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Brind & (and) Rust v. Sullivan: Free Speech and the Limits of a Written Constitution

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I. INTRODUCTION

THE existence of a written constitution is thought by some to place certain rights, obligations, and duties in a preferred place within a nation's legal constellation.[1] Thus, the existence of the First Amendment, with an express guarantee of speech and press rights,[2] should

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1. One of the leading American proponents of this theory is former Circuit Judge Robert Bork. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW, 118-19, 147 (1990) ("[t]he absence of a constitutional provision means the absence of a power of judicial review"); Dronenburg v. Zech, 741 F.2d 1388, 1396-97, 1396 n.5 (D.C. Cir. 1984) (Bork, J.) (opining that courts should not recognize or enforce rights that lack a textual foundation). However, the notion that written provisions (and particularly constitutional provisions) somehow elevate particular rights from nontextual rights is relatively commonplace in law. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2874-76, 2884-85 (1992) (Scalia, J., dissenting) (arguing that as a general matter courts should enforce only rights with a textual foundation in the Constitution); Coy v. Iowa, 487 U.S. 1012, 1015-19 (1988) (holding that the Confrontation Clause of the Sixth Amendment precludes a state from permitting a minor to testify via closed circuit television); Hudson v. Palmer, 468 U.S. 517, 555-56 (1984) (Stevens, J., concurring in part and dissenting in part) (explaining that a written constitution provides a greater degree of protection for enumerated rights); *see also* Johnson v. Louisiana, 406 U.S. 356, 388 (1972) (Douglas J., dissenting) (arguing that the Court should only exercise the powers given it in the text of the Constitution); Griswold v. Connecticut, 381 U.S. 479, 520-27 (1965) (Black, J., dissenting) (lamenting the Supreme Court's decisions to recognize unenumerated rights and arguing that only the text of the Constitution establishes enforceable rights); Fong Yue Ting v. United States, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting) (noting that the powers of the United States government are fixed "by a written constitution").

Several leading British scholars share Judge Bork's view that a written constitution is necessary to ensure the adequate protection of individual rights and liberties. *See, e.g.*, RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 17-23 (1990) (arguing that Britain needs a written bill of rights); Anthony Lester, *The Constitution: Decline and Renewal*, *in* THE CHANGING CONSTITUTION 345, 353-56 (Jeffery Jowell & Dawn Oliver eds., 1989) (arguing that Britain needs a written bill of rights to ensure protection of civil rights and liberties); Jim Murdoch, *The Rights of Public Assembly and Procession*, *in* HUMAN RIGHTS: FROM RHETORIC TO REALITY 173-82, 193-95 (Tom Campbell et al. eds., 1986) (same); HARRY STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 284-85 (1963) (same). *But cf.* STREET, *supra*, at 287 ("Our judges may be relied on strenuously to defend some kinds of freedom.").

2. The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

provide (at least nominally) greater protection for those liberties than would otherwise exist in the absence of such a provision. Quite often, this seemingly unobjectionable proposition holds true.[3]

However, the proposition is not as self-evident as one might assume. Counter examples do exist.[4] The presence of a written constitutional guarantee of a particular right does not automatically mean that courts will afford the right greater solicitude, and the absence of a written constitutional provision does not preclude the protection of a particular liberty.[5]

This is not to suggest that the absence of a specific textual provision protecting freedom of speech and the press has *no* affect on the disposition of cases raising such claims.[6] The point is more limited—the presence or absence of a textual guarantee of speech and press rights is not as sure a predictor of actual outcomes as one might expect.[7]

In a pair of cases, the British House of Lords and the Supreme Court of the United States have demonstrated the limits of written constitutional provisions. Examined conjunctively, these cases show that the protection of free speech or a free press may not be as extensive as one would assume under a written constitution and may, surprisingly, be more extensive than one would expect in the absence of such a document.[8]

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3. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); *cf.* Barnes v. Glenn Theatre, 501 U.S. 560 (1991) (holding that state law prohibiting totally nude dancing did not violate the First Amendment); United States v. O'Brien, 391 U.S. 367 (1968) (holding that law prohibiting burning of draft card did not violate First Amendment).

4. *Compare* Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 748-49, 750-51 (appeal taken from C.A.) (recognizing, but not applying, right of free speech) *with* Rust v. Sullivan, 111 S. Ct. 1759, 1771-76 (1991) (rejecting speech claim by medical doctors); National Press Club v. Commission on Elections, The Law. Review 36 (March 31, 1992) (Philippines) (holding that Philippine constitutional free speech interest does not protect political speech in newspapers); Regina v. Butler, 89 D.L.R.4th 449, 488-89 (1992) (Can.) (holding that Canadian Charter of Rights and Freedoms does not protect certain scatological materials deemed to demean women).

5. THE FEDERALIST No. 84, at 575-81 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see* James Madison, *Address Before the United States House of Representatives* (June 8, 1789), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 370-89 (Gaillard Hunt ed., 1904); *cf. Letter from Thomas Jefferson to James Madison* (Dec. 20, 1787), *in* THE PORTABLE THOMAS JEFFERSON 428, 429 (Merrill D. Peterson ed., 1975) ("I will now add what I do not like. First, the omission of a bill of rights . . . .").

6. *See* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 47-48, 113 n.73 (1984) [hereinafter VAN ALSTYNE, FIRST AMENDMENT].

7. *See infra* notes 95-142 and accompanying text.

8. *Compare Brind*, [1991] 1 App. Cas. at 748-49, 750-51 (recognizing, but not applying, right of free speech) *with Rust*, 111 S. Ct. at 1775-76 (rejecting speech claim by doctors).

In February 1991, in *Regina v. Secretary of State for the Home Dep't, Ex parte Brind*,[9] the British House of Lords upheld a ban on broadcasts featuring in-person appearances by representatives of several designated political affiliates of allegedly terrorist organizations. The ban went into effect in 1988, pursuant to an administrative order issued by then-Home Secretary Douglas Hurd.[10]

In the summer of that same year, the Supreme Court of the United States decided *Rust v. Sullivan*,[11] a case involving policy concerns largely similar to those at issue in *Brind*. In *Rust*, the Court reached a result parallel with that reached in *Brind*, the First Amendment notwithstanding.[12]

To be sure, the precise questions presented in *Brind* and *Rust* were not identical.[13] The approach that the Supreme Court and the House of Lords took in deciding the respective cases, however, belies the proposition that the existence or non-existence of a written speech clause determined the result in either case. A comparison of *Brind* and *Rust* shows that the existence of a written constitution is not a safe predictor of outcomes in actual cases.[14]

In *Brind*, the House of Lords, sitting as a court of law in a nation with no written constitution, appeared to import a "compelling state interest" test into a routine review of an administrative regulation, all in the name of protecting the "fundamental right" of free speech.[15] More or less concurrently, the United States Supreme Court, hearing an appeal challenging the legality of a federal regulation, declined to apply seemingly well-settled First Amendment law,[16] and in the proc-

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9. [1991] 1 App. Cas. at 752-56.

10. *See id.* at 711-15; *see also* Patricia Wynn Davies, *Law Lords Uphold Media Bar on IRA*, INDEPENDENT, Feb. 8, 1991, at A10 (discussing the ban and the challenge brought against it by several broadcast journalists).

11. 111 S. Ct. at 1759.

12. *Id.* at 1775-76.

13. *See infra* notes 48-56, 95-105 and accompanying text (discussing facts of *Brind* and *Rust*).

14. Or, more precisely, that the existence of a written constitution does not always ensure that the seemingly valid invocation of a right can be interposed to block the application of government proscriptions against the exercise of the right.

15. *See* Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 748-49, 750, 763 (appeal taken from C.A.); *cf.* BORK, *supra* note 1, at 147.

16. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Keyishian v. Board of Regents, 385 U.S. 589, 603-08 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); *id.* at 262-63 (Frankfurter, J., concurring); Young Women's Christian Ass'n of Princeton v. Kugler, 342 F. Supp. 1048, 1063 (D.N.J. 1972), *aff'd*, 493 F.2d 1402 (3rd Cir. 1974), *cert. denied*, 415 U.S. 989; *see also* Roe v. Wade, 410 U.S. 113, 163, 166 (1973) (recognizing the constitutional importance of the professional judgment of a physician in making medical decisions); *see generally* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990) [hereinafter Van Alstyne, *Historical Review*].

ess weakened both the scope and strength of the First Amendment.[17] Given these developments, one could reasonably challenge the proposition that written foundational documents are either a prerequisite to or a guarantor of personal liberties in general, or free speech in particular.

Part II of this Article individually examines *Brind* and *Rust*. In particular, the Article gives careful consideration to the novelty of the "law lords"[18] seeming importation of a "compelling state interest" test.

Part III also examines whether the results in *Brind* and *Rust* were in any way contingent on the presence or absence of a written constitutional guarantee of free speech. This section suggests some possible reasons for the level of solicitude accorded free speech claims in the United States and Great Britain. If the results in particular cases cannot be explained, then the presumed value of a written constitutional document should be reevaluated, and perhaps revised. Finally, Part III takes up the implications of *Brind* and *Rust* for the indeterminacy argument advanced by some in the legal academy.

In their battle against normativism in the law, members of the Critical Legal Studies (CLS) movement have identified the "indeterminacy problem" as one of the central bulwarks of their argument that law is mostly politics.[19] Some within the CLS movement argue that law is not simply indeterminate in particular applications, but rather is indeterminate at its "core."[20] A legal system's foundational principles should be the surest place to find stability and determinism; thus, *Brind* and *Rust* lend some support to the CLS claim that law is fundamentally "indeterminate." However, in Part III, this Article argues that written constitutional provisions, coupled with strong community traditions, can at least constrain indeterminacy.

II. *BRIND* AND *RUST*: SIMILAR CASES, SIMILAR RESULTS

The United States and Great Britain are distinct societies.[21] Despite a common legal heritage, the legal systems of the two nations have

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17. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1771-76 (1991); *see also infra* notes 129-142 and accompanying text.

18. A "law lord" is a member of the House of Lords who is appointed for life (he or she is not necessarily a member of the peerage) and who sits in decision over the appeals taken from the lower British courts. The House of Lords, as a whole, does not sit to decide cases. Rather, the small cadre of law lords discharge this function. P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 269 (1987).

19. *See* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1524, 1538-39 (1991) [hereinafter Tushnet, *CLS*]; Girardeau A. Spann, *Baby M and the Cassandra Problem*, 76 GEO. L.J. 1719, 1735 (1988); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 114 (1984).

20. Gordon, *supra* note 19, at 114.

21. *See* Ronald J. Krotoszynski, Jr., Note, *Autonomy, Community, and Traditions of Lib-*

developed quite differently.[22] The absence of a written constitution, or a statutory bill of rights in Great Britain, is perhaps one of the most salient differences between the two legal systems.

Given the absence of a textual guarantee of free speech rights in British domestic law, one would not expect the British House of Lords to decide a free speech case in the same manner as would the United States Supreme Court.[23] Quite reasonably, one would expect the Supreme Court to treat invocations of the right of free speech with greater solicitude than the House of Lords, an appellate court that operates in a nation where the legislature is sovereign[24] and the power of judicial review can charitably be described as "weak."[25] Paradoxically, in spite of its institutional limitations, the contemporary House of Lords seems willing to push at the margins to protect free speech,[26] whereas the United States Supreme Court appears willing to permit the federal government to purchase speech rights through the creative exercise of Congress' taxing and spending powers.[27]

Madison once observed that a Bill of Rights is "useful" but not "essential."[28] *Brind* and *Rust* together suggest that Madison's observation may be more true than one might think.

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erty: The Contrast of British and American Privacy Law, 1990 DUKE L.J. 1398, 1399-1400, 1446.

22. ATIYAH & SUMMERS, *supra* note 18, at 222-39, 408-09.

23. A particularly good example of this is the *Handyside* case. *Handyside* involved the British government's attempt to suppress "The Little Red Schoolbook" because of its somewhat frank discussion of sexual matters. This effort ultimately succeeded, even though the book circulated freely elsewhere in Western Europe. Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737, 740-43, 758-60 (1976).

24. ATIYAH & SUMMERS, *supra* note 18, at 227-28, 298-306; STREET, *supra* note 1, at 286; *see* Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 715 (C.A.).

25. ATIYAH & SUMMERS, *supra* note 18, at 299-306; STREET, *supra* note 1, at 309-11; Colin Mellors, *Governments and the Individual—Their Secrecy and His Privacy*, *in* PRIVACY 93 (John B. Young ed., 1978); Frank Dowrick, *Council of Europe: Juristic Activity 1974-86: Part II*, 36 INT'L & COMP. L.Q. 878, 888 (1987); *see also* Sheila Rule, *Group Says Press Freedom is Declining in Britain*, N.Y. TIMES, Oct. 19, 1990, at 7A; Joe Rogaly, *Why Britain Should Copy Germany*, THE FINANCIAL TIMES, July 13, 1990, § 1, at 16; James Atlas, *Thatcher Puts A Lid on Censorship in Britain*, N.Y. TIMES, Mar. 5, 1989, § 6, at 36.

26. Indeed, recent cases suggest that it will afford free speech judicial protection to the extent consistent with the constitutional role of the British judiciary. *See Brind*, [1991] 1 App. Cas. at 748-49, 751; *see also* Derbyshire County Council v. Times Newspapers, [1992] 3 W.L.R. 28, 48, 56-58, 63-65 (C.A.).

27. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991) (noting that although doctors are required to spout the party line from the Department of Health and Human Services (HHS) as a condition of participation in Title X clinics, participating doctors need not represent the party line as their own professional opinion); Title X Pregnancy Counseling Act of 1991, S. 323, 102d Cong., 1st Sess. § 2 (1991).

28. James Madison, *Address Before the United States House of Representatives* (June 8, 1789), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 370-89 (Gaillard Hunt ed., 1904).

A. Brind: *Incorporating Free Speech Values Absent a Constitutional Mandate*

England, unlike the United States, has no written constitution.[29] Consequently, the English courts do not possess a direct textual command to consider free speech claims. The absence of a written constitution containing a guarantee of free speech no doubt is in part responsible for the English judiciary's failure to vindicate free speech and free press claims routinely.[30] However, this explanation may be a bit too facile.[31]

1. Free Speech as a Canon of Statutory Interpretation and as a Restraint on Administrative Discretion

In Great Britain, the citizen's interest in free speech stems from community tradition rather than legal fiat.[32] Although there is no writ-

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29. Great Britain has a "constitution," albeit an unwritten one. Unlike the U.S. Constitution with its *Bill of Rights*, the British Constitution concerns itself exclusively with the division of powers among the Crown, Parliament, and the judiciary. *See* A. W. Bradley, *The Sovereignty of Parliament—in Perpetuity?*, *in* THE CHANGING CONSTITUTION 25, 27-29 (Jeffrey Jowell & Dawn Oliver eds., 1989); Lester, *supra* note 1; STANLEY DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 3-14 (6th ed. 1989); J. A. Jolowicz, *The Judicial Protection of Fundamental Rights Under English Law in* 2 THE CAMBRIDGE-TILBURG LAW LECTURES 5-6 (Dr. B.S. Markensinis & J.H.M. Willems eds., 1980); STREET, *supra* note 1, at 11, 283-89; *see also* Legislation on Human Rights: A Discussion Document (P) 2.01-05 (Home Office 1976).

30. *See, e.g.*, Attorney-General v. Guardian Newspapers (No. 2), [1990] 1 App. Cas. 109, 156-59, 178 (C.A.). (the so-called "Spycatcher" case); *cf.* Sunday Times v. United Kingdom, 14 Eur. H.R. Rep. 229, 240-44 (1991) (holding that contempt orders in one of the "Spycatcher" cases violated the right of free speech under the European Convention on Human Rights); Observer & Guardian v. United Kingdom, 14 Eur. H.R. Rep. 153, 174-83 (1991) (holding that temporary injunction violated Article 10 of the European Convention on Human Rights); Sunday Times v. United Kingdom, 2 Eur. H.R. Rep. 245, 266-67, 275-82 (1979) (holding that British law of contempt could not be applied to impose a prior restraint on the Times' publication of articles on the thalidomide disaster, despite the existence of pending lawsuits). The *Sunday Times* cases are examples of litigants with free speech claims taking their complaints to an extranational tribunal to vindicate their speech rights. *See generally* Krotoszynski, *supra* note 21, at 1420-26, 1430.

31. *See* Regina v. Secretary of State for the Home Dep't *Ex parte* Brind, [1991] 1 App. Cas. 696, 748-49, 751 (appeal taken from C.A.); *see also* Derbyshire County Council v. Times Newspapers, [1992] 3 W.L.R. 28, 48, 56-58, 63-65 (C.A.) (incorporating freedom of speech into the English law of torts to preclude local government from recovering for libel). In particular, Lord Bridge seems to be applying a "compelling state interest" test to determine whether the ban on in-person broadcasts of the Irish Republican Army representatives was "reasonable" for purposes of reviewing the administrative action. *Brind*, [1991] 1 App. Cas. at 748-49.

32. Lord Goff perhaps explained this best in *Guardian Newspapers*:

> I can see no inconsistency between English law . . . and [A]rticle 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas [A]rticle 10 of the Convention, in accordance with its avowed

ten provision of law securing a "right" of free speech in British domestic law, the English judiciary has demonstrated a willingness to address free speech claims substantively. Thus, the casual observer would be mistaken if, upon discovering the absence of a written guarantee of free speech, he immediately drew the conclusion that freedom of speech as an autonomy interest lacks currency.

The absence of a textual provision undoubtedly circumscribes the British judiciary's ability to vindicate speech interests.[33] Historically the British courts have deferred to Parliamentary acts regardless of the judiciary's appraisal of the wisdom of Parliament's action.[34] Consistent with the doctrine of Parliamentary supremacy, the British judiciary does not possess the constitutional authority to reject an act of Parliament, so long as Parliament promulgated the act properly.[35] Judicial review, in the strong United States form,[36] simply does not exist in Britain. Thus, the British judiciary, in the absence of a Parliamentary command to vindicate speech rights, is limited to considering the tradition of favoring speech rights only at the margins—for example, as a consideration in issues involving statutory interpretation.[37]

Any analysis of the strength of free speech interests in English law must begin with the frank recognition that if Parliament acts clearly

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> purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it.

Attorney-General v. Guardian Newspapers Ltd. (No. 2), [1990] 1 App. Cas. 109, 283 (appeal taken from C.A.). Of course, Lord Goff conveniently failed to mention that Parliament's ability to proscribe speech is unlimited. In light of this fact, his observation is somewhat circular: in Britain, anyone is free to say what they wish anywhere, anytime, unless there is a legal prohibition against the particular speech. However, this proposition is just as true in North Korea or Yemen as it is in England.

33. *Brind*, [1991] 1 App. Cas. at 767.

34. *See, e.g.*, Regina v. Inland Revenue Comm'rs, *Ex parte* Rossminster Ltd., [1980] 1 App. Cas. 952 (appeal taken from C.A.); *see also* ATIYAH & SUMMERS, *supra* note 18, at 46-47, 100-12, 267-69; STREET, *supra* note 1, at 283-84.

35. ATIYAH & SUMMERS, *supra* note 18, at 46-47, 269-70, 299.

36. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

37. *Brind*, [1991] 1 App. Cas. at 761-62. The British judiciary's use of free speech as a background consideration when considering the scope of parliamentary enactments is entirely analogous to its use of privacy as a legal canon. *See* Krotoszynski, *supra* note 21, at 1413-15, 1425. When faced with an ambiguous parliamentary command, the British judiciary will consider vindicating free speech claims. *Brind*, [1991] 1 App. Cas. at 748-50, 763; *see also* Krotoszynski, *supra* note 21, at 1413-15, 1425. Likewise, in the absence of a clear parliamentary command, the British courts are willing to incorporate free speech values into the common law. *See, e.g.*, Derbyshire County Council v. Times Newspapers, [1992] 3 W.L.R. 28, 48-49, 53-54, 56, 64-65 (C.A.). However, where Parliament speaks with a clear voice, the British judiciary will not interpose the community's tradition of free speech to thwart the parliamentary command. *See Brind*, [1991] 1 App. Cas. at 715 (C.A.).

and unambiguously, a claim of privilege under some notion of free speech will fail in the British domestic courts.[38] This illustrates the most obvious effect of a textual speech clause: such provisions legitimate—and often necessitate—judicial review of legislative enactments for consistency with the asserted speech right. At the outset, then, this Article concedes that the absence of an analog to the First Amendment in British domestic law substantially restricts the ability of the British judiciary to consider free speech claims on the merits. In the vast majority of cases, any claim that an act of Parliament unduly infringes legitimate speech rights must be heard (if at all) by the European Court of Human Rights in Strasborg, France.[39]

However, there are exceptions to this general proposition. First, if an act of Parliament is ambiguous, the British courts are free to interpret the act consistently with the European Convention on Human Rights and Fundamental Freedoms (ECHR).[40] The ECHR contains a free speech provision, which may be raised in the British domestic courts as a textual basis for the vindication of free speech claims.[41]

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38. *See* Attorney-General v. Guardian Newspapers (No. 2), [1990] 1 App. Cas. 109, 156-59, 178, 203, 218-20, 256, 283-84; [1987] 1 W.L.R. 1248, 1286, 1296-97 (H.L.).

39. *Brind*, [1991] 1 App. Cas. at 759-62, 717-18; *see* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10-18, 91-92, 456 (1984); R. Higgins, *United Kingdom*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW 123, 124-25, 129-30, 134-35, 137 (Francis G. Jacobs & Shelley Roberts eds., 1987); Krotoszynski, *supra* note 21, at 1415-18, 1420-21.

40. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (1955) [hereinafter ECHR]; *see Brind*, [1991] 1 App. Cas. at 761; *In Re* K.D., [1988] 1 App. Cas. 806, 813-15, 823-25, 828-30 (appeal taken from C.A.); *see also* Krotoszynski, *supra* note 21, at 1425.

41. Article 10 of the ECHR provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television, or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ECHR, art. 10, *reprinted in Brind*, [1991] 1 App. Cas. at 760.

Quite obviously, section 2 creates exceptions to the general rule which could, in the abstract, justify a wide range of restrictions on free expression. Such restrictions would probably not pass muster under contemporary First Amendment standards. *Compare* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991) (holding that statute imposing financial burden on speakers because of speech content was unconstitutional) *and* Near v. Minnesota, 283 U.S. 697 (1931) (prohibiting the application of prior restraints on the press) *with Brind*, [1991] 1 App. Cas. at 749, 751, 759, 763, 765 (upholding content restrictions on

Thus, when a statutory provision is ambiguous, British courts will have recourse to Article 10 of the ECHR to help determine the proper meaning of the provision.[42]

However, the thesis of this Article is that a written constitutional provision is not a safe predictor of outcomes in cases involving free speech rights. Recourse to Article 10 of the ECHR does not materially advance this thesis; an analysis of the effectiveness of Article 10 in the British courts fails to demonstrate that the British courts will consider speech interests in the absence of *any* textual command.

The British judiciary possesses the power to consider speech claims in another context: review of administrative regulations. Parliamentary acts sometimes require implementing regulations,[43] and those regulations are subject to judicial review.

In Britain, as in the United States, judicial review of administrative regulations is not plenary.[44] A reviewing court's discretion is either limited by the terms of the act conferring the authority on the agency to promulgate regulations, or, in the absence of a textual statutory limitation, to a standard of reasonableness.[45]

When reviewing the exercise of administrative discretion, recourse to the ECHR is not mandatory.[46] Thus, unlike cases in which a court engages in statutory interpretation—in such circumstances the British domestic courts must have recourse to the ECHR to resolve statutory ambiguities—recourse to the ECHR is entirely within the discretion of the administrative decisionmaker.[47] In consequence, when a British court reviews an administrative regulation, there is no textual source for the protection of speech rights on which the reviewing court may rely. Nevertheless, the British judiciary has seemingly incorporated free speech values into its review of administrative regulations.

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mass media) *and* Attorney-General v. Guardian Newspapers (No. 2), [1990] 1 App. Cas. at 109 (restraining publication of book) *and* Sunday Times v. United Kingdom, 2 Eur. H.R. Rep. 245 (1979) (overturning prior restraint the United Kingdom imposed on newspaper).

42. The ECHR is not directly applicable in Great Britain and does not have the effect of law in British domestic courts. Consequently, the British domestic courts refuse to consider the treaty, except as an aid in the interpretation of ambiguous statutes. *Brind*, [1991] 1 App. Cas. at 760-62.

43. ATIYAH & SUMMERS, *supra* note 18, at 61-62, 299-300, 322-32.

44. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 841-42, 863-65 (1984).

45. *Brind*, [1991] 1 App. Cas. at 757-59; Council for Civil Serv. Unions v. Minister for the Civil Serv., [1985] App. Cas. 374, 410 (appeal taken from C.A.); Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K.B. 223, 230 (C.A.) (holding that an administrative regulation may not stand if it is "so unreasonable that no reasonable authority could ever have come to it"); *see* SIR WILLIAM WADE, ADMINISTRATIVE LAW 388-462 (6th ed. 1988); *see also* ATIYAH & SUMMERS, *supra* note 18, at 61 & n.72.

46. *Brind*, [1991] 1 App. Cas. at 761-62; Krotoszynski, *supra* note 21, at 1420-25.

47. *Brind*, [1991] 1 App. Cas. at 762.

2. Brind *and Judicially Created Speech Interests*

In *Brind*, the British judiciary had to decide whether an administrative regulation proscribing the in-person broadcast of any message by an official representative of certain allegedly terrorist political organizations[48] exceeded the lawful authority of the government[49] minister who promulgated the regulations.

Then-Home Secretary Douglas Hurd promulgated the directive pursuant to the Broadcasting Act of 1981,[50] which authorized the Home Secretary to establish restrictions on domestic publicly-owned broadcasters. The directive requires the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority (IBA):

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48. Including Sinn Fein, Republican Sinn Fein, and the Ulster Defence Association. *Brind*, [1991] 1 App. Cas. at 755. Sinn Fein and Republican Sinn Fein are organizations committed to the reunification of Ireland, and historically have not proven averse to the use of force in their attempts to further this objective. The Ulster Defence Association is committed to the continued unification of Northern Ireland with the United Kingdom, and has proven itself equally receptive to the use of force. *See generally* David Remick, *A Reporter At Large: Belfast Confetti*, NEW YORKER, Apr. 25, 1994, at 58 (discussing the shared propensity for terrorist violence on the part of republican and unionist paramilitary groups in Norther Ireland).

49. *See* F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 387-405 (1908) (discussing the composition and historical development of the "government").

50. Section 29(3) of the Broadcasting Act, in relevant part, provides:

> Subject to subsection (4), the Secretary of State may at any time by notice in writing require the Authority [the IBA] to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice.

In turn, section 4(1) of the Broadcasting Act provides:

> It shall be the duty of the Authority to satisfy themselves that, so far as possible, the programmes broadcast by the Authority comply with the following requirements [including] — (*a*) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling.

reprinted in Brind, [1991] 1 App. Cas. at 752-53. Subsection (1)(b) and (1)(f) provide, respectively, that the Authority must provide news programming and that programming relating to political matters be impartial.

Although these media restrictions may initially seem incredible to American eyes, two mitigating considerations apply. First, the provisions of the Broadcasting Act apply to a public entity, not a private concern. Mandating editorial neutrality is at least arguably less odious in this circumstance. *But cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding government requiring or forbidding newspaper to publish specified matter is unconstitutional). Second, insofar as a government subsidy of the speech is involved, it is quite conceivable that the First Amendment would not stand as *any* impediment to a like scheme of regulation, for say, the Corporation for Public Broadcasting. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991). Consistent with *Rust*, so long as the journalists were not required to represent that the views they expressed were their own views, *see Rust*, 111 S. Ct. at 1776, the government could most assuredly regulate the content and editorial policies of the publicly-owned broadcast outlet. The purpose of setting forth the statute is primarily to show that the Home Secretary seemingly held broad discretion in regulating the content of broadcasts through either the BBC or IBA.

> to refrain from broadcasting any matter which consists of or includes—any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where—(a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 below or (b) the words support or solicit or invite support for such an organisation, other than any matter specified in paragraph 3 below.[51]

The ban applies only to certain organizations:

> The organisations referred to in paragraph 1 above are—(a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and (b) Sinn Fein, Republican Sinn Fein and the Ulster Defence Association.[52]

Finally, paragraph three limits the applicability of paragraph one:

> The matter excluded from paragraph 1 above is any words spoken—(a) in the course of proceedings in Parliament, or (b) by or in support of a candidate at a parliamentary, European parliamentary or local election pending that election.[53]

The ban also does not apply to purely fictional works.[54]

Consistent with the terms of the directive, the broadcast media can report the words of an official representative of a proscribed organization; indeed, using actors, they may even recreate the statement.[55]

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51. Directive of the Home Secretary (Oct. 19, 1988), *reprinted in Brind*, [1991] 1 App. Cas. at 711 (C.A.).

52. *Id.*

53. *Id.*

54. *See* Letter from Mr. C.L. Scoble, Office of the Home Secretary, to the BBC (Oct. 24, 1988), *reprinted in Brind*, [1991] 1 App. Cas. at 753-54.

55. The Home Secretary's Office made this clear in an explanatory letter:

> [T]he correct interpretation (and that which was intended) is that [the directive] applies only to direct statements and not to reported speech, and that the person caught by the notice is the one whose words are reported and not the reporter or presenter who reports them. Thus the notice permits the showing of a film or still picture of the initiator speaking the words together with a voice-over account of them, whether in paraphrase or verbatim. We confirmed that programmes involving the reconstruction of actual events, where actors use the verbatim words which had been spoken in actuality, are similarly permitted.

Letter from Mr. C.L. Scoble, Office of the Home Secretary, to the BBC (Oct. 24, 1988) (explaining the regulation's intended scope) *reprinted in Brind*, [1991] 1 App. Cas. at 753-54.

A hypothetical demonstrates the absurdity of the regulation. Under the ban, a show styled

The directive thus erects a prior restraint[56] against the broadcasting of statements by certain persons, unless the statements were made incident to an election or are part of a fictional work.

The House of Lords' standard of review for the Home Secretary's action was quite modest: the sole question before the court was whether a reasonable administrator could reasonably have promulgated the regulation at issue.[57] The House of Lords does not exercise plenary review of an administrator's choice among policy options; rather, the Lords are limited to reviewing a decision to ensure that it was not wholly arbitrary.[58] Lord Ackner explained that unlike run-of-the-mill legal cases in which the courts exercise "appellate" jurisdiction, that is, the power to review a trial court's decision on the merits without regard to the lower court's disposition of the legal issues, the court's review of an administrator's exercise of discretion is merely "supervisory."[59]

Despite the court's admittedly modest scope of review, four of the five law lords hearing the case strongly suggested in dicta that they would reject a regulation regulating speech more aggressively; a more stringent regulation of speech[60] would be sufficiently "perverse" to

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"Gardening with Sinn Fein" would be prohibited if the show were hosted by an official representative of Sinn Fein and the gardening tips were sanctioned by the group. However, if an actor recreated the Sinn Fein programming or a broadcaster used a voice-over to convey the message, the ban would not apply. Likewise, a suitably sinister actor could recreate a terrorist communication, and such programming could be broadcast with impunity. (Although, the actual speaker could presumably be held accountable for threats of violence).

56. *See* Near v. Minnesota, 283 U.S. 697, 716-720 (1931). Prior restraints are highly disfavored instruments under the Supreme Court's longstanding First Amendment jurisprudence. Whether this will remain the case under the Rehnquist Court may be open to some doubt, and not without cause. *See, e.g.*, Cable News Network v. Noriega, 498 U.S. 976, 976 (1990) (Marshall, J., dissenting) (arguing that the Court should not have denied certiorari to determine whether a prior restraint was constitutional).

57. *Brind*, [1991] 1 App. Cas. at 748, 751, 757-58, 764-66; *see also* Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp., [1947] 2 All E.R. 680, 683 (C.A.).

58. *Brind*, [1991] 1 App. Cas. at 748-49, 757-58.

59. *Id.* at 757.

> Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its [own view], the judicial view, on the merits and on that basis to quash the decision.

Id. For an administrative law analog in the United States, see Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-44, 864-66 (1984) (deferring to the Environmental Protection Agency's interpretation of the Clean Air Act).

60. For instance, an administrative regulation that prohibited media outlets from propagating the advocacy of the reunification of Ireland as treason against the Crown would presumably be beyond an administrator's power in the absence of an express parliamentary delegation of authority to promulgate such a regulation. *See Brind*, [1991] 1 App. Cas. at 748-49, 750, 757, 763.

fail the "reasonableness" test.[61]

Among the law lords, Lord Bridge is the strongest proponent of free speech as a normative value in the process of judicial review of the exercise of discretionary administrative authority.[62] After noting that the court lacked authority to consider whether the regulation was consistent with Article 10 of the ECHR, Lord Bridge explained that "[I] do not accept that this conclusion means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights."[63] He continued:

> In exercising the power of judicial review we have neither the advantages nor the disadvantages of any comparable code [referring to the ECHR] to which we may refer or by which we are bound. But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, *we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.*[64]

Lord Bridge observed that the "primary judgment as to whether the particular competing public interest justifies the particular restriction imposed" is within the administrative decisionmaker's province.[65] However, the British courts "are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."[66] Applying the test he proposed, Lord Bridge, joined by Lord Roskill, concluded that the restriction at issue furthered an important public interest, and that a reasonable administrator therefore could adopt the regulation.[67]

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61. *See id.* at 751.

62. Opinions of the House of Lords, unlike the Supreme Court, are issued seriatim, with each law lord on a particular panel holding forth individually. However, it is not unusual for a lord to write a short opinion that simply concurs in the opinion of another panel member. *See, e.g., Brind*, [1991] 1 App. Cas. at 749-50 (concurring opinion of Lord Roskill).

63. *Id.* at 748.

64. *Id.* at 748-49 (emphasis added).

65. *Id.* at 749.

66. *Id.*

67. *Id.* at 749-50.

Although ostensibly cabined within the confines of the "reasonable administrator/reasonable conclusion" test, Lord Bridge's opinion promulgates a relatively stout framework for applying that test: "an important competing public interest" is necessary to justify "*any* restriction" on "the right to freedom of expression."[68] This test sounds somewhat like the Supreme Court's "compelling state interest" test, used in cases such as *Boos v. Barry*.[69] To be sure, Lord Bridge's "important competing public interest" test appears to be at least marginally less protective than the "compelling state interest" test, insofar as "compelling" connotes a sense of urgency not inherent in the words "important competing." Regardless of the relative strength of the test, Lord Bridge's opinion is significant because it demonstrates that absent any written document providing a textual basis for the protection of speech interests, a law lord is prepared to promulgate de novo a standard for the protection of speech interests, and moreover, a standard with potential bite.

Lord Bridge and Lord Roskill were not the only members of the *Brind* panel who gave voice to concerns over the protection of free speech. Lord Templeman expressed what Lord Bridge merely implied: "My Lords, freedom of expression is a principle of every written and unwritten democratic constitution."[70] Lord Templeman ultimately concluded that "the interference with freedom of expression" caused by the regulation was "minimal" and that "the reasons given by the Home Secretary [were] compelling."[71] Like Lord Bridge, Lord Templeman decried engaging in judicial review beyond ensuring that the "reasonable administrator/reasonable decision" standard has been satisfied.[72] However, according to Lord Templeman, the context in which the reasonableness analysis occurs must take account of the value British society places on free expression.[73]

Lord Lowry's opinion also reflected concern for the protection of free expression:

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68. *Id.* at 748-49 (emphasis added).

69. 485 U.S. 312 (1988). To justify a content-based restriction on political speech, the Supreme Court has "required the State to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 321 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Justice Kennedy has recently objected to the use of the "compelling state interest" test in cases involving content-based restrictions on speech protected by the First Amendment. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501, 512-15 (1991) (Kennedy, J., concurring).

70. *Brind*, [1991] 1 App. Cas. at 750.

71. *Id.* at 751.

72. *Id.*

73. *See id.* at 749-50.

> [T]he inspiration for the applicants' argument, if not perhaps the facts on which the argument is based, is closely linked with the principle of freedom of speech in a democratic society, so far as compatible with the safety of the state and the well-being of its citizens, which may provide a reason for me to say something.[74]

Lord Lowry concluded that the restrictions at issue imposed at most a "modest" burden on freedom of expression.[75] However, he emphasized that "administrative acts" which severely burdened free expression "might well be justified, but they would certainly deserve the closest scrutiny."[76]

The remaining panel member, Lord Ackner, noted that "[i]n a field which concerns a fundamental human right—namely that of free speech—close scrutiny must be given to the reasons provided as justification for interference with that right."[77] Lord Ackner found that "the extent of the interference with the right to freedom of speech is a very modest one,"[78] and concluded that it was therefore reasonable.

Significantly, Lord Ackner appeared to place considerable reliance on Parliament's subsequent affirmation of the Home Secretary's regulation.[79] Thus, for Lord Ackner, Parliament's overt approval of the directive counted heavily against finding that the regulation was unreasonable.[80] However, Lord Ackner's ultimate conclusion probably stems as much from his conclusion that the directive's interference with the right to free expression was minimal as from his respect for Parliament's imprimatur.[81]

3. Brind *and the Limits of Unwritten Protections of Civil Liberties*

Brind demonstrates that the absence of a written provision protecting free expression does not bar consideration of speech interests as either a "right" or a decisional "principle."[82] In *Brind*, three of the

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74. *Id.* at 763.
75. *Id.* at 764.
76. *Id.* at 763.
77. *Id.* at 757.
78. *Id.* at 759.
79. *Id.* at 756, 758.
80. *See id.* at 756, 758.
81. *Id.* at 759.
82. Note that Lord Bridge, joined by Lord Roskill, and Lord Ackner refer to a *right* of free expression. *Id.* at 749, 750, 757. However, Lord Templeman recognizes that "freedom of expression is a *principle*," *id.* at 750 (emphasis added); Lord Lowry also refers to freedom of expression as a "principle." *Id.* at 763. Thus, three of the five lords on the panel characterized "freedom of expression" as a "right."

five law lords view free expression as a fundamental "right." All five lords believe that when an administrator promulgates a regulation which impinges on free expression, the regulation must receive "close" or the "closest scrutiny" and/or further an "important public interest." Although one may quibble with the result that the lords reach, the language they use along the way closely parallels the language of Supreme Court cases interpreting the First Amendment.[83]

The limited scope of review applicable to the regulation at issue in *Brind* did not prevent the lords from expounding on the administrator's need to have an important reason for exercising his discretion as he did.[84] Moreover, the law lords placed considerable emphasis on the limited nature of the restriction at issue; the regulation merely precluded certain persons, under certain conditions, from directly spreading their message via broadcast media. Neither the message nor the messenger were barred from the exercise of free speech in other fora. Particularly compelling from the lords' perspective was the potential for furthering acts of terrorism through in-person presentations by representatives of the affected organizations.

Brind shows that the existence of a written legal provision protecting free expression is not a condition precedent to the consideration or vindication of speech rights in a democratic society. The law lords are prepared to hold as an abuse of discretion the more ambitious attempts by administrative decisionmakers to impose limits on free expression.[85] To be sure, *Brind* only affords a modicum of protection to free expression; Parliament is always free either to write a statute that expressly confers discretion on an administrator to regulate expression or simply to codify a particular restriction on free speech. *Brind* offers no relief whatsoever in the face of an unambiguous parliamentary enactment.

Brind is significant not because it represents a "strong" free expression case, but rather because it shows that the British judiciary, left to its own devices, will embrace free expression as a decisional norm without any prodding from Parliament. Community tradition, rather than legal fiat, provides the British judiciary with sufficient justifica-

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83. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501 (1991); Boos v. Barry, 485 U.S. 312 (1988); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

84. *Brind*, [1991] 1 App. Cas. at 748-50, 757-59, 763.

85. For instance, should the Home Secretary prohibit the media from reporting on the political activities of Sinn Fein, it seems entirely probable that, under *Brind*, the House of Lords would quash the regulation. Such hypothetical regulation would impose more than a minimal restriction on freedom of expression, and would be extremely difficult to justify as serving a "compelling" need.

tion to create and police barriers against enforcement of restrictions on free expression absent overt approval by Parliament.[86] The strong and longstanding British community tradition in favor of permitting any citizen to speak his piece constitutes, at least in the abstract, a viable *partial* alternative to a legal right stemming from a textual source.

B. Rust *and Limits of the First Amendment*

Both superficially and in practice, free speech enjoys much greater protection in the United States than in Great Britain. The modern Supreme Court's somewhat reflexive vindication of First Amendment claims in many recent cases[87] reflects a solicitude for free speech not necessarily shared in other countries—including Great Britain.[88] The Court's willingness to vindicate speech rights is, of course, undeniably a function of the Speech Clause of the First Amendment.[89]

The existence of the First Amendment, however, does not necessarily mean that the federal courts will always or predictably vindicate speech claims.[90] The First Amendment certainly requires the Supreme Court to consider a speech claim on the merits,[91] but does not fore-

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86. Suppose that Article 10 were domestically applicable in Britain. Would the result in *Brind* necessarily change as a result? It seems doubtful, given Article 10's express sanction of restrictions on free expression necessary to protect "national security," "public safety," and "disorder or crime." ECHR, art. 10(2). The only real question would then be whether the regulation at issue was "necessary in a democratic society." *Id.* Given the limited scope of the regulation, it could be argued (perhaps successfully) that the social benefit conferred by the regulation is so modest as to render the regulation unnecessary. *But see* Glimmerveen & Hagenbeek v. The Netherlands, 4 Eur. H.R. Rep. 260 (1979) (holding that The Netherlands could prohibit racist political speech without violating Article 10's guarantee of free expression).

The fate of the regulation under Article 10 will soon be tested. The journalists who served as plaintiffs in *Brind* intend to bring a complaint before the European Commission on Human Rights, and, perhaps, bring suit before the European Court of Human Rights under Article 10. *See* Patricia Wynn Davies, *Law Lords Uphold Media Bar on IRA*, INDEPENDENT, Feb. 8, 1991, at A10.

87. *See, e.g., Simon & Schuster Inc.*, 112 S. Ct. at 501; Texas v. Johnson, 491 U.S. 397 (1989); Hustler Magazine v. Falwell, 485 U.S. 46, 55-56 (1988).

88. *See* WILLIAM VAN ALSTYNE, FIRST AMENDMENT CASES AND MATERIALS 3-5, 14 (1st ed. 1991).

89. *See generally* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2873, 2874-76, 2884-85 (1992) (Scalia, J., dissenting) (arguing that as a general matter only rights with a textual foundation in the Constitution should be enforced by courts); Coy v. Iowa, 487 U.S. 1012, 1015-19 (1988) (holding that the Confrontation Clause of the Sixth Amendment precludes a state from permitting a minor to testify via closed circuit television set); Hudson v. Palmer, 468 U.S. 517, 541, 555-56 (1984) (Stevens, J., concurring in part and dissenting in part) (explaining that a written constitution provides a greater degree of protection for enumerated rights).

90. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-78 (1968).

91. *See* Krotoszynski, *supra* note 21, at 1448-49.

close a result adverse to the vindication of the claim.[92] The natural question, then, is how much bite a textual provision entrenching speech rights actually has. Put differently, absent the First Amendment, would the Supreme Court have decided a significant number of its more important First Amendment precedents differently, or rather, would the Court have vindicated the speech claims under some other constitutional theory?[93]

The House of Lords' decision in *Brind* suggests that speech rights relate to sufficiently important community traditions[94] to warrant solicitude by courts *regardless* of the precise source of the interest in free speech. Likewise, the Supreme Court's decision in *Rust* suggests that even where a community's tradition of support for free speech is both strong and codified in the foundational legal document, a sufficiently politicized Court is quite capable of ignoring the textual provision.

1. Rust *and the Failure of the Supreme Court to Vindicate Free Expression*

Rust v. Sullivan[95] presented the question of whether certain administrative regulations promulgated by the executive branch of government were consistent with the free speech guarantee of the First Amendment.[96] The facts are relatively straightforward.

In 1970, Congress adopted a restriction on the expenditure of federal family planning appropriations.[97] Codified at section 300a-6 of Title 42, the provision states that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[98]

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92. *See, e.g.*, Rust v. Sullivan, 111 S. Ct. 1759, 1775-76 (1991).

93. An obvious candidate would be the Due Process Clause of the Fourteenth Amendment. *See* Roe v. Wade, 410 U.S. 113, 152-54 (1973); Griswold v. Connecticut, 381 U.S. 479, 481-486 (1965). Professor William Van Alstyne has suggested that free speech values could have been imported into the Constitution through the *Guaranty Clause*, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4, cl. 1; *see* VAN ALSTYNE, FIRST AMENDMENT, *supra* note 6, at 8-9. To be sure, the existence of the First Amendment Speech and Press Clauses most certainly help to ensure that federal court judges will perk up and listen when a free speech claim is presented for review. This does not necessarily mean, however, that such claims would fail to receive consideration on the merits absent the clauses.

94. This Article adverts to the "Anglo-American" tradition of law, and assumes for purposes of this endeavor that the people of the United States and Great Britain share a heritage with significant common elements.

95. 111 S. Ct. 1759 (1991).

96. *Id.* at 1765-66.

97. H.R. CONF. REP. No. 1667, 91st Cong., 2d Sess. 8, *reprinted in* U.S.C.C.A.N. 5068, 5081-82 (1970); *see also* 42 U.S.C. § 300a-6 (1988).

98. 42 U.S.C. § 300a-6 (1988).

In 1988, the Reagan Administration reinterpreted this provision and promulgated a revised code of conduct for physicians participating in the Title X program.[99] Under the regulations, a doctor could not mention the availability of abortion to women who participated in the Title X program.[100] Even if a pregnant patient asked about the availability of abortion as a possible course of treatment, the attending physician could not counsel her in his best professional judgment.[101] Rather, the Reagan Administration required the doctor to say that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[102] Interestingly, the regulations expressly authorized physicians to refer pregnant women for prenatal care.[103] Thus, the regulations prohibited any discussion of abortion, ostensibly because abortion was outside the terms of the project. At the same time, participating clinics were required to refer patients for prenatal care, refuting any claim that the Title X program's services ended once a woman became pregnant.

Rust presented two discrete questions for review. The first related to the Department of Health and Human Services (HHS) decision to change its interpretation of section 300a-6.[104] The second issue, the question of the regulation's consistency with the First Amendment, need only have been reached if the Court concluded that the change in HHS policy had been adequately justified.[105] The majority concluded that HHS had justified its change of policy under section 300a-6,[106] and therefore decided the First Amendment claims.

The First Amendment issue was relatively simple: Could the federal government condition participation in the Title X program on compliance with the administration's speech regulations? The Supreme Court answered in the affirmative.[107]

Chief Justice Rehnquist, writing for the majority, reasoned that the government was not required to subsidize all speech equally.[108] He opined that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it be-

99. *Rust*, 111 S. Ct. at 1765-66.

100. 42 C.F.R. § 59.8(b)(5) (1992). On his first day in office, President Clinton repealed these regulations. *See* 58 Fed. Reg. 7455 (Feb. 5, 1993).

101. *See* 42 C.F.R. § 59.8(b)(5) (1992).

102. *Id.*

103. 42 C.F.R. §§ 59.8(b)(1), (5) (1992).

104. Rust v. Sullivan, 111 S. Ct. 1759, 1767-69 (1991).

105. *Id.* at 1778-80 (Blackmun, J., dissenting); 1788-89 (O'Connor, J., dissenting).

106. *Id.* at 1769.

107. *Id.* at 1771-76.

108. *Id.* at 1772-73.

lieves to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way."[109] The Chief Justice observed that in exercising its taxing and spending powers, Congress could legitimately favor one kind of speech over another to further an otherwise legitimate policy choice.[110]

The *Rust* majority also rejected the petitioners' argument that the regulations violated the unconstitutional conditions doctrine.[111] Under the doctrine, government may not condition the conferral of a valuable governmental benefit on the ceding of some otherwise protected right or liberty.[112] Put differently, the government may not use its largesse "to produce a result which [it] could not command directly."[113] The petitioners argued the regulations at issue impermissibly required participating clinics to cede their speech rights regarding the right to choose abortion to obtain the valuable benefit of Title X funds.[114] The *Rust* Court turned this objection aside simply by noting that participating clinics were free to exercise their speech rights as they wished, so long as they did not use Title X funds to promote abortion.[115]

The Court also rejected the petitioners' argument that the regulations unduly burdened physicians' ability to discharge in good conscience their professional duties.[116] The majority declined to decide whether doctors possessed a protected First Amendment interest in communicating with their patients because the regulations did not require the doctors to represent the forced speech as their own.[117] According to the majority, women who relied on Title X clinics for competent, professional medical advice did not rely on the clinic doctors for comprehensive medical counselling because "the doctor-patient relationship established by the Title X program [is not] sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice."[118]

Finally, the majority determined that a woman's Fifth Amendment right to an abortion was not implicated by the government's decision not to subsidize abortion counseling incident to family planning services.[119] Because the government is not obliged to subsidize a woman's

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109. *Id.* at 1772.
110. *Id.* at 1773 & n.4.
111. *See* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).
112. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).
113. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
114. *Rust*, 111 S. Ct. at 1774.
115. *Id.* at 1774-75.
116. *Id.* at 1776.
117. *Id.*
118. *Id.*
119. *Id.* at 1776-78.

fundamental right to choose abortion, the government is likewise not required to subsidize counselling services related to that right.[120]

Justice Blackmun, in dissent, took issue with every step of the majority's analysis.[121] For present purposes, this Article will examine only the dissent's analysis of the majority's treatment of the speech related claims.[122]

First, Justice Blackmun found that the regulations violated the unconstitutional conditions doctrine by conditioning a valuable governmental benefit on the ceding of protected speech rights.[123] His principal objection was with the majority's assertion that the government was simply subsidizing certain kinds of services and speech incident to those services.[124] The regulations did not prohibit—indeed they encouraged[125]—speech favorable to carrying the fetus to term. Thus, the regulations only prohibited speech by Title X clinics relating to abortion and abortion services.[126]

Second, Justice Blackmun took issue with the majority's analysis of doctors' interest in providing full medical disclosure to their patients.[127] He reasoned that if the government could circumscribe a doctor's professional speech as a condition of receiving government funds, "the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace."[128]

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120. *Id.* at 1777.

121. *Id.* at 1778-86 (Blackmun, J., dissenting).

122. The task at hand is not to establish the general injustice of the *Rust* decision, but rather to demonstrate that the existence of a written constitutional provision expressly protecting free speech made little difference to the outcome of the case.

123. *Rust*, 111 S. Ct. at 1780-82; *see* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).

124. *Rust*, 111 S. Ct. at 1781-82, 1781 n.2.

125. 42 C.F.R. §§ 59.8(a), (b) (1992).

126. *Rust*, 111 S. Ct. at 1782.

127. *Id.* at 1782-84.

128. *Id.* at 1783 (emphasis in original). A hypothetical helps to illustrate Justice Blackmun's concerns. Suppose a law school professor at a state-funded institution teaches the introductory course in constitutional law. Suppose further that the governor and state legislature decide to appropriate funds for the express purpose of providing instruction in constitutional law at the publicly funded state law school. To make the picture complete, we need only hypothesize that as a condition of the grant, which any instructor at the law school is free to accept or reject as she pleases, the instructor must teach that the equal protection doctrine of "separate but equal" as set forth in Plessy v. Ferguson, 163 U.S. 537 (1896), is the only correct interpretation of the Equal Protection Clause of the Fourteenth Amendment, and that Brown v. Board of Educ., 347 U.S. 483 (1954) and Gayle v. Browder, 352 U.S. 903 (1956), which hold otherwise, were incorrectly decided and reflect the basest form of judicial usurpation. Relatively settled law on the First Amendment and academic freedom would, until *Rust*, have presumably precluded either the federal or a state government from so limiting the professional activities of our hypothetical constitutional law instructor. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312

2. Rust *and the Non-Applicability of the First Amendment*

For present purposes, *Rust* is significant primarily for its holding that the government's gag on a physician's speech to further a policy favoring childbirth was constitutional.[129] More specifically, the question of the level of scrutiny brought to bear on the restriction deserves close attention. Presumably, the First Amendment must have mandated that the Court examine with "closest scrutiny"[130] such a restriction. Alternatively, the Court could have required the Secretary of Health and Human Services to justify the restriction on a physician's professional speech under a slightly less rigorous test—perhaps the Secretary need only have proffered "an important competing public interest."[131]

Careful review of the majority's decision reveals that the government had virtually *no* burden to meet—the government was free to pursue the policy without any constitutional impediment, even though the method of implementing the policy had a profound impact on the speech rights of physicians participating in the Title X program.[132] Justice Blackmun failed to target the most troubling turn of logic in the majority's approach: the absence of any statement regarding the level of scrutiny to which the Court would subject the proposed regulation as it related to a physician's professional speech.[133]

Apparently, the government is free, incident to a policy choice to subsidize family planning but not abortion, to restrict professional speech incident to the subsidized services without meeting any level of

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(1978) (Opinion of Powell, J.); Keyishian v. Board of Regents, 385 U.S. 589, 609-10 (1967); *see also* Van Alstyne, *Historical Review*, *supra* note 16, at 112-14.

The *Rust* majority declined to decide whether a medical doctor acting in a professional capacity enjoys the same First Amendment protection of his professional speech as an academician, because the regulations "do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold." *Rust*, 111 S. Ct. at 1776. Under this rationale, so long as a university professor was not required to represent particular viewpoints as her own—i.e., so long as she could at least marginally disassociate herself from them outside the classroom—the state may force her to abdicate her professional duties and academic integrity. Whether this is a salutary doctrine in First Amendment jurisprudence seems, at best, dubious. *Cf.* Young Women's Christian Ass'n of Princeton v. Kugler, 342 F. Supp. 1048, 1063 (D.N.J. 1972); Van Alstyne, *Historical Review*, *supra* note 16, at 153-54.

129. *Rust*, 111 S. Ct. at 1776.

130. Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 763 (appeal taken from C.A.); *see also Brind*, [1991] 1 App. Cas. at 757 (calling for "close scrutiny").

131. *Brind*, [1991] 1 App. Cas. at 749.

132. *See Rust*, 111 S. Ct. at 1776 (requiring no justification for the restriction on a treating physician's speech).

133. *Id.* at 1782-84. Justice Blackmun quibbles merely with the result, and not with the particular means to the result.

scrutiny. "[T]he general rule that the Government may choose not to subsidize speech applies with full force."[134] Thus, a person whose speech is restricted incident to an otherwise legitimate governmental program has no First Amendment interest in maintaining his or her speech rights while on duty. If the government subsidizes A, and a person paid by the government to provide A feels a professional obligation to tell the putative recipient of A that he or she might wish to consider the possibility of B, that is just too bad. The government has no obligation to explain or to justify why it chose to preclude any discussion of B, even if in the professional judgment of the person providing A, mention of B seems mandatory.[135] Likewise, a patient has no protected First Amendment interest in hearing the speech.[136]

Where is the First Amendment in all this? Apparently, it simply has no application on these facts.[137] Under the First Amendment, "Con-

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134. *Id.* at 1776.

135. This actually implicates two speech interests: (1) the interest of the professional when performing duties to do so in a fashion consistent with prevailing professional standards of care, and (2) the recipient's interest in receiving the information. On the first point, see Keyishian v. Board of Regents, 385 U.S. 589 (1967); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970), on the second, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756, 757 & n.15 (1976). For whatever reason, Justice Blackmun's *Rust* dissent largely ignores the patient's interest in receiving accurate and complete medical information. *See Rust*, 111 S. Ct. at 1782 n.3, 1783. Yet, the *Rust* majority's approach entirely discounts the patient's interest in full disclosure with the offhanded observation that "[t]he program does not provide post-conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." *Id.* at 1776. This approach is troublesome for several reasons.

First, its factual premises are flawed: why would it be "unreasonable" for a patient who discovers that she is pregnant to assume that her doctor's silence on the question of abortion reflects a negative determination about the abortion procedure in her case? Moreover, if a patient has doubts about the desirability or appropriateness of an abortion and asks about abortion, the treating physician is required under the regulations to tell her that "abortion [is not] an appropriate method of family planning." 42 C.F.R. § 59.8(b)(5) (1992). Thus, if a patient asks about abortion, any doubts she has regarding the possibility of obtaining an abortion are to be answered in a fashion suggesting that the option is not a viable one.

Second, and perhaps more importantly, the government has not been put to any test regarding this restriction on the doctor's right to speak and the patient's right to hear. *Cf. Rust*, 111 S. Ct. at 1776 ("We need not resolve [the First Amendment] question here . . . because Title X program regulations do not significantly impinge upon the doctor-patient relationship."). The Court is prepared to accept the restriction without any substantive justification regarding either its necessity or appropriateness. *Id.*

136. *Compare Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57 (holding that any First Amendment protection enjoyed by advertisers seeking to disseminate prescription drug price information also is enjoyed by the recipients of such information and therefore may be asserted by the recipients) *with Rust*, 111 S. Ct. at 1776 (holding that the doctor-patient relationship does not justify an expectation on the part of the patient of comprehensive medical advice from a doctor in a government-funded clinic).

137. *See Rust*, 111 S.Ct. at 1776.

gress shall make no law . . . abridging the freedom of speech."[138] It necessarily follows that Congress cannot delegate to the executive branch the task of making a law abridging the freedom of speech and thereby achieve indirectly what it could not itself do. Yet, this is precisely the action the Supreme Court sanctions in *Rust*.[139] So, a written constitutional provision that ostensibly protects both the right to speak[140] and the right to hear[141] may be abrogated at will if the government is subsidizing the forum in which the restriction is to apply.

Rust strongly demonstrates the limits of a written constitution; a textual right is only as powerful as the resolve of those charged with enforcing it.[142]

III. *BRIND, RUST* AND THE LIMITS OF WRITTEN CONSTITUTIONAL PROVISIONS

Viewing *Brind* and *Rust* in juxtaposition, one might wonder which tribunal was working with a stronger legal protection of free speech. The House of Lords subjected the Home Secretary to a far more probing review of the broadcasting restriction than the Supreme Court required of the Secretary of Health and Human Services in *Rust*. This result is at least mildly surprising, especially if one has faith in the power of written constitutional protections.

The restrictions on freedom of expression at issue in *Brind* and *Rust* are not much different qualitatively.[143] Both involve administrative re-

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138. U.S. CONST. amend. 1.

139. Whether Congress intended 42 U.S.C. § 300a-6 (1988) to impose the "gag" rule is open to doubt, if the Congressional hostility to the regulation was any indication. *See* Title X Pregnancy Counseling Act of 1991, S. 323, 102d Cong., 1st Sess. § 2 (1991); Family Planning Amendments Act, H.R. 3090, 102d Cong., 1st Sess. § 2 (1991); *see* 138 CONG. REC. H 2,822-51 (Apr. 30, 1992) (House debate on H.R. 3090); 138 CONG. REC. H 10,667-77 (Oct. 2, 1992) (House debate on override of presidential veto of S. 323). Senate Bill 323 passed both houses, but, citing *Rust* in support of his position, then-President Bush vetoed the bill on September 25, 1992. 138 CONG. REC. H 10,667 (Oct. 2, 1992). Although the Senate voted to override the President's veto by a margin of 73 to 26, *see* 138 CONG. REC. H 10,667, the House failed to muster the required two-thirds majority override vote. 138 CONG. REC. H 10,678 (recording vote of 266 in favor and 148 opposed to override). President Clinton subsequently overturned the ban on his first day in office, Jan. 21, 1993. *See* 58 Fed. Reg. 7455 (Feb. 5, 1993).

140. *See, e.g.*, Cohen v. California, 403 U.S. 15, 16, 17, 22-23 (1971) (jacket bearing the message "Fuck the Draft" protected, even if carried in a courthouse); Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (speech advocating violent overthrow of the government protected); Terminiello v. City of Chicago, 337 U.S. 1, 2-4 (1949) (noting that racist, fascist speech is protected).

141. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976).

142. *See* VAN ALSTYNE, FIRST AMENDMENT, *supra* note 6, at 47-49.

143. *See supra* notes 48-56, 95-103 and accompanying text.

gulations used to implement ambiguous statutes,[144] both regulations proscribe certain kinds of speech deemed unworthy of government subsidy,[145] and both in a concrete way deny the right of free expression to those regulated. Finally, the results are roughly analogous. The shock value of comparing the two cases stems from the absence of a written constitutional protection for free speech in the case of *Brind* and the existence of such a provision in *Rust*.

Beyond irony, *Rust* and *Brind* invite two questions: First, upon what legal basis did the House of Lords import the value of free expression evidenced in the *Brind* decision. Second, upon what legal basis did the Supreme Court abdicate its responsibilities under the First Amendment in *Rust*. This Article will examine each of these questions in turn.

A. Brind *and Judicial Activism*

The opinions in *Brind* reflect a rare burst of judicial activism by the lords.[146] On their own and without parliamentary sanction,[147] the lords took upon themselves the task of safeguarding the English citizenry's right to free expression by incorporating a moderate-to-strong free speech value into the rational basis test used to review administrative acts.[148] Despite their protestations to the contrary,[149] the lords required more than mere rationality to justify the regulation.[150] In doing this, however, the lords acted legitimately.

Although there is no written provision in English law that guarantees freedom of expression,[151] there is a tradition in Britain of respecting the right of free expression. This is not to say that this tradition has always prevailed over popular sentiments favoring the abrogation of the right.[152] Nor is it to suggest that the tradition favoring free

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144. *See* Broadcasting Act, 1981, ch. 68, § 29(3) (Eng.); 42 U.S.C. § 300a-(6) (1988).

145. In the case of *Brind*, speech by official representatives of the designated entities carried by government-supported media; in the case of *Rust*, speech regarding the availability of abortions spoken by physicians whose clinics receive government support.

146. Traditionally, the British judiciary is loathe to engage in anything even arguably activist in nature. Krotoszynski, *supra* note 21, at 1411-13.

147. Indeed, the lords held forth *despite* express Parliamentary approval of the Home Secretary's directive. *See* Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 715 (C.A.) (noting that on Nov. 2, 1988, the House of Commons approved a motion by a vote of 243 to 179 that "this House approves the Home Secretary's action").

148. *Brind*, [1991] 1 App. Cas. at 748-49, 750, 757-58, 763.

149. *Id.* at 748-49, 763.

150. For an excellent example of a court honestly applying a true "mere rationality" standard of review, see Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991).

151. VAN ALSTYNE, FIRST AMENDMENT, *supra* note 6, at 47-48.

152. *See* Graham Zellick, *Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties*, 31 WM. & MARY L. REV. 773 (1990).

speech is a sure substitute for a written guarantee of free speech; it is not.[153] Rather, it would seem that the absence of a written guarantee of freedom of expression does not mean the individual's interest in free expression will be denied routinely and without recourse. Moreover, there is reason to believe that the absence of a written guarantee of free expression may be irrelevant in some cases, provided that an independent judiciary is prepared to consider on the merits the society's tradition favoring free expression. To be sure, a written provision guaranteeing freedom of expression would afford British citizens a greater and more predictable degree of protection.[154] However, the question is one of *degree* rather than substance.

B. Rust *and Judicial Abdication*

A written constitutional provision guaranteeing freedom of speech is of little use if the judiciary charged with enforcing the provision abdicates its responsibilities. *Rust* is an example of such judicial abdication. Regardless of where one stands on the merits of the regulation, it cannot be denied that the restriction on a doctor's right to impart medical information and the patient's interest in receiving such information merited closer scrutiny by the majority under the First Amendment. However, the *Rust* majority was content to apply a de facto rational basis standard of review when examining the speech limitations.[155]

The *Rust* majority did not misconstrue the First Amendment, but rather simply decided not to apply it to the case at hand.[156] Using faulty factual premises and non sequiturs, the majority decided that neither the physician nor the patient had any free speech interest in speech related to abortion in a government-sponsored family planning clinic.[157]

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153. *See* Krotoszynski, *supra* note 21; at 1431-32; VAN ALSTYNE, FIRST AMENDMENT, *supra* note 6, at 1-6, 11-16; *see also* New York Times Co. v. United States, 403 U.S. 713 (1971) (permitting newspapers to publish sensitive government papers on First Amendment grounds; no comparable British decision exists); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that the First Amendment restricts the application of the common law of libel to newspapers; no comparable British decision exists).

154. An easy way to accomplish this object would be through the incorporation of the ECHR into British domestic law. Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 761-62 (appeal taken from C.A.); *see also* Krotoszynski, *supra* note 21, at 1449-53.

155. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991).

156. *Id.*

157. *Id.* Essentially, the majority endorsed the government's position that speech about abortion, in the context of a doctor-patient relationship, was not relevant to the service provided by a Title X family planning clinic. This is akin to saying that speech about God is irrelevant in a church.

The *Rust* majority's approach to the free speech claim reflects a different kind of activism from that in *Brind*—namely judicial abdication.[158] By refusing to apply the Court's well-settled First Amendment analysis, the majority was able to reach the result it desired in the most expeditious fashion. In the majority's haste to uphold the gag rule, the First Amendment became an irrelevancy.

C. *Critical Legal Studies and Indeterminacy*

The novelty of *Brind* and *Rust* may have some currency beyond the straightforward point that written constitutions have their limits, and unwritten societal traditions can help inform decisional principles in appropriate cases. One of the main projects of the Critical Legal Studies (CLS) movement has been the indeterminacy problem. "[T]he indeterminacy argument [holds] that within the standard resources of legal argument [are] the materials for reaching sharply contrasting results in particular instances."[159] According to some in the CLS movement, "law is indeterminate at its core, in its inception, not just in its applications."[160]

Brind and *Rust* seem to support the CLS claim that "law is indeterminate at its core." After all, if law at the *constitutional* level is little more than the expressed policy preferences of a handful of elites wearing black robes, then there is little hope for determinacy at any level.[161] Arguably, a legal system's constitutional provisions—its foundational principles—should be the surest place to find stability and determinism. If judges are free to disregard fundamental laws at will, then they are likely to be free to disregard more mundane ordinances with impunity.

A reexamination of *Brind* and *Rust* with an eye toward the CLS indeterminacy argument will carry the main thesis of this Article—that written constitutions are helpful but unnecessary to vindication of

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158. For other examples of this phenomenon, see Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that statute requiring trains to provide separate but equal accommodations for white and black citizens was constitutional); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding that state regulation requiring public school students to recite the pledge of allegiance was constitutional); Korematsu v. United States, 323 U.S. 214 (1944) (holding that a military order which directed Japanese Americans to leave their homes, which were located in a West Coast military area, was constitutional).

159. *See* Tushnet, *CLS*, *supra* note 19, at 1524.

160. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 114 (1984).

161. Of course, the question whether the determinacy game is worth the candle is open to question. *See* Robert Lipkin, *Indeterminacy, Justification, and Truth in Constitutional Theory*, 60 FORDHAM L. REV. 595, 619-623, 642-43 (1992) (criticizing the determinacy/indeterminacy paradigm as unhelpful to meaningful analysis of constitutional adjudication).

rights—a step further. Moreover, the indeterminacy argument helps to explain, at least in part, the results in *Brind* and *Rust*.

1. The Indeterminacy Argument

Some members of the CLS school argue that legal rules are indeterminate,[162] and that principled decisionmaking cannot exist because its foundation—neutral, normative rules—does not exist.[163]

CLS holds that because the participants in the present legal system have a vested interest in maintaining the status quo, they refuse to recognize that the system of rules constituting the law is nothing but a subjective exercise by judges, who rely on the intellectual equivalent of smoke and mirrors to reach politically pleasing results.[164] As Professor Spann has explained, for many non-CLS adherents "any lingering dissonance between faith in the system's general fairness and perceptions of unfairness in particular cases is resolved through the conviction that while unjust results may constitute imperfections in practice, they do not undermine the theory of principled decision making itself."[165] The process of legal decision making confers legitimacy on the decision; a particular case may be resolved in any number of ways, so long as proper process is observed.

Under this world view, those who maintain a belief in principled decision making have failed to accept the basic truth that the legal system is actually a chaotic place where principle routinely falls to political preference. As a result, such persons are guilty of complicity in the continuing disempowerment of various groups, including women, minorities, and the poor.[166] Not only is the law indeterminate, but the fiction of principled decision making is merely a ruse used to hide the exercise of political power.[167]

Finally, but perhaps most importantly, many in CLS circles generally reject the construct of "rights" as a helpful means of identifying and protecting discrete minority interests.[168] CLS adherents seem to

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162. Tushnet, *CLS*, *supra* note 19, at 1524, 1538-39.

163. Spann, supra note 19, at 1734-39; *see* MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 46-52 (1988) [hereinafter TUSHNET, RED WHITE AND BLUE].

164. *See* Spann, *supra* note 19, at 1735; *cf.* VAN ALSTYNE, FIRST AMENDMENT, *supra* note 6, at 14-16 (arguing that process can legitimate judicial decision making).

165. *See* Spann, *supra* note 19, at 1736.

166. *Id.* at 1736-38; *see also* TUSHNET, RED WHITE AND BLUE, *supra* note 163, at 197-202; Neil Gotanda, *A Critique of Our Constitution is Colorblind*, 44 STAN. L. REV. 1, 8-12 (1991); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 33-41 (1984).

167. *See* TUSHNET, RED WHITE AND BLUE, *supra* note 163, at 51-52.

168. Gabel & Kennedy, *supra* note 166, at 33-34. Gabel and Kennedy explain this aspect of

view rights as merely one more tool for vindicating the policy preferences of the established ruling caste.[169] More subtly, some within the CLS movement argue that rights discourse emphasizes and helps to perpetuate an impersonal world in which individuals are needlessly alienated from the community of which they are inextricably a part.[170]

Given the foregoing premises, one may hypothesize that a CLS critique of *Brind* and *Rust* would probably run along the following lines:

> (1) Because the law is fundamentally indeterminate and judges are essentially political policymakers, judges are unconstrained and are unconstrainable;
> (2) It follows necessarily that it is not in the least surprising that the Supreme Court would largely ignore the First Amendment in *Rust*,

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the CLS canon as follows:

> Duncan
>
> What do you mean there are no rights?
>
> Peter
>
> They don't exist. They have no existence. They are shared, imaginary attributes that the group attributes to its members that don't in fact exist. It's a hallucination. Moreover, the group itself is not constituted. There is no constituted group here, that is in fact acting in any way that we should consider . . . . There is no group discussion; there is no shared power among people generating forms of consensus about social reality. Yet there are thousands of classes each year in "constitutional law" that pretend that such a constituted group exists.
>
> . . . .
>
> [T]he way it happens with lawyers is that lawyers are far down the ladder from the political theory. They are taught the presuppositions of the democratic political theory without ever in fact engaging in hardly any discussion of whether those presuppositions or what they're based on are true. So they're taught at a purely technical level how to manipulate things that are presupposed, such as that the Constitution is a democratic document, based on the will of the people. Nobody gets to discuss that. Instead, you learn constitutional law, which has good things in it like freedom of speech and equal protection. But all of which relegitimizes the idea that there is currently existing a political group, a group in fusion, that is developing forms of shared meaning that is what people want. That is the false consciousness. That does not exist. In fact, it is invented by people in the service of maintaining their fear and anxiety about really developing such a political group, because they choose to believe it, and it's not true.

Id. at 34-35. Thus, under this view, constitutional law is little more than a sham to justify the ruling class's continued empowerment, and the sham maintains itself by representing itself as a reflection of the values of a common culture.

169. *Id.* This criticism of rights includes attacks on the First Amendment Speech Clause. Gotanda, *supra* note 166, at 11. Most recently, CLS adherents have objected to constitutionally imposed impediments, based on First Amendment considerations, to prohibitions against so-called "hate speech" on university campuses. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Indeed, some in the CLS movement appear to reject the utility of written legal rules, even at the constitutional level, believing instead that some sort of communitarian discourse can more effectively resolve disputed matters. *See* TUSHNET, RED WHITE AND BLUE, *supra* note 163, at 317.

170. *See* Lawrence C. George, *Asking the Right Questions*, 15 FLA. ST. U. L. REV. 449 (1987).

nor is it surprising that the House of Lords would give voice to free speech values absent a textual referent compelling consideration of such values;
(3) *Brind* and *Rust* merely demonstrate that law is largely a function of politics,[171] a point that CLS has been explaining for years.[172]

A CLS critique of *Brind* and *Rust* certainly raises troubling possibilities about the nature of judges and judging. Judges free to ignore a constitutional provision they dislike or free to create a provision they deem desirable do not fit the determinist's mold of the neutral adjudicator. But does the play inherent in legal rules, even those with constitutional pedigrees, necessarily mean that the rules are not "rules" or that blessing them with a constitutional mandate is at best superfluous and at worst ludicrous? There is reason for some optimism that law is not merely politics.

2. *Living with Indeterminacy in Constitutional Adjudication*

Even if courts remain theoretically free to disregard constitutional mandates, such action does not entirely devalue the use of written decisional rules.[173] Moreover, the recognition and application of strong community traditions when applying legal rules need not be a cause for alarm. This is true for at least two reasons.

First, the existence of a written provision forces the judiciary to act, to respond to the provision, however disingenuously. Even when a court seemingly refuses to apply a particular constitutional provision fairly,[174] a court faced with a constitutional claim is obliged to explain itself. That is to say that the existence of a written constitutional provision at least nominally circumscribes judicial policy-making by forcing the decisionmaker to at least nod and wink at the ostensibly controlling provision; a written constitutional provision establishes a process through which the claim to a particular right may be raised and heard (if not vindicated).[175] In more ideal circumstances, the judi-

171. *See generally* Gotanda, *supra* note 166, at 11, 62-63; Gabel & Kennedy, *supra* note 166, at 33-41; Gordon, *supra* note 160, at 93-96, 114-16.

172. Gordon, *supra* note 160, at 93.

173. *Cf.* TUSHNET, RED WHITE AND BLUE, *supra* note 163, at 51-52, 197-202, 317.

174. *See, e.g.*, Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991).

175. *See id.*; *see also* VAN ALSTYNE, FIRST AMENDMENT, *supra* note 6, at 11-17; HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 20-22 (1961); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

ciary will simply enforce the provision in good faith.[176] Thus, the existence of the written provision, whether it is enforced in good faith or is merely an impediment to a result the court deems desirable, has a predictable and reliable effect on the outcome of concrete cases. To the extent indeterminacy exists, it is cabined.[177]

Second, there is nothing inherently indeterminate or illegitimate about judges relying on well-established traditions in society when applying and developing legal rules.[178] Problems of legitimacy and indeterminacy arise only when judges resort to tradition as the primary means of discerning the relevant decisional principle, even in the face of an ostensibly relevant and controlling written legal command.[179]

Reconsidered in light of the foregoing, *Rust* appears to be a poorly crafted decision. Even if the result in *Rust* is correct as a matter of

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176. *See, e.g.*, Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501, 512 (1991). The Supreme Court decided *Simon & Schuster* in same Term as *Rust*, and the result enjoyed the endorsement of a unanimous Court. Likewise, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988), exemplifies the Court enforcing the First Amendment in good faith. As with *Simon & Schuster*, the Court was of a single mind in *Falwell*. *See Simon*, 112 S. Ct. at 512.

177. *Cf.* Tushnet, *CLS*, *supra* note 19, at 1538-39. Tushnet argues that the real dispute within the academy is not whether indeterminacy exists—he suggests (correctly) that all sides agree that it does—but rather focuses on the *level* of indeterminacy within the system. CLS adherents argue that the level of indeterminacy is quite high, whereas the more traditionally minded folks believe that determinate results obtain fairly frequently. *Id.*

178. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (recognizing the sanctity of the family in holding that an ordinance which did not allow certain categories of relatives to live together was unconstitutional); *see also* Phillip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1309 (1989) ("[T]he liberal tradition (taking that to be the tradition of our Constitution and its construction) [ ] not only permits but requires [the] judges and presidents and members of Congress [to] resort to their consciences when, having scrupulously followed the modes that ensure legitimization, [a conflict remains]").

179. The Constitution provides that no state shall deprive any of its citizens "equal protection" of the laws. Thus, if a state attempted to deny black citizens the right to vote, such a restriction would be unlawful even if the state had a tradition of denying its black citizens the vote. *Compare* Grovey v. Townsend, 295 U.S. 45 (1935) (holding that the denial of the right to vote to a black citizen pursuant to the rules of the state's Democratic Party did not implicate state action and therefore did not violate the Fourteenth or Fifteenth Amendments) *with* Terry v. Adams, 345 U.S. 461 (1953) (holding that Democratic Party election machinery denied the right to vote to citizens on the basis of race in violation of the Fifteenth Amendment); Smith v. Allwright, 321 U.S. 649 (1944) (holding that the denial of the right to vote to a black citizen in a Democratic primary violated the Fifteenth Amendment). Turning to the use of tradition, a court presented with a case challenging the hypothesized law would act illegitimately if it upheld the regulation on the basis of the community tradition, the Equal Protection Clause notwithstanding. Recourse to tradition should occur only after the relevant decisional principle has been selected; tradition does not itself provide the decisional principle. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that due process of law is the relevant decisional principle); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the Ninth Amendment is the relevant decisional principle).

First Amendment law,[180] the majority did not explain or justify its failure to take up the primary First Amendment question on the merits. However, the radical indeterminacy suggested by some in the CLS school is not entirely borne out. First, the majority was constrained to at least explain (however unconvincingly) why the First Amendment was not implicated by either the physician's professional relationship with his patient or by the patient's interest in hearing the speech.[181] Second, the lack of indeterminacy in this area of the law is precisely what allows the disinterested observer to see the error in the majority's analysis. If the law were truly indeterminate, a "correct" result should not be obvious. That a given case may be wrongly decided for political reasons does not prove that the law itself is fundamentally political. Rather, it demonstrates that although the law is itself not fundamentally indeterminate, those charged with enforcing it may create indeterminate results by declining to decide a given case consistently with the law.[182]

From a legal process perspective, *Brind* fares considerably better than *Rust*. In *Brind*, the lords did not stray from the discrete task at hand: deciding whether a reasonable Home Secretary could reasonably adopt the regulation.[183] However, after having identified the correct decisional principle, i.e. the "reasonableness" test, the lords had to decide how that principle should be applied on the facts of the case. When applying the requisite legal test, the lords had recourse to the English tradition in favor of freedom of expression.[184] Tradition did

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180. A dubious proposition, at best. *See* Van Alstyne, *Historical Review*, *supra* note 16, at 93-97, 112-18; *see also* Board of Educ. v. Pico, 457 U.S. 853 (1982); Keyishian v. Board of Regents, 385 U.S. 589, 603, 609-10 (1967); Young Women's Christian Ass'n of Princeton v. Kugler, 342 F. Supp. 1048, 1063 (D.N.J. 1972); *see generally* Roe v. Wade, 410 U.S. 113, 166 (1973).

181. Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991).

182. Perhaps the best example of this kind of turn about occurred in the flag-salute cases, *Gobitis* and *Barnette*: Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding a West Virginia law which required all students in the public schools to participate in a daily recitation of the pledge of allegiance); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (reversing its three-year-old precedent). Had President Clinton not mooted the issue, the Supreme Court would ultimately have reconsidered its decision in *Rust*. A doctor's interest in her professional speech is no less important, and therefore should be no less protected, than an academic's interest in academic freedom. *See generally Roe*, 410 U.S. at 163, 166 (noting that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and *basic responsibility for it must rest with the physician." (emphasis added)); see also* Van Alstyne, *Historical Review*, *supra* note 16, at 86-87 (describing the origins of academic freedom as beginning in Germany to protect scientific endeavor from ecclesiastical meddling).

183. Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 748-49, 757, 763 (appeal taken from C.A.).

184. *Id.* at 748-49, 750, 763; *see* Hubbard v. Pitt, [1976] Q.B. 142, 178 (Eng.) (Denning, Lord, dissenting); COLIN TURPIN, BRITISH GOVERNMENT AND THE CONSTITUTION 91-94 (1985); *see*

not supplant the decisional principle, but rather informed its application. Thus, the lords were not creating a new right out of thin air, but rather were attempting to apply the law in a fashion consistent with community norms, in the absence of a contrary legal command. Such action should lead to predictable results in similar cases, assuming the lords access the community's tradition at the same level of generality.[185] In any case, *Brind* cannot be fairly characterized as an example of a wild-eyed judiciary making up the law to suit its tastes; *Brind* is an example of conscientious judges attempting to find an acceptable context in which to place a decisional rule.

IV. CONCLUSION

Brind and *Rust* together help to show the limits of a written constitution and the possibilities of an unwritten constitution. Along the way, they also help highlight the importance of principled decision making by judges if there is to be determinacy in the law. To the extent that *Rust* is disturbing for its lack of principled decision making, *Brind* is to the same degree a cause for hope.

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also STREET, *supra* note 1, at 96-97 (describing lapse of press restrictions from 1695 to 1945); *see generally* MICHAEL ZANDER, A BILL OF RIGHTS?, 43-47 (3rd ed. 1985); Jolowicz, *supra* note 29, 5-10, 43-47.

185. *See* Krotoszynski, *supra* note 21, at 1440-42; Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1348-59.