235 [https://perma.cc/KDZ4-ESP8].

¹⁴¹ Christopher L. Eisgruber, *Princeton’s Tradition of Institutional Restraint*, PRINCETON ALUMNI WKLY. (Nov. 7, 2022), https://paw.princeton.edu/article/princeton-president-christopher-eisgruber-tradition-institutional-restraint [https://perma.cc/FZA6-YQWJ].

¹⁴² *Tell USC to Reinstate Muslim Valedictorian’s Speech, Reject Anti-Palestinian and Anti-Muslim Hate*, CAIR CAL., https://cair-la.salsalabs.org/usc-cancels-valedictorian-speech/index.html [https://perma.cc/2WVY-EWMR] (last visited Apr. 17, 2025).

¹⁴³ In addition to denying Tabassum the opportunity to record even a pre-recorded speech displayed on its website, USC never identified with any particularity the safety concerns or why they were more serious than those presented by previous speakers, like President Barack

were no indicia that Tabassum planned to hijack the commencement ceremony to spew provocative speech on Gaza or any other specific political topic. All evidence cut in the other direction. “I was hoping to use my commencement speech to inspire my classmates with a message of hope,” she said after the cancellation.¹⁴⁴ The fact that Tabassum held adamant and articulated pro-Palestinian views did not mean she was incapable of delivering an appropriate, inclusive graduation address; the same would go for a student with adamant and articulated pro-Israeli views.

On the second point, universities should foster the diverse expression of many viewpoints free from internal and external pressure. Academic freedom requires students and faculty to speak directly and energetically on contentious questions of public concern without administrators or extrinsic forces stifling that speech. Regulating commencement speeches or speakers in response to extrinsic backlash or in anticipation of extrinsic backlash threatens “the freedom to hear,” which is an “essential condition of a university community and an inseparable part of academic freedom.”¹⁴⁵ Just as First Amendment law protects speakers from being silenced due to the reaction of a hostile audience through the “heckler’s veto” concept, academic freedom requires universities to resist coercive efforts aimed at silencing speech in academic and public debate based on anticipated or actual reactions to it.

In the case of Tabassum, USC caved to the coercive campaign of a “swarm of on- and off-campus groups” who objected not to the planned substance of her speech but to her identity and extramural utterances.¹⁴⁶ Graduating students and their families and friends lost an opportunity to hear from a speaker that the university, just days before, had deemed as someone with valuable remarks to give because of this intimidation. In her telling, Tabassum included the link in her Instagram biography to “inform and in the spirit of academic discourse” by providing information so that “people” can “make their own decisions.”¹⁴⁷ Her intent, at least in her account, was to foster informed discussion and independent thought—precisely the goals that

Obama, conservative provocateurs Ben Shapiro and Milo Yiannopoulos, and foreign dignitaries. Alisha Ebrahimji & Melissa Alonso, *The University of Southern California Cancels its Muslim Valedictorian’s Commencement Speech, Citing Safety Concerns*, CNN (Apr. 17, 2024, 1:49 AM), <https://www.cnn.com/2024/04/16/us/usc-valedictorian-commencement-speech-canceled/index.html> [<https://perma.cc/FBJ4-L4S8>]; Stephanie Saul, *U.S.C. Cut the Valedictorian’s Graduation Speech. Now the Celebrities Are Out, Too.*, N.Y. TIMES (Apr. 21, 2024), <https://www.nytimes.com/2024/04/19/us/usc-graduation-commencement-guests.html> [<https://perma.cc/CGV4-D3SD>].

¹⁴⁴ Asna Tabassum, *Statement by University of Southern California Student Asna Tabassum, Class of 2024 Valedictorian*, CAIR (Apr. 14, 2024), <https://www.cair.com/wp-content/uploads/2024/04/StatementbyAsna-Tabassum.pdf> [<https://perma.cc/9ZCJ-BSSZ>].

¹⁴⁵ *Fifty-Third Annual Meeting*, 53 AAUP BULL. 133, 134–35 (1967).

¹⁴⁶ Jaweed Kaleem, *Citing Safety Concerns, USC Cancels Pro-Palestinian Valedictorian’s Graduation Speech*, L.A. TIMES (Apr. 15, 2024, 7:40 PM), <https://www.latimes.com/california/story/2024-04-15/usc-valedictorian-asna-tabassum> [<https://perma.cc/GEL7-5XB4>].

¹⁴⁷ Ebrahimji & Alonso, *supra* note 143.

universities should be championing. By canceling her speech to appease an organized pressure campaign, USC effectively suppressed this “academic discourse” and penalized speech that was unambiguously part of the public discourse.

The ramifications of this decision extend far beyond Tabassum or an individual commencement ceremony. By yielding to external pressure against the identity and extramural speech of this potential speaker, USC set a dangerous precedent that could chill future academic discourse. Students, researchers, and professors across the university may now question whether their work could be next, potentially leading to another layer of self-censorship on topics related to Israel-Palestine or other controversial issues. This undermines USC’s commitment to protecting free expression and academic inquiry, particularly on this sensitive and polarizing topic of public debate.¹⁴⁸

Moreover, USC’s cancellation could embolden those who seek to silence diverse viewpoints expressed in the zones of campus committed to free-flowing academic and public discourse. The backlash to Tabassum’s speech was particularly pernicious. Whereas Mohammed’s speech was neither academic nor public discourse, Tabassum’s speech was clearly extramural public discourse which she later characterized as academic. It was the type of speech the university should not regulate and must protect from external backlash. More troublingly, the external backlash had insidious racist undertones; some critics of Tabassum, for example, drew attention to the fact she wears a hijab in arguing for canceling her speech.¹⁴⁹ By revoking the speaking invitation and validating the backlash, USC risked an escalation of such ugly campaigns in the future, further threatening the open exchange of ideas in an inclusive community.

IV. RECONCILING FREE EXPRESSION, UNIVERSITY INTERESTS, AND ACADEMIC FREEDOM

Within First Amendment doctrine, there can be a desire for mechanical and monolithic rules. This Article argues there cannot be for universities’ regulation of graduation speeches. In balancing students’ expressive interests, academic freedom

¹⁴⁸ USC’s decision contributes to what some legal scholars have identified as a distinct climate of self-censorship on this topic. *See, e.g.,* Radhika Sainath, *The Free Speech Exception*, BOS. REV. (Oct. 30, 2023), <https://www.bostonreview.net/articles/the-free-speech-exception/> [<https://perma.cc/5E2C-HN7Y>] (arguing that contemporary debates over Palestinian rights occur in an atmosphere of “censorship, suppression, and intimidation”).

¹⁴⁹ *See* Tabassum, *supra* note 144 (stating “anti-Muslim and anti-Palestinian voices have subjected me to a campaign of racist hatred because of my uncompromising belief in human rights for all”); *see also* Victoria Ivie, *USC Cancels Muslim Valedictorian’s Commencement Speech, Citing Safety Concerns*, L.A. DAILY NEWS (Apr. 17, 2024, 5:57 PM), <https://www.dailynews.com/2024/04/16/usc-cancels-valedictorians-commencement-speech-citing-safety-concerns/> [<https://perma.cc/56A4-3PBJ>].

obligations, and institutional goals, administrators have no choice but to rely on discretionary judgment calls about whether, when, and how to regulate speeches. In lieu of prescription, this Article puts forth some general principles for administrators as they navigate these treacherous shoals.

As a preliminary matter, universities need not review or regulate student speeches. They can embrace the “hazardous freedom” of uncensored commencement addresses, recognizing that “this kind of openness” in a “permissive, often disputatious, society” is “the basis of our national strength.”¹⁵⁰ This approach creates institutional risks, but has feasibility benefits. In most cases, the lack of review or regulation will not impede successful graduation ceremonies. By meeting the qualifications for graduation, a student speaker has demonstrated competence in the academic domains of university, which require self-modulation. And student speakers are rarely selected randomly from the graduating class. They normally have distinguished themselves through superior academic performance (as in valedictorians), significant community contributions (as in recipients of awards from administrators), or wide support among graduating students (as in winners of a plebiscite of the graduating class). In most cases, a student selected through one of these three mechanisms will have the wisdom and restraint to recognize the collective and civic responsibilities inherent in this unusual genre of speech.

Administrators should not regulate to avoid controversial speech qua controversial speech. Instead, the goal should be to avoid speech so controversial it disrupts the ritualistic components of the ceremony or risks serious political reprisals or damage to community ties. One person’s personal is another person’s political; conceptions of “controversy” are inherently culturally contingent and subjective, mediated by the relation of the subaltern to the hegemony.¹⁵¹ Artful graduation speakers comment on contested political subjects in graduation speeches without derailing the ritual or sparking serious backlash to the university. In 2017, for example, Notre Dame valedictorian C.J. Pine¹⁵² and Columbia President Lee Bollinger¹⁵³ used their commencement addresses to subtly criticize then newly elected President Donald Trump and his policies. There were undoubtedly some people in the audience who supported Trump, but the way Pine and Bollinger expressed their remarks cannot be said to have obstructed the social rite.

¹⁵⁰ *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

¹⁵¹ See, e.g., ANTONIO GRAMSCI, *PRE-PRISON WRITINGS* 313–16 (Richard Bellamy ed., Virginia Cox trans., 1994).

¹⁵² See Caleb “C.J.” Pine: *2017 Valedictory Address*, NOTRE DAME NEWS (May 21, 2017), <https://news.nd.edu/news/caleb-cj-pine-2017-valedictory-address/> [<https://perma.cc/H6BF-ELE3>].

¹⁵³ See *Commencement 2017 Address: President Bollinger Calls for a Public Discourse Based on Tolerance Rather Than Fear*, COLUM. NEWS (May 18, 2017), <https://news.columbia.edu/news/commencement-2017-address-president-bollinger-calls-public-discourse-based-tolerance-rather> [<https://perma.cc/QL7M-3Y4H>].

In determining when a speech will become disruptive, university regulation should be attuned to the institution's values and the specific communities it serves. While many other countries nationalize and standardize institutions of higher education, the United States has a heterogeneous constellation of institutions that "define their missions as they see fit."¹⁵⁴ They compete through varying commitments, pedagogies, costs, specialties, and goals. Accordingly, the same graduation speech that might be disruptive to the graduation ceremony of a theologically and politically conservative college (say, Hillsdale College) might be appropriate elsewhere (say, Reed College), even as Hillsdale and Reed both commit to academic freedom.

In most cases, administrators should not discriminate based on viewpoint in regulating commencement addresses.¹⁵⁵ If harsh condemnation of Zionism is inappropriate in a graduation speech, so too should be harsh condemnation of Palestinian nationalism. But there can be rare situations that call for viewpoint discrimination to achieve the ritualistic goals of graduation or to reflect the cultural community of the educational institution. Compare, for example, an optimistic student address depicting education as empowering and transformative to a nihilistic address depicting education as futile and destructive. A university might reasonably prefer the former viewpoint to uphold the aspirational nature of commencement. While viewpoint discrimination is noxious in the public square,¹⁵⁶ education and especially secondary and elementary education are among the various places where it can constitutionally occur.¹⁵⁷

Preserving the ritual of commencement is not a mandate for banality. While most commencement speeches are infamously platitudinous, the American intellectual tradition has been enriched by bold commencement speeches tackling matters of public concern. As the first student commencement speaker at Wellesley College, Hillary Clinton's nimble speech that respectfully but firmly challenged a U.S.

¹⁵⁴ *Students for Fair Admissions, Inc. v. Presidents & Fellow of Harv. Coll.*, 600 U.S. 181, 217 (2023).

¹⁵⁵ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 69 (2007) (characterizing viewpoint discrimination as "the most universally condemned threat to the foundations of free expression").

¹⁵⁶ See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) (arguing that "the First Amendment's central proscription against censorship" is against "viewpoint discrimination").

¹⁵⁷ Viewpoint discrimination regularly occurs in the K-12 context and is constitutional pursuant to *Tinker*. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1184-85 (9th Cir. 2006) (collecting cases for this proposition and stating "speech in the public schools is not always governed by the same rules [against viewpoint discrimination] that apply in other circumstances").

senator catapulted her to national prominence.¹⁵⁸ External speakers have used commencement addresses to introduce significant political programs, including the Marshall Plan,¹⁵⁹ the Great Society,¹⁶⁰ a shift in Cold War strategy,¹⁶¹ and fossil fuel divestment.¹⁶² Yet even if these speeches addressed matters of public import, the orators delivered them in a locution that preserved the ritual for which the community had convened.

In making difficult regulatory decisions, this Article proposes administrators take a longitudinal view. Speech that may be deemed divisive at the time of delivery can, with the passage of time, come to be regarded as profound and powerful. Consider Michael Tigar's 1966 valedictory speech at U.C. Berkeley Law, which criticized the Vietnam War during a period of escalating combat and American involvement.¹⁶³ The reaction to the speech, at the time of delivery, was "mixed."¹⁶⁴ As Tigar later recalled, "[h]alf the audience stood and applauded and half sat on their hands."¹⁶⁵ Today, the speech is seen as a masterful meditation on American values and political freedom. Once polarizing, it is now widely appreciated for its prescience, cogency, and moral clarity. This lesson should lead administrators to err on the side of student expression when faced with tough choices within their regulatory discretion.

¹⁵⁸ See Tamara Keith, *Taking On a U.S. Senator as a Student Propelled Clinton into the Spotlight*, NPR (July 28, 2016, 5:15 AM), <https://www.npr.org/2016/07/28/486799201/taking-on-a-u-s-senator-as-a-student-propelled-clinton-into-the-spotlight> [<https://perma.cc/4LBM-38QS>].

¹⁵⁹ See Colleen Walsh, *70 Years Ago, A Little-Heralded Speech at Harvard's Commencement Outlined the Marshall Plan, Which Calmed a Continent*, HARV. GAZETTE (May 22, 2017), <https://news.harvard.edu/gazette/story/2017/05/70-years-ago-a-harvard-commencement-speech-outlined-the-marshall-plan-and-calmed-a-continent/> [<https://perma.cc/89DN-V98P>] (speech of George Marshall).

¹⁶⁰ See Remarks at the University of Michigan (May 22, 1964), in AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-the-university-michigan> [<https://perma.cc/CVT3-PFGF>].

¹⁶¹ See Commencement Address at American University, Washington, D.C. (June 10, 1963), in JOHN F. KENNEDY LIB., <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/american-university-19630610> [<https://perma.cc/DK3A-QBZS>].

¹⁶² See Shera S. Avi-Yonah & Delano R. Franklin, *Al Gore Calls for Fossil Fuel Divestment at Harvard College Class Day*, HARV. CRIMSON (May 30, 2019), <https://www.thecrimson.com/article/2019/5/30/al-gore-class-day-2019/> [<https://perma.cc/QS4J-DRWH>] (describing speech of Al Gore to Harvard Class of 2019 at "Class Day," a communal and traditional gathering celebrated during Harvard College's commencement week).

¹⁶³ Boalt Hall Valedictory Graduation Speech (1966), in MICHAEL TIGAR PAPERS, <https://law.utexas.edu/tigar/archive-item/may-1966-valedictory-graduation-speech-boalt-hall/> [<https://perma.cc/M7WK-QS3E>].

¹⁶⁴ *Id.*

¹⁶⁵ MICHAEL E. TIGAR, *SENSING INJUSTICE: A LAWYER'S LIFE IN THE BATTLE FOR CHANGE* 197 (2021).

While students do not have a First Amendment right to speak at graduation, universities should follow certain practices to preserve students' expressive interests. Before selecting speakers, universities should provide notice to students if speeches will be regulated.¹⁶⁶ They should transparently and pre-emptively disclose whatever standards they will use in regulation and articulate their goals for the ceremony. If they do significantly regulate speeches, administrators should not present the student speech as purely that of the student at the ceremony and reiterate to the student that she has no obligation to deliver the speech.¹⁶⁷ Requiring students to orate substantially rewritten speeches with which students disagree could raise questions of speech compulsion.¹⁶⁸

If a student proposes delivering a speech that administrators believe will disrupt the ritual of commencement or imperil institutional interests, this Article submits that the university collaborate with the student with the aim of broaching a compromise. This approach draws inspiration from Justice Brennan's dissent in *Hazelwood*. In recognizing the "weighty," "delicate," and "particularized and supremely subjective choices" that public school administrators must make, Justice Brennan posited that "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate."¹⁶⁹

This Article envisions administrators engaging in open and reciprocal dialogue with the student to preserve "some" of the student's message while addressing institutional concerns. This bounded framework between students and administrators could foster a sense of shared responsibility for the commencement ceremony, creating a mechanism that acknowledges students' status as speakers with worthwhile commentary and the university's countervailing institutional interests. The student's recognition that she does not have a free speech right to say *all* of what she wants creates an incentive to compromise, as does the university's recognition that students have their own "views or values" that may clash with their own or those of guests in the audience. Rejecting an all-or-nothing paradigm, this approach models the kind of reasoned discourse, mutual respect, and socialization to professional standards and civic responsibilities that most universities aim to instill in their graduates.

¹⁶⁶ See generally *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (describing a "fair notice" requirement for speech regulation in the "school context").

¹⁶⁷ See, e.g., *Nurre v. Whitehead*, 559 U.S. 1025, 1028 (2010) (Alito, J., dissenting from denial of certiorari) ("School administrators may not behave like puppet masters who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.").

¹⁶⁸ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943))).

¹⁶⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278, 280 (1988) (Brennan, J., dissenting).

The negotiation and balancing might involve several stages. First, administrators could clearly articulate their specific concerns about the proposed speech, framing them in terms of the ceremony's goals and the university's broader mission. This transparency helps students understand the rationale behind potential restrictions, the interests of other stakeholders, and broader political dynamics of which they may not be aware. By requiring reasons for the concerns, it also provides a check on administrators who either consciously or unconsciously advance an orthodoxy on controversial questions.

Second, students could be given the opportunity to explain their proposed language and its relevance to commencement. This exchange can lead to creative solutions that neither party might have considered independently. Potential compromises could include modifying language while preserving key points, contextualizing controversial statements, providing suggestions for alternative wording to reflect the genre of graduation speech, and identifying speech especially important to the student orator or problematic to the university. Reframing substance in a style appropriate for commencement can go far. Tigar's and Mohammed's speeches overlap ideologically in their leftist criticism of American foreign policy and the military. Yet Tigar's address avoids facially incendiary rhetoric and explicitly tries to engage those who may disagree with it.¹⁷⁰

Third, if administrators prohibit specific language, they should clarify other sites of university and public life where the student can make those language and, if needed, take necessary action to ensure those sites remain accessible.

CONCLUSION

The First Amendment is unequivocal. "Congress shall make no law" brooks no compromise.¹⁷¹ Contemporary First Amendment jurisprudence can be equally uncompromising; viewpoint discrimination, for example, is usually verboten.¹⁷² In popular discourse, the First Amendment functions as an impregnable shield, the ultimate rights-as-trump card that an individual can play.¹⁷³ When Mohammed defended her speech by invoking "my First Amendment speech rights," she drew on the formidableness that legal doctrine and popular discourse bestow on constitutionalized free speech rights.

¹⁷⁰ Boalt Hall Valedictory Graduation Speech, *supra* note 163 (addressing arguments "[t]o my colleagues only some of whom I suspect agree with me" and recognizing the shared aspirations and responsibilities of the graduating class despite ideological and political differences).

¹⁷¹ U.S. CONST. amend. I.

¹⁷² See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). But see Erin L. Miller, *The Private Abridgment of Free Speech*, 32 WM. & MARY BILL RTS. J. 615, 667–68 (2024) ("Open balancing is often perceived as alien to the First Amendment, but the doctrine does employ it on occasion.").

¹⁷³ See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977).

This Article proposes a collaborative, reciprocal approach to graduation speech regulation, which necessitates moving beyond the rigid confines of the First Amendment. Analyzing student commencement speeches solely through a First Amendment lens creates a false dichotomy between students' expression and university authority. This zero-sum game erases legitimate regulatory interests, mischaracterizes the entitlements of a students, and degrades the discourse surrounding campus controversies. It assigns constitutional values to speech where those values are not present. And it makes adversaries out of potential collaborators and interlocutors. As Professor Jamal Greene has observed, the discourse of rights can "coarsen[] us, and by leaving us farther apart at the end of a dispute than we were at the beginning . . . diminish[] us."¹⁷⁴

The cancellation of Tabassum's speech and the Kulturkampf surrounding Mohammed's were not inevitable. They resulted from USC and CUNY's failure to proactively balance student expression with institutional integrity. In the case of USC, it denied Tabassum an opportunity to craft a speech appropriate for graduation; in the case of CUNY, it gave Mohammed a platform a speech inappropriate for graduation. The end result of both sagas, at least in the short term, is less student speech. Following these controversies, USC canceled its main graduation ceremony entirely, and CUNY Law scaled back its event and eliminated student speakers. Paradoxically, acknowledging universities' legitimate interest in regulating speech and establishing systems of negotiation to protect these interests can preserve a platform for student expression at graduation.

The reflexive invocation of the First Amendment extends beyond graduation speeches, permeating discussions about restrictions on human language across various managerial contexts. This trend reflects an impoverished constitutional discourse. Not all expression carries equal First Amendment weight as "public discourse." Speech within managerial spheres can be discourse on public concerns without becoming public discourse. The same words can have different constitutional implications and merits depending on their site of delivery. Here and elsewhere, framing all such speech regulation through a First Amendment lens risks oversimplifying complex institutional dynamics, undermining necessary managerial authority, and blinding us to harms that exist outside of a constitutional register.

¹⁷⁴ Jamal Greene, *Foreword: Rights as Trumps?*, 128 HARV. L. REV. 28, 34 (2018).