

LOOK AHEAD, DIXIELAND: AN EXAMINATION OF STATE UNIVERSITY DISCRETION IN MASCOT SELECTION

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INTRODUCTION

Universities are society’s laboratories for new perspectives and ideas.¹ Chief Justice Earl Warren once warned that our society would “stagnate and die”² without the academy’s constant inquiry, study, and evaluation to bring about “new maturity and understanding.”³ The new maturity and understanding gained from inquiry, study, and evaluation sometimes undermine the popular will. Yet the popular will can assert some control over the academy, especially when the institution has been created and partially funded by the government.⁴ State governments establish state

1. See AM. ASS’N OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES 297 (1915), available at [http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915 Declaration.pdf](http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915%20Declaration.pdf) [hereinafter 1915 Declaration].

2. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

3. *Id.*

4. Laura A. Jeltema, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 221 (2004).

colleges and universities by way of legislation or constitutional provision.⁵ And, state legislatures may pass new legislation or amend state constitutions to impose new mandates on the institutions of their creation.⁶

Though state universities must follow governmental mandate, they still must serve as forums for questioning society. State governments give state universities more discretion than other state agencies so they can fulfill this societal obligation.⁷ And to a degree, universities' independence from governmental control has evolved into a recognized constitutional right. For over forty years, the Supreme Court has interpreted academic freedom as a "special concern of the First Amendment."⁸ Other laws also provide protection for decisions made by universities. This Note explores whether the practical and legal limitations on state control of state universities protect universities from state interference in their non-academic institutional decisions. Specifically, the Note explores the boundaries of a state university's freedom to change its mascots.

The University of Mississippi removed the mascot "Colonel Reb," a cartoon depiction of an old Southern white man, from its football sidelines in 2003.⁹ This mascot, widely interpreted to be a plantation owner, made many minority students feel uncomfortable and unwelcome.¹⁰ The mascot's retirement was an attempt to distance the school from a history of poor race relations.¹¹ In 2010, students voted in favor of appointing a new on-field mascot, and the decision was met with resistance from a substantial number of students, alumni, and even Mississippians not affiliated with the university.¹² The following January, Representative Mark DuVall introduced a bill in the Mississippi House of Representatives to legally require the University of Mississippi to reinstate Colonel Reb as its mascot.¹³ DuVall's proposed legislation, House Bill 1106,¹⁴ died in the

5. 14A C.J.S. *Colleges and Universities* § 3 (2011).

6. *Id.*

7. See, e.g., Valerie L. Brown, *A Comparative Analysis of College Autonomy in Selected States*, 60 ED. L. REP. 299 (1990); Jeltema, *supra* note 4, at 227.

8. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967).

9. Robbie Brown, *Ole Miss Shelves Mascot Fraught with Baggage*, N.Y. TIMES (Sept. 19, 2010), <http://www.nytimes.com/2010/09/20/us/20mascot.html>.

10. *Id.*

11. Gary Pettus, *Goodbye, Colonel Reb?*, CLARION-LEDGER (Jackson, Miss.), June 19, 2003, at A1.

12. Brown, *supra* note 9.

13. Bobby Harrison, *Legislator Offers Bill to Bring Back Colonel Reb*, NE. MISS. DAILY J. (Jan. 25, 2011, 4:15 PM), http://djournal.com/view/full_story/11117786/article-Legislator-offers-bill-to-bring-back-Colonel-Reb.

14. H.B. 1106, 2011 Leg., Reg. Sess. (Miss. 2011).

House Colleges and Universities Committee shortly thereafter.¹⁵ The effort to change Mississippi law to bring back Colonel Reb did not end with House Bill 1106. One disgruntled citizen, Arthur Randallson, formed The Colonel Reb Political Action Committee and sought to amend the Mississippi Constitution to reinstate Colonel Reb as the University of Mississippi's mascot.¹⁶ The initiative, known as Initiative Measure 37, failed in June 2012 when it received only 41,000 of the 89,285 signatures needed to proceed to a popular vote.¹⁷

Although Initiative Measure 37 would have created a mandate on university symbols through direct democratic process instead of through a legislature's action, the initiative nevertheless would have constituted state action. The Supreme Court has previously considered state initiatives and referenda to be state action for the purpose of constitutional challenge.¹⁸ In *Reitman v. Mulkey*,¹⁹ the Supreme Court invalidated a California state initiative on Fourteenth Amendment Equal Protection grounds.²⁰ The initiative amended the state constitution to prohibit the passage of housing antidiscrimination laws.²¹ The Court determined that the initiative was state action because it "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment."²² Similarly, Initiative Measure 37 would have constituted state action because this amendment to the state constitution would have significantly involved the state in limitation of a state university's autonomy and expression.

The University of Mississippi is not the only university that has decided to change its mascot for social reasons. St. John's University responded to outcry from Native American activist groups by changing its team name from the "Redmen" to the "Red Storm" in the 1990s.²³ Similarly, Marquette University and Seattle University each voluntarily changed their offensive American Indian team names and mascots to less

15. Bobby Harrison, *Colonel Rebel Revival Bill Dies in Legislature*, NE. MISS. DAILY J. (Feb. 2, 2011, 5:37 AM), http://djournal.com/view/full_story/11210806/article-Colonel-Rebel-revival-bill-dies-in-Legislature?instance=home_news_2nd_left.

16. ARTHUR RANDALLSON, INITIATIVE MEASURE 37 (2011), available at http://www.sos.ms.gov/initiatives/Original%20Filing_Col%20Reb%20PAC%205%2024%202011.pdf [hereinafter INITIATIVE MEASURE 37].

17. Emily Wagster Pettus, *Col. Reb Ballot Initiative Withers*, ASSOCIATED PRESS, June 15, 2012, available at <http://bigstory.ap.org/article/apnewsbreak-col-reb-ballot-initiative-withers>.

18. See *Romer v. Evans*, 517 U.S. 620 (1996); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

19. 387 U.S. 369 (1967).

20. *Id.* at 378–79.

21. *Id.* at 372.

22. *Id.* at 376.

23. André Douglas Pond Cummings, *Progress Realized?: The Continuing American Indian Mascot Quandary*, 18 MARQ. SPORTS L. REV. 309, 317 (2008).

controversial monikers and symbols.²⁴ Mississippi is not the only state whose legislators have unsuccessfully attempted to assert control over university symbols. In 2004, the California legislature attempted to pass a law that would have prohibited all public schools from adopting “Redskins” as a school mascot.²⁵ This Note will focus on the recent University of Mississippi controversy, but it will also explore the protection generally afforded universities and the potential effectiveness of laws that attempt to control school symbols in the future.

Part I will assess a university’s freedom to replace its mascot based on its practical insulation from direct state control and the rationales behind that insulation. Part II will examine the constitutional right of academic freedom and whether that First Amendment right extends to this type of non-academic institutional decision, particularly when that decision is made in order to impart a “social” education to students. Part III will explore other legal avenues for protecting a university’s choice if the limitations on state control over universities do not prevent state intervention. Subpart A will assess whether university mascots can qualify as commercial speech and whether the First Amendment would protect this particular expression of commercial speech. Subpart B will consider whether the university may legitimately and convincingly attribute the mascot change to prevention of a racially hostile environment that violates federal hate speech laws.

I. THE PRACTICAL DISTINCTION BETWEEN STATE UNIVERSITIES AND OTHER STATE AGENCIES

Universities, unlike other state agencies, do not exist to serve a certain branch or branches of the state government.²⁶ They exist to build future leaders by evaluating society’s current decisions and exploring ways to improve them.²⁷ Many states have honored this distinction by managing universities through appointed committees instead of through direct legislative or executive supervision.²⁸ For example, Article 8, Section 213-A of the Mississippi Constitution provides that “the Board of Trustees of State Institutions of Higher Learning” manages the colleges and universities established by the state.²⁹ The governor appoints the board

24. *Id.*

25. *See* California Racial Mascots Act, A.B. 858, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003).

26. Jeltema, *supra* note 4, at 227.

27. *Id.*

28. *See* ALA. CONST. amend. 399; CAL. CONST. art. IX, § 9; N.D. CONST. art. VIII, § 6(6)(b); *see also* Brown, *supra* note 7, at 299.

29. MISS. CONST. art. VIII, § 213-A.

members, but this appointment power is limited by district representation requirements and term limits for board membership.³⁰ The appointments are staggered and the terms last for at least nine years, ensuring that the university governance does not dramatically change when new state leaders are elected every four years.³¹ These mechanisms insulate a state's public universities from direct political control by the state government.

State courts have supported this insulation because state universities often perform poorly under direct government control.³² The Michigan judiciary recognized the need for separation between the state government and universities as early as the nineteenth century. In *Sterling v. Regents of the University of Michigan*, the Michigan Supreme Court acknowledged that “[t]he university was not a success under . . . supervision by the legislature.”³³ The court reasoned that state universities are not successful under such a regime because legislatures have ever-changing membership and a lack of expertise in education.³⁴ Nearly a century later, Mississippi's judiciary expressed similar sentiments. In *State ex rel. Allain*, the Mississippi Supreme Court recognized that the state's universities could not achieve their purposes when they were controlled directly by the state government.³⁵ The court noted that political leaders had used the universities for their own personal gain without regard for the effect on the institutions themselves.³⁶

State legislatures and judiciaries give state universities more discretion than other state agencies because state universities are not successful without insulation from political fluctuations and influence.³⁷ The need for insulation from public opinion supports protecting a university's decision to change its mascot, even if that decision is controversial. That insulation, however, is not absolute.³⁸ The state's distinct treatment of universities will not, by itself, defeat the legal force of state action meant to control mascot selection.

Education professionals have also officially recognized that the academy requires unique latitude and have articulated reasons for that latitude.³⁹ The American Association of University Professors (AAUP)

30. *Id.*

31. *Id.*

32. *See Sterling v. Regents of the Univ. of Mich.*, 68 N.W. 253 (Mich. 1896); *Mississippi ex rel. Allain v. Bd. of Trs. of Insts. of Higher Learning*, 387 So. 2d 89 (Miss. 1980).

33. *Sterling*, 68 N.W. at 254.

34. *Id.* at 255.

35. *Allain*, 387 So. 2d at 91.

36. *Id.*

37. *See Michael J. Sherman, How Free Is Free Enough? Public University Presidential Searches, University Autonomy, and State Open Meeting Acts*, 26 J.C. & U.L. 665, 668 (2000).

38. 14A C.J.S. *Colleges and Universities* § 2 (2011).

39. *See* 1915 Declaration, *supra* note 1.

produced the 1915 Declaration of Principles on Academic Freedom and Academic Tenure (1915 Declaration), which was widely accepted by American academic communities.⁴⁰ The 1915 Declaration was created primarily to support academic freedom for individual professors.⁴¹ Its underlying principles, however, can buttress arguments for institutional academic freedom and a university's freedom to change its mascot.

First, the nature of the academic profession necessitates freedom to explore and evaluate based on expert opinion.⁴² If members of the academy cannot "impart the results of their own . . . investigations and reflection . . . without fear or favor,"⁴³ their findings will not be genuine and the value of their expertise will be lost.⁴⁴ Just as an individual professor's work should influence the public rather than reflect the public's influence, academic institutions must make decisions based on their genuine evaluations in order to influence the public. Next, the 1915 Declaration lists "advanc[ing] the sum of human knowledge"⁴⁵ as the first of three purposes for university existence. Institutions, like individual professors, cannot advance the sum of human knowledge if their operations are anchored by public opinion. The institution must be able to make decisions that progress beyond the current state of knowledge and public consciousness. The 1915 Declaration shows that universities need a significant shield from the democratic process because they cannot benefit society unless they can make genuine evaluations and stay ahead of what society currently accepts.⁴⁶ The mascot selection at the University of Mississippi, as well as at other universities, embodies these core principles because the universities have to honestly assess whether their controversial mascots are appropriate representatives now and whether those mascots will offend social values in the future.

The Carnegie Foundation is another educational organization that has argued for insulating universities from state control.⁴⁷ Its Commission on Higher Education (the commission) released a report listing six rationales for giving universities more independence than other state agencies.⁴⁸ One rationale, keeping out party politics and preventing a spoils system, relates

40. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266 (1988).

41. 1915 Declaration, *supra* note 1, at 291.

42. 1915 Declaration, *supra* note 1.

43. *Id.* at 294.

44. *Id.*

45. *Id.* at 295.

46. *Id.*

47. *About Carnegie*, CARNEGIE FOUNDATION, <http://www.carnegiefoundation.org/about-us/about-carnegie> (last visited Oct. 22, 2012).

48. THE CARNEGIE COMMISSION ON HIGHER EDUCATION, GOVERNANCE OF HIGHER EDUCATION, SIX PRIORITY PROBLEMS (1973) [hereinafter SIX PRIORITY PROBLEMS].

to hiring decisions and does not apply to mascot selection.⁴⁹ However, another, creating alumni support through independent governance,⁵⁰ may work against a school's decision to change its mascot. Alumni often have emotional ties to the symbols of their alma maters, and abandoning those symbols can rouse opposition rather than support, as demonstrated by University of Mississippi graduates.⁵¹ However, this argument can go both ways, since progressive alumni might see such change as a sign of advancement and renew their support in their school. The four other rationales considered by the commission may also support a university's independence in mascot selection when that selection is an attempt to correct past social ills.

The commission argues that states should be reluctant to interfere with university governance because “[p]rofessional matters are best left to members of the profession.”⁵² This rationale primarily pertains to academic matters,⁵³ but it can apply to mascot selection as well. This rationale focuses on expertise.⁵⁴ The current members of the university community have unique knowledge of the campus's current values, so they have unique expertise in determining which symbols most accurately represent those values. Next, the commission asserts that independent governance of the university prevents university problems from becoming statewide crises that the state government must remedy.⁵⁵ A university should be able to handle its own symbolism issues because that decision only affects the university itself. A state should use its resources to remedy problems that affect the whole state rather than an isolated community that often includes many members who are not state citizens.

The final two commission rationales provide the greatest support for university independence in mascot selection. First, university independence increases the “devotion” and “sense of responsibility” to the institution for students, faculty, and administrators.⁵⁶ Allowing students to choose whether to move a university forward ties them more closely to the choice and teaches them a lesson in social responsibility. In the University of Mississippi's case, students received the change with mixed feelings, but the change raised their awareness of the connection between Southern symbols and race.⁵⁷ The administration had to take responsibility for the

49. *Id.* at 24.

50. *Id.* at 23.

51. Pettus, *supra* note 11.

52. SIX PRIORITY PROBLEMS, *supra* note 48, at 23.

53. Sherman, *supra* note 37, at 680.

54. *Id.*

55. SIX PRIORITY PROBLEMS, *supra* note 48, at 24.

56. *Id.* at 23.

57. Brown, *supra* note 9.

decision before a critical public, which demonstrated its passion for the progress of the university.⁵⁸ Including students and faculty in mascot selection to overcome perceived insensitivity toward a certain group creates both a sense of belonging and a heightened social awareness among the community.

This rationale can also apply when a school fights to retain a mascot that singles out a specific group. When the NCAA attempted a ban on Florida State University's use of the Seminole moniker and its Chief Osceola mascot, the school fought back.⁵⁹ The university appealed the ban by highlighting its decades-long relationship of respect with the Seminole tribe.⁶⁰ Members of the Native American community supported their continued use of the mascot.⁶¹ That relationship and support convinced the NCAA to lift its ban on Florida State University's use of its symbols.⁶² This appeal allowed members of the Florida State University community to publicize a unique facet of their university and to fight for something they believed to be right, thus increasing their devotion and sense of responsibility to the institution.

Higher education also serves as an important check on democratic society.⁶³ This rationale most prominently sets universities apart from other state agencies.⁶⁴ A university's function is questioning authority, not following it.⁶⁵ The commission echoed this sentiment by declaring that members of the academic community should have full latitude "to study, to evaluate, to advise on the conduct of other institutions in society."⁶⁶ A university's decision to change its mascot similarly evaluates and advises on the current state of social sensitivity in our nation and shows that changes are necessary. The decision to replace a mascot that offends specific groups can serve as a check on a statewide community that may be resistant to social change.⁶⁷

The distinction between government treatment of state universities and government treatment of state agencies cannot protect a university decision from government intrusion unless that decision embodies the rationales behind university discretion. Several rationales articulated by members of

58. *Id.*

59. Robert Andrew Powell, *Florida State Can Keep Its Seminoles*, N.Y. TIMES, Aug. 24, 2005, at D1.

60. *Id.*

61. *Id.*

62. *Id.*

63. SIX PRIORITY PROBLEMS, *supra* note 48, at 24.

64. Sherman, *supra* note 37, at 680.

65. *See* 1915 Declaration, *supra* note 1, at 296.

66. SIX PRIORITY PROBLEMS, *supra* note 48, at 23.

67. Pettus, *supra* note 11.

the academic community support university discretion in mascot selection when that selection attempts to correct a social problem like racial hostility. Government's practical distinction and the academic community's reasoning for that distinction create a solid foundation for a university's attack on state action that intrudes on mascot selection. These distinctions, however, do not provide a legal basis for blocking that intrusion.

II. ACADEMIC FREEDOM AS A CONSTITUTIONAL RIGHT

The Constitution may provide a legal basis for asserting university autonomy. For over forty years, the Supreme Court has recognized academic freedom as an inherent element of the First Amendment.⁶⁸ The Court, however, has rarely commented on the concept and has not completely defined it.⁶⁹ Nevertheless, the Supreme Court has clarified that institutions, as well as individual educators, have the right to academic freedom.⁷⁰ The Supreme Court has never directly addressed whether academic freedom protects non-academic institutional decisions like choice of school symbols.⁷¹ Academic freedom must stretch beyond purely academic decisions if it can protect a university's mascot selection.

A. Adler and Wieman: Coining the Term "Academic Freedom"

The phrase "academic freedom" first appeared in a Supreme Court decision in 1952 when Justice William O. Douglas dissented in *Adler v. Board of Education*.⁷² Douglas used the phrase while examining a law that prohibited public schools from employing members of groups that advocated the illegal overthrow of the government.⁷³ He asserted that a law that uses "spying and surveillance"⁷⁴ on educators "cannot go hand in hand with academic freedom."⁷⁵ Unfortunately, Douglas only mentioned the phrase in passing and did not define it.⁷⁶ Justice Felix Frankfurter alluded to academic freedom later that term in his concurrence in *Wieman v.*

68. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967).

69. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 253 (1989).

70. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

71. *See* J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929 (2006).

72. Metzger, *supra* note 40, at 1289.

73. *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952) (Douglas, J., dissenting).

74. *Id.* at 510–11.

75. *Id.* at 511.

76. *See id.*

Updegraff.⁷⁷ Without explicitly mentioning the phrase, Frankfurter emphasized the importance of educators' latitude to explore and evaluate even unpopular or threatening ideas and concepts.⁷⁸

B. *Sweezy and Keyishian: Applying Academic Freedom to the "Four Freedoms" and Instructor Autonomy*

A controlling opinion finally referenced academic freedom in 1957 when the Supreme Court decided *Sweezy v. New Hampshire*.⁷⁹ The plurality opinion, written by Chief Justice Earl Warren, held that a college professor's liberties were invaded when he was forced to answer questions about his lectures and his knowledge of certain political groups.⁸⁰ Warren considered the professor's academic freedom an important liberty interest because "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."⁸¹ The plurality opinion asserted the importance of academic freedom without defining it. In his concurrence, Justice Frankfurter came closer to defining academic freedom by naming "the four essential freedoms" of a university.⁸² Frankfurter declared that universities must have the discretion to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁸³ Frankfurter specifically identified these four freedoms, but he did not indicate that they were exclusive.⁸⁴ Although the case concerned the liberties of an individual, neither Warren nor Frankfurter explicitly limited academic freedom to individuals or distinguished between individual and institutional academic freedom.⁸⁵

A majority opinion first acknowledged academic freedom when the Court decided *Keyishian v. Board of Regents* in 1967.⁸⁶ In *Keyishian*, the Court struck down the loyalty law at issue in *Adler*, which had been extended to prohibit "seditious" speech and actions by employees of state universities.⁸⁷ For the first time, the Court recognized that academic freedom is a constitutional right emanating from the First Amendment.⁸⁸

77. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 805 (2010).

78. *Wieman v. Updegraff*, 344 U.S. 183 (1952) (Frankfurter, J., concurring).

79. 354 U.S. 234 (1957).

80. *Id.* at 254.

81. *Id.* at 250.

82. *Id.* at 263 (Frankfurter, J., concurring).

83. *Id.*

84. *Id.*

85. Byrne, *supra* note 69, at 292.

86. White, *supra* note 77, at 810.

87. *Keyishian v Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 622 (1967).

88. White, *supra* note 77, at 810.

The Court called academic freedom a “special concern of the First Amendment”⁸⁹ because universities facilitate the “robust exchange of ideas,”⁹⁰ and that exchange cannot take place without freedom of expression.⁹¹ The decision came closer to defining academic freedom by revealing its constitutional origins, but it still left many questions unanswered. The decision again addressed protection of an individual educator’s freedom to facilitate the robust exchange of ideas, but it did not address the possibility of academic freedom protection for institutions themselves.⁹² It also did not set any limits to academic freedom, leaving only Frankfurter’s “four freedoms” to potentially constrain the constitutional right.

Cases that have followed these foundational decisions have not shed much light on the subject. As one federal judge lamented, “[a]cademic freedom” is a term that is often used, but little explained, by federal courts.⁹³ Later decisions have not defined the limits of academic freedom, but they have extended the doctrine to include institutional academic freedom.⁹⁴ These decisions have relied on Frankfurter’s “four freedoms,”⁹⁵ which signals both expansion of the doctrine to include institutional decisions and limitation of the doctrine to exclude non-academic matters.

C. *Bakke, Horowitz, and Ewing: Recognizing Institutional Academic Freedom in Academic Matters*

The Supreme Court first addressed institutional academic freedom in its plurality opinion in *Regents of the University of California v. Bakke*.⁹⁶ Justice Lewis Powell’s plurality opinion examined a medical school’s minority quota system for admitting students.⁹⁷ The Court invalidated the admissions method on Fourteenth Amendment equal protection grounds,⁹⁸ but Powell indicated that considerations of race in admissions are not per se violations of the Fourteenth Amendment.⁹⁹ Powell recognized that diversity could be a compelling interest for universities, and universities have the

89. *Keyishian*, 385 U.S. at 603.

90. *Id.*

91. *Id.* at 604.

92. *See id.*

93. *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000).

94. Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 36 (2002).

95. *Byrne*, *supra* note 71, at 935.

96. 438 U.S. 265 (1978).

97. *Id.* at 266.

98. *Id.* at 318–20.

99. *Id.* at 305.

academic freedom to select their own student bodies.¹⁰⁰ Powell cited Frankfurter's "four freedoms" and interpreted them to confer academic freedom on the institution itself.¹⁰¹ Institutional academic freedom, however, did not validate the university's decision.

The Court supported institutional academic freedom in two decisions involving universities' dismissals of students.¹⁰² In *Board of Curators v. Horowitz*, the Court did not explicitly mention academic freedom.¹⁰³ The Court did acknowledge, however, that the plaintiff's dismissal from a university's professional program afforded her due process because she was informed of her potential dismissal and the dismissal was based on a thoughtful review process.¹⁰⁴ This result suggested that universities have discretion to choose how and when to dismiss students so long as the university affords process.¹⁰⁵

In *Regents of the University of Michigan v. Ewing*,¹⁰⁶ the Court supported the university faculty's discretion in student dismissal and explicitly mentioned academic freedom.¹⁰⁷ The Court reasoned that it had a responsibility to preserve the academic freedom of the university itself by restraining its interference with university decisions.¹⁰⁸ Justice John Paul Stevens asserted in footnote 12 that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."¹⁰⁹

The Court's support for freedom of universities to make dismissal decisions also stemmed from the Court's appreciation of university expertise in academic matters.¹¹⁰ The decision to dismiss the plaintiff from the university was based on his poor test scores and academic performance,¹¹¹ and the Court expressed its deference to the judgment of the university, especially in purely academic matters.¹¹² Stevens cited to Frankfurter's "four freedoms" and noted that discretion to decide who may attend the university "on academic grounds"¹¹³ is one of those freedoms.¹¹⁴

100. *Id.* at 312.

101. Hiers, *supra* note 94, at 61.

102. Metzger, *supra* note 40, at 1311–12.

103. *Id.* at 1312.

104. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 79 (1978).

105. *See id.*

106. 474 U.S. 214 (1985).

107. *Id.* at 226.

108. *Id.*

109. *Id.* at 226 n.12 (internal citations omitted).

110. *Id.* at 226.

111. *Id.* at 228.

112. *Id.* at 225.

113. *Id.* at 226 n.12.

The Supreme Court's decision in *Ewing* established that institutional academic freedom can validate university decisions.¹¹⁵ It did not specify the bounds of institutional academic freedom for non-academic decisions.

C. *Grutter: Expanding Academic Freedom Beyond Academic Matters but Staying Within the "Four Freedoms"*

In *Grutter v. Bollinger*, the Court suggested that academic freedom is not limited to purely academic decisions.¹¹⁶ The Court held that the University of Michigan School of Law's admissions criteria did not violate the Equal Protection Clause by including race among its flexible factors for choosing students.¹¹⁷ The majority opinion cited Powell's plurality opinion in *Bakke* and tied the interest in student diversity to academic freedom.¹¹⁸ According to the majority, courts should defer to universities on how to educate students and what constitutes the proper environment for learning.¹¹⁹ *Grutter*, like *Ewing*, expressly accepted academic freedom for institutions of higher education. Unlike *Ewing*, however, *Grutter* went beyond purely academic issues. The plaintiff in *Grutter* had not been rejected by the University of Michigan Law School based solely on LSAT score or GPA, but based on a combination of academic factors, like grades and test scores, and non-academic factors, like race.¹²⁰ The Court's decision in *Grutter* was an acknowledgment that attending a school with a diverse student population provides a social education.¹²¹ The Court, however, did not rely solely on this acknowledgment in order to recognize the University of Michigan Law School's academic freedom in *Grutter*. Freedom to choose the student body is one of the "four freedoms" highlighted in Frankfurter's *Sweezy* concurrence.¹²² Thus, it is not clear whether the Court extended protection to this non-academic decision because such decisions are among the "four freedoms" or because the freedom should include institutional decisions that provide students with a social education.

Mascot selection is not a purely academic decision that, based on the last few decades of academic freedom jurisprudence, would definitely be protected from undue state intrusion.¹²³ It also cannot be characterized as

114. *Id.*

115. *Id.* at 226.

116. 539 U.S. 306 (2003).

117. *Id.* at 328.

118. *Id.* at 307.

119. *Id.* at 328.

120. *Id.* at 306.

121. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12. (1978).

122. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

123. *White*, *supra* note 77, at 816.

one of the “four freedoms” that the Court has respected over time.¹²⁴ A mascot selection decision involving replacement of a controversial mascot provides a social education by taking a stand against past wrongs. Therefore, mascot selection can only be protected by institutional academic freedom if that freedom protects institutional decisions that provide an education beyond mere academics.

D. *Rumsfeld v. FAIR: Ignoring Non-Academic Matters Outside of the “Four Freedoms”*

The Forum for Academic and Institutional Rights (FAIR) invoked the academic freedom to impart a social education when its member law schools banned military recruiters from their campuses and lost federal funding under the Solomon Amendment.¹²⁵ The schools had kept out military recruiters in protest of the military’s discrimination of openly gay and lesbian individuals.¹²⁶ In *Rumsfeld v. FAIR*, the Supreme Court held that the schools’ First Amendment rights had not been violated by enforcement of the Solomon Amendment.¹²⁷ The decision spoke to the schools’ rights to expressive association rather than academic freedom.¹²⁸ The fact that the Court ignored FAIR’s academic freedom argument¹²⁹ might indicate that it did not consider the universities’ non-academic lessons to be protected by the doctrine.

The Court’s disregard for FAIR’s academic freedom argument might support Professor J. Peter Byrne’s theory that academic freedom should only extend to matters that directly link to the “four freedoms.”¹³⁰ On the other hand, the facts of *Rumsfeld v. FAIR* may have specifically foreclosed the academic freedom argument. The Court found the ban on military recruiters was not particularly expressive of a social policy because it was not clear to outside observers that there was a ban or that the ban was related to the military’s discriminatory policy.¹³¹ In contrast, school symbols are inherently expressive.¹³² A university is clearly promoting a social policy of improving race relations when it abandons a racially

124. Byrne, *supra* note 71, at 935.

125. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 51 (2006).

126. *Id.* at 52.

127. *Id.* at 69.

128. *Id.* at 69.

129. Brief for Respondents at 20, *Rumsfeld v. Forum for Academic & Institutional Rights* 547 U.S. 47 (2006) (No. 04-1152).

130. Byrne, *supra* note 71, at 937.

131. *Rumsfeld*, 547 U.S. at 66.

132. Lauren Brock, *A New Approach to an Old Problem: Could California’s Proposed Ban on “Redskins” Mascots in Public Schools Have Withstood a Constitutional Challenge?*, 12 SPORTS L.J. 71, 80 (2005).

offensive mascot. The Solomon Amendment also did not force the law schools to host military recruiters but merely conditioned some funding on such action.¹³³ A mandate like House Bill 1106 or Initiative Measure 37 would reinstate a former mascot by law, which is a more direct intrusion on university autonomy. Clear expression and direct government intrusion could necessitate recognition of academic freedom protection despite not invoking one of the “four freedoms” as Byrne would require.

The Supreme Court has yet to clarify the exact bounds of academic freedom. In the past several decades, the Court has interpreted academic freedom in reference to the “four freedoms” mentioned in Frankfurter’s *Sweezy* concurrence.¹³⁴ This has led the Court to recognize that universities have a constitutionally protected right to make certain institutional decisions,¹³⁵ which argues in favor of protecting institutional mascot selection from government intrusion. Reference to the “four freedoms,” however, may limit institutional academic freedom to those exact freedoms, which would foreclose protection for a decision on school symbols. *Rumsfeld v. FAIR* signals the Court’s reluctance to protect institutional decisions related to social policy, but mascot selection might overcome the *Rumsfeld* precedent based on factual distinctions.

III. LEGAL ATTACKS OUTSIDE OF UNIVERSITY AUTONOMY

If courts interpret *Rumsfeld v. FAIR* as a refusal to entertain academic freedom arguments for non-academic decisions, a university could fight state action that restricts university autonomy in mascot selection by using theories outside of universities’ practical autonomy and academic freedom. In her 2005 note, *A New Approach to an Old Problem: Could California’s Proposed Ban on “Redskins” Mascots in Public Schools Have Withstood a Constitutional Challenge?*, Lauren Brock theorized that First Amendment protection of commercial speech and anti-hate speech codes could be used to challenge mascot bans.¹³⁶ This Note further explores the bounds of these two legal challenges. A university’s right to choose its symbols may be protected by the First Amendment right to disseminate commercial speech. A university may also ground its legal argument in federal anti-hate speech laws and cast the change as a remedy to a racially hostile environment.

133. *Rumsfeld*, 547 U.S. at 55.

134. Byrne, *supra* note 71, at 935.

135. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

136. Brock, *supra* note 132.

A. Commercial Speech

The First Amendment protects commercial speech, although in a limited way.¹³⁷ Courts have considered sports teams' mascots commercial speech because mascots provide spectators with "information about the identity and quality" of the teams.¹³⁸ A government infringes on the limited First Amendment right to disseminate commercial speech if its legislation fails the four-prong test established in *Central Hudson v. Public Service Commission of New York*.¹³⁹

The first step in the *Central Hudson* test is to "determine whether the expression is protected by the First Amendment."¹⁴⁰ As a threshold matter, the expression "must concern lawful activity and not be misleading."¹⁴¹ This threshold standard is not difficult to meet,¹⁴² and a school's mascot certainly meets this definition of protected speech. University athletic events are lawful, and the players representing the university are students of that particular university. The mascot truthfully signals that the players attend that university and are participating in a lawful activity.

The second prong of the test determines whether the "asserted governmental interest" in limiting, prohibiting, or changing that speech "is substantial."¹⁴³ A mandate like House Bill 1106 or Initiative Measure 37 to reinstate a mascot would likely not be supported by a substantial governmental interest. In the University of Mississippi's case, the state government never asserted a specific interest in taking action in this matter.¹⁴⁴ The state likely would have asserted its interest as one of preserving tradition or pleasing the alumni who help fund the university.

Preservation of tradition does not reach the level of importance required by this test. In the case establishing the test, the Court recognized a substantial state interest in energy conservation and fair rates for energy sources.¹⁴⁵ Preservation of tradition does not affect daily life in the tangible way that access to electricity does. The Supreme Court has also held that governments have substantial interests in health and safety by promoting

137. *Id.* at 74.

138. *Id.*

139. 447 U.S. 557 (1980).

140. *Id.* at 566.

141. *Id.*

142. STEVEN G. BRODY & BRUCE E. H. HUDSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE § 3:12 (2d ed. 2011).

143. *Central Hudson*, 447 U.S. at 566.

144. Jack Elliot, Jr., *Col. Reb Drama Still Simmering—Efforts Underway to Force Mascot Issue onto Ballot*, COM. APPEAL (Oct. 17, 2011), <http://www.commercialappeal.com/news/2011/oct/17/col-reb-drama-still-simmering/>.

145. *Central Hudson*, 447 U.S. at 568.

temperance,¹⁴⁶ preventing minors from smoking,¹⁴⁷ and maintaining road safety.¹⁴⁸ Preserving the traditional symbols and rituals of a portion of society does not tangibly protect citizens, but curbing the physical harms caused by alcohol abuse, tobacco use, or traffic accidents does provide such protection.

The Supreme Court has even held that prevention of invasions of privacy¹⁴⁹ and protection of students from commercial exploitation¹⁵⁰ are substantial governmental interests. These protections are necessary for certain groups of people and are positive for all people, whereas preservation of tradition is not necessary for any group of people and is only positive for a certain faction of people. In fact, when that tradition can be linked to feelings of racial hostility, the government could very well have an interest in eliminating rather than maintaining it. Thus, a statute like the proposed California law, which sought to eliminate rather than retain certain racially offensive mascots, would likely meet the second prong of the *Central Hudson* test.

Maintenance of alumni support could be a substantial interest because alumni contributions increase the quality of university resources and decrease the monetary burden on the state. The alumni reaction to this particular mascot change, however, has not been universally negative,¹⁵¹ and even alumni who oppose the change will not necessarily respond by refusing to donate.¹⁵² Therefore, a threat to university funding is likely not severe enough to constitute a substantial government interest.

If the government does not have a substantial interest, its intrusion on commercial speech is unconstitutional.¹⁵³ If the government does have a substantial interest, the expression would still be protected unless “the regulation directly advances the governmental interest asserted”¹⁵⁴ and “it is not more extensive than is necessary to serve that interest.”¹⁵⁵ Even if a court accepted the previously named interests as substantial governmental

146. See 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 504 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995).

147. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 539 (2001).

148. See *Metromedia v. San Diego*, 453 U.S. 490, 507 (1981).

149. See *Fla. Bar v. Went For It*, 515 U.S. 618, 625 (1995).

150. See *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989).

151. Nicole Zema, *New Chancellor Proud of Growth at Ole Miss*, NATCHEZ DEMOCRAT (Natchez, MS), Feb. 22, 2011.

152. For example, the University of Mississippi Athletics Association (UMAA) Foundation achieved its second highest fundraising totals in university history in 2012, despite the absence of Colonel Reb and the presence of Rebel the Black Bear at school sporting events. *Ole Miss 2012 Gifts Demonstrate Extraordinary Generosity*, UMAA FOUND., <http://www.olemisssports.com/sports/umaaf/spec-rel/073012aaa.html> (last visited Jan. 29, 2013).

153. *Cent. Hudson v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

154. *Id.*

155. *Id.*

interests in the University of Mississippi's case, both House Bill 1106 and Initiative Measure 37 still would have failed the last two prongs of the *Central Hudson* test. To pass the third prong, the Supreme Court generally requires evidence of direct advancement of the state's interest to a material degree.¹⁵⁶ The change in mascot would directly advance the preservation of tradition. Even though the reinstatement of the mascot would likely preserve a school's tradition, compiling tangible evidence of a vague concept like "preservation of tradition" would be difficult. Given the mixed feelings among the alumni base,¹⁵⁷ the mandated reinstatement in the University of Mississippi's case would not have necessarily advanced the interest of pleasing alumni donors. Because a change in mascot is unlikely to deter donation by major donors,¹⁵⁸ reinstatement of the mascot will not advance preservation of alumni giving to a material degree.

A state that bans the adoption of controversial mascots for its sports teams would, however, advance its interest to a material degree. The state would have an interest in alleviating controversy and offense to a certain group. Activist groups that promote equality for that group would likely be willing to support the state's decision. The support of these groups would serve as evidence that the ban advanced the alleviation of that social controversy to a material degree.

Both House Bill 1106 and Initiative Measure 37 were also more extensive than necessary to serve the state's interests. The Supreme Court requires that a statute be narrowly tailored to serving the state's interest in order to meet the final prong of the *Central Hudson* test.¹⁵⁹ House Bill 1106 not only required the reinstatement of Colonel Reb as the university's mascot but also required that the university's band play the songs "Dixie" and "From Dixie with Love" at specific times during all football and basketball games at which some portion of the band was present.¹⁶⁰ While donors might be pleased to hear certain songs played at sporting events, legally requiring the song to be played at specific times during those events goes beyond what any donor or proponent of tradition would demand. Initiative Measure 37 attempted to create even more obligations for the University of Mississippi than House Bill 1106. The initiative required Colonel Reb's likeness on all university letterhead and all yearbook covers and title pages in addition to use of the mascot at athletic events.¹⁶¹ These demands would have gone beyond what would be necessary to preserve a

156. Fla. Bar v. Went For It, 515 U.S. 618, 625 (1995).

157. Zema, *supra* note 151.

158. *Id.*; see also, UMAA FOUND., *supra* note 152.

159. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989).

160. H.B. 1106, 2011 Leg., Reg. Sess. (Miss. 2011).

161. INITIATIVE MEASURE 37, *supra* note 16.

university tradition and appease alumni donors who rarely see current yearbooks or pay attention to an institution's letterhead. Similar legislative mandates reinstating a former mascot should limit themselves to mandating the mascot's likeness at sporting events in order to meet the fourth prong of the *Central Hudson* test. A legislative attempt to alleviate social controversy, like California's failed statute, however, is narrowly tailored. Activist groups supporting equality for underrepresented groups have expressed their discomfort with these mascots specifically, so elimination of these mascots is the only way to end protests against them.¹⁶²

Even if a state had a substantial interest, a mandate to reinstate a mascot like House Bill 1106 or Initiative Measure 37 would regulate too broadly and thus unconstitutionally infringe on the university's right to disseminate commercial speech under *Central Hudson*. This constitutional attack, however, only works if the state is mandating reinstatement of a controversial mascot. A statute banning such mascots would likely pass all four prongs of the *Central Hudson* test. A university's status as a nonprofit organization could hurt its opportunity for classifying its symbols as commercial speech.¹⁶³ Universities may be able to get around this technicality because their athletic programs usually generate significant revenue.¹⁶⁴

B. Anti-Hate Speech

If a court will not recognize mascots of nonprofit organizations as commercial speech, a university could argue that the change in mascot was an effort to comply with hate speech laws. Under Title VI of the 1964 Civil Rights Act, a school that creates a hostile environment based on race, color, or national origin is in violation of the law.¹⁶⁵ In the University of Mississippi's case, the university could have argued that Colonel Reb created a hostile environment for African-American students who see the mascot as a reminder of American slavery.¹⁶⁶ A university, however, would probably avoid this argument. The term "hate speech" has a strongly negative connotation. Casting itself as a breeding ground for racial hostility and a former proponent of "hate speech" could embarrass a university and alienate university supporters. Therefore, this argument would be a last-

162. See, e.g., California Racial Mascots Act, A.B. 858, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003).

163. Brock, *supra* note 132, at 74.

164. For example, in 2010, University of Mississippi Athletics had total revenue amounting to \$45,737,904. UNIV. OF MISS., EQUITY IN ATHLETICS DISCLOSURE ACT REPORT (2011), available at <http://www.olemisssports.com/school-bio/ole-eada-report.html>.

165. 42 U.S.C. § 2000d-6 (2006).

166. Brown, *supra* note 9.

ditch effort to combat enforcement of a mandate like House Bill 1106 or Initiative Measure 37.

Circuit courts that have decided cases involving mascots similar to Colonel Reb have recognized that such symbols can be sources of racial hostility and that school officials have the authority to remove them.¹⁶⁷ In *Augustus v. School Board of Escambia County*,¹⁶⁸ a school board and intervening students appealed the district court's permanent injunction to restrain the use of the team name "Rebels" and the Confederate flag at school events.¹⁶⁹ The school had previously been segregated, and the district court monitored the school's progress to achieve a unitary system.¹⁷⁰ The school board had recognized that the team name and the flag were sources of racial hostility in the school, and it had made good faith efforts short of removing the symbols in order to alleviate the tension.¹⁷¹ The Fifth Circuit ultimately remanded the case for a determination on the necessity of the injunction, noting that the district court had not allowed much time to test the effectiveness of the school board's good faith efforts to limit use of the school symbols.¹⁷² The court, however, did recognize that the symbols were "racially irritating."¹⁷³ The court also recognized that the school board would have acted within the scope of its authority if it had decided to prohibit use of the name and flag,¹⁷⁴ despite the symbols' wide popularity among the students.¹⁷⁵ Thus, the case turned on the proper scope of the district court's authority in day-to-day school decisions rather than the propriety of eliminating racially offensive symbols.

Thirteen years later, a circuit court again addressed the elimination of a school symbol reminiscent of the Civil War in *Crosby v. Holsinger*.¹⁷⁶ In *Holsinger*, however, the decision to prohibit the racially offensive mascot was made by a school principal instead of a district court.¹⁷⁷ Students challenged the principal's decision to remove the mascot, "Johnny Reb," claiming a violation of their First Amendment free speech rights.¹⁷⁸ The Fourth Circuit recognized, however, that the First Amendment did not

167. *Crosby v. Holsinger*, 852 F.2d 801 (4th Cir. 1988); *Augustus v. Sch. Bd. of Escambia Cnty.*, 507 F.2d 152 (5th Cir. 1975).

168. 507 F.2d 152.

169. *Id.* at 154.

170. *Id.* at 155.

171. *Id.* at 156 (explaining that the school board prohibited any intimidating use of the symbols).

172. *Id.* at 158–59.

173. *Id.* at 158.

174. *Id.*

175. *Id.* at 155.

176. 852 F.2d 801 (4th Cir. 1988).

177. *Id.* at 802.

178. *Id.*

require school officials to promote all student speech.¹⁷⁹ Rather, the court reasoned, “[a] school mascot or symbol bears the stamp of approval of the school itself. Therefore, school authorities are free to disassociate the school from such a symbol because of educational concerns.”¹⁸⁰ The court easily characterized the minority students’ complaints about the offensiveness of the mascot as an educational concern.¹⁸¹ Thus, the court held that the school principal had not infringed upon students’ First Amendment rights by eliminating “Johnny Reb” as the school’s mascot.¹⁸²

Augustus and *Crosby* do not provide perfect precedents for university administrations looking to defend the elimination or replacement of a racially offensive mascot through a “hate speech” argument. First, the cases do not involve Title VI challenges.¹⁸³ Second, the cases are distinguishable from situations like the University of Mississippi scenario. *Augustus* and *Crosby* involved high schools,¹⁸⁴ which rarely rely on alumni funding or seek student input in administrative decisions. Universities, on the other hand, usually take care to appease alumni and respect the growing maturity and awareness of their students. Nevertheless, *Crosby* recognizes that elimination or replacement of a symbol that offends some portion of the student body is a legitimate educational concern.¹⁸⁵ That concern is no different for a university, especially where minority students have expressed that the school’s symbols limit their participation in university events.¹⁸⁶ Certainly, there is educational value in securing maximum participation from all students at both the high school level and the university level. Both cases are helpful in their recognition that school symbols can be significant enough to create racially hostile environments.¹⁸⁷ A university could use these precedents to assert that its decision to eliminate a racially offensive mascot adds educational value to the institution and eliminates racial hostility that could violate federal law. A Title VI argument would be wholly inapplicable to a mascot ban seeking to remedy racial hostility, like the failed California statute.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 803.

183. *Id.* (First Amendment challenge); *Augustus v. Sch. Bd. of Escambia Cnty.*, 507 F.2d 152 (5th Cir. 1975) (desegregation case).

184. *Id.*

185. *Crosby*, 852 F.2d at 802.

186. African-American students at the University of Mississippi expressed that Colonel Reb created a feeling of unwelcomeness for them. See Riva Brown, *NAACP Plans Rally to Back Decision to Oust Colonel Reb*, CLARION-LEDGER (Jackson, Miss.), Oct. 7, 2003, at B-1.

187. *Crosby*, 852 F.2d at 802; *Augustus*, 507 F.2d at 157–58.

CONCLUSION

Each argument for university autonomy in mascot selection has both strengths and weaknesses. Principles of practical university autonomy reveal that the rationales that support universities' insulation from government intrusion generally also support a university's discretion in mascot selection specifically. Independence in such decisions is vital to running a university efficiently and thus providing better educational opportunities within the state. These rationales, however, provide no legal basis for opposing state action. Constitutional academic freedom provides a legal basis for protecting institutional autonomy in decision-making, but courts have not yet extended that freedom to non-academic decisions like mascot selection. Recent Supreme Court decisions cast doubt on whether that freedom can be extended in such a way. Replacement of a socially controversial mascot might be protected by the First Amendment, but state universities' status as nonprofit organizations could jeopardize the symbol's classification as commercial speech. Retention of a socially controversial mascot would likely not be protected by the First Amendment, unless the targeted group supports the mascots, as in Florida State University's case. A university has a legitimate interest in complying with hate speech laws when it replaces a racially controversial mascot, but it risks alienating supporters by labeling the former mascot as hate speech. Universities must combine innovative legal arguments with practical rationales to overcome these obstacles and protect the autonomy of institutions of higher education. Without that autonomy, universities cannot play their key role in inspiring the constant evolution of society.

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