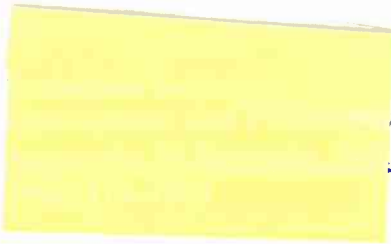


# Funding Controversy: Why Freedom of Religion Justifies Funding Abortion



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As of now, I'd like to get my PhD in political philosophy and become a professor. I have an interest in multiple areas of political philosophy and applied ethics. Because true free choice is a difficult phenomenon to ensure, I believe that certain policies made to ensure freedom will end up being rather counterintuitive on first glance. But I don't believe in intuitions having any special justifying significance. As multiple professors have pointed out— I'm more willing than most to bite-bullets when arguing a point. Accordingly, my favorite arguments to make are those that reach counterintuitive conclusions upon a first glance. This paper is a small example of that. While many people might believe that governments should fund abortion, I believe they do so from the standpoint of a government that should ignore religion altogether. This paper argues that it is *because* of religious freedom that funding abortion is justified.

Although I did write this during 18S, this paper was not written for any class, or for any particular reason. I'm considering using portions of this to write my writing sample for applying to PhD programs. But my main reason for writing this paper is that I made the claim that this paper argues as an off-hand comment during a class in the winter, and felt that I needed to try to substantiate it.

## Relevant Courses:

*Govt 30.11/Pbpl 46*: Policy Implentation; 17S  
*Govt 60.04*: Ethics and Public Policy; 17F  
*Govt 60.14*: Libertarianism; 18S  
*Govt 66.03*: Constitutional Law, Development, and Theory; 18W  
*Phil 16.02*: Kant's Legal and Political Philosophy; 18W  
*Phil 38*: Social and Political Philosophy; 17S

## Research Experience:

*Fall 2017–Spring 2018*: Research Assistant to Professor Susan Brison

- Assisted Professor Brison's co-editing of an anthology titled *Free Speech in the Digital Age*, forthcoming from the Oxford University Press

*Summer 2018–Spring 2019*: Presidential Scholarship to fund Research Assistantship under Professor Julie Rose

- Will be assisting Professor Rose in research for her forthcoming book on—among other topics—the normative implications and backing of economic stagnation.

## INTRODUCTION

On March 19, 2018, Republicans in the United States' Congress put forth yet another plan to reform the Affordable Healthcare Act referred to colloquially in legislation as the "Bipartisan Health Care Stabilization Act of 2018." While the majority of this bill sought to do exactly what the title states and stabilize healthcare in a way that could garner strong bipartisan support, a certain aspect of the bill will likely make sufficient support impossible. Money for reinsurance funds—money meant to act as a safety net to make insurance companies more comfortable covering highest cost, and highest risk patients—would see billions of dollars of increases in funding.<sup>1</sup> However, these new funds would be covered by the Hyde Amendment. The Hyde Amendment was first passed in 1977 and "it barred the use of federal Medicaid funds for abortion except when the life of the woman would be endangered by carrying the pregnancy to term."<sup>2</sup> Each year, with varying degrees of exceptions, the Hyde Amendment has been reenacted as a federal restriction on all public funding for abortion.

There are numerous questions to ask about the rightness of the Hyde Amendment. In many of those discussions, a person's answer will be inextricably linked to their religious or partisan inclinations. However, there is one debate that separates itself from partisanship and instead speaks directly to the sorts of obligations that a government that seeks to embody democratic notions of equality has to its citizens. If the Supreme Court's decision in *Roe v. Wade* grounds abortion as a constitutionally protected right, then does the United States Government have an obligation to ensure the protection and access to that right like they would any other, less controversial right such as the right to a fair trial? It seems fairly straightforward, and nearly tautological, to say that the answer is yes—a government that requires its actors to take on an obligation to uphold the Constitution and the rights of individuals has an obligation to protect and ensure those broad concepts that the components of government qualify as "rights." However, because of the content of controversial rights such as abortion and, in part, because of the fact that it may contradict with some citizens' freedom of religion, policymakers and implementers have difficulties viewing controversial rights as qualifying as, simply, rights.

This paper will use abortion in the United States as a case study to explore the broader question of why government have an obligation to ensure access to controversial rights in order to ensure the rights of individuals to refuse to directly participate in schemes that contribute to those controversies. The first section will explore why individual citizens have a right to access all of the rights that their government affords to them. In the second section, the corollary to this will be considered—why governments have an obligation to ensure the rights that those governments declare their citizens have. The third section will define what constitutes a "controversial right." The fourth section will discuss why governments have a specific obligation to ensure access to controversial rights. Finally, applications of the framework of equal freedom that this paper establishes will briefly be discussed in the fifth section.

In short, this paper argues that it is *because* of an obligation to respect religious freedom that funding for abortion is justified.

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<sup>1</sup> Kliff, 2018

<sup>2</sup> ACLU, n.d.

## **1. WHY INDIVIDUALS HAVE A RIGHT TO ACCESS THE SAME RIGHTS AS OTHER INDIVIDUALS**

Political rights are dependent on features of citizenship rather than specific features about an individual. They are defined by the idea that they are rights created by some sense of political participation or association. These rights are not intrinsic. They are not derived from the humanity or moral worth of each individual, although they may of course be correlated with these ideas.

If rights are not available to all citizens, then they do not qualify as rights—they qualify as privileges. If a state qualifies something as a right, then it makes a commitment to preserving access to those entitlements for all of the group that it stated it would. Here, entitlements are defined as actions that an individual may take without hindrance or a tangible object that he or she may request and be given without question.

More important than this condition of generality is the notion that political rights are contingent and conditional rights. They are optional entitlements that citizens have a choice as to whether or not they would like to exercise. While rights derived directly from humanity are intrinsic to an individual, political rights are based on behavior and association. These rights are phrased as rights that state: “If I am a citizen of a state that allows its citizens a right to X, then I—as a citizen—am allowed to access that right.” In this regard, these rights cannot be phrased as absolute.

Even for abortion, the right can be understood as “if you are in a position to want or need an abortion, then you are allowed to get an abortion.” If you are not in a position to want or need an abortion, then the second part of the conditional is simply silent—you have no need for this right only because it does not apply to you. This is akin to an employer allowing all of their employees a certain number of sick days. If an employee is allowed to call in sick to work if they are, in fact, sick, his or her ability to call in sick to work is dependent on his or her health. If one was not sick, then he or she would not have the right to a sick day. But it should be noted that in this scenario the right to a sick day is not dependent on any other feature about who the employee is or how he or she got sick. Instead, the right to a sick day is completely dependent on the sick day policy that the employer established and on being in a position where the employee needed to access that right.

## **2. WHY GOVERNMENTS HAVE AN OBLIGATION TO ENSURE THE RIGHTS OF ALL INDIVIDUALS**

### *A. Government Obligations*

Constitutive of their structure and purpose, governments must ensure the rights that they acknowledge. Governments serve a regulatory purpose wherein agents of the government work to further the aims of the government. However, in acknowledging their aims, governments also incur onto themselves a set of obligations that—broadly phrased—consist of performing actions

instrumental to the preservation of the government. What constitutes a government's aims are determined by the ideology that that government professes to have. A basic tenet of these rights is that once a government establishes the rights that they wish to ensure, they must ensure them. To do otherwise is for the government to not only break the legal norms that it has established, but for it also to shirk the only moral duties it can have as a state. There is no higher authority that exists to enforce a state's behavior. It is only the bounds of state morality—or, more cynically, fear of retaliation from those within its borders or in the international arena—that regulates a state's actions. Once a government establishes rights, it establishes an obligation unto itself to ensure those rights.

In societies that have a government determined by representation, these obligations have a tendency to be explained in contractual terms. If a citizen votes for a policymaker, the policymaker gains an obligation to perform his or her job in relation to both the broad construction of government and the particular—or, perhaps, objectively beneficial—desires that the constituents voice. Even if it is not consent that justifies the authority of the government, it does seem like political participation changes the obligations, and nature, of the state. This may be the case for numerous reasons related to the ways that the government decides what it wishes to prioritize. For example—one could separate tangential and intrinsic benefits to political participation on behalf of the government and the political participants. Perhaps a government would want participation not for any reasons related to decision-making; perhaps it would only want citizens to participate so that citizens could feel invested in the state.

It should be noted that this argument about a government's obligation to provide for the rights that they acknowledge is not just the case in regimes that value human rights. Rights in this context can be understood as some legal entitlement to behave or obtain something. Even in an authoritarian regime, there are rights that dictators acknowledge. Most broadly speaking there is one right—the right of citizens to be free from interference from other political states. There are arguments to be made that this right is not a real right grounded in any moral inquiry, and I might agree with that argument. However, the political conception of rights discussed in this paper is not purely grounded in morality. It might be more accurately described as “contextually normative,” or stemming from the structure, goals, and values of each government. If Kim Jong Un acknowledges that for the good of his regime his citizens ought to be free from other states, then he has an obligation to his regime and to his citizens to ensure for state defense.

This idea of contextual obligations is somewhat inspired by Arthur Applbaum's *Ethics for Adversaries: The Morality of Roles in Public and Professional Life*. Applbaum argues that the “claims of adversary institutions are weaker than supposed and do not justify much of the harm that professional adversaries inflict. Institutions and the roles they create ordinarily cannot mint moral permissions to do what otherwise would be morally prohibited.”<sup>3</sup> The special status of adversarial professions *does* afford professionals special protections to break traditional moral codes. However, it does so in a limited sense as “[r]ole requirements can overwrite moral permissions, and become moral requirements. But role requirements cannot overwrite moral prohibitions and mint moral permissions.”<sup>4</sup> While individual policymakers or policy

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<sup>3</sup> Applbaum, 3

<sup>4</sup> Applbaum, 248

implementers can use discretion afforded to them by some individual moral prohibitions, there is a separate sort of practice of government.

This paper diverges from Applebaum's work. Applebaum does not believe that a practice can overturn individual moral prohibitions. But this paper argues from the standpoint that a government is not a group of people. It is a system of laws. This can best be illustrated via Theseus's paradox.

The thought experiment regarding the ship of Theseus raises questions about how objects can both change and remain the same throughout time. If the famous hero Theseus sailed his ship into battle, a museum acquired the ship and placed it in a harbor, and replaced the parts when they began to rot until none of the original parts remain, then does the ship of Theseus remain in the harbor? Or is it a new ship entirely? The question raises questions about consistent identity over time.

Nobody considers political states to fall under the realm of Theseus's paradox— political states in the international arena are considered the same state through most exchanges of power. Throughout the history of the United States, politicians have been replaced. Individual laws have been overturned. But the fundamental laws that underscore the structure of the decisions of the United States have remained the same even when some interpretations have changed over time. What defines the United States are the overarching legal codes and norms that establish the permissible practices for its policymakers. The United States as a group agent is different from the conception of the United States that argues that the United States is defined by its individual policymakers. If an individual policymaker uses her discretion to not enforce a particular law on the grounds of some individual moral obligation, then she departs from the practice of fulfilling the positive obligations of being a United States policymaker.<sup>5</sup>

Here, there are two claims to make. First, the United States—as a group political actor— ought to make its legal code internally consistent. To have an inconsistent legal code would be to have an inconsistent political identity that may prove to be problematic for establishing any strong prescriptions for its policymakers to follow, potentially undermining the stability of political obligations inside of the state. Second, as the United States likes to believe that it values the moral worth of its citizens, its legal code ought to abide by a normative system that reflects that inclination. The best way to accomplish this— as explained in the next section— is a system of equal freedom.

### *B. Equal Freedom*

Equal freedom states, roughly, that all persons ought to be granted the maximum possible freedom as long as their freedom does not interfere with the freedom of anyone else. The state

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<sup>5</sup> This does not imply that laws can never change. It must just be done procedurally. For example, a senator is not required to vote any particular way on a bill with one exception— if a bill violates some structural constraint (i.e. the law is unconstitutional) then she ought to vote no regardless of her personal beliefs or the beliefs of her citizens. If values have changes, then senators have an obligation to alter the overarching legal code surrounding the issue. The Constitution must change or contradictory bills must be overturned prior to the senator passing the bill that contradicted her structural obligation.

maximizes the freedom of each individual citizen in ways that do not infringe on the freedom of others. In the ever-wise words of Arthur Ripstein:

[A]s a matter of right, each person is entitled to be his or her own master, not in the sense of enjoying some form of special self-relation, but in the contrastive sense of not being subordinated to the choice of any *other* particular person... The nature and justification of authority, the authorization to coerce [via, for example, the rule of law]... acquire[s]... [its] interest against some version of the assumption that each person is entitled to be his or her own master. Any real or claimed entitlement of a person or group of persons to tell another what to do... is potentially in tension with the latter person's entitlement to be his own master.<sup>6</sup>

That separate, distinct people have the right to be free entails that political institutions have an obligation to balance freedom in such a way that never uses one person's freedom as a means to the freedom of another. In practice, this requires that institutions show that decisions be "consistent with each person's right to freedom before competing interest or values can be considered."<sup>7</sup>

Here, it is worth bringing up Ripstein's argument that private rights are incoherent in a state of nature. For Ripstein, codified positive law is a prerequisite for enforcement, and enforcement is a necessary condition for the existence of private rights. However, there is still a question about what constitutes rightful enforcement and how one can enter into a condition of rightful enforcement. Ripstein attempts to get around the difficulties surrounding these puzzles by obligating individuals in a state of nature to exercise self-respect and respect rightful honor and enter into civil condition where rights can be enforced. The individual obligation exists to form government via positive laws consistent with the protection of equal freedom. In a practical sense, it is difficult to know how one exercises rightful honor without infringing on others' right to humanity in the absence of a system of laws.

For example, in terms of acquiring property, how can one know whether the acquisition of some land is infringing on someone else's right to also acquire that land if there are no laws governing acquisition? Does owning some farmland and not working to grow crops on the land infringe upon someone else's right—someone in dire need of food—to use the land? What if someone does not know whether the land is owned by another person? In even simple cases like these, the state of nature is declared insufficient to allow for the exercise of rightfully acquiring property as no one person knows the limits of property. Laws represent a level of enforcement that can prevent people from infringing on the rights of others and thus rightfully ensure the protection of equal freedoms. Positive law in a government, via an omnilateral will, represents an impartial judge of equal freedom. It is the nature of the omnilateral will that allows for the state to have rightful authority over enforcement, and thus for property rights.

Applied to modern, non-ideal political systems, it is not clear what constitutes an omnilateral will. It is not always clear what will qualify as a normative, innate right that the government

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<sup>6</sup> Ripstein, 4–5; italics in original

<sup>7</sup> Ripstein, 6

ought to protect. There are also disagreements about what rights are important enough to qualify as freedom-ensuring.

In a hesitantly limited sense<sup>8</sup>, there is a less strong approach that the equal freedom theorist could support. This lighter version would state that governments have an obligation to ensure equal access to only the rights that they recognize in some codified legal code. Given the lighter view of equal freedom, governments are not free to internally discriminate between rights that they recognize. Once a right is declared, the government must ensure that no right can be more important in implementation than any other right. Certain rights may be more effective in

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<sup>8</sup> This conception of equal freedom would be limited as it does not seek to explain why a state has political authority. That task is too arduous to take seriously in this paper. This less strong conception would only seek to guide government action. I do not wish to advocate for Ripstein's explanation of political authority in *Force and Freedom*. Although I find it incredibly persuasive as an ideal theory, there is a dilemma:

Ripstein puts forward a series of rigorous conditions for private right. However, these conditions ultimately fail to justify private rights in anything other than his ideal world—a world where the state as the embodiment of the omnilateral will presents laws in accordance with the right of humanity. Unfortunately, access to the morality of the omnilateral will is a question of epistemic limits. It is not always clear what constitutes an omnilateral will, how an omnilateral will arises, or how one could even judge the righteousness of an omnilateral will. Instead, Ripstein uses the laws and institutions of a political state as a proxy for this judgement to take place. If the laws are just, then small mishaps in the execution of those laws would not necessarily affect the normative authority of the state. So, in this case, the dilemma is rephrased as one that questions the normative authority of the state to enforce private right during those cases when the laws themselves are unjust.

Ripstein concedes that there are certain conditions that invalidate the state as having normative authority over the enforcement of private right. In the most basic and vague terms, these conditions would involve some law that contradicts the right of humanity. In more practical terms, these laws could be anything from clear cases where the state supports institutions of slavery (Ripstein, 140) to less clear cases such as state sponsored killing via right to die laws, or even widespread poverty in society. Poverty might not seem to be an infringement on any rights of any persons, but Kant conceives of poverty as “systematic: a person cannot use his or her own body, or even so much as occupy space, without the permission of the other... if all purposiveness depends on the grace of others, the dependent person is in the juridical position of a slave or a serf” (Ripstein 281). In all of these cases, the existence of these state sponsored wrongs—the existence of policies, of laws, that infringe on the right of humanity—invalidates the normative authority of the state. In the world that we live in, there is no political state that does not have poverty. There are economic policies meant to mitigate poverty in most of these states, but the laws themselves are often deficient in design—policies attempt to maximize revenue for certain markets or collect taxes to provide for insufficient public goods, inevitably leading to laws or policies that are contradictory in form rather than simply insufficient at solving public problems. These deficiencies qualify as empirical facts, and therefore these respective laws, economic policies, and conditions invalidate state authority as being considered normatively legitimate.

David Estlund's “Political Authority and the Tyranny of Non-Consent” does a nice job of establishing and defending a theory of normative consent. It is a good starting point to explain why a state—perhaps especially one that uses methods of equal freedom to determine its behavior—has authority to coerce its citizens to follow its laws. In the context of the substance of this paper, it might also be the case that citizens have associative political obligations to facilitate equal protection and access to rights via the state. See A. John Simmons, “Associative Political Obligations”.

Regardless, for the purposes of this paper, it would be useful to assume that the state does have political authority and I ask nicely that you afford me that kindness.

framing other rights, but it would be impermissible for a government to pick and choose which rights—and, more importantly, which citizens—ought to be enjoyed more fully than other rights.

As a regulatory body, governments are not the beneficiaries of rights. They simply state what services they provide, and then it is the obligation of the citizen to determine for themselves, as their own master, which rights he or she would like to access. Any determination made by the state on behalf of citizens would be an impermissible infringement on the choices that its citizens ought to enjoy.

For any citizen to choose what rights his or her fellow citizen ought to enjoy would also be a mistake. For that citizen has no right to make decisions on behalf of another, just as no citizen would be justified in choosing for him or her. If we believe in choice and the separateness of people, then it is inconsistent to say that some people have better ground to choose what rights their fellow reasonable people ought to prefer over others.

An example may be especially useful here:

Cigarettes have the ability to harm people—as carcinogens, their smoke can cause cancer and exacerbate preexisting conditions like asthma. However, some people consent to their harms and choose to smoke them. Is it right for the government to ban cigarettes? Some people say yes, others say no. To navigate around this disagreement, policymakers have many possible options. Some mistaken consequentialist policymakers would spend their entire lives attempting to calculate what policy would maximize the most good for the largest number of people. Some especially republican lawmakers might send out some poll for determining how they could best represent their constituents while simultaneously ensuring public virtue. While there might be separate problems with each of these frameworks or lenses for decision-making about policy, the end result of these policies would likely be the same. The sorts of justifications that policymakers use matters.

Equal freedom requests that the government implement a policy that allows those lovers of cigarettes who consent to their harms to continue smoking cigarettes, while simultaneously preventing the harms of cigarettes to those who do not consent to their harms. It requests a policy be made that maximizes the freedom of all citizens, while making only reasonable infringements on the freedom of others. A policy that respects equal freedom would be something like establishing designated smoking or “no smoking” zones— individuals can choose what areas to enter freely. No option is taken away from any individual on the basis of the protection of some other individual’s belief in the moral wrongness or danger of that option.

In the above scenario, we can see how a state that prioritizes the protection of freedom in each of its citizens, to the best of their abilities and not at the expense of other citizens, would seek to ensure that each citizen had equal access to rights meant to protect freedom. If a policy showed preference to one set of freedoms over another, then it would qualify as an infringement on the capacity of only some individuals to be their own master.



It is in the spirit of self-mastery and freedom that Ripstein argues about the obligation of governments to not just respect equal freedom, but actively facilitate it. While there are numerous examples one could acknowledge, perhaps the most interesting and relevant one is that of a government's obligation to provide for roads.<sup>9</sup> While property rights are—for the most part—thought of as uncontroversial rights that individuals ought to have as an extension of their personhood, the concept of private ownership could potentially be in conflict with a more direct form of freedom—the ability to move freely through space. If all land were privately held, then individuals would be unable to move over certain areas. Taken to the extreme, people would be stuck on their own land, never able to move beyond perhaps even their own home to go to the grocery store without contracts declaring movement across their neighbors' lands permissible. In this case, the trapped individual has little control over his or her own movement—especially in comparison to the level of control that his or her neighbors exert on him or her.

In fear of letting an absolute right to property—an undoubtedly important, but unfortunately all-too-often contingent right—override the overarching right to freedom, the government must very literally build roads to facilitate equal freedom. Roads and highways allow individuals to access a basic liberty—free movement. This “reveals a formal structure to the public task of making the exercise of private rights systematically consistent.”<sup>10</sup> From the standpoint of structuring a government's rights, equal freedom requires that no absolute right of one person infringe on the absolute right to another.

### 3. DEFINING A CONTROVERSIAL RIGHT

To define a controversial right, returning directly to the subject of abortion may be particularly useful. Because, in some regards, the right to abortion in the United States is not controversial—the Supreme Court in *Roe v. Wade* held that abortion fell within the right to privacy protected by the Fourteenth Amendment and “gave a woman total autonomy over the pregnancy during the first trimester and defined different levels of state interest for the second and third trimesters.”<sup>11</sup> However, in Justice Blackmun's opinion in the case, he stated the following:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

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<sup>9</sup> Ripstein Ch. 8

<sup>10</sup> Ripstein 251–2

<sup>11</sup> Oyez, 2018

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.<sup>12</sup>

It is the content of the right to abortion that makes it controversial. It is how specific the right to abortion is that makes it controversial. It is because of certain biological facts about abortion outside of one's control members of the population will never have personal, firsthand that makes it controversial. It is the religious and moral arguments against abortion that make individuals ill-inclined to support abortion as a permissible practice—let alone a right.

However, Justice Blackmun's opinion acknowledges that the task of the Supreme Court is not to comment on the individual morality associated with abortion. Instead, the Court was tasked only with determining whether the content of abortion justified it as a human right—it was to see whether it qualified as something that ought to qualify as merely Constitutional, merely as something that the government ought to qualify as a legal right that they ought to protect. This relates back to the arguments established in Section 2.A. of this paper as the question for jurisprudence was not one of individual moral obligation. It was rather to remain consistent with the practices expected of a Justice on the Supreme Court. The question at hand is, once again, one of practice related obligations and government consistency.<sup>13</sup>

It is within this explanation that we can find what constitutes a “controversial right”—a legally protected right whose exercise could reasonably contradict with the exercise of another person's legally protected right on the basis of content rather than procedure. It is a particular right to a particular action.

By this conception, freedom of religion also qualifies as a controversial right. The exercise of certain religions requires people to convert others to their own religion; conversion is an example of one person's right to religion having the potential to curtail the free choice of another to exercise a religion of their choosing.

There may be an argument that these religions ought not have the specific right to convert other people. However, this would still entail the law having a preference for certain religions over others. With the First Amendment written as is—“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”—there is little recourse for the government to prohibit certain religions that do not represent a tangible danger to others. It might also be the case that it is not immediately clear what would constitute as an attempt to convert someone. Is a Jehovah's Witness going from door-to-door in a town of Jewish people an exercise of religion that requires infringing on the freedom of religion of others? Is an Evangelical Christian's devout profession of faith to her friends an act of conversion, or simply an act of personal faith? Would you ask her not to talk about her religion the same way you would ask a Jehovah's Witness to not knock on doors?

It should be noted, though, that it is not the potential of regulating away controversy that makes the right to religion controversial in this sense. It is the mere existence of a conceivable time

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<sup>12</sup> *Roe v. Wade*, 1973

<sup>13</sup> If you do want to see a beautiful defense of abortion as a right, please see Judith Jarvis Thomson's “A Defense of Abortion”

wherein the exercise of the right by one person infringes on the exercise of a right—in this case, the right to freely practice religion or the right to an abortion—of another person.

Here, it is worth discussing concrete examples of what policies do not qualify as controversial rights. Although the right to possess firearms is a Constitutionally protected right in the United States that many people disagree with, it is not a controversial right in this sense. The Second Amendment states “A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.” First, the content of the right—the right to own and use a gun—does not infringe on the exercise of another person’s right. There are arguments that the use of a gun infringes on individuals’ right to life. However, this is a conditional rather than categorical contradiction where the only cases where a person’s firearm is used on another person rather than for something like target practice. And as murder is prohibited, individuals who exercise their right to bear arms simply do not have the right to bear their arms on an innocent person. Second, it is worth noting that nowhere is the “right to life” codified as a legal right that the government has an obligation to protect—the closest obligation is the Fourteenth Amendment that only forbids state governments from making and enforcing laws that would deprive people of life without due process.<sup>14</sup>

Immigration is another area of political controversy. First, however, non-naturalized immigrants are non-citizens. Although it may seem cold and potentially amoral to say that the government has no obligation to them, it is the case. Especially inside of a representative form of government, the government has an obligation to citizens—to those whom it is accountable to. There may be individual ethical reasons why governments ought to pass certain policies that ensure a certain standard of treatment to these non-citizens, but it cannot be the case that governments that are only capable of conceptualizing rights via the very law that they create can obligate themselves to perform certain actions outside of what the law states. As such, governments do not have an obligation to non-citizens even if it may be beneficial or good for them to behave with decency towards them. Second, even if governments did have an obligation to treat non-citizens the same as citizens, the right of non-citizens to immigrate would not qualify as a controversial right as it would only increase the obligations of the government rather than infringe on the exercise of existing citizens’ existing rights. Arguments about the effects of large-scale immigration on a state—perhaps that an influx of immigrants might lead to unemployment on behalf of natural born citizens—are not relevant to the question of rights. Simply put: there is no legal right to be employed.

#### **4. WHY GOVERNMENTS HAVE AN OBLIGATION TO ENSURE CONTROVERSIAL RIGHTS**

In the most basic, nearly tautological form: controversial rights—abstracted from, and intimately related to their respective controversy—are simply rights. Because a government has an

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<sup>14</sup> The Fourteenth Amendment states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

obligation to ensure the protection of rights that it has recognized, a government has an obligation to ensure controversial rights that it recognizes.

But there are questions related to one's individual right of refusal that upon first glance complicate this issue. Recall that freedom is defined as the right to be one's own master. Just as one has the choice to participate in the exercise of certain rights, one has the right to choose not to exercise a right. People must be able to abstain from participating in a collaborative scheme, while still ensuring that the collaborative scheme be freely open to other people.<sup>15</sup> For pragmatic reasons, this may involve getting another individual to participate in the scheme or perform a certain task as a proxy.

Let's say that a Catholic doctor is the only doctor within miles of this woman attempting to get an abortion. Is it right to force the Catholic doctor to perform an abortion and violate her own values to allow another citizen access to her right to abortion? Is it right to deny a citizen a constitutionally protected right in favor of allowing someone else to access a different constitutionally protected right?

If we believe in access to all of the rights that our government affords to its citizens, then politicians ought to pass policies that ensure equal access to those rights. There are many policy options that could accomplish this. One of those options might be to fully fund abortion on the federal level. Or, at the very least, make all abortion clinics government owned and public.

There is a question here both about whether the government has a right to fund controversial practices as the money that it would use to fund these practices may come from individuals who do not wish to be associated with the practice. Upon first glance, this concern does seem legitimate— especially in regard to the importance of an individual's right of refusal. Is it right for a devout Catholic's tax dollars to go towards funding abortion? Do they have the right to refuse to give their money towards the practices that they disagree with? Both of these questions frame the issue at hand poorly. Instead, one must ask what the purpose of taxes are.

To avoid the common complaint that taxation is equivalent to theft, one can think of taxes as payment for the services of government. If individuals choose to live within the borders of a state and participate in the economy, then they accept the benefits associated with being a citizen. In a state that embodies democratic ideals or establishes some conception of rights, the services provided are those associated with rights. Taxes are pragmatic ways of ensuring the government

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<sup>15</sup> See the discussion of Nozick's community radio thought experiment in Klosko, "Presumptive Benefit, Fairness, and Political Obligation." Briefly, Nozick in *Anarchy, State, and Utopia* proposes a thought experiment wherein, roughly phrased, there is a community radio. Every day, another person in the community takes a turn running the radio station.

Klosko responds that individuals do have obligations of fair play when the benefits provided by a cooperative scheme are 1. Public and non-excludable; 2. Worth the cost to the average member of the scheme; 3. Fairly distributed; 4. Presumptively beneficial. I do not fully advocate for this as I clearly advocate for strong rights of individual refusal. However, this just places the burden back on the government to organize collaborative schemes or public rights in a way that allows for exceptions. It's also not clear that the case of abortion is completely equivalent to a collaborative scheme in this technical sense. More than anything this is meant to be illustrative example of the sorts of communal obligations that individuals have.

has capital enough to provide services. There is a place to push back against the general normative justification of taxes. However, there is less ground to push back against taxes based on a personal disagreement over what services the government ought to provide. If someone agrees to pay taxes, they give up their money to the government. This might be akin to a person paying for an all-you-can-eat Buffet when he or she only likes a portion of the food at the buffet. The agreement for entering the restaurant is that you pay a chunk fee for the *option* of eating all of the food— you do not get a discount for avoiding the food that you choose not to eat for reasons related to personal choice such as your religion, tastes, or allergies. Besides, the stipulation could also be made that individuals who disagree with controversial practices could declare that in advance so that the government would draw the funding for those practices from individuals who support the practice. That would not deny the overall thesis that governments ought to fund controversial rights.

Someone could make the false argument at this point that this stipulation would be the same as the Hyde Amendment. This would obviously be a mistake. If governments allowed for individuals to declare what practices they would like not to fund with their taxes, that would not imply a blanket prohibition against the government funding a particular practice. Instead, an individual's moral inhibitions regarding specific issues would mean that the government would not use his or her money to fund a specific practice— each individual would still be obligated to pay the same amount in taxes. Because money is fungible, the fact that all tax dollars would still be pooled as revenue for government services would ensure that in the majority of cases finding funds to cover a practice would be a matter of balancing a budget.

But it would be a mistake to claim that moving money around could solve for an inefficient policy full of loopholes. Exceptions would of course need to be carefully regulated for pragmatic reasons; if enough individuals claimed moral opposition to enough policies, then it may be the case that the government would have insufficient funds to cover any number of practices. However, the form of these exceptions would not be about general tasks that the government performs— an individual could not ask for their taxes to not be used to rebuild roads or fund the military as both of those represent public goods like unhindered movement across land and security. A moral qualm with taxation generally would also not qualify as a legitimate exception as these exceptions ought to be phrased in terms of exercising a specific right of refusal. Besides, detesting taxes and choosing not to pay them has a few implications. First, this individual has shirked his or her duties as a citizen. The authoritative state then has recourse in justified coercion. Second, by not paying taxes, this individual is free-riding and has no claim to the benefits that his or her fellow persons reap because of their abiding by the law. Third, this person had no right in the first place to not pay taxes if he or she was still invested in either citizenship or the benefits of the state.

With all of that established, in some regards, the methods of funding are not of particular interest to this paper— funding is merely instrumental to the assurance of a citizen's access to rights. Depending on what the right in question is, the government would have different methods of assuring citizens could access their rights. In some cases, like freedom of speech or religion, the government may simply need to impose law or change policy or alter existing institutions to respect this right. In other cases, like that of abortion, where the right is to a particular service,

the government may need to actually fund the service because the service requires some tangible goods separate from that which the government could provide with already existing resources.

There is also what might appear to be a plausible objection to this account of a government's obligation to provide for rights. If the government has an obligation to fund abortions because it has deemed it a right, then does the government also have an obligation to pay, for example, for citizens to have guns? The Second Amendment in the United States is clear in stating that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Does this mean that the government must buy all of its citizens guns?

The answer is clearly no. The government does not have an obligation to pay for its citizens to possess guns because the purpose of the Second Amendment is that guns are merely instrumental to a right to security—something that the government already funds via the military and the criminal justice system. The right to bear arms is "necessary to the security of a free State," and the government must fund security rather than a particular right to firearms. The Supreme Court has also recognized the Second Amendment as a representation of the right to self-defense.<sup>16</sup> But in the context of self-defense, there are numerous ways to defend oneself. The phrasing of the Second Amendment is clear that the government shall not infringe on an individual's right. Furthermore, because of the context of self-defense, it seems plausible that there is some element of *self*-defense that implies that there is a level of self-ownership and accountability that an individual must take in exercising the right that is not present in the case of abortion.

But what about the right to vices like marijuana, alcohol, or tobacco? Does the government of California have the obligation to pay for millennial's Friday nights? Once again, the answer to this ludicrous question is no. The right to these vices is not a right to some public good. Instead, it's the right of people to buy certain products on the market. Someone could make the case that the government ought to facilitate transactions in the marketplace via some regulatory policy, but that specific argument is separate from the scope of this paper and requires justifying an almost absurd degree of government interference in the public market. Explaining why the government ought to pay special attention to these vices would require an explanation of why the government, while performing the task of regulating the economy, has the right to facilitate the growth of certain markets over other markets. The general form of this argument—that the government ought to simply facilitate the growth of a market that allows individuals to access a multitude of goods—is not so difficult to justify.

Taking all of these facets of funding into consideration, there is one main takeaway: funding is always instrumental. The purpose of funding policies is not to simply throw money at a problem because the money will, by itself, fix some problem. Money funds a policy that ensures access to some practice or object that has some already contextually value.

In the case of controversial rights, one need not make the claim that these rights are intrinsically good or derive from natural rights. It is sufficient to say that the government has given these rights some assigned value that justifies an obligation to fund them. It is not just enough to declare some actions valuable and then not facilitate citizens' ability to access them. While there

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<sup>16</sup> *D.C. v. Heller*, 2008

are many arguments that justify this claim, the most straightforward one is our earlier argument of equal freedom.

If some people do not have access to certain rights that others have, then the government has an obligation to facilitate access to those rights. In this regard, it is the protection of religion that justifies funding the right to abortion. Because it is only by making abortion available fully in the public sphere—perhaps even as a public good—that the absolute right of refusal could be exercised by any person who did not want to participate in the scheme of abortion.

## **5. TANGIBLE APPLICATIONS**

The most literal application of this paper to policy might very well be to create federal funding for abortion to allow for true equal access to abortion to everyone regardless of income or geographic location. But this does not need to be the case. There may not need to be literal funding for abortion. Instead, it may be to do away with a “state’s rights” conception of abortion. If one state has more stringent restrictions on abortion than another state, then the citizens in that state do not possess the same rights as citizens in another state.

To briefly return to the question of the Second Amendment, it might be the case that—although the Second Amendment is still not considered controversial in the technical conception established in this paper as the possession of a firearm does not have the ability to conflict with a different legally codified right of another person—the United States ought to establish more federal laws about firearms. It might be the case that concealed carry laws, Castle Doctrine, and Stand Your Ground laws ought to be the same in all 50 states.

States’ rights are an important component of the United States legal framework. However, in terms of the context of equal freedom—as citizens of the United States are formally citizens of the United States rather than their individual state—it might be the case that large discrepancies between states in terms of the prohibitions of accessing certain rights provided are unjustified.

Another more palatable option would be to keep the discrepancies between states intact and simply create federal funding for transportation and lodging for people to get abortions where it is legal for them to get an abortion.

In the context of negative liberties, the federal government has an obligation stemming from equal freedom to ensure that no entity infringes on the ability of a citizen to access a federal right—including state governments.

## **6. CONCLUSION**

Controversy can be defined as some legal right whose exercise could reasonably contradict with the exercise of another person’s legally protected right on the basis of content rather than procedure. In the case of abortion, someone getting an abortion could infringe on the free exercise of another’s religion if, for example, the doctor performing the abortion is a practicing Catholic.

There are arguments out there that it's not within the government's normative authority to fully fund controversial procedures. At the end of the day, these arguments are unjustified. Governments are procedural—the only rights and values that they can justify protecting and ensuring are those rights established in their legal codes. More importantly, the deeper obligation of a government that values a broad conception of rights is to ensure that its citizens all have access to those rights. There are arguments that the federal government doesn't have the right to perform such an action—states should have autonomy. While states' rights are incredibly important to our nation, discrepancies between access to rights cannot be justified under a paradigm that supports citizens' rights. An individual's right of refusal becomes more powerful if she can freely choose it with the knowledge that her actions will not harm anyone else's liberty.

Rights within a society ought to be made available to all of its citizens. If because of a lottery of birth, uncontrollable situations, or—in the case of the Catholic doctor—professional obligation, some individuals cannot access certain constitutionally protected rights, the government ought to step in to ensure equal liberties.



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