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Dorothy E. Roberts

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Rust v. Sullivan and the Control of Knowledge

Dorothy E. Roberts*

Prologue: Three Stories About Oppression and Knowledge

[My mistress] finally became even more violent in her opposition to my learning to read than was Mr. Auld himself. Nothing now appeared to make her more angry than seeing me, seated in some nook or corner, quietly reading a book or newspaper. She would rush at me with the utmost fury, and snatch the book or paper from my hand, with something of the wrath and consternation which a traitor might be supposed to feel on being discovered in a plot by some dangerous spy. The conviction [was] thoroughly established in her mind, that education and slavery were incompatible with each other.¹

* * *

In Derrick Bell's "Chronicle of the Slave Scrolls," the narrator, Geneva Crenshaw, finds a model slave ship on a desolate beach

* Associate Professor, Rutgers University School of Law-Newark. B.A. 1977, Yale College; J.D. 1980, Harvard Law School. Prior drafts of this Article were presented at the Rutgers University School of Law-Newark Faculty Colloquium and the Fourth Annual Critical Race Theory Workshop. I would like to thank the participants, particularly Norman Cantor, Peggy Davis, Alan Hyde, Eric Neisser, Annamay Sheppard, and Kendall Thomas, for their suggestions. I am especially grateful to my colleagues Jim Pope and George Thomas for their detailed comments and generous encouragement. Sherley Ayala, Jeanne-Marie DeRobertis, Deborah Reid, Jean Stewart, and Guy Winters provided valuable research assistance.

1. FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 74 (Citadel Press 1983) (1841).

during a pilgrimage to Ghana.² Inside she discovers three parchment scrolls containing a testament from African slaves in which they answer the mystery of their survival in America: "What tools of the spirit were in their hands with which to cut a path through the wilderness of despair?"³ Returning to America, Geneva begins to teach the Slave Scrolls' lessons of overcoming the burdens of racial oppression. Blacks who attend the prescribed "healing groups" are enabled by the knowledge of their ancestors' survival to discard their oppression mentality and rapidly transform their communities into centers of industry and achievement. The reaction of whites is swift and brutal: they ban the healing sessions through "Racial Toleration Laws."⁴ They resort to violence and economic threats to suppress the teaching of the Scrolls. In the end, thousands of Blacks are forced to renounce publicly their rediscovered knowledge.⁵

* * *

In 1992 a young Black woman named Mary received the results of her pregnancy test at a federally-funded family planning clinic in her neighborhood: she was pregnant.⁶ Mary was scared and confused, but she knew that she did not want to have the baby. She wasn't sure if it was too late to have an abortion or where she could obtain one. She had heard about another woman in her neighborhood who had been rushed to the hospital bleeding from a perforated uterus after getting an abortion at a storefront doctor's office. She wasn't sure if her diabetes would make it more dangerous to go through the procedure.

Mary was grateful to be able to turn to the clinic for help because she had no health insurance and could not afford to visit a private gynecologist. When she addressed her concerns to the counselor, the counselor refused to give her any information about abortion.⁷ She would not even tell Mary where she could

2. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 215-21 (1987).

3. *Id.* at 217 (quoting Dr. Howard Thurman, *On Viewing the Coast of Africa*, in *FOR THE INWARD JOURNEY: THE WRITINGS OF HOWARD THURMAN* 199-200 (Anne Thurman ed., 1984)).

4. *Id.* at 220.

5. *Id.* at 221.

6. Title X of the Public Health Service Act, Pub. L. No. 91-572, 84 Stat. 1506 (codified as amended at 42 U.S.C. §§ 300-300a-41 (1982)), enacted in 1970, provides federal grants to public and non-profit organizations "to assist in the establishment and operation of voluntary family planning projects." 42 U.S.C. § 300(a).

7. In 1988 the Department of Health and Human Services issued regulations which prohibited family-planning clinics that receive Title X funds from providing their patients with information about abortion. See 42 C.F.R. §§ 59.2, 59.7-10 (1989). I will refer to these regulations throughout this Article as "the regulations." Newly elected President Clinton repealed the regulations on January 22, 1993—the twentieth anniversary of the *Roe v. Wade* decision. See Robin Toner, *Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES, Jan. 23, 1993, at 1.

For a description of the legislative history and summary of the regulations, see C. Andrew McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics*, 77 CAL. L. REV. 1181, 1183-88 (1989).

Specifically, the regulations banned Title X projects from counseling their patients about abortion, referring a pregnant woman to an abortion provider, and even from informing her where this information may be obtained. See 42 C.F.R. § 59.8(a)(1) (1989). The regulations also prohibited Title X projects from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." *id.*

find a safe and inexpensive clinic that performed abortions. Instead, the counselor gave her a selective list of clinics and hospitals providing prenatal care.⁸ She told Mary that some of these facilities might also perform abortions, but she could not identify them. When Mary insisted that she had made up her mind to terminate the pregnancy, the counselor responded: "this project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."⁹ Mary left the clinic even more bewildered, wondering where to turn next.¹⁰

Introduction

The Supreme Court in *Rust v. Sullivan*¹¹ upheld the regulations that prohibit employees of Title X-funded clinics from discussing abortion with their patients. The Court rejected the First and Fifth Amendment challenges brought by clinics and their doctors, reasoning that the regulations were merely a constitutional refusal by government to subsidize the delivery of abortion information.¹² According to the majority, the "government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."¹³ Although the regulations subsequently were repealed, the *Rust* decision remains a powerful defense of government restrictions on speech.¹⁴

§ 59.10(a), and required that Title X projects remain "physically and financially separate" from prohibited abortion activities. *Id.* § 59.9.

8. The regulations required Title X projects to provide their pregnant patients with a referral list of health care providers "that promote the welfare of mother and unborn child," but which did not include any health care providers that offered abortion as their "principal business." See 42 C.F.R. § 59.8(a)(2)-(3).

9. See *id.* § 59.8(b)(5).

10. My story about Mary is hypothetical because a federal judge enjoined the government from enforcing the regulations prior to their repeal. See National Family Planning & Reprod. Health Ass'n v. Sullivan, No. 91-935, 1992 U.S. Dist. LEXIS 7043 (D.D.C. May 28, 1992), *aff'd*, 979 F.2d 227 (D.C. Cir. 1992). The stories of women who have endured unwanted pregnancies and suffered mutilation from botched abortions are, however, real. See, e.g., Tamar Lewin, *Hurdles Increase for Many Women Seeking Abortions*, N.Y. TIMES, Mar. 15, 1992, at A1, A18 (telling the story of 23-year-old Mary Jiveden, a divorced, unemployed mother, who traveled to three cities in an unsuccessful and expensive attempt to get an abortion); Robert D. McFadden, *Abortion Mills Thriving Behind Secrecy and Fear*, N.Y. TIMES, Nov. 24, 1991, at A1, A36 (telling the story of Doris Olivo, a 29-year-old unemployed, Dominican mother of two children, who received a botched abortion from a doctor she read about in a newspaper advertisement). Thus, even though the Title X directives were not ultimately enforced, these stories illustrate that women desperately need more information about abortion and other aspects of reproduction.

11. 111 S. Ct. 1759 (1991).

12. See *id.* at 1771-78.

13. *Id.* at 1774.

14. Indeed, the Bush administration aggressively used *Rust* in court and before Congress to support several limitations on government-funded speech. See David A. Kaplan & Bob Cohn, *Take the Money and Shut Up!: The Government's New Efforts to Regulate Speech*,

This Article is about the struggle over knowledge. It examines how the Court in *Rust* aligned with the side of the powerful on two fronts. We live in a society in which poor Black communities are isolated geographically in inner cities and excluded from the benefits of society.¹⁵ *Rust* upheld regulations that deliberately withheld from women in these communities knowledge critical to their reproductive health and autonomy. By promoting ignorance among these women, the Court erected one more layer of the “structural entrapment” that keeps poor Black women at society’s margins.¹⁶ The Court’s reasoning also excluded them from the concern and compassion of the rest of society, by portraying Title X patients as undeserving of the care to which affluent women are entitled simply because poor women are dependent on the government’s charity. The Court’s logic foreclosed the possibility of an alternative constitutional interpretation that requires affirmative protection of Title X patients’ right to self-determination. Poor women of color live in communities hidden from sight. The Court’s legal discourse hides them from the mind, as well.

This Article has two goals. The first is to critique the Court’s First Amendment analysis in *Rust*. The Court’s rhetoric, which focused on the abstract equality of ideas, masked the violence that the regulations inflicted upon women. It failed to recognize that the government’s control of knowledge available to poor Black women not only suppresses an idea, it also represses a people. My second goal is to use this analysis as the foundation for an alternative vision of the government’s role in nurturing individual liberty and achieving racial justice. I am more interested in the way that we think about dependency and government control of knowledge than in manipulating current First Amendment doctrine to reach a more desirable outcome. My particular task is to articulate an affirmative government obligation to provide abortion counseling to Title X patients. I see this project as part of the broader inquiry into the relationship between constitutional liberties and the distribution of wealth. Rather than present a generalized entitlement theory, however, I defend a narrower claim by people dependent on government aid to a particular resource—information necessary for self-determination.¹⁷ It is my hope that my explanation of this particular claim to

NEWSWEEK, Jan. 20, 1992, at 55 (explaining, for example, how the *Rust* decision is or could be used to defend the National Endowment for the Arts’ withdrawal of funds from an artist’s controversial performance, or to defend denial of funding for AIDS education materials discussing homosexuality).

15. See DOUGLAS G. GLASGOW, *THE BLACK UNDERCLASS: POVERTY, UNEMPLOYMENT, AND ENTRAPMENT OF GHETTO YOUTH 1-15* (1980) (discussing institutions that maintain the status of long-term, persistently poor, and immobile Blacks); Loïc J.D. Wacquant & William J. Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 8-10, 25 (1989) (attributing the “underclass” to the unprecedented social, economic, and spatial marginalization of poor Blacks, rather than to a culture of poverty).

16. See Wacquant & Wilson, *supra* note 15, at 25.

17. A number of legal scholars have elaborated theories of minimal entitlements based on the Constitution and on principles of distributive justice. See, e.g., C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131

information will illuminate the need to change the negative constitutionalism that has supported unjust relationships of power.

One of the most important contributions of critical race scholars is their vision. Their negative critique of liberal and universalist doctrine refuses to remain mired in a deconstructionist mode. They have added to critical scholarship the historical ability of people of color to criticize the law while embracing an aspirational vision of the law.¹⁸ Their critique of critical legal scholars' failure to recognize that the oppressed experience the law as both alienating and liberating has helped to advance progressive legal thought to a more positive, reconstructive plane.¹⁹ Scholars of color have

U. PA. L. REV. 933, 959-98 (1983) (describing an "equality of respect" model of state guarantees "designed to provide everyone the opportunity fully to participate in community life and to have a meaningful life as understood by the community"); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 888-901 (1976) (arguing "that individuals who cannot meet their essential material needs through free transactions have a right, which should be enforceable through law, to have these needs met out of the assets of others"); Frank I. Michelman, *The Supreme Court, 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969) [hereinafter *Protecting the Poor*] (proposing a vision of social justice in which citizens are entitled to "minimum protection against economic hazard"); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 16 (1985) (describing a distributive premise of need that "permits sufficient participation in the mainstream activities of the community to enable the person to be regarded and to regard herself as a member"). These entitlements have been conceived either as a specific welfare guarantee—a right to provision for a certain need, such as food, shelter, education or medical care—or as a right to a minimum income that protects against excessive inequality of wealth. See Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966 (1973) (interpreting Rawls' theory of justice to support a structured set of priorities that assures specific needs of liberty and self-respect before reaching the question of generally amplifying one's income).

18. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990) (discussing the complex dialogue between the aspirational voices of liberalism and the voices of real people); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989) (observing that outsider lawyers and scholars must often adopt a "dualist approach" that incorporates an elitist legal system and the concept of rights while seeing the world from the standpoint of the oppressed); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1464 (1991) (recognizing the tension between relying on the "liberal rhetoric of choice," while acknowledging "the fallacy of choice for poor women of color").

19. See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 986 (1990) (arguing that the Critical Legal Studies' (CLS) theoretical critique of liberal society failed "to appreciate the role the state can play in neutralizing and eradicating ubiquitous racial oppression"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, *passim* (1987) (describing lessons that critical legal studies can learn from "looking to the bottom"); cf. Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 552-60 (1984) (criticizing critical legal theorists for presenting the negative attack on liberal legal doctrine as the principal path to liberation, and for discounting the affirmative relationship of law to social movements). Mark Tushnet, one of critical legal studies' most ardent rights-trashers, has suggested recently that the minority and feminist critique of CLS may force CLS to adopt "classical social theory" by "stressing the

pushed forward the frontiers of legal inquiry by insisting that, "[a]lthough theoretical deconstruction is important, the ultimate goal of critical theory should be the reconstruction of community from the debris of theoretical deconstruction."²⁰

In this Article, I hope to advance the discussion among critical legal scholars, feminists, and critical race theorists by applying critical and reconstructive methods to the particular context of government-funded information. I attempt to move beyond theoretical deconstruction and the call for reconstruction to the project of fleshing out the vision for social change.²¹ This undertaking rests on the faith that the relationship between power and knowledge is not unidimensional. The tales of oppression and knowledge in the *Prologue* do not tell the whole story. Our understanding of human liberty is not simply imposed on us by the ideology embodied in the *Rust* decision. We can resist and imagine and struggle for a better way. On the contested field of power and knowledge, I want this Article to be a volley on the side of the dispossessed.

Part I of this Article sets out the context in which the *Rust* decision must be understood. It explains the violence that the regulations would inflict on poor women—especially poor women of color—and the ways in which the Court made their suffering invisible. Part II presents a critique of the Court's First Amendment analysis. I demonstrate how the Court's two theories of free speech—the marketplace of ideas and the unconstitutional conditions doctrine—used neutral principles to avoid confronting the political significance of the government's control of knowledge.

Parts III through V examine the role that the control of knowledge plays in the oppression and liberation of subordinated groups. I rely primarily on Black people's historical struggle for knowledge in America to illustrate the relationship between knowledge and power. I discuss three aspects of this relationship—the determination of social meaning, education, and the control of sources of information. Part III examines how the powerful use knowledge to

limits that social circumstances place on the accomplishment of substantial change while acknowledging that people do indeed . . . make history with will and consciousness." Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1538 (1991).

20. Cook, *supra* note 19, at 993. Feminist legal scholars also have asserted the need to apply our scholarship in positive ways. See, e.g., Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's TOWARD A FEMINIST THEORY OF THE STATE*, 100 YALE L.J. 2247, 2248 (1991) ("Of course, we need a program that legally delegitimizes the gender hierarchy and exposes the seriousness of sexual abuse. But we also need a more expansive, positive program. . . ."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 72 (1988) [hereinafter West, *Jurisprudence*] ("Feminism must envision a post-patriarchal world, for without such a vision we have little direction."); Robin West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473, 1501-02 (1990) [hereinafter West, *Relativism*] (suggesting the need for theories aimed toward action rather than criticism).

21. See, e.g., Cook, *supra* note 19, at 988 (describing Dr. Martin Luther King, Jr.'s "philosophical praxis" which incorporated "theoretical deconstruction, experiential deconstruction, reconstructive theorizing, and collective acts of transformative social struggle").

secure their superior position. Part IV discusses the connection between the oppressive control of knowledge and dependency on government charity. Part V explores how the oppressed recreate knowledge as a means of liberation.

Finally, Part VI attempts to connect this account of the oppressive and liberating potential of knowledge to the reconstructive project. I focus on two features of a liberating constitutional vision. First, I suggest that this theory would seek to provide poor women of color with the information necessary to enable them to struggle against their subordination. Second, liberation requires a radical change in the prevailing concept of dependency and its ideological connection to human freedom.

I. *Uncovering the Violence Of Rust*

A. *The Violence of the Rust Decision*

In his compelling article, *Violence and the Word*, Robert Cover reminds us of a reality about legal interpretation that judges work so hard to obscure: "[T]he interpretive commitments of officials are realized, indeed, in the flesh."²² Because *Rust v. Sullivan* was an opinion about ideas, it is easy to overlook its imprint on the flesh: The regulations upheld by the Supreme Court violated the minds and bodies of real women.

Congress enacted Title X in 1970²³ to give millions of poor and low-income women access to reproductive health services that otherwise would not be available to them.²⁴ Title X-funded clinics are a critical source of medical care for poor women,²⁵ given that these clinics are often the only provider of medical services and health information that their patients can afford.²⁶ Congress recognized that Title X projects would serve as a point of entry into the

22. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605 (1986); cf. Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1803 (1990) (commending the CLS movement for linking the "intellectual blinders of American liberal legal scholarship" to "the actual blood that has flowed because of the hidden realities").

23. Title X of the Public Health Service Act, Pub. L. No. 91-572, 84 Stat. 1506 (codified as amended at 42 U.S.C. §§ 300-300a-41 (1982)).

24. See S. REP. NO. 1004, 91st Cong., 2d Sess. 3 (1970), reprinted in 116 CONG. REC. S24,095; H.R. REP. NO. 1472, 91st Cong., 2d Sess. 4 (1970), reprinted in 1970 U.S.C.C.A.N. 5068, 5074.

25. In 1987, Title X supported nearly four thousand clinics nationwide that served over four million poor and low-income women. Steven V. Roberts, *U.S. Proposes Curb on Clinics Giving Abortion Advice*, N.Y. TIMES, July 31, 1987, at A1. Title X is the single largest source of federal funding for family planning and reproductive health care, providing support to seventy-seven percent of all family-planning clinics in the nation. Gary A. Winters, *Unconstitutional Conditions as "Nonsubsidies": When is Deference Inappropriate?*, 80 GEO. L.J. 131, 159 n.138 (1991) (citing Brief for Petitioners at 2 & n.2, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (No. 89-1391)).

26. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES § 9.4 (39A) (1981); see also

health care system.²⁷ These clinics provide, in addition to contraceptive information and services, related medical tests, such as general physical examinations and counseling.²⁸

The government's stifling of medical information endangered the health and lives of low-income women. The regulations prohibited clinics from discussing abortion or from providing women with the names of accessible, low-cost clinics that perform abortions.²⁹ Some pregnant women would interpret the clinic's failure to discuss abortion to mean that abortion is not a safe and legal alternative.³⁰ This obfuscation of referrals would mean dangerous delays in obtaining an abortion.³¹

In addition, pregnancy may accelerate the progression of certain serious medical conditions, such as heart disease, hypertension, diabetes, sickle cell anemia, cancer, and AIDS.³² For example, a woman with diabetic retinopathy who becomes pregnant may go blind.³³ The regulations prohibited doctors from advising women suffering from these conditions that abortion may reduce the long-

Nadine Brozan, *Poor are Rocked by Closing of Gynecological Clinics*, N.Y. TIMES, Mar. 25, 1991, at B1 (describing the difficulty of poor and low-income women in New York City in finding subsidized family-planning and gynecological care). Ninety percent of clinic clients have incomes below 150% of the poverty level. Alexandra A.E. Shapiro, *Title X, The Abortion Debate, and the First Amendment*, 90 COLUM. L. REV. 1737, 1738 (1990).

27. See SPECIAL SUBCOMM. ON HUMAN RESOURCES, SENATE COMM. ON LABOR AND PUBLIC WELFARE, REPORT OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE SUBMITTING FIVE-YEAR PLAN FOR FAMILY PLANNING SERVICES AND POPULATION RESEARCH PROGRAMS, 92d Cong., 1st Sess. 318 (1971) ("[F]amily planning is often the point of entry into a fragmented health care system for many individuals.").

28. S. REP. NO. 29, 94th Cong., 1st Sess. 55 (1975), reprinted in 1975 U.S.C.C.A.N. 469, 517.

29. See *supra* note 8. This limitation typically means that the only abortion providers that the referral list may include are hospitals and private physicians, which are often financially or geographically inaccessible to poor women. Brief of *Amici Curiae* The American Public Health Association, The American College of Physicians, et al., in Support of Petitioners at 12-13, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (Nos. 89-1391, 89-1392) [hereinafter *Amici Curiae* Brief for Petitioner]. Poor women often lack information about abortion providers; they turn to sources such as newspaper advertisements that may steer them to an expensive and unsafe abortion mill. See *supra* note 10. Many poor women in New York, for example, are unaware that they live in one of the few states that cover abortions under Medicaid. McFadden, *supra* note 10, at 36.

30. Many women are unaware of their legal right to obtain an abortion. See NATIONAL ABORTION RIGHTS ACTION LEAGUE, HICKMAN-MASLIN POLL FOR AMERICAN VIEWPOINT 4 (1987) (finding that 36% of American adults believe that, during the first three months of pregnancy, abortion is allowed only under "extreme circumstances" or not at all).

31. The mortality risk for abortion increases 50% and the risk of major complications increases 30% with each week after the eighth week of pregnancy. *Amici Curiae* Brief for Petitioner, *supra* note 29, at 13-14.

32. See, e.g., ABORTION, MEDICINE, AND THE LAW 251-54 (J. Douglas Butler & David F. Walbert eds., 1986); MATERNAL-FETAL MEDICINE: PRINCIPLES AND PRACTICE 734-1149 (Robert K. Creasy & Robert Resnick eds., 2d ed. 1989); OBSTETRICAL DECISION MAKING 86-166 (Emanuel A. Friedman et al. eds., 2d ed. 1987). But see Howard L. Minkoff, *Care of Pregnant Women Infected with Human Immunodeficiency Virus*, 258 JAMA 2714 (1987) (criticizing studies that demonstrate the effect of pregnancy on HIV disease progression).

33. *Amici Curiae* Brief for Petitioner, *supra* note 29, at ¶ 9 (declaration of Dr. David A. Grimes).

term risks to their health.³⁴ Moreover, the recommendation of prenatal care may give the false impression that pregnancy does not jeopardize these women's health.³⁵

The regulations also had broader implications for the health care services available in poor communities. Many clinics would find it economically unfeasible to separate their family-planning facilities from those for abortion services, and, therefore, would eliminate one part of their program.³⁶ Some clinics would refuse the conditioned federal funding altogether for ethical reasons and would be forced to cease operations.³⁷ The regulations, thus, might have created a serious reduction in the provision of health care—beyond just abortion counseling—for poor women.

The regulations violated more than the flesh. Scholars of oppression have explained that the violence imposed by oppressive regimes injures the mind, as well as the body.³⁸ Oppression includes

34. See *id.* at ¶ 9. Physicians should advise patients with a dangerous medical condition about abortion, as well as prenatal care. See *id.* at ¶ 10. Other situations where abortion counseling is medically indicated include pregnancy wherein the mother has an immovable IUD in place and pregnancy involving the possibility of severe genetic or congenital problems with the fetus. *Id.* at ¶¶ 11-14. See generally ABORTION, MEDICINE, AND THE LAW, *supra* note 32, at 251-57 (discussing diseases and disorders suffered by pregnant women and fetal abnormalities that may indicate therapeutic abortions). I highlight these medical complications because they provide a reason for considering abortion that the pregnant woman herself may not be aware of. Of course, women have non-medical reasons for considering abortion, as well. See, e.g., West, *Jurisprudence*, *supra* note 20, at 30-32 (describing women's experiences of unwanted pregnancy).

35. See Brief of *Amici Curiae* NOW Legal Defense and Education Fund and 117 Organizations Committed to Women's Equality in Support of Petitioners, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (Nos. 89-1391, 89-1392).

36. See *Massachusetts v. Secretary of HHS*, 889 F.2d 53, 59-60 (1st Cir. 1990) (en banc) (acknowledging the argument that "the new regulations would require many clinics either to give up their Title X funding or to terminate family planning services altogether."); see also Tamar Lewin, *Latest Administration Tactic Makes Abortion Fight a Free Speech Issue*, N.Y. TIMES, Feb. 7, 1988, at E7 (noting that it would cost Planned Parenthood of New York an estimated one million dollars to segregate its abortion counseling from its other family planning activities).

37. See Carole I. Chervin, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 408 (1989) (citing telephone interview with Scott R. Swirling, executive director of National Family Planning and Reproductive Health Association, predicting that a majority of current Title X programs would refuse to withhold abortion information from their clients); Linda Greenhouse, *5 Justices Uphold U.S. Rule Curbing Abortion Advice*, N.Y. TIMES, May 24, 1991, at A1 (stating Planned Parenthood clinics will not withhold information because their doctors fear legal liability); *Congress, Agencies Wrestle with Abortion Regulations*, SEATTLE TIMES, July 21, 1991, at A5 (stating California state family-planning clinics will probably turn down Title X funding because of the belief that the federal ban on counseling amounts to medical malpractice).

38. See, e.g., FRANZ FANON, *THE WRETCHED OF THE EARTH* 249-311 (1963) (describing mental disorders in victims of violence imposed by oppressive regimes); PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 28 (Myra B. Ramo trans., 1970) (stating that an unjust order stimulates violence in the oppressor and, in turn, dehumanizes the oppressed).

the brutal control of the mental processes necessary for self-determination and personhood. "Any situation in which some men prevent others from engaging in the process of inquiry is one of violence. . . . [T]o alienate men [and women] from their own decision-making is to change them into objects."³⁹ The regulations inflicted this form of mental violence by dominating poor women's deliberations about pregnancy.

The regulations' violence would be most dramatic in the Black community. Black women are more likely than white women to rely on publicly funded clinics because they are less likely to have health insurance, sufficient income to pay a private physician, or a regular source of medical care.⁴⁰ Of the nearly four million women in 1988 who used a Title X clinic for their last family-planning visit during the previous year, twenty-eight percent were Black.⁴¹ This number represented fifty-three percent of Black women, compared to thirty-two percent of white women.⁴² These figures demonstrate not only that a large number of Black women would be denied information, but also that the Black community as a whole would feel the deprivation most.⁴³ This significant impact is bound to increase as the number of Blacks who are desperately poor continues to grow.⁴⁴

Moreover, the medical consequences of the regulations would be gravest for Black women. Black women are more likely than white women to suffer from the health conditions that are aggravated by pregnancy.⁴⁵ They also are more likely to experience difficulties in

39. FREIRE, *supra* note 38, at 73. The respect for autonomous decisionmaking is, of course, a central tenet of liberalism. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272 (1977) ("Government must treat those whom it governs . . . with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived."). For the classic liberal defense of personal autonomy, see JOHN STUART MILL, *ON LIBERTY* 77-79 (Gertrude Himmelfaub ed., Penguin Publishing 1974) (1859) ("Over himself, over his own body and mind, the individual is sovereign.")

40. William D. Mosher, *Use of Family Planning Services in the United States: 1982 and 1988*, VITAL AND HEALTH STATISTICS, Apr. 1990, at 3. In 1984, 32.3% of Black women lived in poverty as compared to 11.5% of white women. Julie B. Wilson, *Women and Poverty: A Demographic Overview*, in *WOMEN, HEALTH AND POVERTY* 21, 26 (Cesar A. Perales & Lauren S. Young eds., 1988). The poverty rate of Black children is even more staggering. In 1987, almost half of all Black children (45.6% of Black children under age eighteen and 49% of Black children under age six) lived in poverty. CENTER ON BUDGET AND POLICY PRIORITIES, *STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY* v (1988).

41. Mosher, *supra* note 40, at 2-3.

42. *Id.*

43. My focus on the group as a whole is different from disproportionate impact analysis which focuses on the percentage of all patients affected who are Black, compared to the percentage who are white. My point compares the percentage of Blacks as a group who use Title X clinics with the percentage of whites as a group who use them.

44. Blacks in the "poorest of the poor" category, with incomes below half the poverty line (below \$4,528 for a family of three in 1987), increased by 69 percent in the period between 1978 and 1987. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 40, at vii.

45. See Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in *REPRODUCTIVE LAWS FOR THE 1990s*, at 23, 27-28 (Sherrill Cohen & Nadine Taub eds., 1989) ("For example, black women have higher rates of diabetes, cardiovascular disease, cervical cancer, and high blood pressure."). In 1988, AIDS killed nine times as many Black women as white women. Susan Y. Chu et al., *Impact of the Human Immunodeficiency Virus Epidemic on Mortality in Women of Reproductive Age, United States*, 264 *JAMA*

obtaining abortions because of other obstacles to abortion services.⁴⁶

Race is significant in the *Rust* decision at a less obvious level. Although the Reagan and Bush administrations could not succeed at imposing a ban on *all* abortion counseling in America, they did succeed at imposing such a ban on women dependent on government assistance. Of course, the latter was doctrinally more feasible; but why was it politically acceptable? Race may help to explain the government's willingness to exclude Title X patients from the privileges that other women enjoy. It may help to explain the Court's refusal to require that the government provide equal access to medical care. Race generally has proven to be a barrier to social reform in America. White Americans have been unwilling to pay for subsidies perceived to benefit primarily Blacks. As economist Robert Heilbroner noted, the "merging of the racial issue with that of [social] neglect serves as a rationalization for the policies of inaction that have characterized so much of the American response to need."⁴⁷ Whites' stake in their privileged racial identity—their property right in their superior status⁴⁸—is a powerful incentive to leave the existing social order intact.⁴⁹ Derrick Bell has concluded that whites in

225, 226 (1990). Black women are also three times more likely to die from complications of pregnancy and childbirth than are white women. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH, UNITED STATES, 1989, at 33 (1990). It is equally important, however, that physicians and government policies do not deny pregnant women of color the choice of continuing a pregnancy. See, e.g., Taunya L. Banks, *Women and AIDS: Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 358-63 (1990) (arguing that abortion counseling of HIV-infected women occurs within a coercive atmosphere and discriminates against poor women of color); Roberts, *supra* note 18, at 1462-76 (discussing the constitutional protection of Black women's decisions to bear children).

46. Nsiah-Jefferson, *supra* note 45, at 30-33 (listing financial, cultural, social, and geographic factors contributing to the difficulty in obtaining abortions).

47. Robert L. Heilbroner, *The Roots of Social Neglect in the United States*, in *IS LAW DEAD?* 288, 296 (Eugene V. Rostow ed., 1971).

48. See *Plessy v. Ferguson*, 163 U.S. 537, 549 (1896) (conceding, for the purposes of that case, that "the reputation of belonging to the dominant race" is the "property" of the white man).

49. See Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 402-03 (1990) (suggesting that the failure to address racial inequities is based on both whites' incentive to preserve their "superior" status and the need for white America to have a scapegoat); Kimberlè Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1380-81 (1988) (observing that viewing the Black condition as illegitimate would require whites to be convinced that the free market system is flawed and that equal opportunity is a myth); Margaret J. Radin & Frank Michelman, *Fragmatist and Post-structuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1039 (1991) (discussing the "knowledge of peoples of color . . . that it is not just legal consciousness but racial consciousness that supports . . . the prevailing power dispensations in American society"). For a discussion of how racism blocked social reform during Reconstruction, see W.E.B. DU BOIS, *BLACK RECONSTRUCTION* 700-01 (1976). Du Bois explained that whites resisted labor reform because "the white group of laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage." *Id.* at 700.

America believe that they gain from continued economic disparities that leave Blacks at the bottom: "Even those whites who lack wealth and power are sustained in their sense of racial superiority by policy decisions that sacrifice black rights."⁵⁰

The Court made no mention of the particular meaning to Black women of its decision. Although litigants acknowledged the regulations' disproportionate impact, no one suggested that it made any difference to the analysis of the constitutionality of the regulations. Prevailing legal doctrine tends to conceal the racial implications and origins of social practices that do not overtly discriminate on the basis of race.⁵¹ This omission is consistent with the practice of discussing the maldistribution of wealth in the nonracial terms of poverty and class.⁵² Professor Gary Peller attributes this myopia to society's embracing an integrationist ideology that "has signified the broad cultural attempt not to think in terms of race at all."⁵³

B. *The Court's Reconstruction of Patients' Lives*

How was it that—despite the regulations' violent impact on women's lives—the Court was able to conclude that "[t]here is no question but that the statutory prohibition contained in [section] 1008 is constitutional"?⁵⁴ How is it that the Court's opinion does not mention the pain and confusion that women would experience because of the regulations? How did the Court make their suffering invisible? The Court avoided the question of whether the doctor-

50. Bell, *supra* note 49, at 402. A corollary of Professor Bell's thesis is the principle of "interest convergence," which posits that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." Derrick Bell, Brown and the Interest-Convergence Dilemma, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91, 95 (Derrick Bell ed., 1980) [hereinafter *SHADES OF BROWN*]. Professor Bell supports this claim by demonstrating that civil rights gains have taken place only when they do not threaten white supremacy. See Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 14-16 (1979).

51. See, e.g., *Washington v. Davis*, 426 U.S. 229, 237-45 (1976) (requiring proof of discriminatory intent, not just a showing of disproportionate impact, in equal protection cases arising under the federal constitution). See generally T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1086-87 (1991) (arguing that the law has often "denied the presence of blacks and the issue of race in American history and culture"); Crenshaw, *supra* note 49, at 1335 (criticizing critical legal scholarship for overlooking the relationship of racism to hegemony); Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 77 (arguing that "[l]egal scholars have virtually ignored the issue of race in thinking about what is important in the formulation of legal theory"); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 16-23 (1991) (arguing that "color-blind" nonrecognition of race is self-contradictory and allows racial subordination to continue).

52. See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 845 (arguing that "filter[ing] the discussion of the wide disparities between African American and white communities through the nonracial language of poverty and class" embraces integrationism); cf. Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043, 1053 (1988) (stating that the current racially identifiable distribution of social resources is the legacy of historical subordination).

53. Peller, *supra* note 52, at 845.

54. *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991).

patient relationship should enjoy special First Amendment protection, similar to that enjoyed by publicly funded universities,⁵⁵ by inventing a legal fiction to define the clinic doctor-patient relationship.⁵⁶ The Court reasoned that the regulations did not constitute enough of an impingement upon the doctor-patient relationship:

Nothing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice.⁵⁷

Both of these observations distort the nature of medical treatment in the lives of poor women.

First, the Court incorrectly assumed that patients will not trust their doctors' advice. In fact, patients expect more than neutral medical consultation; they expect their physicians to provide comprehensive counsel directed toward the patient's best interests.⁵⁸ A doctor is more than someone we objectively consult for pieces of

55. *See id.* (recognizing that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"). In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), for example, the Supreme Court struck down a statute that conditioned the employment of professors in the State University of New York upon compliance with a plan designed to eliminate "subversives" from public education. *See also* *Board of Trustees of Stanford University v. Sullivan*, 773 F. Supp. 472, 476-77 (D.D.C. 1991) (distinguishing *Rust* in declaring unconstitutional a confidentiality clause in a National Institute of Health research contract).

56. *See Rust*, 111 S. Ct. at 1776. Courts sometimes invent legal fictions to support a decision that would seem unjust if it were based on the real circumstances of people's lives. On fictions invented by the law, see generally LON L. FULLER, *LEGAL FICTIONS* (1967) (examining the use of legal fictions—i.e. assumptions, implications, characterizations and analogies—as instruments in human thinking); Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 914 (1986) (observing legal fictions' potential to do "great harm by narrowing thought and deed."); Ibrahim J. Wani, *Truth, Strangers and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 53 (1989) (arguing that legal fictions in immigration law are often "distortions and misrepresentations" which are "used to achieve ends that would be unthinkable in other areas of American law and popular belief").

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

58. Justice Blackmun, in dissent, disagreed with the majority's assumption, stating that "[a] woman seeking the services of a Title X clinic has every reason to expect, as do we all, that her physician will not withhold relevant information regarding the very purpose of her visit." *Id.* at 1782 n.3 (Blackmun, J., dissenting). *See generally* GEORGE J. ANNAS, *THE RIGHTS OF PATIENTS: THE BASIC ACLU GUIDE TO PATIENT RIGHTS* 83-100 (2d ed. 1989) (discussing the importance of the doctrine of informed consent). The trust that patients repose in their doctors need not be coextensive with the belief that doctors can act on their behalf. Rather, it may be an expectation of honest and complete information that enables patients to participate in the medical decisionmaking process. *See* JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 85-103 (1984). Professor Katz rejects the traditional model of trust, based on parent-child interaction, that emphasizes the doctor's authority. He proposes instead a conversational model in which physicians assist patients in making their own decisions. *Id.* at 100-02.

information. We faithfully turn to our doctors in a time of need for uncompromised guidance so that we may make informed decisions about our health. The physician's failure to discuss abortion as a legal option is likely to lead at least some patients to conclude incorrectly that abortion is not such an option.⁵⁹

Second, the Court wrongly assumed that Title X patients have the ability to seek other medical advice. In fact, these women may encounter numerous obstacles in attempting to obtain reproductive health services elsewhere.⁶⁰ Indigent women may simply lack the resources to afford private medical counsel.⁶¹ Low-income patients may be forced to rely exclusively on the Title X doctor's advice in order to conserve limited funds.

Finally, the Court's narrow focus on the private exchange between physician and patient concealed the full significance of the regulations which affect more than the words exchanged between a woman and her doctor. Although the regulations do violate doctor-patient confidentiality, they more clearly impact the ability of poor women to determine their own destinies and to participate fully in society. The Court's nearly total privatization of the regulations' realm of influence obscured the broader political meaning of the Court's decision which this Article addresses.

C. *The Court's Doctrinal Blindfold*

More insidious than the Court's misrepresentation of women's experience was its misuse of doctrine. The Court not only failed to acknowledge or consider the pain in women's lives; it affirmatively manipulated legal rhetoric to obscure the existence of that pain.

Perpetrators of official violence commonly blur the suffering that they cause by carefully cultivating the justification for their actions.⁶² A frequently used technique is to "focus[] our attention on abstraction, when it is particularity and real-world detail that alone

59. See *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1500-01 (10th Cir. 1990). Three federal courts of appeals considered the constitutionality of the regulations. The First and Tenth Circuits struck down the regulations as a violation of Title X patients' right to make informed decisions concerning abortion and their physicians' First Amendment rights to advise them properly. See *id.*; *Massachusetts v. Secretary of HHS*, 899 F.2d 53 (1st Cir. 1990) (en banc). A divided panel of the Second Circuit upheld the regulations. See *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989).

60. See generally Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 340-50 (describing the unavailability of contraception and sex education, prenatal care, and abortion for poor or adolescent females).

61. See Margaret T. Orr & Jacqueline D. Forrest, *The Availability of Reproductive Health Services from U.S. Private Physicians*, 17 FAM. PLAN. PERSP. 63, 67-68 (1985) ("Substantial proportions of physicians who provide reproductive health services are inaccessible to the poor, because they will not accept Medicaid reimbursements or reduce their fees."). In considering petitioners' Fifth Amendment argument, the Court did acknowledge petitioners' contention that most Title X clients are too poor to consult with another health care provider for abortion-related services. *Rust*, 111 S. Ct. at 1778. The Court simply dismissed this claim on the ground that the patients' inability resulted from indigency rather than from government restrictions on access to abortion. *Id.*

62. See Cover, *supra* note 22, at 1629.

move us."⁶³ This technique is part of a discourse that makes the current social order seem fair and natural.⁶⁴ The power wielded by the Court in *Rust* was evident not only in its ability to punish those who violate the regulations, but also in its "capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live."⁶⁵ Legal doctrine provides an important language through which the powerful justify their immense share of society's wealth. It also enables them to ignore the suffering caused by the material inequalities from which they benefit. It allows us all to tolerate the lawfulness of the intolerable.⁶⁶

The Court's doctrinal blindfold was the distinction it drew between direct state interference with a protected activity and the state's mere refusal to subsidize a protected activity.⁶⁷ The former, the Court conceded, raises a constitutional issue because it involves

63. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normality in Legal Thought*, 139 U. PA. L. REV. 933, 956 (1991) (describing how judges use normative legal theory as permission to ignore suffering); see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 154 (1975) ("National evils are only cured by holding men's eyes open, and forcing them to gaze on the hideous reality.") (quoting WENDALL PHILLIPS, *A REVIEW OF LYSANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY* 3-4 (1847)). Progressive legal scholars can help force our society to "gaze upon the hideous realities" of our times by stripping away the veil of abstraction. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (describing the feminist legal method of attending to the particular experiences of women involved in cases); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1394 (1991) [hereinafter Matsuda, *Voices*] (describing the work of progressive scholars as "unmasking" exercises of power disguised as science, history, and law); Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1445 (1991) (proposing the study of individual liberty as an area of factual and scientific knowledge, rather than merely one of philosophy and principle).

Two examples of progressive scholarship that have attempted to remove the legal interpretation of "free speech" from the realm of abstract rhetoric are Catharine MacKinnon's description of pornography and Mari Matsuda's description of racist speech which treat these forms of speech as violence to women and people of color, respectively, rather than the mere expression of ideas. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 158-62 (1987); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-61 (1989) [hereinafter Matsuda, *Racist Speech*].

64. Critical legal scholars refer to this process as the law's "legitimation function." See Tushnet, *supra* note 19, at 1527.

65. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984).

66. See Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 39 (1983) (describing the genesis of utopian constitutionalism as the "inability to bear the dissonance of the lawfulness of the intolerable"); see also Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1546 (1991) (arguing that "[t]he rhetoric of poverty shelters us from our choices . . . [by] allow[ing] us to imagine that the suffering of the poor is just or that we are helpless to end it"). On the law's "dismissal of women's gender-specific suffering," see Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 82 (1987).

67. *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991).

state action, whereas the latter was characterized as a constitutionally insignificant failure to act.⁶⁸ Embedded in this distinction is a concept of constitutional protections that is limited in three ways. First, the prevalent view holds that the Constitution protects only an individual's "negative" right to be free from unjustified intrusion, rather than the "positive" right to actually lead a free life.⁶⁹ Second, this view restricts constitutional protection to interference by the state.⁷⁰ Finally, this view measures government action and inaction against a baseline of the current arrangements of wealth and privilege: "Decisions that upset existing distributions are treated as 'action'; decisions that do not are thought to stay close to nature and thus to amount to no action at all."⁷¹ The prevailing conception of the Constitution, therefore, does not recognize any affirmative government obligation either to ensure the social conditions and resources necessary for individual liberty or to protect the individual from degradation inflicted by social forces other than the state. It often fails to recognize, as well, the ways in which the government uses its authority to fortify private relationships of power.⁷²

The Court's distinction in *Rust* serves three purposes: It forecloses serious inquiry into the standard of review, it insulates judges from the violence they inflicted, and it justifies the unequal distribution of medical care. First, in considering the regulations, many judges deemed women's reliance on government funds to obviate

68. *Id.* ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.' . . . 'There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity, consonant with legislative policy.'") (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980), and *Maier v. Roe*, 432 U.S. 464, 475 (1977), respectively).

69. See Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 96 (1992); Robin L. West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992); see also Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (critiquing the prevailing conception of the Constitution as solely a charter of negative liberties).

70. Michelman, *supra* note 69, at 96; West, *supra* note 69. See generally Gotanda, *supra* note 51, at 7-16 (discussing the public-private distinction in the context of racial discrimination); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (analyzing the past, present, and future of the public/private distinction).

71. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 2 (1992); accord Martha Minow, *The Supreme Court, 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 56-57 (1987) (discussing the Supreme Court's assumption that critical features of the status quo—general social and economic arrangements—are "natural and good"); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 53-54 (criticizing the Supreme Court's distinction in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), between government action versus failure to act).

The Supreme Court has employed this narrow view of liberty to deny welfare claims and other forms of government aid. See, e.g., *DeShaney*, 489 U.S. at 196 ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("[T]he Constitution does not provide judicial remedies for every social and economic ill.").

72. Cass Sunstein, for example, agrees that the First Amendment concerns only the exercise of public power, but criticizes courts for failing to acknowledge that legal structures restricting speech, such as a right of exclusive ownership in a television network, are created by the exercise of this public authority. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263-77 (1992).

automatically any need for critical thinking about the regulations' effects. They indicated that when claimants depend on a government gratuity, their claims become "constitutionally irrelevant."⁷³ The phrase "mere refusal to subsidize" served as an often-invoked talisman, enabling courts to ignore whether the refusal warranted heightened scrutiny as a denial of rights.⁷⁴ As Justice Blackmun noted in his *Rust* dissent, "the Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support."⁷⁵

Second, by characterizing the government policy it upheld as inaction, the Court distanced itself from the violence of its decision.⁷⁶ Judges would not be directly inflicting pain on women who receive inadequate or harmful medical care as a result of the regulations. These women's suffering results from the circumstances of poverty, for which the judges hold no responsibility. Because the brutality was carried out in health care clinics by means of physicians' omissions—not the typical brute force of a tyrant—the law did not recognize it as official violence. Thus, the language of government inaction fulfilled the law's mesmerizing role: "Those in power sleep well at night—their conduct does not seem to them like oppression."⁷⁷

Finally, the Court's distinction between action and inaction allowed it unabashedly to impose separate standards of justice for the rich and the poor. The dichotomy rendered "equal" the plainly unequal system that ensures full medical advice for the wealthy, while denying it to the indigent. This inequality is especially striking in

73. See, e.g., *New York v. Sullivan*, 889 F.2d 401, 411 (2d Cir. 1989) ("[S]o long as no affirmative legal obstacle to abortion services is created by a denial of the use of governmental money, facilities, or personnel, the practical effect of such a denial on the availability of such services is constitutionally irrelevant.").

74. See, e.g., *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1506 n.4 (10th Cir. 1990) (Baldock, J., dissenting in part) ("How . . . can the first amendment be read to prohibit a restriction on the dialogue between a physician and patient, when the physician and patient rely on federal funding to carry on such dialogue?"); *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988).

75. *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting).

76. See Cover, *supra* note 22, at 1628 (describing the social organization of violence through which responsibility for official violence is shared).

On the other hand, the Court's willingness to uphold the regulations without clear congressional approval of the Secretary's construction of Title X, and despite the serious constitutional questions that construction raised, can be seen as a flagrant violation of the principles of judicial restraint. See *The Supreme Court, 1990 Term; Leading Cases*, 105 HARV. L. REV. 177, 397-99 (arguing that the *Rust* Court should have set aside the regulations on statutory grounds and awaited a clear demonstration of congressional intent); see also *Rust*, 111 S. Ct. at 1788-89 (O'Connor, J., dissenting) (same).

77. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413-14 (1989).

the courts' recognition that the same restrictions would pose a constitutional problem had they applied to women who could pay for medical care. The Second Circuit, for example, explicitly acknowledged that it would be a matter of judicial concern if the regulations restricted abortion advice given to *private* patients who used a clinic receiving Title X funds.⁷⁸

The Court's reasoning can be challenged either by accepting its action/inaction dichotomy or by rejecting it. First,—accepting the action/inaction dichotomy—petitioners very persuasively argued that the regulations did constitute government action.⁷⁹ Petitioners portrayed the government's offer to poor women of pregnancy testing, medical advice, and referrals as affirmative conduct. Once inside the clinics, most patients would rely solely on the counseling mandated by the regulations which was intended to deter them from obtaining an abortion. Had the government not provided this service, some of these women might have managed to receive full and accurate information about abortion elsewhere. It is arguable that, even if they could not afford to pay for alternate advice, they would be in a better position to judge their medical options without the biased information dispensed at Title X clinics.⁸⁰ In this sense, patients are worse off than if the government had not become involved in family planning at all. "Lured into Title X clinics by the apparent promise of reliable health care, indigent women leave the clinic not merely unenlightened but affirmatively misled."⁸¹

An alternative challenge is to reject the constitutional significance of the Court's action/inaction dichotomy altogether. Indeed, the ease with which the regulations can be characterized alternatively as a mere failure to subsidize abortion counseling or as the affirmative manipulation of women's choices demonstrates the futility of the action/inaction distinction as a basis for judging the regulations. We can easily recharacterize government omission as affirmative interference: The state actively protects the rights of affluent women through laws that require informed consent, while deliberately promoting ignorance of medical information among poor women.⁸² As

78. See *New York v. Sullivan*, 889 F.2d 401, 413-14 (2d Cir. 1989).

79. See Brief for Petitioners at 19, *Rust* (Nos. 89-1391).

80. See Brief of *Amici Curiae* Planned Parenthood Federation of America and the National Family Planning and Reproductive Health Association in Support of Petitioners at 17, *Rust* (Nos. 89-1391, 89-1392); cf. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 356-60 (1991) (arguing that a manipulative restriction of access to information, like a lie, violates individual autonomy).

81. Brief for Petitioners at 12, *Rust* (No. 89-1391); accord *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1500-01 (10th Cir. 1990).

82. The Constitution does contain guarantees of affirmative government protection. See Akhil R. Amar & Daniel Widawsky, *Child Abuse As Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1381 (1992) (arguing that the absence of a state action requirement in the Thirteenth Amendment implies that certain state inaction is prohibited); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 873-80 (1986) (giving examples of arguably positive government duties found in the primarily negative Constitution); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 1991 DUKE L.J. 507, 512-45 (tracing the origins and development of the positive right to government protection in Anglo-American constitutionalism); Sunstein, *supra* note 71, at 9 (noting that private property and

the regulations demonstrate, the welfare state wields as much power by withholding benefits as by coercive force.⁸³ In a society where survival depends on inclusion in an economy dominated by government welfare of one sort or another, the consequences of exclusion may be more devastating than criminal punishment.⁸⁴

Changing the perspective from which we view government policy destroys the traditional significance of the action/inaction dichotomy. A constitutional lens that looks at the broader impact of government conduct on the status of subordinated groups diminishes the importance of that distinction. The critical questions become: Is the state perpetuating existing hierarchies of power?⁸⁵ Does the government's policy further alienate an already-outcast community from society's privileges?

II. Critique of Rust's First Amendment Analysis

The contest in *Rust* rested on two First Amendment theories—the marketplace of ideas and the unconstitutional conditions doctrine. Both theories assert that the aim of the Constitution's guarantees is government neutrality. This focus on neutrality cannot illuminate the regulations' injury to Black women because it fails to recognize the significance of speech and government restrictions on speech within the context of relationships of power.

contract rights are positive because they depend on state enforcement of trespass laws and contractual arrangements). Professor Sunstein gives two examples of the positive dimensions of current First Amendment law—government's obligation to protect speakers from a hostile private audience and constitutional constraints on the common law of libel that, in effect, compel those who are defamed to subsidize speech through the loss of their own reputation. See Sunstein, *supra* note 72, at 273-74.

83. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1295-96 (1984); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)* 70 B.U. L. REV. 593-603 (1990) (arguing that the subsidy/penalty distinction cannot be sustained in light of the omnipresence of government spending and funding); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1609 (1960) (arguing that "the power to impose conditions is not a lesser part of the greater power to withhold, but instead is a distinct exercise of power which must find its own justification").

84. See Reich, *supra* note 63, at 1438. Charles Reich described the ways in which government largess increases the political and legal bases for government power in his landmark article, *The New Property*. Chief among them is the government's ability to "purchase" the abandonment of constitutional rights. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 764 (1964). Government funding also increases governmental power by expanding administrative discretion in policymaking and interpreting legislative policy. *Id.* at 749.

85. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 693 (1990) ("The targeted evil is not irrational state action, but state action or inaction, rational or not, . . . that perpetuates the damaging social, economic, domestic or private domination of some groups by others.")

A. *The Marketplace of Ideas*

The freedom of speech theory framing the arguments in *Rust* was the marketplace of ideas model. The marketplace metaphor originated in Justice Holmes' dissenting opinion in *Abrams v. United States*,⁸⁶ which invoked "free trade in ideas" as the theoretical foundation for freedom of speech.⁸⁷ It has since dominated the Supreme Court's interpretation of the First Amendment.⁸⁸ The marketplace of ideas theory provides that speech should be protected from government interference because exposing the public to different viewpoints is the best way to discover truth. The theory posits that truth will prevail ultimately in public debate wherein all ideas are allowed to compete freely.⁸⁹

Both sides in *Rust* viewed the regulations as government participation in the market's public debate on abortion. The point of contention was whether interjecting the government's antiabortion viewpoint distorted an otherwise rational and fair marketplace.⁹⁰ Petitioners argued that the government's participation in the marketplace potentially could drown out other viewpoints.⁹¹ The government failed to see any distortion of the marketplace at all but saw merely the government's effort to add its voice to the debate. The test that both the majority and the dissent used to answer the question of government distortion was whether the regulations violated the principle of viewpoint neutrality.⁹² The danger in the regulations was that they breached the touchstone of First Amendment

86. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

87. See *id.* at 630; see also *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (using for the first time the phrase "marketplace of ideas" to support the right to receive ideas). Milton's *Areopagitica*, which based freedom of expression on the search for Truth, foreshadowed Holmes's metaphor of the free trade in ideas. See JOHN MILTON, *AREOPAGITICA* (1644), reprinted in *THE TRADITION OF FREEDOM* 28 (Milton Mayer ed., 1957); see also David Cole, *Agon at Agora: Creative Misreadings in First Amendment Tradition*, 95 *YALE L.J.* 857, 876 (1986) (pointing out Milton's foreshadowing of Holmes' concept of free trade in ideas).

88. For a description of the Supreme Court's consistent use of marketplace imagery in its discussions of freedom of speech, see C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7-12 (1989).

89. See, e.g., *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . ."), overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

90. See generally Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 *CAL. L. REV.* 1104 (1979) (proposing political establishment clause, implied from the First Amendment, that would prohibit government advocacy of political viewpoints that distorts the marketplace of ideas). Compare MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 204 (1983) (observing that government expression may distort citizen judgment and drown out opposing messages) with Frederick Schauer, *Is Government Speech a Problem?*, 35 *STAN. L. REV.* 373 (1983) (reviewing YUDOF, *supra*, and discounting the impact of government speech on public opinion).

91. Brief for Petitioners at 23-24, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (No. 89-1391).

92. See *Rust*, 111 S. Ct. at 1772, 1780. But see generally Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 *VA. L. REV.* 203 (1982) (suggesting "that a broad content neutrality rule not only obscures free speech questions, but is antithetical to any rational analysis of freedom of expression").

doctrine—"equality of status in the field of ideas."⁹³ By refusing to fund family-planning projects advocating abortion, petitioners argued, the government targeted a particular ideological viewpoint and forced doctors to be instruments for fostering public adherence to the opposite orthodoxy.⁹⁴ This First Amendment analysis focused on the individual and on ideas. The constitutional evil was perceived as suppression of abortion advocacy. The right at stake was the individual's right to be free from imposition of the state's viewpoint.

One weakness of the marketplace approach is that constitutional answers can vary, depending on the delineation of the "marketplace." Petitioners presented the marketplace as the limited forum in which poor and low-income women can obtain medical counsel and information—in other words, the Title X project itself.⁹⁵ This marketplace is monopolized entirely by the government. Petitioners' construction of the marketplace recognized that poor communities have fewer resources to challenge the government-sponsored view. Respondents, on the other hand, described the government as a participant in a bigger marketplace of diverse ideas.

An analogy in respondents' brief illustrates this distinction. Respondents likened the regulations to a government grant to produce

93. *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKELJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)); see also Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975) (asserting that "*Mosley* is a landmark first amendment decision" because it declares that "the essence of the first amendment is its denial to government of the power to determine which messages shall be heard and which suppressed").

94. See Brief for Petitioners at 18-21, *Rust* (No. 89-1391); see also *Rust*, 111 S. Ct. at 1782 (Blackmun, J., dissenting) (using same argument).

The free speech values raised in *Rust* illustrate the tension between individualistic and communitarian interpretations of the Constitution. While a liberal focus on autonomy questions the power of government speech to influence individual choice, a communitarian perspective recognizes the community's need to inculcate its members with a set of shared values. In contrast to the liberal opposition to the regulations' interference in women's abortion decisions, the community's competing interest might support greater government power to impart its antiabortion message. For discussions of the tension between individualistic and communitarian speech values in other contexts, see Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 24-46 (1990) (discussing the tension between individualistic and communitarian traditions and suggesting a First Amendment analysis that includes the communal worth of individual rights); James C. O'Brien, *The Promise of Pico: A New Definition of Orthodoxy*, 97 YALE L.J. 1805, 1823 (1988) (proposing an expanded approach to orthodoxy that resolves "the conflict between schools' inculcative function and the need to equip students for self-government").

For articles arguing that the government need not remain ideologically neutral and should contribute its voice to the public debate over abortion policy, see Theodore C. Hirt, *Why the Government Is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895, 1906 (1988); Edward G. Reiter, *The Title X Family Planning Subsidies: The Government's Role in Moral Issues*, 27 HARV. J. ON LEGIS. 453 (1990). See generally JOSEPH TUSSMAN, *GOVERNMENT AND THE MIND* (1977) (defending the government's legitimate, constitutional power to influence citizens' minds).

95. See Brief for Petitioners at 22, *Rust* (No. 89-1391).

a television documentary that discusses family-planning techniques, but not abortion.⁹⁶ The government may decide simply not to enter the market of abortion documentaries. In respondents' hypothetical, a lack of absolute control over the available information is what makes the government a market participant rather than a regulator of expression. Other producers remain free to present alternative views, including documentaries about abortion.

The government's analogy, however, mischaracterized the regulations' overwhelming impact on patients' access to abortion information. Nor was the proper analogy a solely government-owned station that forces all citizens to imbibe the state's message. The hypothetical that more accurately illustrates the injustice of the regulations is a society where the dispossessed only have access to a government television channel that broadcasts limited, misleading—even harmful—information, while the privileged have their pick of channels that provide a wealth of information.

Petitioners' focus on neutrality among abstract ideas also limited the force of their argument. The logical extension of this neutrality perspective is that government must stay out of the marketplace of ideas altogether and fund no viewpoint, or it must fund each and every viewpoint equally. This approach has two immediate shortcomings. First, the Court pointed out that petitioners' assertion would mean that, if government chooses to subsidize one protected view, it also must subsidize all counterpart views.⁹⁷ If the government sponsored programs aimed at dissuading people from drinking alcohol, for example, it must also fund programs that encourage drinking. State funding of messages promoting racial harmony would require funding for hate speech. This logical extension of the neutrality argument is undesirable both because the costs are prohibitive and because we do want the government to be somewhat selective in its funding decisions.⁹⁸

Second, under the neutrality approach, the constitutional wrong was that the government suppressed only one of two reproductive options—abortion and not childbirth. The government's "neutral" elimination of all pregnancy counseling would remedy this viewpoint discrimination. The government's total retreat from the marketplace of reproductive information, however, would have a devastating impact on the health of poor women.⁹⁹ Thus, neither

96. Brief for the Respondent at 22-23, *Rust* (Nos. 89-1391). In fact, the federal government spends hundreds of millions of dollars each year on films, TV programs, and radio broadcasts. YUDOF, *supra* note 90, at 7.

97. *Rust*, 111 S. Ct. at 1772-73.

98. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding selective government subsidies of non-racist educational institutions).

99. Most poor women of color face financial and other barriers to receiving proper prenatal care. See CHILDREN'S DEFENSE FUND, *THE HEALTH OF AMERICA'S CHILDREN* 43-48 (1991) (discussing women's inability to pay for health-care services); Mary A. Curry, *Nonfinancial Barriers to Prenatal Care*, 15 *WOMEN & HEALTH* 85-87 (1989) (discussing transportation and childcare problems that limit access to health care sites); Ruth E. Zambrana, *A Research Agenda on Issues Affecting Poor and Minority Women: A Model for Understanding Their Health Needs*, 14 *WOMEN & HEALTH* 137, 148-50 (1988) (discussing cultural barriers to prenatal care). In 1986, only half of all pregnant Black women in

solution to the problem framed as viewpoint discrimination—government funding of all viewpoints or government funding of none—adequately addresses the harm caused by the regulations.

The marketplace of ideas assumes not only a marketplace in which ideas trade freely, but also one which is open to all citizens who seek knowledge.¹⁰⁰ It is based on the fiction that prohibiting government restrictions on access to knowledge is enough to ensure access to everyone. The negative protection against government interference alone, however, overlooks the effect of existing inequalities of resources in the marketplace.¹⁰¹ It also ignores that many people are silenced by social domination on the basis of race, gender, and class.¹⁰² A laissez-faire market inevitably will produce an exchange

America received adequate prenatal care. See CHILDREN'S DEFENSE FUND, *supra*, at 4 (table 1). For my argument that the government has an obligation to provide poor women with prenatal care, see Roberts, *supra* note 18, at 1479.

100. The Supreme Court has recognized a constitutional "right to receive information" which limits the government's ability to restrict public access to information. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (stating that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating that the government "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) ("It would be a barren marketplace of ideas that had only sellers and no buyers."); cf. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 568, 573 (1991) (showing that public choice theory, which views information as a public good, suggests a government duty to promote speech). But see Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579 (1986) (defending government restrictions on the acquisition and dissemination of knowledge). See generally William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303 (noting the Warren Court's recognition of a First Amendment right to receive expression); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974) (discussing the free flow of information as an objective of the First Amendment). The Court, however, has never interpreted this limitation as a positive right of citizens to compel the government to provide information. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) ("[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.").

101. See, e.g., Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 608 (1982) (arguing that "the power of some groups to raise enormous sums of money to oppose ballot propositions, without regard to . . . popular feeling, seriously interferes with the ability of other groups to use the institutions of direct democracy for their intended purpose"); Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227, 1287 (1986) (discussing the Court's unwillingness to acknowledge that institutions controlling large clusters of wealth pose First Amendment problems). See generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5-6 (demonstrating that the marketplace inevitably supports entrenched power structures and ideologies).

102. See MACKINNON, *supra* note 63, at 158 ("For women, the urgent issue of freedom of speech is not primarily the avoidance of state intervention as such, but finding an affirmative means to get access to speech for those to whom it has been denied."). The government often is implicated in this private silencing by granting to private citizens

of ideas dominated by those with the most economic and social power. The monopoly of mass media ownership and the difficulty of organizing participation by less powerful groups compound marketplace failures.¹⁰³ Government involvement may be necessary to counterbalance the overwhelming communications power wielded by corporate and wealthy interests.¹⁰⁴ The poor often must depend on the government to express or subsidize their views.¹⁰⁵ Thus, government intervention may broaden, rather than distort, the spectrum of views expressed.

The focus on neutrality is one of the chief instruments of legal legitimation. It provides the conceptual means for concluding that "particular social practices are fair because they are objective and unbiased."¹⁰⁶ Liberal discourse concerning racial discrimination uses neutral principles in a similar way. Its assumption of a realm of

the legal authority both to harm others through speech and to limit the speech of others. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 414; Sunstein, *supra* note 72, at 277.

103. BAKER, *supra* note 88, at 38; cf. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 173 (1977) (describing business' disproportionate influence on government decisions in capitalist polyarchies). Knowledge has become a valuable commodity, appropriated by private interests and sold by private enterprise only to those who can afford to pay its price. This privatization of information fosters increased restrictions on access to knowledge, because this is the way that the market economy ensures information's profitability. SUE C. JANSEN, *CENSORSHIP: THE KNOT THAT BINDS POWER AND KNOWLEDGE* 168-69 (1988); cf. Farber, *supra* note 100, at 579 (arguing that First Amendment protection provides nonfinancial motivation to encourage the production of information). For a legal history of the conflicting approaches to information as a public resource and as a form of private wealth, see Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 674-724 (1992).

104. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415-24 (1986) (arguing that the Court should encourage state intervention that enriches public debate); see also Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2104 (1991) ("[A] decision of the state not to act—to go out of the funding business altogether—might itself be a form of action prohibited by the First Amendment.").

The Supreme Court generally has rejected government restrictions on speech designed to ensure a more balanced public debate. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (overturning campaign spending restrictions; stating that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). In *Austin v. Michigan Chamber of Commerce*, however, the Court for the first time upheld limits on corporate campaign speech as a means of correcting "the corrosive and distorting effects of immense aggregations of wealth." 494 U.S. 652, 660 (1990); see also David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 264-77 (1991) (discussing the potentially revolutionary repercussions of *Austin's* recognition of the systemic distorting effects of wealth).

105. See Balkin, *supra* note 102, at 412 (proposing governmental investment in communication technologies as a means of enhancing the substantive liberty of speech); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 799 (1981) (distinguishing between government promotion of the system of freedom of expression—facilitating expression by private individuals or groups—and government participation in the system); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine which required broadcasters to present public issue programming, giving time to each side).

106. Peller, *supra* note 52, at 775; see also Delgado, *supra* note 77, at 2421 (describing the use of neutral, procedural terminology to submerge substantive questions of subordination). For an examination and critique of the prevailing concept of neutrality rooted in existing distributions of power in the context of a wide range of constitutional issues, see Sunstein, *supra* note 71.

"neutral" social practices developed outside the influence of racial history parallels the marketplace-of-ideas doctrine's focus on government distortion of an otherwise rational exchange of ideas. Racism, like viewpoint discrimination, is viewed as isolated incidents deviating from an otherwise rational decisionmaking process.¹⁰⁷ Although conservatives and liberals differ as to the extent of desirable race-consciousness, both embrace neutrality—or color-blindness—as meritorious and divorced from social power.¹⁰⁸ Similarly, both the liberal and conservative positions in *Rust* relied on the principle of viewpoint neutrality to judge the regulations without considering their relationship to the distribution of power in America.

Identifying neutrality alone as the First Amendment ideal accords with the claim that Enlightenment—"the free use of reason"—can abolish the bond between knowledge and power.¹⁰⁹ According to this view, it is possible to separate theory from practice, form from content, and to attain free inquiry and objectivity. It presumes the possibility of achieving "epistemological humility" by removing government censorship.¹¹⁰ Government neutrality eliminates coercion, allowing ideas to be judged on the basis of rational argument alone. The Enlightenment view, however, mistakenly assumes that reason—and not power—will determine the debate within the marketplace, as long as neutral rules are followed.¹¹¹

It is important to rethink the fixation on viewpoint neutrality by

107. See Peller, *supra* note 52, at 779; see also Crenshaw, *supra* note 49, at 1344 (describing the "restrictive view" of antidiscrimination law that assumes that a racially equitable society already exists); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978) (describing the prevailing perception of racism as disconnected acts of "blameworthy individuals who are violating the otherwise shared norm").

108. See Peller, *supra* note 52, at 772-79. Reliance on the supposedly neutral criterion of merit is used to justify the exclusion of Blacks and disguises the way that racism still influences decisionmaking. See Patricia J. Williams, *The Obliging Shell (An Informal Essay on Formal Equal Opportunity)*, in *ALCHEMY OF RACE AND RIGHTS* 98, 98-110 (1991). See generally Gotanda, *supra* note 51 (explaining how the Supreme Court's color-blind constitutionalism fosters white domination). Similarly, Mari Matsuda has demonstrated how employers' use of a purportedly neutral standard to determine intelligible accents is actually a hidden exercise of power. See Matsuda, *Voices*, *supra* note 63, at 1394.

109. See JANSEN, *supra* note 103, at 4-6; Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1159 (1985).

110. See Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 281 (1991) (arguing that the essence of freedom of expression is the doctrine of "epistemological humility," which protects autonomous decisionmaking from government interference).

111. Contrary to liberal principles, neutrality is not necessarily the critical prerequisite for autonomous decisionmaking. Joel Handler, for example, explains that in social work practice "client self-determination justifies the abandonment of neutrality." Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1099 (1988); see also Simon, *supra* note 17, at 2-23 (describing the welfare jurisprudence developed by social workers during and after the New Deal);

considering the social and political context of government speech. An alternative approach examines the effect of government control of information on relationships of social power. It does not allow us to use the shield of neutral principles in order to avoid confronting inequalities in the power to communicate. This view rejects the illusion that we can achieve knowledge without the taint of power. Rather, it purposefully examines how the relationship between knowledge and power operates in our society. It asks how knowledge functions to secure the powerful and how it might serve to liberate the oppressed. This analysis reveals the real evil of the regulations: The government's control of knowledge not only suppresses an idea, it represses a people. This inquiry then calls us to determine what information is essential for self-determination and demands that the government provide this information to people who are dependent on government aid.

B. *Unconstitutional-Conditions Doctrine*

The other theory framing the First Amendment analysis in *Rust* is the unconstitutional-conditions doctrine. This doctrine provides that the government may not condition the conferral of a benefit on the beneficiary's surrender of a constitutional right, although the government may choose not to provide the benefit altogether.¹¹² The doctrine rests on a negative vision of the Constitution. It presumes that the state has no affirmative obligation to fund the exercise of rights, but asks whether its conditional offer of a benefit requires stricter scrutiny than its denial of the benefit.¹¹³

Both sides in *Rust* accepted the premise that "[n]o one has a right to a subsidy for the exercise of rights to speech and privacy."¹¹⁴ Petitioners argued, however, that once the government had chosen to

cf. Margaret J. Radin, *Market-inalienability*, 100 HARV. L. REV. 1849, 1886-87 (1987) (rejecting the liberal position of neutrality as to the good life for human beings and advocating instead an ideal of "human flourishing").

In Joel Handler's dialogue between social worker and client, the concern for client empowerment overcame any adherence to formal neutrality:

[T]he workers were not expected to be neutral in this dialogue. This did not mean lack of respect for client autonomy; rather, it was a recognition of the possibility that the social context was conditioning the client's perception of her own interests. Neutrality would inhibit the dialogue and the ability to challenge the client to develop her own ideas as to her interests. It was also important for the worker to show herself as a distinct individual who had ideas and was capable of empathy and feelings of solidarity. Disdaining neutrality did not mean embracing paternalism. It was the client's choice to engage in the dialogue and to make whatever decisions emerged.

Handler, *supra*, at 1097. Ironically, in *Rust*, the isolated appeal of neutrality justified the abandonment of client self-determination.

112. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); Sunstein, *supra* note 83, at 593-94 n.2. Legal scholars have posited numerous theories to determine when a beneficiary's agreement to accept a conditioned benefit should be unenforceable. See Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 485-504 (1991) (cataloguing five unconstitutional-conditions theories).

113. Sullivan, *supra* note 112, at 1425.

114. Brief for Petitioners at 11, *Rust* (No. 89-1391); see also Brief of the Commonwealth of Massachusetts, the Center for Constitutional Rights et al. as *Amici Curiae* in

subsidize family planning, it could not exact adherence to its anti-abortion orthodoxy through the imposition of viewpoint-based conditions on its largesse.¹¹⁵ The Court rejected petitioners' unconstitutional-conditions argument on the ground that the regulations did not deny a benefit to anyone, nor did they prevent grantees from engaging in First Amendment activities outside the scope of the federally funded project.¹¹⁶ The regulations simply required that Title X funds be spent on the purpose for which they were intended—establishing and operating projects that provide preventive family-planning services.

Framing the First Amendment problem as an unconstitutional condition is also a demand for government neutrality.¹¹⁷ This approach recognizes the potential for government use of conditions on benefits to prefer one constitutionally protected viewpoint over another.¹¹⁸ As the Supreme Court noted in *Speiser v. Randall*, "the denial of [funding] for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'"¹¹⁹ As with the marketplace-of-ideas model, inequalities of communications power caused by social and economic disparities are beyond the doctrine's reach.¹²⁰

One failing of the unconstitutional-conditions approach in *Rust* is that it focused on the wrong distinction. The doctrine classifies potential beneficiaries into two groups: those who comply with the

Support of Petitioners at 14, *Rust* (Nos. 89-1391, 89-1392) ("[A]mici do not suggest that the government is affirmatively required to provide women with information regarding their post-pregnancy reproductive options."); see also Sullivan, *supra* note 112, at 1497 (stating that "a right against government distortion need not entail a right to government equalization").

115. See Brief for Petitioners at 18, *Rust* (No. 89-1391).

116. See *Rust*, 111 S. Ct. at 1759-74.

117. See, e.g., Sullivan, *supra* note 112, at 1506 (stating that the doctrine "preserves spheres of private ordering from government domination and ensures that citizens receive appropriately evenhanded treatment from the government"); Sunstein, *supra* note 83, at 601 ("[T]he current constitutional mainstream[] sees the unconstitutional conditions doctrine as an effort to preserve legal requirements of governmental neutrality under different social and economic conditions.").

118. See Sullivan, *supra* note 112, at 1496-97.

119. 357 U.S. 513, 519 (1958) (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950)).

120. See Sullivan, *supra* note 112, at 1497 n.359; see also Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1219 (1990) (placing the unconstitutional-conditions doctrine in the context of constitutional rights that "function to prevent the State from imposing various deterrents . . . above and beyond those economic deterrents that are a natural concomitant of a market economy"); cf. ROGER M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 254-55 (1985) (discussing the rational liberty position that regards the inequalities of market society as legitimate, but demands strict scrutiny where public measures exacerbate the significance of economic difference in ways that endanger basic liberties).

condition and receive the benefit and those who do not.¹²¹ The critical inequality created by the regulations was not between those provided with government aid—i.e., clinics that do not advocate abortion—and those denied aid—i.e., clinics that do. The violence of the decision was not suffered by the physicians whose speech was restricted, but by their patients, the third-party beneficiaries of Title X.¹²² Moreover, the violence did not consist solely of the distinction the government made between ideologies. Rather, the regulations' injustice lies in the distinction they allow between the powerful—who attempt to control knowledge—and the dispossessed whose status is maintained through that control.¹²³

The tortured history of the unconstitutional-conditions doctrine also raises questions about its utility as a test of constitutional legitimacy. Scholars have noted the use of the doctrine to justify irreconcilable decisions.¹²⁴ Different justices have manipulated the doctrine to achieve desired results based on their respective substantive ideals.¹²⁵ The doctrine was "invented by a laissez-faire Court bent on dismantling progressive legislation that reduced the liberty of corporations, but then perpetuated by a Court seeking strong protections for personal liberties."¹²⁶ The Court more recently has disregarded the doctrine, as it did in *Rust*, to weaken these very protections.¹²⁷

121. Sullivan, *supra* note 112, at 1496.

122. See Chervin, *supra* note 37, at 425 (recognizing the interdependence between unconstitutional conditions and the third parties they affect).

123. Cf. Sullivan, *supra* note 112, at 1489-99 (discussing three distributive concerns that unconstitutional conditions present); Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327, 334-35 (1989) (applying these distributive concerns to the Title X regulations). Professor Sullivan's theoretical foundation for the doctrine centers on the "systemic effect of conditions on the distribution of rights in the polity as a whole," including the constitutional caste created by discrimination among rightholders on the basis of their relative dependency on a government benefit. Sullivan, *supra* note 112, at 1421. This systemic approach recognizes that the regulations' unequal treatment extends beyond discrimination between ideas about abortion: The regulations divide pregnant women into two "constitutional castes." *Id.* According to this view, the critical hierarchies of power are those created by the government condition itself—either vertical hierarchies between government and rightholders or horizontal hierarchies among rightholders—rather than by preexisting arrangements of social power. An accurate account of the balance of societal power, however, must examine how the government condition functions in the particular context of race, gender, and class relationships.

124. See, e.g., Sullivan, *supra* note 112, at 1440-41.

125. Compare *United States v. Butler*, 297 U.S. 1 (1936) (prohibiting Congress from using its spending power to purchase state compliance with federal agricultural policy) with *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding conditioning of federal highway funds on state adoption of minimum drinking age); compare *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that denial of unemployment benefits to persons who refuse to work on Saturdays for religious reasons violates the First Amendment) with *Lyng v. International Union, UAW*, 485 U.S. 360 (1988) (holding denial of food stamps to strikers does not violate the First Amendment); compare *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down selective exemption of specialty journals from state taxation) with *Maher v. Roe*, 432 U.S. 464 (1977) (upholding selective state subsidy of only childbirth, not abortion, expenses).

126. Sullivan, *supra* note 112, at 1505.

127. These conflicting uses of the doctrine contradict Professor Sullivan's conclusion that "[t]he doctrine occupies a demilitarized zone between different substantive theories

Kathleen Sullivan defends the unconstitutional-conditions doctrine as a useful method for identifying "a characteristic technique by which government appears not to, but in fact does burden . . . liberties."¹²⁸ The state, however, appears not to burden liberties by conditioning benefits only if we accept the premises of the action/inaction and positive/negative rights discourse.¹²⁹ The unconstitutional-conditions doctrine explains the harm of government conditions within the constraints of this discourse; thus, abandoning the prevailing use of these dichotomies would dispense with the need for the doctrine altogether.¹³⁰ We would then face squarely the critical question ignored by the Court: How can the government justify its denial of information to people who rely on government aid? By addressing directly the issue of dependency and the opportunity it creates for oppressive government control of knowledge, we may develop a stronger claim to the government's affirmative obligations.

The Court's reliance on neutral principles to address the First Amendment questions raised in *Rust* masked the regulations' violence and overlooked broader issues of social power. I have suggested the need for an alternative approach that rejects the exclusive focus on neutrality with respect to ideas and considers the political implications of government speech. How does this critique suggest a path for transformation? After explaining how Critical Legal Studies has freed us to conceive of and to create more just communities, Professor Anthony Cook asks a number of questions about the task that critical scholars face:

of constitutional law because it identifies a powerful technique of government manipulation." *Id.* at 1505. I do not believe that there is such a safe zone in constitutional theory unaffected by the struggle for substantive vision. Examining techniques of government power is an important part of understanding the politics of law. The unconstitutional-conditions doctrine, however, does not encompass the realm of power relationships in which government wields those techniques.

128. *Id.* at 1419.

129. See Sunstein, *supra* note 83 (advocating the abandonment of the unconstitutional-conditions doctrine as an antiquated conception of the regulatory/welfare state). Sunstein suggests that we replace the doctrine with an inquiry into "first, the nature of the incursion on the relevant right, and second, the legitimacy and strength of the government's justification for any such incursion." *Id.* at 620-21; cf. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1123 (1987) (rejecting unconstitutional-conditions principles as "far too blunt to serve as tools to separate valid from invalid conditional spending").

130. The unconstitutional-conditions doctrine is necessary only to explain how a government condition on funding could possibly be unconstitutional when the government has no obligation to provide funding in the first place. If the government may constitutionally deny the grant altogether, why should recipients be heard to complain about a restriction? The doctrine allows some protection against such government interference with rights, while preserving the traditional view that the Constitution confirms no affirmative claim to government subsidies. If the government were required to subsidize certain protected activities, however, there would be no need for a special doctrine to prohibit government conditions that threaten these activities.

How do we begin this reconstructive enterprise? What use do we make of our newfound liberation? If we are free to define collectively our existence and to transcend our present context, are we any better equipped to act than before? How do we know that the community to which we aspire is better than the social order we transcend? . . . In short, what values and concerns will guide us in this reconstructive moment?¹³¹

We must move towards a theory that draws upon and critiques current legal jurisprudence, but does not attempt simply to fit the experiences of Blacks and other dispossessed people into existing legal doctrine.¹³² The task is to study the form and methods of oppression and to develop legal theories that seek to end it. Stated positively, we need a law of liberation. We will benefit in this project from studying the works of scholars of oppression and liberation, as well as progressive legal scholarship. The following three parts explore the role that the creation of knowledge plays in the oppression and liberation of subordinated groups. I rely primarily on Black people's historical struggle for knowledge in America to illustrate the relationship between knowledge and power.

III. *Oppression and the Control of Knowledge*

The regulations banned from publicly funded clinics information vital to a woman's well-being, autonomy, and participation in the community. From the perspective of the people most affected, the regulations deliberately promoted ignorance among poor Black women.¹³³ They are an example of the control of knowledge that helps to maintain the existing structure of racial domination.

To understand the political implications of the state's promotion

131. Cook, *supra* note 19, at 991.

132. See, e.g., Culp, *supra* note 51, at 97-99; Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2032 (1991); cf. Cook, *supra* note 19, at 1014 (stating as to Martin Luther King, Jr.'s multidimensional critical activity, that "[d]rawing from the best of liberalism and the best of Christianity, King forged a vision of community that transcended the limitations of each and built upon the accomplishments of both"); Robert Staples, *What is Black Sociology?*, in *THE DEATH OF WHITE SOCIOLOGY* 161, 168 (Joyce A. Ladner ed., 1973) ("If white sociology is the science of oppression, Black sociology must be the science of liberation"); Cornel West, *The Dilemma of the Black Intellectual*, 1 CULTURAL CRITIQUE 109, 122 (1985) (describing the "insurgency model" for Black intellectual work).

Drucilla Cornell's caution against over-reliance on tradition is relevant to this task: "We should not pretend that there is a better view of law and politics in the tradition than is actually operative under even the most generous interpretation. We must always be clear that we are bringing out the potential of the *might have been*." Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1205 n.225 (1988). For examples of feminist theory that reject patriarchal doctrine and methodology, see AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110 (1984); MACKINNON, *supra* note 63, at 32-45; Bartlett, *supra* note 63.

133. See *supra* notes 40-43 and accompanying text; see also Brief for the NAACP Legal Defense and Educational Fund, Inc., and Other Organizations as *Amici Curiae* in Support of Petitioners at 8, *Rust* (Nos. 89-1391, 89-1392); *Massachusetts v. Bowen*, 679 F. Supp. 137, 146 (D. Mass. 1988) ("In its attempt to implement a health care policy which promotes childbirth, the defendant has devised a system which rests in large part on keeping Title X clients in ignorance.").

of ignorance, it is helpful to look at theories about oppression and the control of knowledge. The Brazilian scholar Paulo Freire illuminated the relationship between education and oppression in his book, *Pedagogy of the Oppressed*.¹³⁴ Freire defines oppression as any situation in which one person hinders another's pursuit of self-affirmation as a responsible person, thus interfering with "man's ontological and historical vocation to be more fully human."¹³⁵ The chief preoccupation of oppressors is to prevent the oppressed from taking steps to change their status. It is in the interest of those in power to keep the oppressed in a state of "submerged consciousness," impotent to critique and transform their situation.¹³⁶ The powerful are so afraid that critical thinking will lead to revolution that they instinctively use any means, including physical violence, to keep the oppressed from this enterprise.¹³⁷

The most critical weapon of oppressors, then, is the control of knowledge. Those in power control knowledge in three interconnected ways: They attempt to determine social meaning; they reinforce their dominance through education; and they stifle sources of information available to subordinated groups. These methods of oppression may operate outside the conventional political and legal processes. Their repressive function is not always curtailed by legal doctrines, such as the marketplace-of-ideas and unconstitutional-conditions doctrines, which promote neutrality. The most potent instruments of domination go unnoticed in opinions such as *Rust v. Sullivan*.

A. Social Meaning and Oppression

The most powerful mechanism for controlling knowledge functions at the level of social meaning. This view of knowledge recognizes the inextricable bond between knowledge and power.¹³⁸ In contrast to the Enlightenment claim of objective truth, this model

134. FREIRE, *supra* note 38.

135. *Id.* at 40-41; see also MAURICE CORNFORTH, *THE THEORY OF KNOWLEDGE* 197 (3d ed. 1963) (asserting that oppression includes denying the oppressed "the opportunity of utilizing for their own interests the knowledge and power which exist in society").

136. FREIRE, *supra* note 38, at 37.

137. *Id.* at 146; see also BELL, *supra* note 2, at 221-22 (discussing examples of Black leaders who were persecuted because they "placed a high priority on ridding blacks of their slave mentality").

138. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 27 (1977) [hereinafter, FOUCAULT, *DISCIPLINE*] ("[T]here is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations"); Michel Foucault, *Truth and Power*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, at 109-33 (Colin Gordon ed., 1980).

posits that knowledge is a social construct that emerges from relationships of power.¹³⁹ Power constitutes the interpretation of reality through disciplines and institutions that permeate every aspect of our lives. How we experience the world—our very categories of thought—is determined by our social relationships. Thus, the regulations contributed to shaping society's understanding both of abortion and of the government's role in a way that supports existing social arrangements. By banning the mention of abortion, they defined it as a degrading and dangerous experience.¹⁴⁰ They also reinforced the dominant view that poor women of color are not capable of self-determining activity or worthy of society's support.

Those in power seek to preserve their sovereignty by creating and enforcing definitions of social reality that maintain the current social boundaries, excluding others from the privileges they enjoy.¹⁴¹ This epistemological function operates in the minds of both the oppressor and the oppressed. The powerful invent stories that create a shared reality in which their domination seems fair and natural.¹⁴² As we have seen, the law is a critical aspect of ideology that obscures the suffering of the oppressed and relieves the oppressor of his complicity in that suffering.¹⁴³

The dominant culture tries to transmit this "wisdom" to subordinated groups as they interpret their own experiences. By teaching the oppressed the official story, those in power hope to snuff out rebellion at its inception. The oppressed learn that the present social arrangements are actually in their best interest and that change is inconceivable.¹⁴⁴ In this way, the oppressor attempts

139. For a description of the sociology of knowledge, see KARL MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE* (1936). Its principal thesis is that modes of thought can only be understood by examining their social origins. *Id.* at 2; see also CORNFORTH, *supra* note 135, at 3 (describing the Marxist study of knowledge, which asks "how ideas actually arise, develop and are tested in the concrete conditions of real human life, in the material life of society").

140. Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861, 914 (1991). For a discussion of the constitutive struggle over abortion, see *id.* at 910-17.

141. See, e.g., Minow, *supra* note 71, at 61 (1987) (discussing feminist recognition of the "power of naming" which takes "a male as the reference point and treat[s] women as . . . 'different,' [and] 'deviant'"); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection & Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 179 (1987) (discussing feminist recognition "that knowledge and identity are forged in social relationships"); Peller, *supra* note 109, at 1274-85 (discussing the representation of social hierarchies through a language "which establishes the categories through which the relation with the social other is mediated"); cf. Matsuda, *Voices*, *supra* note 63, at 1398 (explaining how accent is a social construction that enforces social boundaries).

142. See Delgado, *supra* note 77, at 2412-13 ("The stories . . . told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.").

143. See *supra* notes 62-66 and accompanying text; see also Peller, *supra* note 109, at 1289 (describing legal thought as a "political act of power" in that "it institutionalizes socially created metaphors for the representation of social life").

144. For a description of Antonio Gramsci's concept of hegemony, the prevailing consciousness that is internalized by the masses and supports the established order, see CARL BOGGS, *GRAMSCI'S MARXISM* (1976). According to Gramsci, hegemony "encouraged a sense of fatalism and passivity toward political action; and it justified every type of system—serving sacrifice and deprivation. In short, hegemony worked in many

to erase from the minds of the oppressed any memory of a dignified heritage or vision of a just future.

American slavery epitomized the oppressive control of knowledge. The brutality of enslavement was not limited to physical restraint; its captive power operated in the realm of the imagination. Slavery's critical tool of social control was to transform the African's identity from a human being into an object of property. Slavemasters made slaves more vulnerable to subjugation by extinguishing the Africans' collective memory of liberty.¹⁴⁵ A Louisiana doctor, Samuel W. Cartwright, attributed runaways to a disease of the mind peculiar to Africans, which he called Drapetomania.¹⁴⁶ His cure for Drapetomania—which included medical advice and whipping—embraced slavemasters' need to stifle their slaves' dream of freedom.¹⁴⁷

Racial ideology is the particular manifestation of the control of knowledge to oppress Blacks in America.¹⁴⁸ The American psyche holds a set of consistent beliefs about the superiority of whites and the inferiority of Blacks that legitimate Black subjugation. Kimberlé Crenshaw describes the hegemonic function of racist ideology embodied in an "oppositional dynamic, premised upon maintaining Blacks as an excluded and subordinated 'other.'" ¹⁴⁹ Under this pattern of oppositional categories, whites are associated with positive characteristics (industrious, intelligent, responsible), while Blacks are associated with the opposite negative qualities (lazy, ignorant, shiftless).¹⁵⁰ The dominant society blames Blacks, rather

ways to induce the oppressed to accept or 'consent' to their own exploitation and daily misery." *Id.* at 40. As I explain in Part V, this unidimensional view of knowledge and power neglects the ways in which people use knowledge to resist their oppression.

145. Cook, *supra* note 19, at 1015. The practices of forbidding slaves from speaking their native language, prohibiting the practice of African customs, and separating slaves with similar backgrounds reinforced the brutal detachment from African society. *Id.* at n.86. See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982) (describing the rituals of enslavement in various cultures that contributed to the slave's social death). Professor Patterson terms the obliteration of slaves' genealogical and cultural roots, "natal alienation," which created a "socially dead person." *Id.* at 38.

146. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELUM SOUTH* 109 (1956).

147. *Id.*

148. See ROBERT STAPLES, *INTRODUCTION TO BLACK SOCIOLOGY* 260-61 (1976). On the historical development of Black stereotypes, see GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 256-82 (1971) (discussing the propagation of theories of Black inferiority and degeneracy at the turn of the century); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 111-51 (1984) (discussing the prevalence of theories near the turn of the century that Blacks, freed from slavery, were returning to their "natural state of bestiality").

149. Crenshaw, *supra* note 49, at 1381; accord Lynn D. Frost, *Western Metaphysical Dualism as An Element in Racism*, in *CULTURAL BASES OF RACISM AND GROUP OPPRESSION* 49, 49-84 (John L. Hodge et al. eds., 1975) (observing the "dualistic nature" of racist beliefs).

150. See Crenshaw, *supra* note 49, at 1370-71 & n.151.

than racism, for the state of the Black community. Descriptions of the degeneracy and disintegration of the Black family, for example, have explained Black poverty, crime, and unemployment.¹⁵¹ Popular mythology degrades Black women and has reinforced the systemic, institutionalized denial of their reproductive freedom.¹⁵² These images deny the humanity of Blacks, obscuring Black pain and the need for social change.¹⁵³

Racial ideology also operates at a deeper level. The dominant society constructs categories of thought that appear objective and divorced from race, but which operate in conjunction with racial stereotypes to rationalize white domination. The universalist concepts of free will and meritocracy support the belief that Blacks' inequality results from their own disabilities rather than from racism.¹⁵⁴ Eldridge Cleaver demonstrated how the white cultural dichotomy between reason and desire was another example of the language of power.¹⁵⁵ Cleaver emphasized the particular manifestation of this mind/body dichotomy in the "white supremacist discourse that depicted whites as rational and civilized, and blacks as irrational and lustful."¹⁵⁶ White culture's sexual repression manifested its deep fear of Black sexuality that both determined white identity and justified white domination over Blacks.¹⁵⁷ Cleaver's thinking suggested, "the very definition and content of rationality itself represented an ideology rooted in the sexual politics of race."¹⁵⁸

B. Education and Oppression

Education also serves the interests of those in power. In contrast to the liberal view of public education as a means of social mobility, radical educators have theorized that schools function to reproduce the dominant social structure, ideology, and culture.¹⁵⁹ Black scholars similarly have seen public schools as vehicles for inculcating

151. See Jewell H. Gresham, *White Patriarchal Supremacy: The Politics of Family in America*, NATION, July 24/31, 1989, at 116, 118-19.

152. Roberts, *supra* note 18, at 1437 (describing "how several popular images denigrating Black mothers—the licentious Jezebel, the careless, incompetent mother, the domineering matriarch, and the lazy welfare mother—have reinforced and legitimated their devaluation").

153. See Gresham, *supra* note 151, at 120 (describing the dominant society's resistance to the concept of Black people as "vulnerable human beings").

154. STAPLES, *supra* note 148, at 260. See generally CULTURAL BASES OF RACISM AND GROUP OPPRESSION, *supra* note 149 (examining the concepts, values and structures of traditional Western culture, particularly Western dualist thought, that support racism); John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 207 (1982).

155. See ELDRIDGE CLEAVER, SOUL ON ICE 155-92 (1968); John L. Hodge, *Mind, Body and Soul on Ice*, in CULTURAL BASES OF RACISM AND GROUP OPPRESSION, *supra* note 149, at 90 (discussing Cleaver's analysis of mind-body dualism in Western thought); cf. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 107-125 (discussing the dominant culture's use of the social constructs of Reason and Unreason to subordinate Blacks).

156. Peller, *supra* note 52, at 805 (citing CLEAVER, *supra* note 155, at 145-73).

157. *Id.*

158. *Id.* (citing CLEAVER, *supra* note 155, at 145-73).

159. CULTURAL AND ECONOMIC REPRODUCTION IN EDUCATION (Michael W. Apple ed.,

Black children with the dominant white world view.¹⁶⁰

Henry Giroux explains that schools reproduce the dominant social structure, ideology, and culture in three ways. First, schools impart to different social groups the particular knowledge and skills they need to occupy their assigned position in the labor force, according to their class, race, and gender.¹⁶¹ Jonathan Kozol's recent report on American public schooling reveals a two-tiered system that prepares Black children for inferior status through disparate funding.¹⁶² He contrasts schools in affluent suburbs that provide

1982); Henry A. Giroux, *Theories of Reproduction and Resistance in the New Sociology of Education: A Critical Analysis*, 53 HARV. EDUC. REV. 257, 257-58 (1983) [hereinafter Giroux, *Reproduction in Education*]. Examples of the radical critique of schooling based on the concept of reproduction of the dominant society include HENRY A. GIROUX, *IDEOLOGY, CULTURE & THE PROCESS OF SCHOOLING* (1981) [hereinafter GIROUX, *IDEOLOGY OF SCHOOLING*]; *IDEOLOGY AND PRACTICE IN SCHOOLING* (Michael W. Apple & Lois Weis eds., 1983). For discussions of how legal education supports existing hierarchies of power, see Kimberlé Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1989) (describing the "perspectivelessness" required of minority law students, who "must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts"); Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988); Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40-64 (David Kairys ed., 1982).

160. See, e.g., Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 330-41 (1980); STAPLES, *supra* note 148, at 35-36.

161. Giroux, *Reproduction in Education*, *supra* note 159, at 258. Standardized testing plays an important role in tracking Black and Latino students into an educational program that limits their employment opportunities. See Arons & Lawrence, *supra* note 160, at 332-37; see also JACQUELINE J. IRVINE, *BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS* 9-12 (1990) (citing studies demonstrating that tracking disproportionately places Black students in educational programs that limit their achievement). For discussions of schooling and its reproduction of gender roles, see Gail P. Kelly & Ann S. Nihlen, *Schooling and the Reproduction of Patriarchy: Unequal Workloads, Unequal Rewards*, in *CULTURAL AND ECONOMIC REPRODUCTION IN EDUCATION*, *supra* note 159, at 162 (examining how schools reproduce the sex role division of labor in United States society); Terry N. Saario et al., *Sex Role Stereotyping in the Public Schools*, 43 HARV. EDUC. REV. 386 (1973) (demonstrating how elementary school books, educational achievement tests, and differential curricular requirements contribute to sex role stereotyping); Linda Valli, *Becoming Clerical Workers: Business Education and the Culture of Femininity*, in *IDEOLOGY AND PRACTICE IN SCHOOLING*, *supra* note 159, at 213-34 (describing how a high school office education program taught working-class girls a "feminine work identity").

For a description of how the public school movement reinforced class divisions in nineteenth century industrial America, see JANSEN, *supra* note 103, at 155-56 (discussing MICHAEL B. KATZ, *CLASS, BUREAUCRACY, AND SCHOOLS: THE ILLUSION OF EDUCATIONAL CHANGE IN AMERICA* 3-55 (1971)). Public schools resocialized children of the laboring classes to fit the demands of industrial production, while private academies prepared children of privilege for positions of leadership. *Id.* In 1828, the Boston School Committee described the beneficial effects of Lancasterian "manufactories" on students as "'disposing their minds to industry, to readiness of attention, and to subordination thereby creating in early life love of order, [and] preparation for business.'" *Id.* (quoting Boston School Committee).

162. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991); see also Abbott v. Burke, 575 A.2d 359, 395-403 (N.J. 1990) (describing factors that contribute to the "inferior quality of education in poorer urban districts" in New

wood-panelled libraries, computers, and seminar-size classes, with overcrowded inner-city schools that offer fragmentary curriculums, inadequate supplies, and decaying facilities.¹⁶³ For example, despite twenty-three years of court challenges, per-pupil spending in San Antonio, Texas ranges from \$2000 in the poorest districts to \$19,000 in the richest.¹⁶⁴

Second, schools attempt to reproduce the dominant culture by transmitting and legitimating dominant forms of knowledge, values, language, and style.¹⁶⁵ The curriculum organizes bodies of knowledge in a hierarchy subordinating information about women, people of color, and the poor and working class.¹⁶⁶ Teachers reward students who mimic the linguistic style and other aspects of the ruling

Jersey, including disparities in curriculum, equipment, and physical facilities); Brenna B. Mahoney, *Children at Risk: The Inequality of Urban Education*, 9 N.Y.L. SCH. J. HUM. RTS. 161, 165-73 (1991) (citing findings of reports on inequities in the quality of urban education); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 787-94 (1985) (describing the failure of urban public schools to provide adequate education, particularly to poor, minority students).

The United States Supreme Court has upheld school financing schemes based on local property tax bases that create these gross disparities among schools. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (holding that the Texas school-financing system did not violate the equal protection clause). State constitutions may, however, provide a stronger claim to equal education. See, e.g., *Abbott v. Burke*, 575 A.2d 359, 408-10 (1990) (striking down New Jersey school-aid formula as a violation of the state constitution and mandating increased funding for poor districts); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (holding that education is a fundamental interest under the state constitution and applying stricter scrutiny to educational disparities), *cert. denied*, 432 U.S. 907 (1977). See generally John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969) (proposing a strict scrutiny standard for constitutional review of educational financing); Mahoney, *supra*, at 171-96 (discussing recent state court decisions striking down school finance systems).

163. See Kozol, *supra* note 162, at 40-132 (comparing suburban and inner-city public education in Chicago and New York City).

164. *Id.* at 223.

165. Giroux, *Reproduction in Education*, *supra* note 159, at 258; see also Robert Dreeben, *The Contribution of Schooling to the Learning of Norms*, 37 HARV. EDUC. REV. 211 (1967) (analyzing how the social structure of schooling contributes to the socialization of students).

The Supreme Court views the inculcation of values as the proper function of public education. Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1274 (1991); see, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding restrictions on student speech in school-sponsored activities that contradicts the school's basic educational mission); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (same). The Court's only restrictions of schools' inculcation of values have been limited largely to religious issues. Arons & Lawrence, *supra* note 160, at 319; see, e.g., *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (holding that the non-sectarian invocation of God at a public school graduation ceremony violated the Establishment Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (requiring the state to exempt Amish children from compulsory high school attendance rules because those rules violated the right to free exercise of religion); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (holding unconstitutional Bible reading and prayer in the classroom).

166. See Giroux, *Reproduction in Education*, *supra* note 159, at 268-69. History text books, for example, usually emphasize the accomplishments of white men and minimize those of women and minority groups. See Joshua Brown, *Into the Minds of Babes: A Journey Through Recent Children's History Books*, 25 RADICAL HIST. REV. 127 (1981). Practical courses, such as industrial arts, associated with the working class, are ranked as inferior to theoretical courses. See Giroux, *Reproduction in Education*, *supra* note 159, at 268.

Thus, the importance of the hegemonic curriculum lies in both what it includes—with its emphasis on Western history, science, and so forth—and

culture and punish those who rebel.¹⁶⁷ Finally, schools inculcate students with an ideology that replicates the current distribution of power.¹⁶⁸ For example, knowledge acquisition is evaluated as a matter of individual competition rather than as a collective process. In contrasting the traditional American learning process with that of the Amish, the Supreme Court in *Wisconsin v. Yoder* recognized the ideological aspect of schooling:

The [public] high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing, a life of "goodness" rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.¹⁶⁹

The powerful attempt to control not only the interpretation of existing knowledge, but also the way people approach new knowledge. We can tackle new information critically or assimilate it into the old categories of thinking. The oppressor's sovereignty depends on how well people adapt to the prevailing order and how little they question it.¹⁷⁰ Those in power therefore employ a pedagogy designed to ensure that the oppressed absorb the dominant world view without resisting.¹⁷¹ Paulo Freire describes this pedagogy as the oppressive "banking" approach to education, which merely deposits information into the brains of receiving objects, discouraging critical and creative thinking.¹⁷² Although the Title X regulations controlled knowledge dispensed in a clinic

what it excludes—feminist history, black studies, labor history, in-depth courses in the arts, and other forms of knowledge important to the working class and other subordinate groups.

Id. at 269.

167. See Arons & Lawrence, *supra* note 160, at 330-31 (telling the story of a group of Black high school students whose school demanded that they "walk and talk and wear their clothes in a way that made their white teachers comfortable").

168. Giroux, *Reproduction in Education*, *supra* note 159, at 258; see also Jean Anyon, *Workers, Labor and Economic History, and Textbook Content*, in *IDEOLOGY AND PRACTICE IN SCHOOLING*, *supra* note 159, at 37-60 (demonstrating the legitimization of powerful groups and denial of working class identity in 17 high school history books); Arons & Lawrence, *supra* note 160, at 323 (presenting a First Amendment critique of the practice of "expos[ing] children only to values and ideas that buttress the status quo and legitimize the position of those in power"); Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (1987) (proposing implementation of a fairness standard for public school textbooks); cf. Sara L. Lightfoot, *Politics and Reasoning: Through the Eyes of Teachers and Children*, 43 HARV. EDUC. REV. 197 (1973) (demonstrating that the political ideology of Black elementary school teachers affects their educational philosophy and practice).

169. 406 U.S. at 211.

170. FREIRE, *supra* note 38, at 63.

171. See *id.* at 60.

172. *Id.* at 58-66.

rather than a classroom, they too adopted this pedagogical approach. The government deposits limited information about reproduction into the minds of poor women. Its "pedagogy," like that described by Freire, treats women as objects to be manipulated by government policy and not subjects who participate fully in decisions that determine the course of their lives.¹⁷³

C. *Oppression and the Control of Sources of Information*

The regulations' most direct consequence was depriving poor women of their only source of important information about reproduction. The exclusion from sources of knowledge has played a principal role in racial oppression in America. Criminal laws prior to the Civil War punished anyone who taught slaves to read or write and forbade slaves from meeting together for "mental instruction."¹⁷⁴ Whites were not allowed to employ slaves to set type in a printing office or to give books or pamphlets to slaves.¹⁷⁵ White slaveowners blocked the slaves' access to knowledge because they feared that a literate Black population would be more capable of rebellion. In his narrative, a former slave named Lewis Clarke tells why he never learned to read:

I did not *dare* to learn. I attempted to spell some words when a child. One of the children of Mrs. Banton went in, and told her that she heard Lewis spelling. Mrs. B. jumped up as though she had been shot. "Let me ever know you to spell another word, I'll take your *heart* right out of you." I had a strong desire to learn. But it would not do to have slaves learn to read and write. They could read the guideboards. They could write passes for each other. They cannot leave the plantation on the Sabbath without a written pass.¹⁷⁶

In 1863, Black illiteracy was over ninety-five percent; less than 150,000 of the four million emancipated slaves could read and write.¹⁷⁷

173. The regulations did not seek to provide the reproductive information women need to make decisions about their health. Rather, like the "banking" pedagogy, the regulations determined what information to withhold from women to discourage them from taking a disapproved action. The "education" provided by clinics under the regulations was designed not to promote women's critical thinking, but to achieve the government's policy objectives.

174. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* 198 (1978); *INTERESTING MEMOIRS AND DOCUMENTS RELATING TO AMERICAN SLAVERY AND THE GLORIOUS STRUGGLE NOW MAKING FOR COMPLETE EMANCIPATION* 239-40 (1969) [hereinafter *INTERESTING MEMOIRS OF SLAVERY*]. For a description of the political struggle over slave literacy in South Carolina, see JANET D. CORNELIUS, "WHEN I CAN READ MY TITLE CLEAR": LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH 37-58 (1991).

175. STAMPP, *supra* note 146, at 208.

176. *INTERESTING MEMOIRS OF SLAVERY*, *supra* note 174, at 80. Lewis Clarke's story of his mistress's violent opposition to his learning is remarkably similar to that of Frederick Douglass that began this Article. See *supra* text accompanying note 1.

177. DU BOIS, *supra* note 49, at 638. For accounts of the five percent of slaves who managed to learn to read against all odds, see CORNELIUS, *supra* note 174, at 59-104; EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 561-66 (1974).

After Emancipation, whites saw education for the freed slaves as the ultimate absurdity.¹⁷⁸ Most white Southerners regarded publicly-funded education for Blacks at best an unjustifiable waste of private property, given that Blacks were thought to be incapable of learning, and at worst, a positive social danger.¹⁷⁹ The state-enforced peonage system that confined Black laborers to poor-paying, menial occupations relied on keeping Blacks ignorant and disorganized.¹⁸⁰ The typical sentiment was reflected in the expression, "schooling ruins a nigger."¹⁸¹

Southern whites violently opposed early efforts to educate Blacks and considered teaching Blacks to be an act of treason against the white race. Throughout the South, teachers in Negro schools were assaulted and threatened with death and schoolhouses were burned.¹⁸² "'Nigger teachers' was one of the most opprobrious epithets that the Southern vocabulary furnished."¹⁸³ Officials sought to conciliate whites by closing schools for Blacks,¹⁸⁴ and some Black schools remained open only with military protection.¹⁸⁵ W.E.B. Du Bois captured Southern animosity to Black education in the following passage:

The opposition to Negro education in the South was at first bitter, and showed itself in ashes, insult and blood; for the South believed an educated Negro to be a dangerous Negro. And the South was not wholly wrong; for education among all kinds of men always has had, and will always have, an element of danger and revolution, of dissatisfaction and discontent. Nevertheless, men strive to know.¹⁸⁶

178. See DU BOIS, *supra* note 49, at 637-48. The remarks of a white member of the restored Louisiana legislature, upon passing one of the schools established by the Freedman's Bureau in New Orleans, reflects this view of Black learning: "'Is this a school?' 'Yes,' was the reply. 'What, for niggers?' 'Evidently.' He threw up his hands. 'Well, well,' he said, 'I have seen many an absurdity in my lifetime, but *this is the climax!*'" *Id.* at 637 (quoting J.J. Alvord, in REPORT OF JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. 247 (1866)).

179. *Id.* at 637-48.

180. ALLEN B. BALLARD, THE EDUCATION OF BLACK FOLK: THE AFRO-AMERICAN STRUGGLE FOR KNOWLEDGE IN WHITE AMERICA 12-13 (1973); DU BOIS, *supra* note 49, at 696-97.

181. DU BOIS, *supra* note 49, at 645.

182. *Id.* at 646.

183. *Id.* at 645-46. For an account of the Ku Klux Klan's intimidation of teachers and supporters of Black schools, see *They Would Not Let Us Have Schools*, in BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 112 (Gerda Lerner ed., 1973).

184. In 1862, for example, Edward Stanley, the provisional governor of North Carolina, closed a Negro school in New Bern on the grounds that his mission was to restore the old legal order, which forbade teaching slaves to read and write. DU BOIS, *supra* note 49, at 638.

185. *Id.* at 646-47.

186. W.E.B. DU BOIS, *The Souls of Black Folk*, in W.E.B. DU BOIS: WRITINGS 357-548 (1986).

D. *The Symbolic Significance of Exclusion from Knowledge*

The exclusion of the oppressed from knowledge also has symbolic significance: It serves as a powerful emblem of their inferior status. The denial of education was more than a reflection of stereotypes about Blacks' lack of intelligence or an instrument of subordination; it was the most powerful reminder of the hierarchical relationship between Blacks and whites. I believe it is this metaphoric role of ignorance that best explains the violent opposition of Southern whites to the efforts of the newly freed slaves to acquire an education. Whites resented Black attempts at schooling so bitterly, because they saw it as an effort by Blacks to become their equals.¹⁸⁷ Education, more than any advance made by Blacks, represented a threat to the racial prerogatives of all whites. Indeed, whites were more hostile to the establishment of schools for freed slaves than to Black ownership of land.¹⁸⁸ While white laborers received an education inferior to the private schooling of wealthy whites, it was imperative that Blacks remained at the bottom of the hierarchy of knowledge.¹⁸⁹ Thus, a Southern Congressman declared in a speech: "Woe be unto the political party which shall declare to the toiling yeoman, the honest laboring poor of this country, 'Your children are no better than a Negro's.'" ¹⁹⁰

The Supreme Court in *Brown* held that de jure segregation of schools was unconstitutional not only because of the tangible inferiority of colored schools, but because of its message of subordination.¹⁹¹ Segregated education did more than separate Black children from white children; it served to define Blacks as inferior and to exclude them from social participation.¹⁹² The opinion in *Brown* recognized one aspect of the symbolic exclusion created by segregation: Separation generated in the minds of Black schoolchildren "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹⁹³ It is true that the Court's focus on the psychological injury of racial separation failed to address the institutional function of segregation and led to an inadequate integrationist remedy.¹⁹⁴

187. Du Bois, *supra* note 49, at 645.

188. *Id.* at 647. Even some whites who supported the abolition of slavery and participated in the Freedman's Aid Societies to provide the freed slaves with food and clothing were unwilling to cooperate in any movement to educate the Black community. *Id.* at 646.

189. *See id.* at 663.

190. *Id.*

191. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

192. *Id.*; Charles R. Lawrence III, "One More River to Cross"—Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in *SHADES OF BROWN*, *supra* note 50, at 48, 50-54 [hereinafter Lawrence, *The Real Injury in Brown*]; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439-40 (interpreting segregated education as speech and *Brown* as the rejection of its message that "black children are an untouchable caste").

193. *Brown*, 347 U.S. at 494.

194. *See* DERRICK BELL, *The Chronicle of the Sacrificed Black Schoolchildren*, in *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 107-118 (1987) (discussing an alternative educational policy that emphasizes Black control over its own school funds and administration rather than pupil desegregation); HAROLD CRUSE, *PLURAL BUT EQUAL: A*

Yet the *Brown* decision stands as a landmark in constitutional jurisprudence because the Court identified the connection between educational exclusion and racial domination. The Court in *Rust*, however, failed to see the symbolic significance of excluding millions of poor women from knowledge deemed essential to the health and autonomy of the privileged. This form of exclusion, more than any other, reinforces their inferior status and signifies society's disregard for their humanity. In the following Part, I will discuss how this exclusion is related to dependency on government funds.

IV. Knowledge and Dependency

A. Government Gratuities and the Meaning of Dependency

In his groundbreaking article, *The New Property*,¹⁹⁵ Charles Reich described a critical feature of the dominant conception of government aid, which he termed the "gratuity principle."¹⁹⁶ This principle holds that because "[g]overnment largess has often been considered a 'gratuity' furnished by the state[,] . . . the state can withhold, grant, or revoke the largess at its pleasure."¹⁹⁷ The gratuity principle accords to government in its role as dispenser of public funds the same status as a private giver. The recipients hold this wealth conditionally rather than absolutely, subject to confiscation by the state.¹⁹⁸ The gratuity principle thus creates a feudal relationship between the government and grantees: "Just as the feudal system linked lord and vassal though a system of mutual dependence, obligation, and loyalty, so government largess binds man to the state."¹⁹⁹

CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY 244-57 (1987) (criticizing the NAACP's advocacy of public school integration rather than local control of schools); Lawrence, *The Real Injury in Brown*, *supra* note 192, at 56-62 (arguing that the simple reassignment of pupils, teachers, and administrators ignores the systemic nature of segregation).

195. Reich, *supra* note 84.

196. *Id.* at 740.

197. *Id.*; see also William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440 (1968) (critiquing Justice Holmes's distinction between constitutionally protected rights of private citizens and unprotected government-granted privileges).

198. Reich, *supra* note 84, at 770; see also *Bowen v. Gilliard*, 483 U.S. 587, 604-05 (1987) ("Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level.").

199. Reich, *supra* note 84, at 769-70. For another perspective on the relationship between dependent people and the modern welfare state, see JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986), and Handler, *supra* note 111. Professor Handler proposes a cooperative, dialogic model of agency and client decisionmaking that preserves autonomy and dignity rather than domination.

The gratuitous nature of state assistance to the poor is an important feature of oppression. Paulo Freire explained how state aid in the context of oppression always manifests itself in a false generosity: It never goes beyond the oppressor's "attempt to 'soften' [its] power . . . in deference to the weakness of the oppressed."²⁰⁰ The government's charity does not change the underlying power structure that sustains and justifies the state's mercy. Rather, "[a]n unjust social order is the permanent fount of this 'generosity', which is nourished by death, despair, and poverty."²⁰¹ Freire distinguished this false generosity of oppression with the true generosity that enables liberation: "True generosity consists precisely in fighting to destroy the causes which nourish false charity."²⁰²

The dependent status of the poor in America is reinforced by an ideology that separates and stigmatizes them as morally weak and "different from us."²⁰³ Recent discourse increasingly has attributed the problems of the poor to their own behavior and has based poverty reform on correcting their social deviance through programs such as workfare—requiring welfare recipients to work for their benefits—and mandatory paternity laws.²⁰⁴ The rhetoric of poverty categorizes people who receive government aid as either "deserving" or "undeserving."²⁰⁵ The deserving are considered entitled to government assistance either because their impoverished condition resulted from forces beyond their control or because they earned benefits through previous work.²⁰⁶ The undeserving, on the other hand, have no claim to public funds because they are considered responsible for their plight.²⁰⁷ Thus, the public views disaster relief, disability benefits, and social security as entitlements, while it views welfare as charity.²⁰⁸

200. FREIRE, *supra* note 38, at 28-29.

201. *Id.*

202. *Id.*

203. See ROSS, *supra* note 66, at 1502-03 (describing the rhetoric of poverty in American culture and Supreme Court decisions).

204. See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 277-85 (discussing poverty reform discourse as applied to single mothers); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (criticizing recent welfare reform initiatives that focus on the deviance of the poor).

205. See MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 9-16 (1989).

For another analysis of dependency in the context of the *Rust* decision, see Wendy E. Parmet & Mary E. O'Connell, *Gag-Rules and Gratuities: Why Rust Won't Go Away* (unpublished paper on file with the author). The authors argue that the main function of the ideological distinction between earned and unearned benefits is to "insulate[] all of us from a recognition of the depth of our own dependence on government, or the necessity of the welfare state." *Id.* at 14.

206. Parmet & O'Connell, *supra* note 205, at 14-15.

207. *Id.* at 14.

208. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972) (upholding welfare scheme that distinguished between undeserving, able-bodied poor, and deserving, disabled, and aged poor); cf. William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1516 (1986) (describing the New Contract version of private law welfare jurisprudence which "accords the highest and most secure status to nominally private wealth, such as pensions, the second highest to social insurance, and the lowest to public assistance").

Black women on welfare are considered "undeserving" because of both their race and their gender. Blacks have experienced the precarious state of dependence more than any group in America—a condition Patricia Williams describes as "defining blacks as those who ha[ve] no will."²⁰⁹ As slaves, they were deemed chattel owned by others with virtually no protection by the law. Their physical and mental well-being—indeed their very lives—were subject to the whim of white masters, as well as the brutality imposed by law.²¹⁰ Slavery inflicted, in addition to individual white masters' violence, the terrorism of the entire state. Because Blacks remain subordinate to whites in many ways—for example, many Blacks' dependency on the welfare system for survival—Black nationalist scholars have characterized the modern Black experience as a form of domestic colonialism.²¹¹ Poor Black women's reliance on government welfare makes them particularly vulnerable to government control of their reproductive decisions.²¹² The popular mythology about the social degeneracy of Blacks and the causes of their poverty places the poor Black community within the "undeserving" category of the poor.²¹³

209. See PATRICIA J. WILLIAMS, *On Being the Object of Property*, in *THE ALCHEMY OF RACE AND RIGHTS* 216, 219 (1991).

210. See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401, 421 (1987). See generally GENOVESE, *supra* note 177, at 3-49 (discussing the paternalism of slavery and the hegemonic function of slave law); STAMPP, *supra* note 146, at 141-91 (describing the ways in which masters controlled their slaves); *id.* at 192-236 (discussing the legal enforcement of white domination of slaves). Alan Watson concludes that "in English America one might almost say that a slave belonged to every citizen—at least he was subordinate to every white." ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 66 (1989). Under the Fugitive Slave Act of 1793, for example, even if a slave managed to escape his master, he was subject to capture by anyone. See STAMPP, *supra* note 146, at 153. Free Blacks in the North and South were also subordinated by law. See IRA BERLIN, *SLAVES WITHOUT MASTERS* 336-40 (1974) (discussing denial of the rights of free Blacks in the South); LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860*, at 64-186 (1961) (discussing political, educational, and economic repression against Blacks in the free states). Robin West argues that it is precisely this "dual sovereignty" which the Fourteenth Amendment was intended to abolish. See Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 *W. VA. L. REV.* 111, 132 (1991).

211. See, e.g., ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* 83-89 (1972) (explaining the four basic components of colonization and how the experience of the American communities fits within these); HAROLD CRUSE, *REBELLION OR REVOLUTION?* 76-77 (1968) (declaring that "the American Negro has existed as a colonial being" from the beginning, and that "the only factor which differentiates the Negro's status from that of a pure colonial status is that his position is maintained . . . in close proximity to the dominant racial group").

212. See Roberts, *supra* note 18, at 1432-36, 1440-44, 1457 n.197 (discussing the vulnerability of poor Black women to prosecution for drug use during pregnancy, sterilization abuse, forced cesarian sections, and removal of their children for neglect due to the fact that their associations with welfare agencies place them under greater government supervision).

213. See KATZ, *supra* note 161, at 23-29; *supra* notes 148-53 and accompanying text.

The distinction between deserving and undeserving poor is constructed according to gender, as well as race.²¹⁴ Men are entitled to compensation by social insurance programs for their prior participation in the labor force, while women—especially single mothers—are treated as dependent clients of the welfare system.²¹⁵ As unpaid caregivers, many women lack the relationship to the work force necessary to entitle them to benefits. In addition, society blames them for perpetuating poverty by deviating from the norm of marriage to a male breadwinner.²¹⁶

This categorization of those who receive government assistance profoundly affects the way we view dependency. Because social welfare programs are based on mere altruism, rather than any sense of collective obligation, it is likely that in times of economic hardship the “undeserving poor” will lose what meager support they have.²¹⁷ Dependency on the part of the “undeserving” has come to signify a lack of entitlement to the basic conditions of human dignity and membership in society. The current ideology of poverty, race, and gender links this form of reliance on the government with the forfeiture of a claim to constitutional protection.²¹⁸ Our society does not recognize any injury in violating the autonomy of the propertyless. It tolerates laws such as the regulations at issue because it cannot imagine poor Black women as self-determining people, seeing them as having no will.

B. *Dependency and the Constitutional Role of Property*

The preceding view of dependent people is a corollary of the Constitution’s protection of property. The Court in *Rust* appeared to conceptualize speech rights as individual property, which could be owned by citizens or the government.²¹⁹ The government essentially owned the knowledge at issue in *Rust* because it paid the salaries of the doctors who dispensed it. Accordingly, the Court was

214. See Fineman, *supra* note 204, at 283-84; NANCY FRASER, *Women, Welfare, and the Politics of Need Interpretation*, in UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY 144 (1989).

215. See Fraser, *supra* note 214, at 151-53.

216. See Fineman, *supra* note 204, at 289-93 (linking the view of single motherhood as pathological to patriarchal ideology). I would add to Professor Fineman’s identification of patriarchy in the images of single mothers in current poverty discourse, the racist devaluation of Black mothers. See *supra* note 152.

217. See Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1936 (1990). Two examples of the weakening of altruistic support for the poor are the recent termination of the Michigan general assistance welfare program and the passage of legislation in New Jersey denying additional benefits to children born to women on welfare. See Wayne King, *Florio Signs an Overhaul of Welfare*, N.Y. TIMES, Jan. 22, 1992, at B1 (discussing New Jersey legislation); Don Terry, *To Avoid Deficit, Michigan Ends Welfare to Some Adults*, N.Y. TIMES, Oct. 7, 1991, at A1.

218. Not all forms of reliance on government funds entail this forfeiture of freedom. Our society views the millions of Americans who receive social security, Medicare, tax deductions, and other “earned” benefits as fully entitled to constitutional protection. See Parmet & O’Connell, *supra* note 205, at 5-11 (discussing the ways in which “we are all recipients of government subsidies”). It is only the “undeserving” recipients of government charity who have lost their claim to self-determination.

219. See Balkin, *supra* note 102, at 401 (observing that access to forums depends on

able to deny poor women this knowledge because they lacked any property right on which to base a claim. Once the government established its claim to ownership of the speech, it won the right to restrict its use.²²⁰

The legal institution of property occupies a critical position in both liberal and republican constitutionalism. The interest in protecting private property structured the Constitution's concept of individual rights, as well as the limits of republican participation.²²¹ Liberalism views property ownership both as the object of affirmative government protection and as the shield from government abuse.²²² The centrality of private property in liberal thought originates in the Lockean view of human nature governed by perfect

the state's enforcement of its own private property rights); cf. Rand E. Rosenblatt, *Legal Entitlement and Welfare Benefits*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 159, at 262, 266-67 (discussing the "metaphor of private ownership"); PATRICIA J. WILLIAMS, *Gilded Lilies and Liberal Guilt*, *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 209, at 15, 35 (discussing the "notion of privately purchased public rights"). For a critique of the view of rights as a kind of individual property, see Staughton Lynd, *Communal Rights*, 62 *TEX. L. REV.* 1417, 1423-24 (1984); Cass R. Sunstein, *Government Control of Information*, 74 *CAL. L. REV.* 889, 916-18 (1986) (rejecting property-based notions of information ownership as justifying broad restrictions on speech by government employees).

220. The *Rust* Court's treatment of speech as government property is reminiscent of the Court's rationale nearly a century ago in *Davis v. Massachusetts*, 167 U.S. 43 (1897), which upheld a Boston ordinance banning any public address on public grounds without a permit. The Court adopted the reasoning of Oliver Wendall Holmes, then-Justice of the Massachusetts Supreme Judicial Court: "'For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.'" *Id.* at 47 (quoting *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895)). The Supreme Court rejected this view forty years later in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public."). *But see Adderley v. Florida*, 385 U.S. 39, 47 (1966) (upholding state's denial of access to jail entrance and driveway for student demonstration: "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

221. For an examination of America's property-based tradition of constitutionalism, attributed primarily to James Madison, see JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 141-202 (1990). Professor Nedelsky argues that the original focus on property created a Constitution structured around inequality by neglecting issues of popular participation in government and the relationship between economic and political power. The Madisonian Constitution favors civil rights over political rights as a means of securing property from the republican threat of the propertiless majority. "For the Framers, the protection of property meant the protection of *unequal* property and thus the insulation of both property and inequality from democratic transformation." *Id.* at 2. For a conservative defense of the primacy of constitutional property rights as the guarantee of political liberty, see JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992).

222. See Reich, *supra* note 84, at 779.

freedom and equality to appropriate private property.²²³ Traditional liberal theory excludes the poor by making no provision for the actual realization of their choices. The liberal connection between property and freedom ultimately dehumanizes those without property: "Locke objectifies the propertyless as 'things' to be managed and controlled by the state, as mere means to the propertyholders' end of happiness."²²⁴

Charles Reich used property's integral role in our constitutional system of individual rights as the basis for his redistributive claims.²²⁵ Private property affords individuals an essential base from which to assert their individuality and claim their rights. Because private property largely has been replaced by government largess and no longer can perform its protective function, Reich argued, society must recognize "New Property" private rights to public funds: "Only by making such benefits rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny."²²⁶

Civic participation, the foundation of republicanism, also depends on material security. Only citizens who owned property were considered authentic members of the community capable of independent deliberation about the common good.²²⁷ The best suited to govern were, in James Madison's words, "'men of intelligence, patriotism, property and independent circumstances.'"²²⁸ Classic republicanism considered the poor to be corrupt because they are subject to the will of another for existence; the dispossessed, therefore, were excluded from the public dialogue.²²⁹ The republican revival has suggested instead that the connection between property

223. Cook, *supra* note 19, at 993-96; CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 3 (1964); *see also* Johanna Brenner, *Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth*, 1 *GENDER & SOC'Y* 447, 448 (1987) (observing that under liberal political thought equality is equal opportunity, and "fairness exists when the distribution of individuals within unequal positions reflects their individual qualities").

224. Cook, *supra* note 19, at 995; *see also* FREIRE, *supra* note 38, at 136 (including among the oppressor's indispensable myths "the myth of private property as fundamental to personal human development, (so long as oppressors are the only true human beings)").

225. *See* Reich, *supra* note 84, at 771-78.

226. *Id.* at 785. For a critique of using New Property rights, rather than need, as a basis for welfare reform, *see* Simon, *supra* note 208, at 1486-515; Simon, *supra* note 17, at 23-37. Professor Simon argues that the New Property is antiredistributive because it provides no basis to challenge the conflicting claims of old property rights, and it discourages collective action by the poor.

227. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319, 1328-29 (1987) (suggesting reasons for the original focus on property as the object of constitutionalized private rights).

228. NEDELSKY, *supra* note 221, at 51 (quoting James Madison letter to Thomas Jefferson, 5 *Writings* 66 (Dec. 9, 1787)).

229. *See* Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 *HARV. J.L. & PUB. POL'Y* 37, 38 (1990); Derrick Bell & Preeti Bansal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609, 1612 & n.12 (1988); Linda K. Kerber, *Making Republicanism Useful*, 97 *YALE L.J.* 1663, 1665 (1988) ("[T]he absence of the dependent classes—defined by race, gender, and property—was essential to the republican view of the world, not an easily correctable accident."). *But see* Michelman, *supra* note

and political participation requires redistribution of wealth to provide individuals with the material prerequisites of civic virtue.²³⁰

For liberals, property is the barrier that protects the private sphere of individual liberty from the reach of government power. For republicans, property is the assurance of independence that enables civic engagement. Both theories concerning the constitutional role of property demonstrate how dependence on government aid, viewed as mere charity, places human freedom in peril.²³¹

C. *Dependency and the Control of Knowledge*

The state's false generosity and the dependency it fosters combine with the control of knowledge to perpetuate hierarchies of power. The gratuitous nature of government aid ensures continued dependency on the government, which, in turn, allows the state greater control over what knowledge is made available to dispossessed communities. Government charity merely placates the poor, rather than providing the knowledge and other resources necessary to change their status. Freire explains, "[i]ndeed, the interests of the oppressors lie in 'changing the consciousness of the oppressed, not the situation which oppresses them'; for the more the oppressed can be led to adapt to that situation, the more easily they can be dominated."²³²

The interdependence of discourse and material dependency reminds us that power does violence to both the body and the mind.

227, at 1332-34 (arguing that the founders' focus on possessive property rights reflected a democratically inclusive republican conception given the country's economic and social circumstances of "a modest proprietary competence lying within reach of all"). Of course, Michelman's "all" does not include Black slaves who did not share the real possibility of property ownership.

230. See, e.g., Amar, *supra* note 229; Michelman, *supra* note 227, at 1330-50; Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981).

231. The embrace of the link between inclusion and property by both liberal and republican scholars demonstrates how deeply it is embedded in American culture. See, e.g., Amar, *supra* note 229, at 37 (arguing that socialism, in which the state controls all resources, is incompatible with individual liberty and democracy because "the citizen would have no ground of her own on which to stand, to define herself, and to resist government tyranny"); Charles A. Reich, *Commentary*, 100 YALE L.J. 1465, 1468 (1991) (arguing that "the idea of a propertyless people in a democratic society" is unacceptable). For a discussion of the "mythic power of property" in American society, see NEDELSKY, *supra* note 221, at 246-50. Nedelsky attributes the enduring force of property in American constitutionalism to a deeply embedded "psychological" belief that "property rights bear a special relation to liberty." *Id.* at 250.

232. FREIRE, *supra* note 38, at 60 (quoting SIMONE DE BEAUVOIR, *LA PENSÉE DE DROITE, AUJOURD'HUI* (1908)). This dual control reinforces society's dehumanizing image of the oppressed. See *id.* at 45 (stating that "the more the oppressors control the oppressed, the more they change them into apparently inanimate 'things'").

Although ideology is a powerful instrument of domination, domination is grounded in more than ideology.²³³ It has a material foundation that often leaves the dispossessed at the mercy of those with money and status. The metaphysical aspects of power/knowledge do not entirely explain the subordination of poor women of color. They lack reproductive autonomy not only because of the ideological construction of dependency and opposition to abortion, but also because their material conditions place concrete barriers in their way. Their poverty prevents them from paying for the information they need; their dependency on the government makes them especially vulnerable to the government's antiabortion message.

These coordinated tools of power are at work in the *Rust* decision. The Court held in *Rust* that poor women of color are not entitled to knowledge that the rest of society deserves.²³⁴ It reasoned that their constitutional entitlement is to rely on the conditional generosity of the state, rather than to change the material conditions of their lives.²³⁵ The *Rust* decision keeps these women in a state of ignorance that makes it more likely that they will adapt to social control of their reproduction. Both methods—the state's false generosity and the promotion of ignorance—serve to entrench the poor Black community further into the structure of oppression.

V. Knowledge and Liberation

The relationship between knowledge and power is not unidimensional. Knowledge is not merely an instrument of domination; it can also be a liberating force, a means of human freedom.²³⁶ While the powerful use knowledge to dominate, the oppressed use knowledge to survive, resist, and gain power. Knowledge, then, is not created exclusively by the powerful and imposed from above. It is a contested terrain in which members of society struggle to determine the meaning of social events and relations. Thus, the connection between power and knowledge contains the seeds of both repression and emancipation.²³⁷

233. See Cook, *supra* note 19, at 992 (recognizing that subordinated people may be "limited by the existential constraints of enslavement, apartheid, intimidation, or poverty that make meaningful social struggle difficult if not impossible"); see also Giroux, *Reproduction in Education*, *supra* note 159, at 273 (discussing the concrete constraints on working class students as to academic freedom and privileges); Matsuda, *Voices*, *supra* note 63, at 1399 (describing the material and ideological dimensions of accent discrimination).

234. *Rust v. Sullivan*, 111 S. Ct. 1759, 1766-71 (1991).

235. See *id.* at 1768-69 (stating that Title X patients were not entitled to government funding of abortion counseling).

236. See PATRICIA H. COLLINS, *BLACK FEMINIST THOUGHT* 221 (1991) (discussing "Black women's emerging power as agents of knowledge"); CORNFORTH, *supra* note 135, at 189 ("[M]en are free not when their actions take place without causes but when their actions are determined by their knowledge of their own requirements and how to realise them.").

237. See JANSEN, *supra* note 103, at 7; cf. Karst, *supra* note 155, at 109 (observing that freedom of expression "is a mixed blessing" for subordinated groups because it is part of the system of domination but also necessary for emancipation). Nor is the other half of the relationship—power—a unitary concept. Power is also a human capacity that may be used to maintain oppressive institutions or to create more egalitarian ones. Black

The oppressed use knowledge in several ways. First, their observations of the oppressor's use of knowledge to secure power helps them to negotiate their own mechanisms for survival.²³⁸ The oppressed are not completely fooled by the official story. Their knowledge of how the system really operates, acquired from their own experience of enduring poverty and subordination, becomes a critical weapon of resistance.²³⁹

Second, the oppressed create their own counter-stories that resist and subvert the dominant version of reality. The oppressed have always known that their "[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset."²⁴⁰ Indeed, they appropriate for their own purposes the very ideologies intended to oppress them. For example, African slaves reinterpreted conservative Christianity as an affirmation of their humanity and a call to revolutionary action.²⁴¹ Far from understanding the Bible as a

feminist writers have stressed this alternative vision of power. See, e.g., COLLINS, *supra* note 236, at 224 (distinguishing between power as domination and power "based on a humanist vision of self-actualization, self-definition, and self-determination"); BELL HOOKS, *Changing Perspectives on Power, in FEMINIST THEORY: FROM MARGIN TO CENTER* 83-92 (1984) (asserting that power can also mean women's ability to act to resist exploitation and work towards transforming society); see also West, *supra* note 132, at 50-52 (describing the "insurgency model" of Black intellectual activity which recognizes, instead of the "ubiquity of power," "the possibility of effective resistance and meaningful social transformation"). The same point has been made about the connection between language and power. See, e.g., Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1902 (1987) ("Language not only can express and confirm power but also can challenge and claim it.").

238. See HOOKS, *Introduction, supra* note 237, at ix ("Living as we did—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the center as well as on the margin. We understood both."); Minow, *supra* note 71, at 68-69 (discussing biculturalism as "a strategy of resistance and as a method for exposing the workings of power"). This multiple consciousness is expressed in the slave song: "Got one mind for white folks to see, 'Nother for what I know is me; He don't know, he don't know my mind." LAWRENCE W. LEVINE, *BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM* at xiii (1977).

239. See Cover, *supra* note 22, at 1608 (arguing that ideology is more effective at justifying an order to those who benefit from it than it is at hiding the nature of the order from its victims); Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 BROOK. L. REV. 861, 885-86 (1990) (discussing how people in the welfare rights movement learned to revalue their skills and abilities acquired from the experience of subordination and to use them in the struggle for welfare rights).

240. Delgado, *supra* note 77, at 2413.

Feminist consciousness-raising, wherein women construct a shared reality by telling stories about their personal experiences, is an example of resisting dominant ideology through narrative. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 87 (1989) (describing consciousness-raising as a process that "gives both content and form to women's point of view"). For a discussion of feminist views on knowledge and power, see, for example, Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 687 (1990) (affirming the role of myth in feminist theory as a way of "confirm[ing] a different view of the world"); MACKINNON, *supra* note 63, at 169 (defining feminism "in a way that connects epistemology with power as the politics of women's point of view").

241. Cook, *supra* note 19, at 1018. Anthony Cook gives a fascinating account of the

legitimizing text, slaves saw in scripture divine condemnation of their earthly subjugation: "To the surprise and fear of many whites, slaves transformed an ideology intended to reconcile them to a subordinate status into a manifesto of their God-given equality."²⁴²

The act of creating an alternative version of the world helps to heal the anguish of oppression. It constructs a mental space where one can live somewhere in the past or in the future, free from the debilitating assault of oppression. Spirituals served this purpose during slavery. The slaves' religious songs created a sacred time and space that made their visions of the Biblical past and heavenly future immediate.²⁴³ Lawrence W. Levine explains that, for the slaves, the sacred did not represent "a rejection of the present world but . . . the process of incorporating within this world all the elements of the divine."²⁴⁴ This creative act is also the first step toward liberation. As Audre Lorde observed, "the true focus of revolutionary change is never merely the oppressive situations which we seek to escape, but that piece of the oppressor which is planted deep within each of us."²⁴⁵

The counter-stories of subordinated groups serve not only to resist the dominant culture, but also to create their own identity.²⁴⁶ Black women have a strong tradition of creative resistance to the dominant culture's norm of womanhood that denied their identity: "[B]lack women have had to learn to construct themselves in a society that denied them full selves."²⁴⁷ For the women in Zora Neale

ways that slaves used Christian ideology as the basis for surviving the brutalities and indignities of slavery. *Id.* at 1015-23. See generally GENOVESE, *supra* note 177, at 161-284 (offering a critical assessment of slaves' adoption of Christianity); LEVINE, *supra* note 238, at 3-80 (describing the religious aspects of slaves).

242. Cook, *supra* note 19, at 1018.

243. LEVINE, *supra* note 238, at 37. Africans also resisted enslavement by more concrete acts of rebellion and escape. See GENOVESE, *supra* note 177, at 648-57 (describing the experience of hundreds of slaves who ran away to the North, Canada, and Mexico); STAMPP, *supra* note 146, at 132-40 (describing Nat Turner's rebellion and Denmark Vesey's conspiracy). Black women resisted slavery through acts of rebellion against their masters, such as assault, arson, poisoning, theft, participation in slave revolts, and running away. See SARAH BRADFORD, HARRIET TUBMAN, THE MOSES OF HER PEOPLE (3d ed. 1961); Elizabeth Fox-Genovese, *Strategies and Forms of Resistance: Focus on Slave Women in the United States*, in IN RESISTANCE 143 (Gary Y. Okihiro ed., 1986) (describing slavewomen's participation in armed rebellions, as well as daily resistance against their masters); Betty Wood, *Some Aspects of Female Resistance to Chattel Slavery in Low Country Georgia, 1763-1815*, 30 HIST. J. 603, 620-22 (1987) (discussing the multiple imprisonments of three slavewomen in Savannah, Georgia, for their acts of resistance against their enslavement).

244. LEVINE, *supra* note 238, at 31.

245. AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in SISTER OUTSIDER 114, 123 (1984).

246. Cf. Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 98-100 (1991) (exploring in works of fiction and judicial opinions how people negotiate their identities in the context of social and political structures of power).

247. Harris, *supra* note 18, at 613 (discussing the writings of Zora Neale Hurston); see also COLLINS, *supra* note 236, at 222 (discussing "subjugated knowledges, such as a Black women's culture of resistance"); e. christi cunningham, *Unmaddening: A Response to Professor Angela Harris*, 4 YALE J.L. & FEMINISM 155, 156 (1991) (arguing that Black women's multiple consciousness "should not be more than an intermediary step to the goal of whole, self-defined identity"); Roberts, *supra* note 18, at 1468-69 (arguing that affirming Black women's constitutional claim to personhood is especially suited for challenging

Hurston's novels, "[t]he dream is the truth."²⁴⁸ Thus, the culture and identity of oppressed peoples is not simply the product of domination; it is forged from the constant battle over knowledge.

This liberating aspect of knowledge is reflected in the campaign waged by freed slaves to acquire education during Reconstruction. Blacks' desire to improve their condition by means of education generated the first mass movement for publicly funded education in the South.²⁴⁹ Prior to the abolition of slavery, there was no general education system supported by public taxation in the Southern states; education was considered a luxury connected with wealth.²⁵⁰ W.E.B. Du Bois observed the remarkable contribution that the freed slaves made to the expansion of education in the South:

Public education for all at public expense, was, in the South, a Negro idea. . . . It was only the other part of the laboring class, the black folk, who connected knowledge with power; who believed that education was the stepping-stone to wealth and respect, and that wealth without education was crippled. Perhaps the very fact that so many of them had seen the wealthy slaveholders at close range, and knew the extent of ignorance and inefficiency among them, led to that extraordinary mass demand on the part of the black laboring class for education. And it was this demand that was the effective force for the establishment of the public school

the devaluation of Black women and reinforcing their tradition of willful self-definition). Drucilla Cornell, in her critique of Catharine MacKinnon's identification of feminine desire with masculine constructs, makes a similar point about all women: "I am not advocating that we deny male power. I am only suggesting that we not make the masculine our world by insisting that we are only what men have made us to be." Cornell, *supra* note 240, at 693.

248. ZORA N. HURSTON, *THEIR EYES WERE WATCHING GOD* 9 (Illini Books 1978) (1937).

249. DU BOIS, *supra* note 49, at 637-69. Booker T. Washington poignantly described the former slaves' yearning for education:

Few people who were not right in the midst of the scenes can form any exact idea of the intense desire which the people of my race showed for education. It was a whole race trying to go to school. Few were too young, and none too old, to make the attempt to learn. As fast as any kind of teachers could be secured, not only were day-schools filled, but night-schools as well.

Id. at 641. For a discussion of Black women's contribution to the movement for education, see *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY*, *supra* note 183, at 92-118.

The drive for education after Emancipation was a continuation of Blacks' struggle for literacy during slavery. See generally CORNELIUS, *supra* note 174 (describing the political and religious context of Black literacy during slavery). For enslaved Blacks, literacy was the key to self-determination: "Reading and writing, above all, pointed the way to freedom—first of all in the mind and spirit, and often in the body. . . . [A]cquiring reading and writing skills was an act of resistance against the slave system and an assertion of identity by the literate slave." *Id.* at 61.

250. DU BOIS, *supra* note 49, at 638-41. The establishment of a free public school system was stymied not only by the elite's belief that education interfered with the exploitation of laborers, but also by the failure of white laborers to demand it. The white laboring class relied on the possibility of becoming slaveholders themselves as their means of upward social mobility. *Id.* at 641.

in the South on a permanent basis, for all people and all classes.²⁵¹

Du Bois believed that the establishment of Negro schools built an "inner culture" that enabled Blacks to withstand the white reaction to Reconstruction.²⁵² Blacks had not acquired a sufficiently stable economic stake in land and capital in the ten years since Emancipation. Instead, it was their knowledge that allowed them to resist the effort to drive them back into slavery.

The Black community's desire to gain control over knowledge has been manifested in recent decades in the demand for local control of education. Malcolm X, for example, understood school segregation within the context of racial domination: "A segregated school system produces children who, when they graduate, graduate with crippled minds. But this does not mean that a school is segregated because it's all black. A segregated school means a school that is controlled by people who have no real interest in it whatsoever."²⁵³ He advocated as the solution, not integrating Black and white school children, but liberating schools that teach Black children from white control.²⁵⁴ Popular movements for community control over schools in poor urban neighborhoods such as Harlem and Ocean Hill-Brownsville in New York City and Adams-Morgan in Washington, D.C. in the 1960s were attempts to implement this view.²⁵⁵

Black people's resistance to the dominant interpretation of knowledge has been directed at legal ideology, as well. Within the struggle for racial justice, there lies a tradition of reconstructing the Constitution as a text of liberation. Frederick Douglass broke with Garrisonian abolitionists who rejected the Constitution as a slaveholding instrument to adopt his own radical constitutionalism.²⁵⁶ Douglass gave the following account of his decision to embrace the Constitution:

By such a course of thought and reading I was conducted to the

251. *Id.* at 638, 641.

252. *Id.* at 667; see also BALLARD, *supra* note 180, at 22-26 (discussing the accomplishments of the first Black colleges). Blacks made remarkable progress in education during Reconstruction. In the period between 1860 and 1880, the proportion of Blacks who were literate grew from 10% to 30%, and of Black children who attended public schools, from 2% to 34%. BELL, *supra* note 2, at 288 n.8.

253. MALCOLM X, MALCOLM X SPEAKS 42 (George Breitman ed., 1965).

254. *Id.*

255. See Robert C. Maynard, *Black Nationalism and Community Schools*, in COMMUNITY CONTROL OF SCHOOLS 100-11 (Henry M. Levin ed., 1970); Peller, *supra* note 52, at 800-01 & n.89. Some Black educators advocate the adoption of an Afrocentric curriculum as a means of asserting community control over predominantly Black schools and increasing the self-esteem of Black students. See, e.g., Molefi K. Asante, *The Afrocentric Idea in Education*, 60 J. NEGRO EDUC. 170 (1991); Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1293 (1992); Serge Madhere, *Self-Esteem of African American Preadolescents: Theoretical and Practical Considerations*, 60 J. NEGRO EDUC. 47 (1991).

256. See Cover, *supra* note 66, at 37-38; Matsuda, *supra* note 19, at 334-35, 341 (describing Frederick Douglass' interpretation of the Constitution as a "blueprint for fundamental social change").

conclusion that the Constitution of the United States—inaugurated “to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty”—could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery, especially as not one word can be found in the Constitution to authorize such a belief. Then, again, if the declared purposes of an instrument are to govern the meaning of all its parts and details, as they clearly should, the Constitution of our country is our warrant for the abolition of slavery in every State of the Union.²⁵⁷

The liberating dimension of Douglass' constitutional interpretation was his redemptive vision—“a vision of an alternative world in which the entire order of American slavery would be without foundation in law.”²⁵⁸ A century later, Martin Luther King, Jr. offered the civil rights movement a transformative vision of the Beloved Community.²⁵⁹ Dr. King envisioned a rule of law, rooted in the experience of the oppressed, that rejected the liberal subordination of human freedom to the security of property and required the state to remove both public and private obstacles to liberation.²⁶⁰

For Dr. King, the rights of life, liberty, and the pursuit of happiness meant that “all individuals everywhere should have ‘three meals a day for their bodies, education and culture for their minds, and dignity, equality and freedom for their spirits.’” This vision required that the state affirmatively create the institutions necessary to realize these natural rights.²⁶¹

Pedagogy can also be liberating. Henry Giroux criticizes the reproduction theory of education for discounting the possibility of resistance and thereby “offer[ing] little hope for challenging and changing the repressive features of schooling.”²⁶² In fact, schools do not simply transmit ideology onto blank slates; they often encounter resistance by teachers, students, and parents. Giroux challenges radical educators to develop a critical pedagogy that not only unravels the processes of reproduction, but also examines the dynamics of social transformation.²⁶³ This task requires analyzing students' oppositional behavior as possible acts of resistance manifesting moral and political indignation.²⁶⁴

257. DOUGLASS, *supra* note 1, at 267.

258. Cover, *supra* note 66, at 38.

259. See Cook, *supra* note 19, at 1033-41.

260. See *id.*

261. *Id.* at 1034-35 (quoting Martin L. King, Jr., *Nobel Prize Acceptance Speech*, reprinted in NEGRO HIST. BULL., May 1968, at 21).

262. Giroux, *Reproduction in Education*, *supra* note 159, at 259.

263. *Id.* at 289-93.

264. *Id.*; GIRoux, IDEOLOGY OF SCHOOLING, *supra* note 159, at 79-109.

Paulo Freire similarly advocates an alternative pedagogy of liberation that rejects the banking approach to education. His model replaces the educational method of depositing information with posing problems concerning people in their relations with the world.²⁶⁵ This liberating pedagogy encourages students both to examine the historical roots of oppressive institutions and to imagine the implementation of new structures; students are not docile listeners, but are jointly responsible with teachers for a process in which they all grow.²⁶⁶ This critical consciousness leads oppressed people to understand oppression as a historical reality that they can change.

VI. *Liberation Theory: The Government's Affirmative Duty to Provide Information*

What lessons can we learn from this account of the oppressive and liberating potential of knowledge? What insights can it lend to our reconstructive project? This Part explores using the study of oppression and liberation as a focus for progressive constitutional doctrine. It accepts Dr. King's liberationist understanding of liberty that requires the state affirmatively to remove the public and private constraints on freedom and to create institutions supporting the ideals of liberty and equality.²⁶⁷ It shares Frederick Douglass' vision of an alternative constitutionalism in which racial subordination is without foundation in law.²⁶⁸ A liberation theory would be aimed at ending the oppressive control of knowledge available to the Black community and ensuring the information necessary for Black emancipation. The preceding examination of dependency and the control of knowledge suggests two features of a liberating constitutional vision: It would recognize the importance of information for self-determination, and it would place an affirmative obligation on the government to provide this information to people who are dependent on government funds.

265. FREIRE, *supra* note 38, at 66-68; Paulo Freire, *The Problem-Posing Concept of Education as an Instrument for Liberation*, in EDUCATION AND AMERICAN CULTURE 392-93 (Elizabeth Steiner et al., eds., 1980). For Paulo Freire's thinking on the role of education in liberation struggles, see PAULO FREIRE, THE POLITICS OF EDUCATION: CULTURE, POWER, AND LIBERATION (1985). John Dewey's philosophy of democratic education similarly recognized the potential role of schools in developing students' critical capacities that would enable them to participate in the democratic process. See JOHN DEWEY, DEMOCRACY AND EDUCATION (1916); see also AMY GUTMANN, DEMOCRATIC EDUCATION (1987) (discussing the democratic ideal that all children must be taught enough to be able to participate in the political process).

266. FREIRE, *supra* note 38, at 66-68.

267. See *supra* notes 259-61 and accompanying text.

268. See *supra* notes 256-58 and accompanying text; see also Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1380 (1991) (suggesting a possible understanding of liberty as "liberation from any number of pernicious constraints, whether imposed by the state, private persons, or nature"); West, *supra* note 210, at 149 (interpreting the Fourteenth Amendment as a "charter of positive liberty or a charter protecting our right to be self-governing, autonomous, free of other rulers, masters, or superiors, within the confines of the rule of law").

A. Knowledge and Liberation

The essential ingredient of liberation is the participation of the oppressed in the revolutionary process.²⁶⁹ The oppressed must take responsibility for the struggle against their subordination by shedding their status as dominated and alienated objects and assuming the status of subjects who act to achieve their full humanity. This emancipatory transformation clearly encompasses the acquisition of the information at issue in *Rust*. Our society has determined already that medical information is essential to human dignity and self-determination. The common law doctrine of informed consent requires the physician's complete disclosure of the risks involved in a recommended treatment and of all reasonable medical alternatives.²⁷⁰ Ideally, the doctrine protects the patient's autonomy by ensuring her informed participation in a cooperative decisionmaking process.²⁷¹ In addition, the medical profession recognizes in its ethical canons the patient's right to receive disclosure of medical risks and alternatives.²⁷² The Supreme Court recognized the constitutional importance of the patient's interest in autonomy over medical decisionmaking in *Cruzan v. Director, Missouri Department of Health*.²⁷³

Information about reproduction is especially critical to women's self-determination. The denial of information about abortion deprives women of the knowledge necessary to take control of their lives and to transform their own reality. The systematic, institutionalized denial of reproductive freedom has been a principal means of Black women's subjugation throughout their history in America.²⁷⁴

269. See, e.g., FREIRE, *supra* note 38, at 54; BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 43 (1989).

270. See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972). Courts have applied the doctrine of informed consent to medical decisions relating to childbirth and abortion. See, e.g., *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 523-24 (9th Cir. 1984) (holding that the doctrine of informed consent requires disclosure of the material risks of continuing Dilantin during pregnancy); *Phillips v. United States*, 566 F. Supp. 1 (D.S.C. 1981) (holding physicians liable for failing to inform parents of child with Down's Syndrome of availability of amniocentesis). See generally ANNAS, *supra* note 58, at 83-103 (discussing the doctrine of informed consent as one of the rights of patients); PAUL S. APPELBAUM ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE (1987) (discussing the theory, legal requirements, and practice of informed consent).

271. The ideal of informed consent, however, has not been realized in the actual practice of medicine. See KATZ, *supra* note 58, at 48-84.

272. See, e.g., AMERICAN MEDICAL ASSOCIATION, CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION, ¶ 8.08, at 32 (1989); see also PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH: MAKING HEALTH CARE DECISIONS 149-50 (1982) (discussing the ethical values underlying informed consent).

273. 497 U.S. 261, 270 (1990) (recognizing a constitutionally protected liberty interest in refusing unwanted medical treatment).

274. Roberts, *supra* note 18, at 1436-50 (describing the historical devaluation of Black motherhood). I have criticized the focus of mainstream feminist reproductive rights

A liberating constitutionalism would invalidate the promotion of ignorance among poor Black women that denies them control over their reproduction and would seek to provide the information necessary for them to experience true reproductive liberty.

Both liberal and republican constitutional theory support a government duty to provide information. Constitutional scholars belonging to both schools have suggested First Amendment approaches rejecting the abstract focus on ideas that characterized the *Rust* opinion. Rather, their systemic models analyze the role of freedom of speech within the social structure and in relation to a broader vision of social justice.

Liberal scholars have argued that the aim of freedom of expression is to ensure individual autonomy.²⁷⁵ This model argues that individual liberty, rather than the free trade of ideas, deserves protection from government interference.²⁷⁶ It values expression, not because it leads to the "truth," but because it fosters the individual's self-determination.²⁷⁷ Under this view, government censorship is the primary evil because it "stunts the individual's growth as a human being and shows disrespect for the individual's ability to make her own informed decisions."²⁷⁸ This approach suggests that the government's power to restrict speech should be subject to special scrutiny where it is used to influence constitutionally protected choices, such as the decision to terminate a pregnancy.²⁷⁹ The regulations violate the liberty model of free expression because they impermissibly infringe upon poor women's autonomy, denying women information critical to a decision that will significantly impact the course of their lives. Abortion counseling respects a woman's autonomy by providing her with the information necessary to make a decision about pregnancy that best contributes to her well-being.²⁸⁰

literature on abortion rights for neglecting the broader range of reproductive health issues that affect poor women of color. See *id.* at 1461-62.

275. See, e.g., BAKER, *supra* note 88, at 58-59 (describing a liberty model of free expression); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) (describing the First Amendment's protection of "individual self-fulfillment"); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (discussing "self-realization" as the purpose of free speech); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (arguing that the First Amendment protects autonomy); cf. Matsuda, *Voices*, *supra* note 63, at 1389 (arguing that the idea of tolerance in liberal thought supports recognizing the language rights of individuals; "[w]e hurt ourselves when we exclude the possible knowledge that diversity in participation can bring"). For the classic liberal defense of freedom of expression as a guarantee of individual autonomy, see MILL, *supra* note 39, at 30-40.

276. See BAKER, *supra* note 88, at 12-17 (using modern social theory to critique the dominant marketplace of ideas rationale for freedom of speech).

277. *Id.* at 59.

278. Redish & Lippman, *supra* note 110, at 281.

279. See Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916, 1931 (1988). The Court's treatment of the Fifth Amendment issue in *Rust* did address clinic patients' ability to make rational decisions about abortion. *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991). A major flaw in the Court's analysis is that it separated the First Amendment discussion from the question of women's autonomy.

280. See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and*

Civic republicanism centers on citizens' participation in collective deliberation. Rather than rely on individual rights to protect against wrongful state action, republicans propose continuing dialogue within the community as the methodology for achieving the common good.²⁸¹ Republican theory justifies free speech as the foundation for self-government through deliberative democracy. This conception of the First Amendment, associated with Thomas Jefferson and Alexander Meiklejohn, ensures the ability of citizens to fulfill their decisionmaking role as the true rulers in a republican society.²⁸² It is premised on the belief that intelligent determination of public issues requires widespread and informed popular deliberation.²⁸³ Free speech allows citizens to gather the information necessary to make rational decisions about public issues and to communicate with others in the deliberative process.

Thus, republican thought historically has seen popular education as essential to self-government.²⁸⁴ Education serves not only to prepare citizens for deliberation, but also to protect citizens against government corruption. Early constitutional thinkers believed that

Wisdom, 77 CAL. L. REV. 1011, 1067 (1989) (criticizing the Court in *Roe v. Wade* for curtailing any state regulation of abortion counseling during the first trimester and suggesting that "the Court should encourage states to develop programs that could improve a woman's deliberative process about abortion"); see also Sarah Bittenweiser & Reva Levine, *Breaking Silences: A Post-Abortion Support Model*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 121-28 (Marlene G. Fried ed., 1990) (describing the benefits of a post-abortion support group for women experiencing emotional struggles in making and living with abortion decisions); Terry N. Steinberg, *Abortion Counseling: To Benefit Maternal Health*, 15 AM. J.L. & MED. 483-517 (1989) (discussing importance of abortion counseling to the emotional health of women and advocating state laws requiring abortion counseling). It is critical, however, that abortion counseling be offered in a way that respects women's autonomy, rather than overriding it. See *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 443-44 (1983), *overruled by Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (striking down "informed consent" regulation designed not to inform the woman's consent, but to persuade her to withhold it altogether).

281. See Frank I. Michelman, *The Supreme Court 1985 Term, Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-33 (1986) (describing the role of civic virtue and self-government in the republican tradition); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988) (identifying deliberation in government, political equality, universalism, and citizenship as the central republican commitments).

282. See Sunstein, *supra* note 72, at 263 ("[T]he First Amendment is fundamentally aimed at protecting democratic self-government."); Sunstein, *supra* note 219, at 890-91; see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) ("[T]he First Amendment . . . has a structural role to play in securing and fostering our republican system of self-government."); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) (arguing that the First Amendment protects collective self-determination rather than individual expression). Alexander Meiklejohn presented his theory on the function of free speech as a guarantee of citizen deliberation about public issues in ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). For a discussion of Jefferson's views on public deliberation, see HANNAH ARNDT, *ON REVOLUTION* 234-42 (1963).

283. Sunstein, *supra* note 219, at 890-93.

284. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1210 (1991).

government had an obligation to educate the populace because education was “[t]he most obvious republican instrument for . . . inculcating virtue in a people.”²⁸⁵ This educative function is critical to Akhil Reed Amar’s structural account of the Bill of Rights as the popular majority’s protection against self-interested government.²⁸⁶ Professor Amar demonstrates how the concept of popular education emanates throughout the Bill of Rights: Each of the intermediate associations it protects—church, militia, and citizen jury—can be understood as “a device for educating ordinary Citizens about their rights and duties.”²⁸⁷

Modern republican scholars have used traditional republican philosophy to establish the populace’s affirmative claim to the basic necessities that are prerequisites for genuine self-government.²⁸⁸ Frank Michelman’s work on the distributive implications of republican theory places on democratic society the responsibility of providing its members with these prerequisites of political participation.²⁸⁹ Citizens cannot contribute effectively to public deliberation without the basic necessities of life to sustain them and without an understanding of the issues at hand.²⁹⁰ Michelman asks:

Without basic education—without the literacy, fluency, and elementary understanding of politics and markets that are hard to obtain without it—what hope is there of effective participation in the last-resort political system? . . . [W]hat about life itself, health and vigor, presentable attire, or shelter not only from the elements but from the physical and psychological onslaughts of social debilitation? Are not these the universal, rock-bottom prerequisites of effective participation in democratic representation? . . . How can there be . . . sophisticated rights to a formally unbiased majoritarian system, but no rights to the indispensable means of effective participation in that system?²⁹¹

Michelman argues that the legitimacy of majoritarian republicanism implies a duty to ensure against bias arising out of the distribution

285. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 426 (1969). The Massachusetts Constitution of 1780, for example, declared: “Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; as these depend on spreading the opportunities and advantages of education . . . it shall be the duty of legislatures and magistrates to encourage [these ends].” MASS. CONST. of 1780, pt. II, ch. V, § II.

286. See Amar, *supra* note 284 at 1132-33, 1208. Professor Amar identifies the “agency problem”—the problem of government officials following self-interested policies that fail to reflect the views and protect the liberties of ordinary citizens—as one of the principal concerns of the Bill of Rights. *Id.* at 1206. The Supreme Court’s validation of the regulations and President Bush’s veto of congressional legislation overturning them is a glaring example of the professional judiciary and the executive branch collaborating to deny the will of citizens expressed by their elected representatives. See Adam Clymer, *President Vetoes Bill on Abortion; Override Bid Fails*, N.Y. TIMES, Nov. 20, 1991, at A1.

287. Amar, *supra* note 284, at 1210.

288. See, e.g., *id.*; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 677.

289. Michelman, *supra* note 288, at 677.

290. *Id.*

291. *Id.*

of unmet needs.²⁹² His theory gives specific support to welfare rights and regulations designed to equalize political access.²⁹³ These republican concerns also justify substantial restrictions on government secrecy.²⁹⁴ When the government withholds information from the public, it hinders public deliberation and dramatically increases the risk of self-interested representation and of corruption in government processes by powerful private factions. Cass Sunstein concludes that the republican theory of free expression requires a right of access to information held by the government.²⁹⁵

This republican model of free speech supports the government's obligation to provide abortion counseling. The regulations degrade the citizenship of poor Black women by limiting their ability to participate in the public sphere. A constitutional guarantee of the necessities for republican self-government would invalidate the regulations' obstruction of information critical to the public debate on abortion and to citizens' knowledge of their rights.²⁹⁶

Both liberal and republican theories of the First Amendment explain the constitutional importance of knowledge. Taken together, they support the value of self-determination, embracing both the liberal ideal of individual autonomy and the republican ideal of participation in collective decisionmaking. C. Edwin Baker's theory of fundamental, progressive change as a central function of rights protected by the First Amendment integrates both ideals. Baker argues that human progress requires transforming the social conditions that link liberalism's normative content—the values of human equality, self-determination, and self-realization—with its oppressive institutional content—historically manifested in the capitalist market

292. *Id.* at 684.

293. *See id.*; Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1495 (1988) (arguing that republican constitutionalism inherently involves an ongoing revision of normative history in order to include in the political community those who have been excluded); Michelman, *supra* note 227, at 1340-50 (discussing redistribution in the context of political speech); *see also* Sunstein, *supra* note 72, at 263-300 (advocating a "New Deal" for speech protecting democratic efforts to promote popular sovereignty); Sunstein, *supra* note 281, at 1577 (arguing that a republican approach to the First Amendment supports campaign finance regulation in order to achieve political equality).

294. *See* Sunstein, *supra* note 219, at 894; *cf.* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521 (suggesting that an important function of the First Amendment is to check government abuses by ensuring citizen access to information).

295. Sunstein, *supra* note 219, at 921.

296. Cass Sunstein, however, exempts *Rust* from these republican concerns on the ground that "it involved a limitation on a governmentally funded private counseling program," rather than "public, political speech." *See* Sunstein, *supra* note 72, at 299 n.136. Sunstein's privatization of the speech involved in *Rust* ignores the political dimensions I attempt to demonstrate in this Article. I believe that Sunstein's theory of the role of speech in protecting popular sovereignty supports the government's duty to provide abortion counseling as a political resource.

and bureaucratic state.²⁹⁷ "Progress results from people engaging in popularly chosen, self-realizing, value-integrating practices that oppose, transform, or replace alienating institutions."²⁹⁸ The rights embraced by the First Amendment provide the structural preconditions for this progressive change by protecting people in expressing and living their values and in joining together to create new structures.²⁹⁹

Baker suggests that the First Amendment's role in providing the means needed for progressive change requires not only protection from government intrusion, but also requires "the guarantee of material resources necessary to allow large numbers of people to engage in self-constitutive political activities."³⁰⁰ Although Baker does not elaborate on the extent of such an affirmative guarantee of free expression, the process of progressive change would require ensuring women's access to information essential to their self-determination.³⁰¹ Reproductive information is a political resource because it enables women to take control of their lives and to join in transforming social institutions.³⁰²

The liberal and republican models of the constitutional role of information are strengthened by recognizing the connection between the control of knowledge and racial subordination. Acknowledging this connection enhances the First Amendment analysis in two ways. First, it complicates the fear that both liberalism and republicanism have concerning the concentration of power in the corporate economy and bureaucratic state as the primary threat to human freedom.³⁰³ Both the liberal protection of the individual

297. See BAKER, *supra* note 88, at 99-100.

298. *Id.* at 120. While Professor Baker's analysis of the collective process of change incorporates republican principles, its driving concern seems to be individual liberty. For example, Professor Baker argues that the concept of speech as a key element of democracy is actually premised upon liberty: "[L]iberty implies democracy as a process for specifying and implementing people's choices." *Id.* at 31. Any attempt at strict categorization, however, would be futile. See, e.g., Richard H. Fallon, Jr., *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1730-31 (1989) (noting commonalities between liberalism and the theories of republican revival); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 297 n.38 (1990) (asserting that "republican and liberal traditions have been intertwined since their inceptions").

299. BAKER, *supra* note 88, at 120-21. For other views of the First Amendment's role in the struggle for social change, see Pope, *supra* note 298, at 345-56 (discussing the First Amendment's protection of direct exercises of popular power); Sparer, *supra* note 19, at 530-35 (defending the need for inalienable rights to free speech and political dissent in the struggle to change society).

300. BAKER, *supra* note 88, at 120.

301. Professor Baker argues elsewhere that the Constitution requires government to guarantee the minimum resources necessary for a meaningful daily life, but not the fulfillment of all personhood-based claims to property. See C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 760-64 (1986).

302. See LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 414-18 (1976) ("Reproductive self-determination is a basic condition for . . . women to assume full membership in all other human groups.").

303. See Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 321 (1985); see, e.g., BAKER, *supra* note 88, at 92-122 (identifying hierarchical structures of bureaucracies and capitalist markets as the target for progressive change); Reich, *supra* note 63, at 1409 ("Existing constitutional theory is inadequate to protect against the ceaseless and rapidly increasing encroachments of organized power.").

against the state and the republican protection of the majority against self-interested government ignore the context of social power, defined by race, gender, and economic status, in which these conflicts occur. The state is not a monster that strikes arbitrarily simply to enhance its might. Rather, it wields its power in ways that have historically supported the subordination of particular groups of people. The alienation of all citizens in the capitalist, bureaucratic state cannot explain the particularly brutal oppression of the Black community. The liberal and republican approaches also discount the possibility of using the power of government to destroy illegitimate social domination.

Second, the connection between knowledge and subordination brings into question the faith that both liberalism and republicanism have in an ideal government process, a faith that neglects the need to eradicate these forms of subordination.³⁰⁴ Republicanism relies on the notion that reasoned deliberation, divorced from private interests, will lead to community consensus as to the common good.³⁰⁵ The republican reliance on dialogue may provide insufficient protection against repression of minorities.³⁰⁶ The model of civic deliberation presents the danger that outsiders' freedom of expression will be sacrificed on the basis of the dominant group's perception of the common good. Subordinated voices typically have been silenced on the ground that their speech is not worthy of participation in the public debate.³⁰⁷ When a subordinated group challenges the social order it is more likely to generate violent conflict than reasoned deliberation.³⁰⁸

The history of racial domination in America demonstrates that

304. An important exception is civic republicans' recognition of systemic bias due to the inequalities of wealth. See, e.g., Michelman, *supra* note 288, at 684.

305. See Bell & Bansal, *supra* note 229, at 1610 ("Republicanism, through its faith in the existence of shared values and the possibility of a common good, assumes at the base that a social consensus will emerge from 'reasoned' deliberation by individuals who are thinking 'rationally.'"); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1476-85 (1990) (critiquing Michelman's reliance on rational argumentation).

306. Bell & Bansal, *supra* note 229, at 1610-11; see also Delgado, *supra* note 217, at 1939 (noting that dialogic arrangements often increase preexisting power differentials among participants); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1658-62 (1988) (arguing that civic republican reforms may bias the political system in favor of the status quo).

307. Cf. MEIKLEJOHN, *supra* note 282, at 25 ("What is essential is not that everyone shall speak, but that everything worth saying shall be said.").

308. See Karst, *supra* note 155, at 96 ("When a subordinated group challenges a dominant community of meaning, those expressions are bound to arouse strong emotions, for they threaten the individual identities of the people who live inside the boundaries of the dominant culture."). For an alternative view of republican political theory that focuses on periodic outbursts of direct popular power, see Pope, *supra* note 298. According to Professor Pope, it is during these "republican moments" that groups that are underrepresented in liberal interest-group bargaining are able to achieve social change through extra-institutional forms of political participation. *Id.* at 320.

Blacks are particularly vulnerable to exclusion. For most of American history, Blacks were barred by law from civic participation, including voting, holding public office, and serving on juries.³⁰⁹

For centuries in this country . . . blacks have served as the group whose experiences and private needs have been suppressed in order to promote the "common good" of whites. Indeed, the "shared values" in which the antifederalists laid faith included a historically constant and (for whites) a unifying belief in the inferior and subordinated position of black Americans.³¹⁰

The common good is an elusive goal when one group defines its interests in terms of the continued subordination of another. Liberation is a precondition for true republicanism.³¹¹

Liberalism depends on neutral government decisionmaking that protects rational individual choice. The experience of group oppression, however, teaches that the dehumanization of the individual is connected to the subordination of the group.³¹² The individual's ability to make autonomous decisions is circumscribed by the material conditions of her life, including the community to which she belongs. For members of subordinated communities, protecting individual autonomy necessarily involves the struggle for group liberation. These individuals recognize a positive aspect of group membership that corresponds with communitarians' faith

309. Karst, *supra* note 155, at 112-13. See generally *Scott v. Sandford*, 60 U.S. (19 How.) 393, 412 (1857) ("[Blacks] have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure."); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 67-109 (3d ed. 1974) (describing the creation and implementation of Jim Crow statutes following Reconstruction); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1006-07 (1989) (discussing segregation in the public sphere).

310. Bell & Bansal, *supra* note 229, at 1610-11; cf. Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 253 (1989) (providing, by analogy, the feminist critique of civic republicanism focusing on its imposition of "universal values and norms which were derived from specifically masculine experience"). The new republicans have repudiated the elitist tradition of republican thought and propose a republican vision that includes direct participation by all citizens, especially the historically disempowered. See, e.g., Michelman, *supra* note 293, at 1505-06; Sunstein, *supra* note 281, at 1569-71.

311. See Radin & Michelman, *supra* note 49, at 1041 ("How can we hope to approach or preserve a state of undominated dialogue without a concerted assault on [race, gender and class] stratifications?").

312. See Roberts, *supra* note 18, at 1480. The communitarian understanding that the individual identity is determined at least in part by the community, may better explain this experience. See Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2052 (1991) (arguing that a communitarian perspective is preferable to liberalism as a method for advancing the goals of people of color); see, e.g., MICHAEL J. SANDEL, *LIBERALISM AND ITS CRITICS* 6 (1984) ("[T]he story of my life is always embedded in the story of those communities from which I derive my identity."). Relational feminists also have criticized liberalism for presenting a masculine view of the individual as separate, competitive, and atomistic, rather than caring and connected to others. See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); West, *Jurisprudence*, *supra* note 20. I have argued, however, that the recognition of these connections between the individual and the community are not inherently inconsistent with the notion of autonomy. See Roberts, *supra* note 18, at 1478 & n.297; see also Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1174-75 (1992) (contesting the feminist "caricature" of liberalism as atomistic).

that "freedom might encompass an ability to share a vision of a good life or a good society with others."³¹³ In contrast to the liberal emphasis on individual freedom, many Blacks see their historically created community as the basis for social identity and the source of liberation.³¹⁴ The existence of liberating aspects of both liberalism and communitarianism affirms the inevitable interdependence of individual autonomy and community membership—"the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom."³¹⁵

The systemic nature of racism in American society suggests that rational processes will fail at social transformation without a more deliberate eradication of racial subordination.³¹⁶ Liberal and republican theories do not address the invidious potential for government to perpetuate racial subordination by controlling knowledge available to the Black community. The power to control knowledge not only limits individual women's ability to engage in self-determining activity, it also keeps entire communities of people in ignorance. This critical nexus between freedom of speech and racial equality strengthens the affirmative claim to information.

B. *Knowledge and Dependency*

Although the reasoning of *Rust* was premised on the gratuity principle, I believe the decision is a powerful endorsement of government's affirmative obligations to the dispossessed. The violence of the regulations and the ease with which the Court overlooks that violence demonstrates the dangerous potential of the state's false

313. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 24 (1985). Moreover, subordinated groups have experienced the process of dialogic sharing as empowering. See COLLINS, *supra* note 236, at 212-13 (discussing the use of dialogue in African and African-American culture); FREIRE, *supra* note 38, at 66-68 (discussing a liberating dialogue between teacher and student); MACKINNON, *supra* note 240, at 87 (discussing the feminist method of consciousness-raising which focuses on specific incidents and dialogue).

314. See Peller, *supra* note 52, at 794-95.

315. Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 *INDUS. REL. L.J.* 503, 506 (1981); see also Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 209, 212-17 (1979) (discussing the "fundamental contradiction" embodied in the "collective aspects of our individuality").

316. For another critique of both individualistic and communitarian perspectives on the rights of ethnic minority groups, see Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 *NOTRE DAME L. REV.* 615 (1991). Professor Addis proposes instead a model of "critical pluralism," which is "concerned not only with providing resources for minorities so as to enable them to maintain and develop their culture, to produce and tell their stories, but [which] seeks also to develop institutional structures that will enable the minority cultures to engage the dominant culture in a dialogue." *Id.* at 649-50.

generosity. Giving government aid the status of a mere gratuity affords government intolerable power to perpetuate the powerlessness of subjugated communities, particularly by limiting the information available to them. I argued earlier that we have accepted this power structure based on the underlying belief that dependency entails the forfeiture of liberty.³¹⁷ This analysis suggests a second element of a liberating constitutionalism—the rejection of the prevailing understanding of dependency. We could choose to value ensuring autonomy and participation in the community over securing private wealth. Once we reject the constitutional primacy of protecting property from invasion, we can set about rethinking a constitutional structure that affirmatively nourishes self-determination.³¹⁸ Consistent with this understanding, people who are dependent on government welfare would be entitled to information necessary for self-determining activities.³¹⁹ Rather than view dependency as a bar to autonomy and political participation, society would acknowledge its responsibility to foster the self-determination of its members who are dependent on government assistance.

Property owners undoubtedly will object to paying for the needs of others. Property is a social construct, however, that serves societal interests and its meaning can be revised to accommodate changing views of justice.³²⁰ For example, the most dramatic redistribution of property in the name of social justice in American

317. See *supra* Part IV.

318. See NEDELSKY, *supra* note 221, at 273; see also Mary A. Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 523 (1992) (noting that most western constitutions omit property rights and include affirmative welfare obligations); cf. Schnably, *supra* note 140, at 930-31 (suggesting a privacy theory that asks how the power of the state should be deployed to improve the institutional contexts of moral decisionmaking, rather than how individuals may be shielded from it); Simon, *supra* note 17, at 17 ("Rights . . . did not constitute a fortress for the individual against the state, but rather an encounter between the individual and the state in which the identity of each was partly up for grabs."). For a diametrically opposed view, see Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 57 (1992) (arguing that "expansive protection of freedom of speech . . . becomes an unambiguous good only when paired up with a system of limited government and strong property rights").

319. One precedent for the government's affirmative obligation to provide information to dependent people is *Miranda v. Arizona*, 384 U.S. 436 (1966), which requires police to give custodial suspects specific information about their legal rights before interrogation. This obligation arises from the suspect's dependence on the government in the isolated and police-dominated stationhouse for knowledge of his rights. The *Miranda* warnings were designed not only to remedy the inherent coerciveness of police interrogation, but also to demonstrate the government's respect for the suspect's dignity and self-determination. See *id.*, at 473 ("[O]nly by effective and express explanation to the indigent of this right [to counsel] can there be assurance that he was truly in a position to exercise it."); Thomas S. Schrock et al., *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1, 44 (1978) (describing the warnings as "communication by the government to the individual of its recognition that in constitutional contemplation he is a moral agent, capable of responsible choice"); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 447 (1987) (asserting that the warnings demonstrate to the suspect that the police know his rights and are prepared to respect those rights). For a criticism of the warnings' failure to achieve these objectives due to the Supreme Court's gradual erosion of *Miranda*, see Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987).

320. See Baker, *supra* note 301, at 743-44 (observing that property rules serve a number of social functions; "[T]he notion of a complete set of timeless, natural, or

history was the abolition of slavery.³²¹ The Thirteenth Amendment deprived slaveholders of their property interest in Blacks and gave Blacks an inalienable property right to their own persons.³²² The purpose of the Thirteenth and Fourteenth Amendments was not only to protect the liberty of individual Blacks, but also to eliminate a racial caste system that was deemed intolerable.³²³ The work left undone by Emancipation demands an equally dramatic modern reconstruction of the social order—one that eliminates the role of government gratuity in the perpetuation of that caste system and replaces it with an affirmative duty to provide the basic requirements of self-determination. Affirming the humanity of everyone can no longer be seen as subversion of rights to property.³²⁴

Conclusion: Utopia and Liberation

I anticipate two objections to this liberationist theory from those who agree with the goal of liberation.³²⁵ First, some will argue that this theory is internally inconsistent. My very premise that knowledge is an instrument of power dispels the possibility that those in power would use their legal knowledge to dismantle the very foundation of their domination. How can oppressed people possibly

proper property rules is absurd."); Reich, *supra* note 84, at 779 (describing the function of private property to protect individual liberties).

321. See Amar, *supra* note 229, at 39-40; see also West, *supra* note 85, at 715 (discussing the redistributive directive embodied in the Fourteenth Amendment). The history in the United States of revising property rights to serve societal interests also includes the oppression of people of color. Indeed, much of the claim to land in this country derives from the state's extinguishing Indian title by conquest and granting title to private individuals or groups. Reich, *supra* note 84, at 778, (citing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 589 (1823) (holding Indian title subordinate to that of United States on grounds of "discovery" and "conquest")).

Jerome Culp observes that, although slavery has influenced American thinking about property, legal scholars have largely overlooked this relationship. See Culp, *supra* note 51, at 77 & n.115. Professor Culp's comments suggest that we will not be able to uproot our deeply embedded ideas about property and freedom until we truly confront the whole history of racism in America.

322. U.S. CONST. amend. XIII.

323. See *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (asserting that the Thirteenth Amendment abolishes "all badges and incidents of slavery"); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (identifying as the "one pervading purpose" of the amendments "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him"). Akhil Reed Amar and Daniel Widawsky emphasize that the Thirteenth Amendment prohibits certain state inaction, as well as certain private action: "Hence the broad command that slavery *shall not exist* does more than impose an absolute duty on private would-be enslavers; it also imposes a duty on the state to provide an adequate apparatus to enforce the emancipation of all persons within its jurisdiction." Amar & Widawsky, *supra* note 82, at 1380.

324. See FREIRE, *supra* note 38, at 45 (observing that humanity is seen as something possessed by oppressors as an exclusive right, while humanization of "others" appears to be subversive).

325. These questions have plagued me most in writing this Article.

trust the oppressor to provide the information they need for a liberating knowledge? Moreover, the theory contains the paradox of recognizing an affirmative government obligation to ensure self-determination, while acknowledging the control that dependence on government subsidies allows. Would not expanded government aid to the Black community simply increase that community's subjugating dependence on the government? Even if the claim to government aid is declared a right rather than a gratuity, judicial enforcement of welfare rights has limited liberating potential.³²⁶

The struggle over knowledge does not end with the receipt of information; that is only the beginning. Dispossessed communities must appropriate the information for themselves. The government's obligation to provide information must coexist with an effort to promote the community's ability to generate and distribute information on its own. At times it will be equally important to resist state interference in local sources of knowledge.³²⁷

My defense of government aid attempts to overcome the dangers of dependency in several ways. Government aid should be based on collective obligation rather than altruistic charity. It is not a special dispensation to the poor; it ensures the fulfillment of the human needs of all. Rather than reject state assistance, my approach seeks to redefine government aid to eliminate its liberty-depriving qualities. Moreover, the government must fulfill its affirmative obligations as part of the pursuit of liberation from oppressive conditions that create and perpetuate reliance on the government. The goal of state assistance is to facilitate action by the oppressed, rather than simply placating them to ensure the prevailing order.

Second, some will argue that a liberationist legal theory, which

326. For an historical examination of how the American public welfare system regulates the political and economic behavior of the poor, see FRANCES F. PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971). Legal scholars have criticized welfare rights litigation in particular for stunting the radical potential of a grass-roots, welfare-rights movement. See, e.g., Delgado, *supra* note 217, at 1947 (arguing that civil rights litigation requires claimants to exaggerate victimhood in a manner inconsistent with human dignity); Rosenblatt, *supra* note 219, at 271-75 (discussing the limitations of welfare legalization as a strategy for redistributive change); Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 708-09 (1980) (book review) (arguing that welfare reform litigation diminishes political forces seeking equality). But see Sparer, *supra* note 19, at 562-63 (critiquing Tushnet's assessment on the ground that the decision to pursue welfare rights through litigation was an organizing strategy of the welfare rights movement); White, *supra* note 239, at 870-71 (discussing how litigating *Goldberg v. Kelly*, 397 U.S. 254 (1970), benefitted the welfare rights movement).

327. Regina Austin suggests an analogous approach to the state's role in facilitating the growth of the informal economy in Black communities. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1807-11 (1992). Professor Austin recognizes that a politics of identification with poorer Blacks who must "hustle" to survive requires both advocacy of government support for Black informal entrepreneurship and working "to keep the law at bay." *Id.* at 1808. She demonstrates that in cases of rivalry from the formal economy, informality better protects the interests of Blacks, such as squatters and sidewalk merchants, working in the informal sector, while the need for credit requires more legal formality. *Id.* at 1809-10. Although this Article advocates government support of self-determination, I do not discount the need sometimes to "keep the law at bay." See Roberts, *supra* note 18, at 1449-50 (opposing criminalization of Black women's reproductive decisions while advocating government support for prenatal care and drug treatment).

implies economic redistribution and affirmative government duty, is purely utopian—irreconcilable with our current legal system and impossible to implement.³²⁸ These ideas are deemed incongruous with the accepted market economy and negative vision of constitutional rights. Those in power have always aimed to destroy utopian ideas that challenge the system sustaining their dominance.³²⁹ They characterize utopian ideas as absolutely unrealizable even though these ideas are unrealizable only within the present order.³³⁰ They drain these ideas of revolutionary potential by integrating them within the prevailing world view. Thus, as I discussed in an earlier section,³³¹ the unconstitutional-conditions doctrine has served as a way of integrating the recognition of economic inequality within the existing constitutional order that rejects affirmative government obligations.³³² The *Rust* opinion hides not only the repressive function of the law, but also the possibility of a more liberating interpretation of the Constitution.

In describing the martyr's commitment to God's law, even in the face of world-destroying pain, Robert Cover reminds us of the human capacity to imagine a just social order despite the effects of dominant ideology.³³³ The slave songs enabling Blacks to imagine freedom despite their chains and the dreams of Black women told by Zora Neal Hurston confirm the power of vision.³³⁴ The effect of this realization is profound. It frees us to consider the possibility of a more radical constitutional vision. We may no longer be able to resist the question buried in our consciences: How can we tolerate the lawfulness of the intolerable? How can we tolerate laws that force women to travel in desperation from city to city in search of an

328. See Torres, *supra* note 52, at 1045-46 (discussing the difficulty of making plausible arguments for redistribution of social resources within current legal ideology). For a discussion of utopian ideas, see MANNHEIM, *supra* note 139, at 192 ("A state of mind is utopian when it is incongruous with the state of reality within which it occurs."), and utopian constitutionalism, see Cover, *supra* note 66, at 39.

329. MANNHEIM, *supra* note 139, at 193.

330. *Id.* at 196.

331. See *supra* Part II.B.

332. Conservatives similarly have usurped the progressive rhetoric of tolerance, color-blindness, and equal opportunity to confine the possibilities of reform. See Peller, *supra* note 52, at 762.

333. Cover, *supra* note 22, at 1604-05. Drucilla Cornell similarly has celebrated the utopian potential of the feminine: "Feminism calls us to the dream of a utopia of sensuous ease in which the *reality* of the castrated subject appears as a nightmare from which we are trying to awaken. Feminism calls us all to wake up and to 'see' the doubly-prized world which might be ours." Cornell, *supra* note 240, at 699; see also Cornell, *supra* note 132, at 1229 (challenging us to accept the "invitation to realize the potential inherent in the 'would be's' of our social reality"); Minow, *supra* note 237, at 1867 (explaining an alternative meaning of "rights" that people imagine, even though they have not been formally recognized or enforced). For a story about a Black South African village's struggle for justice, grounded outside the South African law, see Lucie White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 719-38.

334. See *supra* notes 243-48 and accompanying text.

honest answer about their health? How can we tolerate laws that lead women to spend their last penny for an abortion in an unlicensed clinic when safer, less expensive ones are available? How can we tolerate laws that deliberately deny poor women of color the knowledge they need for self-determination? Freed to ask these questions, we may then imagine an alternative constitutional order in which this inhuman treatment has no foundation in law.

While vision is an essential part of a liberating legal theory, it is inadequate for worldly redemption.³³⁵ Without social action, the vision will remain mired in some "moral heaven."³³⁶ Social change requires resistance and creation by people willing to live according to the vision. It requires lawyers and legal scholars willing to collaborate with social movements to assist in constructing, defending, and implementing the vision.³³⁷ Because the conventional political and legal process is biased in favor of the prevailing order, radical visionaries must use unorthodox means. Masses of people must repudiate their participation in institutions of domination and refuse to obey unjust laws.³³⁸ They must collectively force their vision to the forefront of political discourse through mass demonstrations, militant protest, strikes, boycotts, and other forms of direct popular

335. See Cover, *supra* note 66, at 38 (contrasting Garrisonian perfectionism that permitted the pursuit of pure nomos without a polity with Douglass' redemptive vision of slavery without foundation in law).

336. I borrow this phrase from Frank Michelman. See Michelman, *Protecting the Poor*, *supra* note 17, at 58 (discussing the need for a standard in order for the duty of minimum protection to be enforced).

337. I do not presume that the vision is created exclusively by legal scholars, divorced from social action. Rather, it must be forged by a collaborative effort of academics, lawyers, activists, and ordinary citizens. For a case study of a lawyer's collaboration with a Black South African village to resist forced removal from their homes, see White, *supra* note 333. Arthur Kinoy's career as a movement lawyer provides another illustration. See ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER* (1983).

It is beyond the scope of this Article to explore fully the relationship between law and liberation. A comprehensive analysis would include a historical and normative examination of the form of legal discourse that best critiques the present social order and describes the vision of a new one; the role of law in the process of achieving social change, particularly the possibility of using the legal system as a vehicle for fundamental change and the work of lawyers and legal scholars in social movements; and the role of law in the new social order. For scholarship addressing some of these issues, see, for example, Richard L. Abel, *Lawyers and the Power to Change*, 7 *LAW & POL'Y* 5 (1985) (asserting that progressive lawyers have significant power to change the law, the legal system, and society); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978) (examining the possibilities and limitations for social movements' use of courts to achieve social change); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (describing the work of progressive lawyers within subordinated communities). The role of legal academics in the process of social change requires further examination. See Radin & Michelman, *supra* note 49, at 1019 (calling for self-inquiry as to "precisely how . . . we imagine that our scholarship might work to move the world closer to whatever it is we mean to be contending for"); Pierre Schlag, *Normativity and the Politics of Form*, 139 *U. PA. L. REV.* 801, 879 (1991) (criticizing normative legal scholars for omitting "any sense of how th[eir] prescription[s] might realize [themselves] in the social sphere"); *Symposium on Feminism in the 90s: Bridging the Gap Between Theory and Practice*, 4 *YALE J.L. & FEMINISM* 1 (1991).

338. See BAKER, *supra* note 88, at 111 (describing a non-hierarchical, noninstrumental process of progressive change). For an account of Dr. Martin Luther King, Jr.'s philosophy of nonviolent civil disobedience, see Adam Roberts, *Martin Luther King and Non-*

power.³³⁹ Their goal may be legislative implementation of their vision rather than the creation of judicially enforceable rights.³⁴⁰

The regulations were met immediately with resistance. Women's and health organizations mobilized to force Congress to pass legislation invalidating the regulations.³⁴¹ Clinics stated that they would refuse to give women misleading information; they would forgo government funding rather than abide by the government's oppressive law.³⁴² Most important, Black women have formed their own organizations, such as the National Black Women's Health Project, to share information about reproduction and otherwise empower themselves to take control of their health.³⁴³ Those engaging in

Violent Resistance, in MARTIN LUTHER KING, JR.: CIVIL RIGHTS LEADER, THEOLOGIAN, ORATOR 759 (David Garrow ed., 1989) (3 vols). For a defense of revolutionary counterviolence as the only means of liberation from violent colonialism, see FANON, *supra* note 38, at 85-106.

339. See Pope, *supra* note 298, at 293 (defining "Direct Popular Power" as the form of political participation characteristic of social movements that is inclusive and outside the formal structure of representative democracy). Such mass movements have periodically compelled the Court to increase protection of speech rights. See David Kairys, *Freedom of Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 159, at 140, 141.

For a discussion of the tension within the civil rights movement of militant, "direct action" versus legalistic, litigation-oriented strategies, see Peller, *supra* note 52, at 826-30. See generally THOMAS R. BROOKS, WALLS COME TUMBLING DOWN: A HISTORY OF THE CIVIL RIGHTS MOVEMENT, 1940-1970 (1974) (describing the rifts that developed in the civil rights coalition between non-violent integrationists and militant Black power advocates); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984) (describing tension between bureaucratic organizations and local community groups); ROBERT WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT (1990) (describing the conflict between the liberal coalition and Black activists).

Strategic use of the legal system nevertheless contributes to social struggle by expanding the movement's tactical options, protecting its ability to engage in direct action, and providing a forum to express its vision. See, e.g., White, *supra* note 239; West, *supra* note 22, at 1799-800 (describing the defensive work of radical lawyers within the existing legal system; "This work, although often demoralizing, serves as an important link to past victories and as a basis for the next wave of radical action.").

340. See Michelman, *supra* note 69, at 98-99 (proposing a view of liberty that involves judicial respect for government actions designed to provide aid, rather than judicially enforceable entitlements to government aid); West, *supra* note 210, at 152-55 (suggesting that legislatures, rather than courts, implement the abolitionist interpretation of the Fourteenth Amendment); West, *supra* note 85, at 717 (characterizing the "progressive interpretation of the constitutional guarantees of liberty and equality as political ideals to guide legislation, rather than as legal restraints on legislation").

341. See Philip J. Hiltz, *House Votes to Overturn Limit on Abortion Advice*, N.Y. TIMES, NOV. 7, 1991, at A24. President Bush vetoed this legislation, and the House failed by 12 votes to override the veto. See Clymer, *supra* note 286.

342. See *supra* note 37 and accompanying text. Planned Parenthood's South Bronx clinic refused about \$37,000 in Title X funds so that it could continue to provide information about abortion. Felicity Barringer, *Ban on Abortion Counseling Is Struck Down*, N.Y. TIMES, NOV. 4, 1992, at A29.

343. See Byllye Avery, *Empowerment Through Wellness*, 4 YALE J.L. & FEMINISM 147, 147-150 (1991) (statement by Founding President of the National Black Women's Health Project) (describing the origins of the National Black Women's Health Project); *Reproductive Rights Position Paper: National Black Women's Health Project*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT, *supra* note 280, at 291.

popular struggle declare: “[O]ur lives constitute bridges between the reality of present official declarations of law and the vision of our law triumphant.”³⁴⁴ In this way, we may craft a vision of law that, far from promoting ignorance and pain in outcast communities, will foster the knowledge necessary for their liberation.

344. Cover, *supra* note 66, at 47. See generally *Symposium on Lawyers and Civil Disobedience*, 52 U. PITT. L. REV. 723 (1991) (discussing lawyers' role in social change). For accounts of women's resistance to laws controlling reproduction, see NINIA BAEHR, *ABORTION WITHOUT APOLOGY: A RADICAL HISTORY FOR THE 1990'S* (1990) (describing the evolution of the radical, grass roots movement for reproductive control); Lynn M. Paltrow, *Women, Abortion and Civil Disobedience*, 13 NOVA L. REV. 471 (1989); Roberts, *supra* note 18, at 1439-40 (describing ways in which Black women struggled to resist efforts of slave masters to control their reproductive lives).