3-1-2008

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Speech and Subsidies: How Government Uses Financial Threats and Incentives to Dampen First Amendment Protections

Crandall Close*

INTRODUCTION

Mahmoud Ahmadinejad, President of Iran, made his way through a sea of protest into Columbia University’s Lerner Hall on September 24, 2007,¹ to make a speech in which he would claim that there are no homosexuals in Iran and that the Holocaust should be treated as a theory and not fact.² Lee C. Bollinger, president of the University, was harshly criticized for his decision to host Ahmadinejad at the University’s World Leaders Forum³ and not all criticisms were toothless ideological objections. New York lawmakers threatened to retaliate. Sheldon Silver, leader of the state assembly, claimed that he would consider taking steps to withhold Columbia’s public funding to punish the University and protest its hosting of Ahmadinejad, stating that “Bollinger made a big mistake and there should be consequences for him [sic] making that decision.”⁴ Silver criticized Bollinger for “legitimizing” a person who “[is] clearly responsible for the death of Americans” and “remains as much a threat to the world as anyone today.”⁵ Notably, a similar threat was made by United States Representative Duncan Hunter on Fox News. Hunter asserted that, if Bollinger “follows through with his hosting of the leader of Iran, I will move in Congress to cut off every single type of federal funding to

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* Juris Doctor Candidate, University of North Carolina School of Law, 2009.
3. Gershman, supra note 1, at A5.
4. Id.
5. Id. (alteration added).
Hunter justified his opposition to the hosting of Ahmadinejad by pointing to the fact that roadside bombs made in Iran and sent into Iraq have killed U.S. soldiers.\footnote{6} State and federal governments have been attempting, sometimes successfully, to regulate constitutionally protected speech through the power of the purse for decades.\footnote{7} However, the course of action Silver and Hunter proposed went beyond legislation which conditions the provision of funding on a recipient’s abstention from certain speech. Both government officials threatened retaliatory action against Columbia for providing a forum, even an unfriendly one,\footnote{9} to a controversial political figure. Could such government action ever be endorsed by an American court? Or, perhaps a closer question: Could legislation which provided for the revocation of public funds to educational institutions that hosted, for example, “an enemy of the United States” be upheld?

This Note explores the constitutionality of the proposed actions of Silver and Hunter and others like them by examining two possible courses of action: (1) withholding funds from Columbia in retaliation for hosting Ahmadinejad and (2) conditioning the provision of future government funds to Columbia on its agreement to not host speakers like Ahmadinejad. Part I(A) and (B) of this Note will introduce two cases dealing with 42 U.S.C. § 1983 claims of retaliatory action by county and


\footnote{7} Id.

\footnote{8} See FCC v. League of Women Voters, 468 U.S. 364 (1984) (holding that 47 U.S.C. § 399 was unconstitutional because the government’s ban on editorializing did not serve a sufficiently compelling interest to justify a substantial abridgment of First Amendment rights); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (holding that 26 U.S.C. § 501(c)(3) was constitutional because Congress did not infringe in any First Amendment rights by withholding tax exempt status from organizations which engage in political lobbying, it merely refused to pay for lobbying with public funds); see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (holding that the N.Y. Son of Sam law was unconstitutional because it imposed a financial burden on certain speakers because of the content of their speech).

\footnote{9} See generally Peter Kiefer, Report: Columbia Professor to Apologize to Ahmadinejad, N.Y. SUN, Jan. 9, 2008: Staff Reporter for the Sun, Columbia’s Bollinger Tops Time Magazine’s ’Top 10 Awkward Moments’ List, N.Y. SUN, Dec. 12, 2007.
state governments and discuss the how the withholding of funds from Columbia may be viewed under this case law. Part II will examine case law on government subsidies and free speech. This section will explore the reasoning and underlying facts of several United States Supreme Court cases by using *FCC v. League of Women Voters* as a stepping stone leading to two more recent decisions: *Simon and Schuster v. N.Y. State Crime Victims Board* and *Rumsfeld v. Forum for Academic and Institutional Rights*. Part II(D) will then discuss the Ahmadinejad controversy given the framework provided by the preceding cases. Part III will more thoroughly analyze the constitutional issue in light of the two hypothetical courses of action for government actors. Finally, the Note will argue that although the political atmosphere created by the “war on terror” has put increasing pressure on those seeking to protect core First Amendment principles, it is unlikely that the Supreme Court would go as far as to uphold government action such as that threatened by Silver and Hunter.

I. THE FRAMEWORK FOR RETALIATORY GOVERNMENT ACTION

A. North Mississippi Communications, Inc. v. Desoto County Board, and *El Dia Inc. v. Governor Pedro J. Rossello*

*North Mississippi Communications, Inc., and El Dia Inc. v. Governor Pedro J. Rossello* both involved government’s punishment of free speech. Although these cases differ from the Columbia scenario in that they deal with retaliation against completely private entities, they are nevertheless relevant because they involve retaliatory government action. They also employ a key mode of analysis in deciding the issue. Since the United States Supreme Court’s decision in *Mt. Healthy City School District Board of Education v. Doyle* federal courts have had a relatively clear test available to evaluate actions by government against its employees. *North Mississippi* and *El Dia* indicate that courts may use

13. 951 F.2d 652 (5th Cir. 1992).
14. 165 F.3d 106 (1st Cir. 1999).
the test not only in the event of retaliation against an individual, but also when faced with actions against private bodies such as the North Mississippi Times and perhaps private universities like Columbia.

*Mt. Healthy* involved a teacher, who claimed that the Mt. Healthy School Board refused to rehire him because of his criticism of a recently distributed teachers' memorandum on a local radio show.16 Doyle claimed that the Board’s actions infringed on his constitutionally protected speech.17 The Court introduced a two-step analysis to determine whether the school’s firing of Doyle violated the First Amendment. Under the first step of *Mt. Healthy* the burden was placed on Doyle “to show that his conduct was constitutionally protected, and that his conduct was a ‘substantial factor’ . . . in the Board’s decision not to rehire him.”18 The second step shifted the burden of proof to the school board to prove that it would have acted in the same manner had Doyle never made the controversial remarks at issue.19 This test “has become standard fare in discrimination cases.”20

In *North Mississippi*, the North Mississippi Times brought suit against the Desoto County Board alleging that the Board withheld county advertising from the paper in retaliation for the paper’s publishing negative stories about them.21 The record indicated that in 1975 the Times started to publish highly critical articles about the Board and that before 1976 the Board’s advertising went mostly to the Times instead of the Olive Branch Tribune, the county’s other, much smaller, newspaper.22 The evidence at trial showed that although before 1976 the Board had given almost no legal notices to the smaller paper, presumably because of low circulation, by 1977 almost all legal notices were given to the Tribune.23

The Fifth Circuit in *North Mississippi*, applying the *Mt. Healthy* analysis, found that in order for the Board to be exonerated it would have to prove that not one of the advertising and legal notices was withheld as

16. *Id.*
17. *Id.*
18. *Id.* at 287.
19. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
punishment for the *Times*’s critical articles.\(^{24}\) The Court remanded the case to be evaluated under this standard.

*El Dia* also dealt with a newspaper being penalized for publishing of articles critical of the government. In 1997 *El Nueva Dia* published various articles that criticized the governor and his administration for fraud and waste.\(^{25}\) On April 13, 1997, the newspaper published an article which criticized the governor’s first 100 days in his second term, and on April 14, 1997, “eighteen government agencies that had routinely advertised in *El Nueva Dia* terminated” their advertising contracts with the paper.\(^{26}\)

The central issue in *El Dia* was whether the governor could dismiss the claims against him on grounds of qualified immunity. Under qualified immunity, public officers are protected from liability “if their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable person* would have known.”\(^{27}\) The Court concluded that the governor’s conduct violated clearly established constitutional law that a reasonable person would have been aware of.\(^{28}\)

The reasoning set forth in these two short opinions rests on precedent from various Supreme Court cases which established and fortified the principle that conditioning the withdrawal of benefits in a manner that infringes on constitutionally protected rights is unconstitutional.\(^{29}\) In *Perry v. Sinderman*\(^{30}\) the Court held that a former college professor could initiate a lawsuit against the Board of Regents when he claimed that he was fired because of his exercise of free speech. In 1989, in *Price Waterhouse v. Hopkins*,\(^{31}\) the Court held that a

\(^{25}\) *El Dia* v. Rosello, 165 F.3d 106, 108 (1st Cir. 1999).
\(^{26}\) Id.
\(^{27}\) *El Dia*, 165 F.3d. at 109 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added)).
\(^{28}\) Id. at 110.
\(^{29}\) *See Mt. Healthy, supra* note 17 and the text accompanying notes 15-19; *Perry v. Sindermand*, 408 U.S. 593 (1972) (holding that a former college professor could initiate a lawsuit against the Board of Regents when he claimed that he was fired because of his exercise of free speech).
\(^{30}\) 408 U.S. 593 (1972).
\(^{31}\) 490 U.S. 228 (1989). *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a defendant employer had to prove by a preponderance of the evidence that his firing of the plaintiff was not an act of discrimination).
defendant employer had to prove by a preponderance of the evidence that his firing of the plaintiff was not an act of discrimination. Taking these two cases together, North Mississippi adds the Mt. Healthy analysis to the framework while El Dia makes the symbolic point that retaliatory actions such as the Governor's will may be deemed clearly unconstitutional, not only to public officials, but also to a reasonable person.

B. Sheldon Silver and Duncan Hunter under Mt. Healthy

The New York legislature and the United States Congress have options when it comes to showing disapproval of Columbia and Bollinger. This section will analyze how the withholding of funds from Columbia would be treated by a reviewing court.

It is beyond question that both legislatures have the authority to defund Columbia. Neither the state nor federal constitutions put the legislature under an obligation to fund institutions of higher education. Nevertheless, cases such as Legal Services Corp. v. Velaquez, FEC v. Mass. Right to Life, and Speiser v. Randall demonstrate that government cannot unconstitutionally withhold funds simply because an entity is not entitled to them in first place.

A successful attempt by Sheldon Silver or Duncan Hunter, acting as representatives of their respective government bodies, to withhold public funds from Columbia would most likely be found unconstitutional. As the Constitution does confer on Bollinger the right to invite Ahmadinejad to Columbia, it seems highly unlikely that if the New York Legislature or Congress elected to take this route their actions

32. N.Y. CONST. art. VIII, § 358.
33. 531 U.S. 533 (2001) (holding that a provision of the Omnibus Consolidated Rescissions and Appropriations Act, which limited arguments that recipient lawyers were allowed to make on behalf of their indigent clients, violated the First Amendment).
34. 479 U.S. 238 (1986) (holding that a law 2 U.S.C. § 441(b), which prohibited corporations from using treasury funds in connection with election events, unconstitutionally infringed on free speech).
35. 357 U.S. 513 (1953) (holding that a statute that required veterans to take an oath that they did not advocate the overthrow of the government in order to get a property tax exemption unconstitutionally infringed in free speech).
36. See infra, text accompanying note 142.
would be upheld. The *Mt. Healthy* test would almost certainly be deemed apt analysis given the retaliatory nature of government’s actions. If a court did choose to evaluate the revocation of funds under *Mt. Healthy*, the government would be unlikely to prevail. Columbia would be faced with proving that the refusal to fund was retaliatory in nature. Statements such as those made to the press by Silver and Hunter would be extremely probative, especially given Silver’s comment to the *New York Sun* that, “Bollinger made a big mistake and there should be consequences for him making that decision,” 37 Columbia would likely satisfy the first prong of the test. Under *Mt. Healthy*, the burden would then shift to the state legislature or Congress to prove that the withholding would have taken place even if Ahmadinejad had never been invited. Again, in light of statements made by both men to the press, Columbia would most likely prevail. *El Dia* tells us that if Silver and Duncan were identified as the force behind the firing, the court would ask if either of their actions would be seen as unconstitutional to a reasonable person. If the answer is yes, neither official would be given qualified immunity.

II. FRAMEWORK PROVIDED BY CASE LAW ON SPEECH AND SUBSIDIES

Part II of this Note will provide the framework to implement when analyzing Silver and Hunter’s second hypothetical course of action—drafting legislation which would condition the provision of future government funds to Columbia on its agreement not to host speakers like Ahmadinejad. I will describe three principle cases in order to shed light on how the Court has approached similar legislation in the past. Each case stands for important principles that are relevant to the free speech implications of hypothetical number two. In *FCC v. League of Women Voters (League of Women Voters)* 38 the Court highlighted the paramount importance of the protection of editorial speech. In *Simon & Schuster v. NY State Crime Victims Board (Simon & Schuster)* 39 the Court made clear that speech’s offensive nature does not justify its

suppression. Rumsfeld v. Forum for Academic and Institutional Rights

is an example of the current Court’s approach to free speech challenges in the peculiar arena of national security.

A. FCC v. League of Women Voters

The United States Supreme Court in League of Women Voters was faced with determining the constitutionality of § 399 of the Public Broadcasting Act of 1967 (Act). The Act created the Corporation for Public Broadcasting (CPB) which would be responsible for distributing funds “to noncommercial television and radio stations in support of station operations and educational programming.” The challenge in League of Women Voters came from a grant recipient constrained by § 399, which prohibited noncommercial educational stations from engaging in editorializing.

Because the ban on editorializing burdened free speech, as protected under the First Amendment, the Court evaluated the legislation under strict scrutiny, demanding that the legislation be narrowly tailored and in service of a compelling government interest. Justice Brennan, writing for the majority, stressed the importance of First Amendment protection of editorial speech, considered the drafting of the Act and subsequent amendments made thereto, and then concluded that the provision failed to satisfy strict scrutiny on several counts.

The government and its counsel claimed § 399’s ban on editorializing served to ensure that programs funded by the federal government could not be coerced into engaging in propaganda which would serve governmental interests, and to prevent local stations from becoming an outlet for the opinions of station managers and other private

43. Id. (citing 47 U.S.C. § 399).
44. Id. at 380 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969)).
45. League of Women Voters, 468 U.S. at 395.
46. Samuel Alito
The Court accepted the importance of these goals and recognized Congress's power under the Commerce Clause to regulate broadcast communication, but stressed that § 399 was directed at “the expression of editorial opinion” and that this form of speech “lies at the heart of First Amendment protection.” Justice Brennan’s opinion repeatedly articulated this principal and demonstrated its venerable and permanent presence in judicial philosophy by citing various past Supreme Court decisions. Most relevant was the Court’s emphasis on its earlier decision in Thornhill v. Alabama. In Thornhill, the Court stated that the First Amendment protected “the liberty to discuss publically and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”

The Court’s second stated objection to § 399 was that the ban was aimed at speech’s content and consequently appeared to seek to “limit discussion of controversial topics” and “shape the agenda for public debate.” When facing First Amendment challenges the Court has distinguished between “laws which impose burdens on some speech on the basis of the ideas or view expressed” and “laws which impose burdens on speech without reference to the ideas or views expressed.” Laws which burden speech according to its content have been coined “content based.” Content-based restrictions on speech have been rigorously scrutinized by the Supreme Court since League of Women Voters. Justice Brennan said: “The prevailing assumption, reflected in

48. Id. at 396.
49. Id. at 376-77.
50. Id. at 381.
52. 310 U.S. at 101-02.
54. Id. at 384.
56. See, e.g., Ashcroft v. ACLU, 542 U.S. 656 (2004) (granting a preliminary injunction against the enforcement of the Child Online Protection Act stating that
both popular debate and constitutional jurisprudence, is that core American values would be threatened if the government distinguished between true and false, high-value and low-value, or socially useful and harmful expression." 57 Justice Brennan justified the need for such rigorous analysis by pointing to the risk that such a ban may allow "the government to control . . . the political search for truth," 58 thus arguing that the government’s ban created the risk that it claimed it was seeking to avoid. 59

Justice Brennan then looked behind the Act for congressional intent and discovered that § 399 was not part of the administration’s original proposal and was not included in the initial version passed by the Senate. 60 Justice Brennan also cited legislative history that indicated that for some members of Congress the motivating factor behind including §399 was to prevent criticism of the government on these stations. Representative Springer, a leading proponent of the provision, 61 articulated his concerns by stating "[t]here are some of us who have very strong feelings because they have been editorialized against." 62

Justice Brennan then moved to explain why the provision failed to meet the narrow tailoring requirement of strict scrutiny analysis. He deemed § 399 overinclusive because “editorializing,” especially by local stations funded by CPB, includes a very broad category of speech which may have nothing to do with government. Brennan asserts, “[i]ndeed, although the government’s interest in the protection of minors was compelling, the Act’s criminalizing of commercial internet postings that were harmful to minors was not the least restrictive means of serving Congress’s objective); R.A.V. v. St. Paul, 505 U.S. 377 (1992) (holding that the St. Paul Bias Motivated Crime Ordinance was unconstitutional because it prohibited speech solely based on the subjects the speech addressed); Simon & Schuster v. NY State Crime Victims Board, 502 U.S. 105 (1991) (holding that a NY’s Son of Sam law, which required a publisher which contracted with a convicted person to submit a copy of the contract and turn over all income derived from the contract to the NY State Crime Victims Board was unconstitutional because it was imposing a financial burden on speech based on the speech’s content).

57. Reiter, supra note 55, at 183.
59. See supra text accompanying note 47-48.
61. Id. at 387, n.18.
62. Id. (alteration added).
the breadth of editorial commentary is as wide as human imagination permits." He mentions, for example, that a local station’s urging improvements to a town park or museum would be prohibited under § 399.

Finally, § 399 contains yet another fatal flaw—underinclusivity. Because the provision is only aimed at noncommercial stations which receive funding from CPB, it leaves a broad spectrum of programs, which also receive CPB funding, free to nationally broadcast editorial commentary. Due to their wide audience, these programs are much more likely to catch the attention of Congress and perhaps be retaliated against.

The majority opinion concludes with consideration of the government’s asserted interests. The Court implied that given both the under- and overinclusivity of the provision, it had doubts as to the genuineness of the interests presented. It reasoned that if these noncommercial stations were truly free, as the government contended, to broadcast controversial views, and select interviewees, then it is hardly plausible that § 399 truly serves to keep partisan or controversial opinions from being presented. The Court said: “[Section] 399 does not prevent the use of noncommercial stations for the presentation of views on partisan matters; instead, it merely bars a station from specifically communicating such views on its own behalf . . . .” In sum, because the stated government interests were not functionally served by § 399 and because other provisions of the Act adequately served to protect these government interests, the provision was found to be not only unconstitutional, but also unnecessary. This analysis demonstrates that the Court will look behind a government’s stated interests to see what is really driving legislation. If what the Court sees as the government’s genuine interest isn’t substantially weighty, the legislation will fail strict scrutiny.

63. Id. at 393 (alteration added).
64. Id.
65. Id. at 391.
66. Id.
67. Id. at 396 (citing First National Bank of Boston v. Bellotti, 435 U.S. 765, 793 (1978)).
68. Id.
69. Id. at 397.
In *League of Women Voters*, the Court conceded very little and held that § 399’s ban unconstitutionally infringed on First Amendment rights. The case is an excellent example of the rigorous analysis implemented by the Court when First Amendment freedoms are at stake and content-based restrictions are in question. The key lesson from *League of Women Voters* is that if an abridgment of political speech is implicated, strict scrutiny will be used in analysis.

Significantly, Justices Rehnquist, White, and Stevens dissent. One might infer that the stance of Rehnquist, the author of the dissent, may be more in step with the conservative Court of today. In his dissent Rehnquist emphasizes the fact that the government is providing aid to these stations and has the right to choose to spend public funds in any manner it deems appropriate. Since *League of Women Voters*, Justice Rehnquist put forth this principle again in *Rust v. Sullivan*. *Rust* involved a provision of the Public Health Service Act which prohibited recipients of Title X funds from using those “funds in programs where abortion is a method of family planning.” The Court in *Rust* stressed that the government may choose to fund “one activity at the exclusion of another; a legislature’s decision not to subsidize the exercise of a fundamental constitutional right does not infringe the right . . .” Under this line of reasoning, a government could place any conditions on it provision of public funds, as long as the potential recipient was not constitutionally entitled to them. Fortunately, since *Rust* there have been numerous decisions which have demonstrated that this principle is far from absolute.

70. *Id.* at 403 (Rehnquist, J. dissenting).
72. *Id.* at 191 (quoting Title X of the Public Health Service Act).
73. *Id.* at 193.
74. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (holding that a provision of the Omnibus Consolidated Rescissions and Appropriations Act, which limited arguments that recipient lawyers were allowed to make on behalf of their indigent clients, violated the First Amendment); FEC v. Mass. Citizens for Life Inc., 479 U.S. 238 (1986) (holding that a law, 2 U.S.C. § 441(b), which prohibited corporations from using treasury funds in connection with election events, unconstitutionally infringed on free speech); Speiser v. Randall, 357 U.S. 513 (1953) (holding that a statute that required veterans to take a loyalty oath in order to get a property tax exemption unconstitutionally infringed on free speech).
In *League of Women Voters*, the Court held that § 399’s ban unconstitutionally infringed on First Amendment rights. The case is an excellent example of the merciless analysis implemented by the Court when First Amendment freedoms are at stake and content based restrictions are in question. From *League of Women Voters*, one undoubtedly takes that if an abridgment of political speech is implicated, strict scrutiny will be used in analysis.

**B. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board**

Although *Simon & Schuster* does not deal with government funding, it is relevant to this Note when one considers its implications on Columbia’s situation. The fact that a large portion of society sees Ahmadinejad as a reprehensible enemy of the United States and finds his words to be outrageous and hurtful adds another element to the Columbia political speech controversy. The public’s perception of Ahmadinejad and the effect that his political identity and social beliefs may have on a court cannot be ignored. In *Simon & Schuster* these societal perceptions and underlying moral judgments were in play as well.

*Simon & Schuster* arose in the southern district of New York as a challenge to the state’s Son of Sam law. The law was enacted in 1977 and provided “that an accused or convicted criminal’s income from works describing his crime be deposited in an escrow account. These funds [were] then made available to the victims of the crime and the criminal’s other creditors.” The stated purpose of the statute was to “ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.” Under the law, the definition of “a person convicted of a crime” included people who had admitted to the commissioning of a crime but who were never prosecuted. The case first began in 1986 when the Board became aware that Simon & Schuster

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78. *Id.*
79. *Id.* at 110.
had contracted with organized crime figure, Henry Hill. Hill had worked with Nicholas Pileggi from 1981 until 1986 to create the non-fiction work *Wiseguy: Life in a Mafia Family*. The work was later adapted into the motion picture *Goodfellas*.

Upon learning of the contractual relationship between Hill and Simon & Schuster, the Board demanded that Hill turn over all proceeds which had already been received and ordered Simon & Schuster to give all future proceeds intended for Hill to the Board. In response Simon & Schuster brought suit claiming that the Son of Sam law violated the First Amendment and sought an injunction against its enforcement. The District Court found that there was no constitutional violation and the Court of Appeals affirmed.

Justice O’Connor, writing for the majority, first pointed to the established presumption that a “statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.” Like Justice Brennan, Justice O’Connor stressed that it is imperative that the First Amendment protect the people from a government that attempts to “drive certain ideas or viewpoints from the marketplace” by imposing “content-based burdens on speech.” This law only burdened income which was derived from a very specific type of work. Thus, whether or not the work falls under the statute was determined by its content. The legislation of hypothetical number two—the conditioning of future funding—would most likely be deemed content based.

Because the Son of Sam law was deemed to discriminate based on content, the Court evaluated the law under strict scrutiny. In *United

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80. Id. at 111.
81. Id. at 112.
82. Id. at 114.
83. Id. at 115.
84. Id.
85. Id.
86. Id. (quoting Leathers v. Medlock 499 U.S. 439, 447 (1991)).
87. Id. at 116.
88. Id.
89. See infra Part II(D).
States v. Eichman the Court made clear that avoiding the presentation of an idea that may be found offensive by society does not constitute a compelling state interest, a statement very relevant to the hypothetical legislation. To avoid the content-based label, instead of presenting the government interest as preventing the glorification of crime, the Board focused more on the victim and perpetrator than on the content of the work. The Court stated that its interest was in “ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries.” Again, the Court questioned the authenticity of this stated interest, asking why not grant all of the criminal’s assets to their victim, thereby questioning the authenticity of the stated interest and implying that this interest had a tenuous connection with what the law functionally accomplished.

As in League of Women Voters, the statute was also condemned for overinclusivity. Justice O’Connor criticized the law’s inclusion of “works of any subject, provided that they express the author’s thoughts or recollections about his crime” and the law’s definition of “person convicted of crime.” This definition, the Court emphasized, “enables the Board to escrow the income of any author who admits in his work to having committed a crime whether or not the author was even actually ever accused or convicted.” These two aspects of the law implicate a very large body of work. Justice O’Connor mentioned authors such as Malcolm X, Thoreau, and Martin Luther King Jr. as individuals whose works would be implicated under this law.

Due to the Board’s failure to present a compelling government interest and the overinclusivity of the law, the majority struck down the Son of Sam law. Although the law at issue served to punish “the bad”

92. Id. at 319.
94. Id.
95. Id. at 121.
96. Id. (emphasis added).
97. Id. at 121.
98. Id.
99. Id. at 121-22.
and compensate the afflicted, it did not pass constitutional muster. The suspect nature of content based restrictions on speech was reaffirmed.

Given the rhetoric put forth in *Simon & Schuster* and *League of Women Voters*, a substantial and unquestionably genuine interest would have to be at stake to justify enacting a clearly content-based regulation of free speech. In order to prevent speakers such as Ahmadinejad from expressing their beliefs in public, content-based regulations would most likely be necessary.

C. Rumsfeld v. Forum for Academic and Institutional Rights, Inc. 100

Rumsfeld v. Forum for Academic and Institutional Rights [FAIR] 101 came thirty years after *League of Women Voters*, ten after *Simon & Schuster*, and involved a very different set of circumstances then them both. At issue in *Rumsfeld* was 10 U.S.C.S. § 983, the Solomon Amendment. The Solomon Amendment (Amendment), as originally adopted, prohibited institutions of higher education from refusing or in effect preventing military recruiters “from gaining entry to campuses.” 102 The Amendment posed a challenge to members of an association of law schools who wished to restrict military recruiters’ access out of a desire to protest the Congress’s policies regarding homosexuals in the military. 103

Some law schools had previously skirted the Amendment by having military recruiters conduct interviews on their undergraduate campuses. 104 However, after September 11, 2001, the Department of Defense (DOD) “adopted an informal policy of requiring universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters.” 105 This interpretation prohibited law schools from directing military recruiters to their undergraduate campuses. FAIR objected to DOD’s interpretation and sought a

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101. FAIR is an organization of law schools and faculties “whose mission is ‘to promote academic freedom and to support educational institutions in opposing discrimination . . . .’” *Id.* at 52.
102. *Id.*
103. *Id.*
104. *Id.* at 53.
105. *Id.*
preliminary injunction against enforcement of the Amendment. The district court denied FAIR’s request for a preliminary injunction holding that FAIR “failed to establish a likelihood of success on the merits of its First Amendment claims” and that “the inclusion of an unwanted periodic visitor did not significantly affect” the law schools’ ability to exercise their First Amendment Rights.

While the district court rejected FAIR’s constitutional claims, it disagreed with DOD’s new interpretation of the Amendment. DOD responded to this disagreement by codifying its equal access policy. After this codification the Amendment further specified that “if any part of an institution of higher education denies military recruiters access equal to that provided to other recruiters, the entire institution would lose certain federal funds.”

Chief Justice Roberts wrote for a unanimous court which upheld the Solomon Amendment. In his opinion, Roberts pointed to Congress’s “broad and sweeping [power]” to raise armies, discussed why the Amendment is consistent with the unconstitutional conditions doctrine, stressed that the Amendment regulates conduct and not speech, and analyzed the question of whether the Amendment violates freedom of association.

The Court pointed to its decision in *Rostker v. Goldberg* to highlight the principle that “judicial deference [] is at its apogee” when Congress is legislating under its duty to raise and support armies. Chief Justice Roberts implied that Congress could have chosen to directly mandate that military recruiters be provided equal access to all universities, and with subtle approval, pointed to the fact that they instead chose to meet their objective through use of the Spending

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106. *Id.* at 52.
107. *Id.* at 53.
108. *Id.* at 51.
110. *Id.* at 59.
111. *Id.* at 60.
112. *Id.* at 68.
115. *Id.*
Clause. He went on to state that the chosen congressional action arguably deserved more deference since it granted universities a choice: forego federal funding, or provide military recruiters equal access to your campus. He did however go on to recognize that this so-called “choice” is not enough to ensure constitutionality.

The Court then reasoned that since the Amendment neither “limits what law schools may say, nor requires them to say anything,” their constitutional right to free speech had not been violated. The Court of Appeals for the Third Circuit had come to the opposite conclusion. It concluded that forcing institutions to host military recruiters amounted to compelled speech. Its basic analysis was that by being forced to accommodate these recruiters, these institutions were effectively being forced to speak “the Government’s message.” In addition, unlike the Supreme Court, the Third Circuit reasoned that even if it is conduct and not speech that is being regulated, this conduct is expressive and should therefore be protected under the First Amendment.

Chief Justice Roberts addressed each of the Court of Appeals’ arguments and concluded that while precedent undoubtedly established that compelled speech violates the First Amendment, accommodation of military recruiters did not amount to compelled speech. He drew a distinction between speech that is incidental to the requirements of certain legislation, like the speech pointed to by the Court of Appeals, and legislation that dictates the content of speech. For example, “[c]ompelling a law school that sends scheduling emails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance . . .”

After concluding that the Solomon Amendment did not burden free speech, Chief Justice Roberts then turned to the argument that the

116. Id.
117. Id. at 58-59.
118. Id. at 60.
119. Id. at 59.
120. Id. at 60.
121. Id.
122. Id. at 60-61.
123. Id. at 61-65.
124. Id.
125. Id. at 65 (alteration added).
Amendment burdened expressive conduct which merits First Amendment protection. He specified that the Court has extended First Amendment protection to "conduct that is inherently expressive" and came to the conclusion that the conduct proscribed by the Amendment did not meet this threshold requirement, stating that denying military recruiters access to a law school campus was not sufficiently expressive conduct. It would not be "overwhelmingly apparent" to an observer that by doing this, a law school was expressing its views on military policy.

The last argument addressed in the Rumsfeld opinion is that forcing a law school to provide equal access to military recruiters violates that law school's freedom of association. In its briefs and arguments FAIR had relied heavily on the Court's precedent in BSA v. Dale. In Dale the Court held that New Jersey's public accommodation laws, which required the Boy Scouts to accept a homosexual scout master, violated the Boy Scouts' freedom of association. The Court distinguished Rumsfeld from Dale by distinguishing military recruiters from scoutmasters, and arrived at the conclusion that recruiters, unlike scoutmasters, do not become members of the group's expressive association. Therefore, unlike New Jersey's public accommodation laws, the Solomon Amendment does not require a group to accept members into its community and therefore does not violate the First Amendment.

Many rules and exceptions come out of the Rumsfeld opinion:

(1) Congress may place reasonable conditions on its provision of aid so long as these conditions do not infringe on freedom of speech, but one must keep in mind that maximum deference is due to Congress when they are operating under their authority to build an army; (2) government compelled speech violates the First Amendment, but only if the government is mandating the content of speech or if that speech is

126. Id.
127. Id. at 66 (citing Texas v. Johnson, 491 U.S. 397, 406 (1989)).
128. Id. (quoting Texas v. Johnson, 491 U.S. 397 (1989)).
129. Id. at 66.
131. Id. at 68.
132. Id. at 68-69.
133. Id. at 69.
affecting a message the complaining speaker is trying to convey – not if the required speech is merely incidental to the government policy;\footnote{134} (3) the First Amendment does protect conduct, \textit{but} that conduct must be “inherently expressive”\footnote{135} and “overwhelmingly apparent”\footnote{136} and (4) the First Amendment protects freedom of association, \textit{but} freedom of association only protects individuals from being forced to admit someone into their “expressive association.”

On a broader note, \textit{Rumsfeld} cites precedents to fit the Solomon Amendment somewhere along the spectrum of free speech cases. What stands out in opinions like \textit{Rumsfeld}, is how vulnerable to manipulation precedent is. Couldn’t a military recruiter who visits a law school multiple times a year, spending days at a time with the school’s students and staff, be considered within the law school’s “expressive association?” Is the speech compelled by the Solomon Amendment truly \textit{incidental} to the law? Is even more deference owed to Congress when they are operating under their authority to build and support armies when our country is at war? With so many potential factors at play and no decipherable rule to guide us, predictions are very difficult to make. Fortunately, cases such as \textit{North Mississippi} and \textit{El Dia} do hint at a rule against retaliatory action as punishment for the exercise of First Amendment rights.

\textit{D. Silver and Hunter under Strict Scrutiny}

The three cases discussed above each address important aspects of potential conflicts which may arise in contexts similar to that of Ahmadinejad and Columbia. \textit{League of Women Voters} puts a broad prohibition conditioning government funding on an entity’s promise not to engage in editorializing. \textit{Simon & Schuster} highlights the principle that the expression of offensive ideas cannot be regulated simply because this expression may be insulting or even hateful to society. \textit{Rumfeld} adds an important caveat. Despite the significance of First Amendment protections, in some circumstances, specifically circumstances implicating national security, the protection of these rights may be

relegated to second place. Readers of Rumsfeld may object to this characterization pointing to the numerous other reasons Chief Justice Roberts offered for upholding the regulation, but one cannot ignore the first argument proffered by the Chief Justice: congressional authority is at its most unquestionable when acting in its capacity to raise and support an army. One can certainly imagine that congressional authority may also be "at its apogee" when acting to secure our nation against foreign threats. This consideration could be deemed completely irrelevant in the case of Columbia and Silver because in that case we are dealing with the actions of a state legislature which plays a very minimal role in national security. Do state governments have any recognizable interest in acting to ensure the security of their citizens against foreign threats? If they do, this interest is certainly far less established than the federal government interest at issue in Rumsfeld. An asserted interest in homeland security would undoubtedly be more credible coming from Congressman Hunter.

If the New York legislature or the U.S. Congress responded to Bollinger's actions by enacting a law that prohibited entities which receive government funds from "hosting enemies of the United States," the most likely method of analysis would be strict scrutiny. Facialy, this restriction on speech would be conditioned on the identity of the speaker, not the content of his speech. Functionally the regulation would have the same implications of a content based restriction and would presumably trigger the merciless analysis used in cases like Simon & Schuster and League of Women Voters.

III. APPLICATION OF FRAMEWORK AND POLITICAL CLIMATE TO COLUMBIA AND AHMADINEJAD

Fortunately for Columbia it seems that Sheldon Silver and Duncan Hunter have chosen not to act on their threats or have been prevented from doing so. Although neither has managed to punish Columbia, their words should not be dismissed as overblown rhetoric. As recent cases such as North Mississippi and El Dia demonstrate, retaliatory government action is a very real phenomenon.

137. Id.
138. Id.
Before looking to the threats and actions of Silver and Hunter, this Note must first address whether President Bollinger was exercising his and Columbia’s First Amendment rights when he chose to invite Mahmoud Ahmadinejad to speak on Columbia’s campus. Is this invitation an exercise of Columbia’s free speech? If there were no constitutional implications here, then there will be no challenge to Silver’s potential withdrawal of state funds.

As Rumsfeld tells us, conduct can be considered free speech as long as that conduct is “inherently expressive.” The Court in Texas v. Johnson stated that “conduct may be sufficiently imbued with the element of communication to fall within the scope of the First and Fourteenth Amendments.” Bollinger has stated that “in order to fulfill Columbia’s mission he must respect the rights of [Columbia’s] faculty and deans “to create programming for academic purposes.” He added “this will [on occasion] bring us into contact with beliefs many, most, or even all of us will find offensive and even odious.” Could the invitation been seen as the University’s expression of its “mission,” as Bollinger refers to it? Or, alternatively, is an invitation to someone to come and express their ideas “inherently expressive conduct?” Both formulations implicate freedom of speech. Undeniably, one of a university’s most fundamental duties is to provide a venue for the expression of a broad array of viewpoints and to expose its students and its community to the diversity this fosters. Punishing a university for executing this duty, or burdening its ability to promote a free exchange of ideas, would certainly be considered both an infringement of free speech and an act contrary to public policy.

By examining the very small handful of cases described in this Note, one can see that conditionally withholding something from an entity in a manner which forces it to give up a freedom granted by the Constitution is presumptively unconstitutional. In none of the cases discussed did the Court find that the government interest at stake was so strong as to justify the infringement on speech. Although strict scrutiny is the Court’s most exacting test, it is possible for a law to withstand this

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139. See supra note 127.
141. Id. at 404 (quoting Spence v. Wash., 418 U.S. 405, 409 (1974)).
142. See Gershman, supra note 1.
If a court found that an institution's inviting a speaker like Ahmadinejad to speak, was indeed an exercise of a First Amendment right, the government forbidding that speech would have to produce a compelling government interest which could only be served by this prohibition. What potential interest could be served by prohibiting an extremely controversial figure like Ahmadinejad from speaking? Given that preventing speech which insults society has been deemed an illegitimate interest, the most compelling interest either Silver or Hunter could offer would most likely be ensuring the safety of the American people.

143. See, e.g., Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 666 (1990) (holding that a campaign finance act that prohibited corporations from using corporate treasury funds to support or oppose a candidate did not unconstitutionally burden free speech because the state’s interest in “eliminating from the political process the corrosive effect of political war chests amassed with the aid of the legal advantages given to corporations” was sufficiently compelling and the provision sufficiently narrowly tailored to pass strict scrutiny); Am. Party of Tex. v. White, 415 U.S. 767 (1974) (holding that Texas had a compelling state interest in preserving the integrity of the electoral process and that Tex. Elec. Code art. 13.02 was narrowly tailored to serve that purpose); see also Hobbs v. County of Westchester, 397 F.3d 133 (2d Cir. 2005) (holding that New York had a compelling interest in protecting children from sexual predators and that Executive Order 3-2003 was narrowly tailored to serve that interest); Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172 (9th Cir. 2007) (holding that California demonstrated a compelling state interest in informing voters of the identity of individuals who have spent money in support of or in opposition to ballot measures and that its definition of “contribution” was sufficiently narrowly tailored).

144. See, e.g., U.S. v. Eichman, 496 U.S. 310, 319 (1990) (explaining “that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

145. The fact that Ahmadinejad’s speech was clearly offensive would undoubtedly be deemed an insufficient interest. No case better demonstrates the principle that offensive content cannot be regulated than R.A.V. v. St. Paul. In R.A.V. the petitioner had allegedly burned a cross on the lawn of an African American family’s home. The petitioner moved to dismiss the charge asserting that St. Paul’s Bias-Motivated Crime statute was an unconstitutional content-based restriction on free speech. The Supreme Court granted the motion saying that the “First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed.” 505 U.S. 377, 382 (1992).
CONCLUSION

Our country’s recent history has shown that when faced with issues of homeland security, some of America’s most revered principles fall by the wayside. One can see an interplay between homeland security and statutory interpretation in *Rumsfeld* when the DOD broadened the commands of the Solomon Amendment after the events of September 11th. Nevertheless, some rationale would have to be advanced in order to characterize the invitation of Ahmadinejad to speak at a university as a threat to American security and, as stated above, the United States Congress has a greater interest at stake than the New York legislature. One could contend that providing a forum to leaders like Ahmadinejad emboldens our enemies, and therefore endangers the United States. Recent events in our history make this rationalization more likely to be accepted than it may have been in the past. However, neither Silver nor Hunter ever implied that he objected to the invitation out of a concern for safety. The primary thrust of both arguments to the press was that Columbia should not “legitimize” such a despicable figure by providing him with a forum. In light of this statement, proving the authenticity of a government interest in public safety may be challenging.

Another relevant principle emphasized in *Rumsfeld* is that “judicial deference is at its apogee” when Congress is acting under its duty to raise and support armies. As stated *supra*, one might infer that a court may be willing to extend this deference to cases where a legislature is acting to “protect the United States from foreign enemies” or to “keep New York safe.” A drawback to this argument is that a legislature has no textual constitutional duty to protect the United States


147. *See supra* note 114.

148. *Id.*
from terrorism. Nevertheless, the American public may support such a rationale out of fear. Jurisprudentially, it could be supported by those advocating the importance of judicial restraint—given their resources and expertise, the legislature is certainly in a better position to assess threats to the safety of Americans than the judiciary.

The Supreme Court has come a long way since its opinion in *League of Women Voters*. Indeed, the government counsel in that case is now a member of the bench. The only other current Justice that was present during the *League of Women Voters* decision is Justice Stevens, who joined in Rehnquist's dissent. Recent cases other than *Rumsfeld* may seem to some to suggest that the Roberts court gives less than appropriate deference to First Amendment freedoms. Although the Supreme Court may seem increasingly willing to sacrifice constitutional rights in the name of homeland security and judicial restraint, it remains far from upholding a retaliatory revocation of funding such as that threatened by Sheldon Silver and Duncan Hunter. After the statements made by Silver and Hunter to the press, a revocation of Columbia’s

149. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that a district attorney's speech was not protected by the First Amendment because he was making statements pursuant to his official duties and not speaking as a citizen); *see also* Morse v. Frederick, 127 S. Ct. 2618 (2007) (holding that school officials did not violate a student’s First Amendment rights when they suspended him for displaying a banner which appeared to advocate drug use. The Court stated that the “substantial disruption” rule established by precedent was not the only basis for restricting student speech.); Davenport v. Wash. Educ. Ass’n, 127 S. Ct. 2372 (2007) (holding that a Washington state law which prohibited unions from spending agency shop fees of a non-member for election related purposes did not implicate the First Amendment because unions are not constitutionally entitled to receive these fees); Beard v. Banks, 548 U.S. 521 (2006) (holding that a regulation which prohibited dangerous inmates from having access to newspapers, magazines, and personal photographs does not violate the First Amendment; the Court reversed the Third Circuit, saying that they did not grant sufficient deference to the judgment of prison officials). But see FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007) (holding that § 203 of the Bipartisan Campaign Reform Act, which made it a federal crime for any corporation to broadcast, shortly before an election, any advertisement which is aimed at the electorate and names a candidate, unconstitutionally infringed First Amendment rights); Randall v. Sorrell, 548 U.S. 230 (2006) (holding that Vermont’s campaign finance statute’s limits on expenditures and contributions were inconsistent with the First Amendment. The Court stated that the statute was not narrowly tailored to serve Vermont’s asserted interest in deterring corruption or the appearance of corruption.).
government dollars would likely be subjected to a *Mt. Healthy* analysis, and a statute similar to the one proffered above would be subjected to strict scrutiny. Silver and Hunter’s burdens under *Mt. Healthy* would be considerable. If strict scrutiny were applied to a restriction on public speakers, and the safety of the American people was the stated government interest, the policy would have to be deemed overinclusive in light of the manner in which the narrow tailoring requirement was interpreted and applied in *League of Women* and *Simon and Schuster*. The link between allowing a leader such as Ahmadinejad to speak and putting American lives in danger, is simply too unconvincing to satisfy the Court’s most demanding test. Even if the Court were to see this issue as a closer question than this Note anticipates, Chief Justice Roberts recently acknowledged that “the First Amendment requires [the Court] to err on the side of protecting political speech rather than suppressing it.”

Perhaps Silver and Hunter made their statements to the *New York Sun* in a fit of rage or perhaps they seriously believed that withholding funds from Columbia University was a viable response. Whatever the case, one may take these threats as an excuse to pontificate on the dwindling respect our government seems to hold for the most cherished principles of the Constitution, or to forecast the rise of an American police state. Whether or not these concerns are generally valid, in the case of Silver, Hunter, Bollinger, and Ahmadinejad one can glean hope from the relevant case law. As long as content-based restrictions on speech and retaliatory government action are scrutinized according to established constitutional tests such as *Mt. Healthy* and strict scrutiny, it will take a drastic departure from precedent for a court to condone actions such as those threatened by Sheldon Silver and Duncan Hunter.

A broader point to take from this scenario is that while certain areas of freedom of speech precedent seem to come and go, the most fundamental principles arise in every opinion. The presumption against content-based restrictions on speech and the constitutional protection afforded to free expression of editorial opinion are examples of principles that have been in our jurisprudence for decades and are likely to remain. What is left to be seen is whether they will be chipped away in

the face of what may be seen as more legitimate concerns for national security, or if the Mt. Healthy analysis and strict scrutiny will continue to demand the utmost from American law and lawmakers.