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ARTICLE

RELIGIOUS FREEDOM AND THE COMMON GOOD: A SUMMARY OF ARGUMENTS AND ISSUES

THOMAS C. BERG*

INTRODUCTION

Challenges to religious freedom have become more prominent and intense in recent years, both in the United States and abroad. The challenges abroad range widely in their severity, and some of them involve violent targeting of disfavored religious groups: Christians, dissenting branches of Islam, and other minority groups throughout the Middle East; Rohingya Muslims in Myanmar; Buddhists, Christians, Muslims, and Falun Gong practitioners in China; and others elsewhere.¹ In the U.S., the conflicts are much less severe but still cause significant social turmoil. They involve both individuals and organizations, of varying faiths—with Muslims and conservative Christians as the two most prominent claimants—and laws on matters from LGBT rights to healthcare to national security.²

Arguments over these questions often treat religious freedom as a matter of personal autonomy. But religious freedom may have another dimension and justification: that it advances, or is a component of, the common good. That concept is defined in Roman Catholic teaching as the “sum total of social conditions which allow people, either as groups or as individuals,

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1. See 2018 U.S. COMM’N ON INT’L RELIGIOUS FREEDOM ANN. REP. 1, 1 <https://www.uscirf.gov/sites/default/files/2018USCIRFAR.pdf> (describing twenty-eight countries where “governments and nonstate actors targeted religious minorities, dissenting members of majority communities, and nonreligious persons.”). “The most severe abuses included genocide and other mass atrocities, killings, enslavement, rape, imprisonment, forced displacement, forced conversions, intimidation, harassment, property destruction, the marginalization of women, and bans on children participating in religious activities or education.” *Id.*

2. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm.*, 138 S. Ct. 1719 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

to reach their fulfilment more fully and easily.”³ In this collection, Stanley Carlson-Thies defines the common good as the ideal that laws and institutions “must, as far as possible, aim for the good of all, not the good of some over the good of others in the political community.”⁴ The common-good argument, therefore, explores the ways in which religious freedom does not simply protect its practitioners but also preserves space for religion and religious communities to benefit the broader society (including by benefiting individuals).

We tend to think that the common good is simply a limit on freedom: that individual and societal claims inevitably clash, that the common good stands for society’s interests in restricting the actions of individuals and private groups. But freedoms also serve social purposes. Freedom of speech and the press preserve a democratic society by checking abusive rulers and the Supreme Court recently emphasized how the right to marry—including, in that case, the right of same-sex couples to marry—serves purposes sounding not only in personal autonomy but in responsibility and commitment. Marriage, the Court said, “offers the hope of companionship and understanding,” of care from the spouse in moments of need; it “safeguards children and families,” which are nurtured by same-sex as well as opposite-sex couples; overall, it is “a keystone of our social order.”⁵ Some of the important literature advocating same-sex marriage framed it as a matter not just of “civil rights” but of “civil responsibility,” on the ground that marriage as an institution serves social goals—for gay people and others—that government itself cannot directly achieve.⁶

The vital and historic right of religious freedom can also rest on common-good arguments. Indeed, such arguments may be increasingly important to defending that right in an era of skepticism toward many religious-freedom claims. Perhaps for this reason, advocates and scholars have made a discernible turn toward exploring the common good as one key rationale for religious freedom.⁷ “Freedom to serve [others]” is a chief theme for the

3. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 164–65 (2004), http://www.vatican.va/roman_curia/pontifical_councils/just_peace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html#Meaning%20and%20primary%20implications (quoting SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION GAUDIUM ET SPES, 26: AAS 58 (1966)).

4. Stanley Carlson-Thies, *The Common Good Requires Robust Institutional Religious Freedom*, 15 U. ST. THOMAS L.J. 529 (2019).

5. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015).

6. JONATHAN RAUCH, *GAY MARRIAGE: WHY IT’S GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 67 (2008) (arguing that “no institution or government program can begin to match the love of a devoted partner”); see also WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

7. See, e.g., *Religious Freedom Annual Review 2018: Religion and the Common Good*, INT’L CTR. FOR L. AND RELIGIOUS STUD., BRIGHAM YOUNG UNIV. <https://www.iclfs.org/index.php?pageId=4&linkId=285&contentId=2269&blurId=93239>; MARK DAVID HALL, *RELIGIOUS ACCOMMODATIONS AND THE COMMON GOOD* (2015); Kathleen Brady, *Religious Freedom and the Common Good*, 50 LOY. U. CHI. L. REV. 137 (2018).

religious-freedom efforts of both the U.S. Conference of Catholic Bishops (USCCB) and the evangelically-based Institutional Religious Freedom Alliance (IRFA).⁸

But this justification of religious freedom also raises a number of important challenges and questions. They can generally be grouped into three areas:

- A. What precisely is the evidence, and how strong is it, for the connection between religion and benefits to individuals and society?
- B. What do religion's social contributions have to do with religious freedom?
- C. How does the common good suggest limits on the scope of religious freedom, or criticisms of religious freedom as it is practiced or claimed today?

To address these and other questions, this symposium draws together social scientists, legal scholars and advocates, and policy experts. The papers were first delivered at the University of St. Thomas School of Law in the spring of 2018. The initiative is co-sponsored by the *University of St. Thomas Law Journal*; the Baylor Institute for Studies of Religion, directed by Dr. Byron Johnson (who also contributed a paper); the Terrence J. Murphy Institute for Catholic Thought, Law, and Public Policy at St. Thomas; and the Religious Freedom Institute in Washington, D.C.

I. SYMPOSIUM PAPERS

A. *Religion's Contributions to the Common Good: The Empirical Case*

The collection begins with Byron Johnson, among the nation's leading empirical researchers on religion, summarizing the "mounting body of empirical evidence [that] documents that . . . [religion] has significant beneficial effects."⁹ Religious practice is "associated with making people [among other things] happier, healthier, . . . and more active and responsible citizens"; it makes "varied social contributions, ranging from increasing civic participation to ministering to spiritual, physical, emotional, economic, and other life needs"; it "can help decrease crime, increase sobriety, and promote mental and physical health"; and under the proper conditions it "improves government stability and economic growth" and "enhance[s] social capital and networks of social support that aid human flourishing."¹⁰

8. See, e.g., *Free to Serve: Monthly eNewsletter*, U.S. CONF. OF CATH. BISHOPS, <https://www.usccb.org/issues-and-action/religious-liberty/free-to-serve.cfm>; Stanley Carlson-Thies, *Free to Serve: Protect the Religious Freedom of Faith-Based Service Organizations*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Nov. 1, 2012), <http://www.irfalliance.org/free-to-serve-protect-the-religious-freedom-of-faith-based-service-organizations/>.

9. Byron R. Johnson, *Ten Reasons We Need Effective Research on Faith-Based Compassion*, 15 U. ST. THOMAS L.J. 662 (2019).

10. *Id.* at 662–63.

Yet Johnson identifies a significant scholarly gap: “Despite the thousands of studies documenting the benefits of religion and religious practices to individuals as well as society, only a small number of studies have examined the contributions or effectiveness of faith-based organizations.”¹¹ Noting a few controlled studies documenting the relative effectiveness of organizations attacking child poverty and prisoner recidivism, Johnson suggests that more extensive, rigorous research could show that the “impact of faith-based organizations may likely be far more consequential for the common good than people imagine.”¹² He argues that further research could attract media attention to the benefits, not just the harms, from religion; could teach how to improve faith-based organizations’ work; and most relevant here, could help strengthen the case for religious freedom. “Research that accurately estimates the economic value and social contribution of the ‘faith factor’ should make it easier to advocate the case that society benefits when religion is allowed to flourish. Conversely, society will suffer when religion is restricted.”¹³

Brian Grim, president of the Religious Freedom and Business Foundation, has co-published a widely noted study, which he explains here, estimating the annual value that religious organizations and activities add to society.¹⁴ The estimate begins with the revenue of the hundreds of thousands of religious congregations, educational institutions, health-care networks, charitable social services, media entities, and food providers.¹⁵ On top of that, however, are indirect or “halo” effects—for example, “having the stable, attractive force of a congregation in a community, providing a center for education, childcare, social events, charity, and job training, . . . [as well as] provid[ing] a sizeable number of jobs”¹⁶—which together amount to four times the actual direct spending by the congregations.¹⁷ Further including “halo effects” from separate charitable institutions, as well as the revenues of religiously inspired businesses and religiously themed films, produces a yearly economic value of American religion of almost \$1.2 trillion¹⁸—an estimate that may be conservative but that still amounts to “the world’s fifteenth largest national economy.”¹⁹ As Grim acknowl-

11. *Id.* at 666.

12. *Id.*

13. *Id.* at 671.

14. Brian J. Grim, *The Earthly Good of Being Heavenly Minded: The Economic Value of U.S. Religion*, 15 U. ST. THOMAS L.J. 607 (2019) (discussing Brian Grim & Melissa Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. RES. ON RELIGION, no. 3, 2016, at 25).

15. *Id.* at 610–11.

16. *Id.* at 622.

17. *Id.* at 631–37.

18. *Id.* at 637–41.

19. *Id.* at 664. Along the same lines, other major empirical work has documented the distinctive power of religious organizations to mobilize “social capital”—motivating volunteers and donors, creating social networks—to address human needs. *See generally, e.g.*, ROBERT PUTNAM

edges, the figure “does not account for the negative impacts that occur in some religious communities, . . . [such as] the abuse of children by some clergy, cases of fraud, and the possibility of being recruitment sites for violent extremism”—but those costs, he argues, must be weighed in the light of religion’s “purpose-driven institutional and economic contributions to health, education, social cohesion, social services, media, food and business itself.”²⁰

B. *Religious Freedom and the Common Good*

If many kinds of religious activity, on balance, make important (although perhaps still not fully analyzed) contributions to the common good, what does that have to do with religious freedom? The point may simply be, in Byron Johnson’s words, “that society benefits when religion is allowed to flourish . . . [and] will suffer when religion is restricted.”²¹

Some scholars have defended religious freedom, in part, on the more specific ground that it creates space for religious organizations to serve others (members and non-members) and thus promotes the common good. Political scientist Stephen Monsma published a study concluding that “if these violations of religious-freedom rights would cause a significant number of faith-based organizations to go out of business, to withdraw from certain areas of service, or to reduce their size, . . . a crisis of the first magnitude would exist in the nation’s social safety net.”²² He provided evidence that religious organizations provided extensive services, that they often “fill[ed] a niche that governmental or nonprofit secular agencies would have a difficult time filling,” and that religious identity was sufficiently “alive and meaningful” for enough of them that forcing them to modify that identity might discourage their activities.²³ Although Monsma collected existing evidence rather than conducting new controlled studies, his collected evidence was still suggestive. With Stanley Carlson-Thies, Monsma made the case for protecting religious organizations’ “freedom to serve”—to contribute to the common good even if those contributions are “uncommon” in the sense that the organizations depart from majority norms on other matters such as sexuality.²⁴ I have made such arguments too.²⁵

AND DAVID CAMPBELL, *AMAZING GRACE: HOW RELIGION UNITES AND DIVIDES US* (2010); JOHN J. DiIULIO, JR., *GODLY REPUBLIC: A CENTRIST BLUEPRINT FOR AMERICA’S FAITH-BASED FUTURE* (2007); RAM A. CNAAN, *THE NEWER DEAL: SOCIAL WORK AND RELIGION IN PARTNERSHIP* (1999); ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* (1993).

20. Grim, *supra* note 14, at 640-41.

21. Johnson, *supra* note 9, at 671.

22. STEPHEN V. MONSMA, *PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY* 16, 19 (2011).

23. *Id.* at 26. *See generally id.* at 15-44.

24. STEPHEN V. MONSMA & STANLEY W. CARLSON-THIES, *FREEDOM TO SERVE: PROTECTING THE RELIGIOUS FREEDOM OF FAITH-BASED ORGANIZATIONS* (2015).

25. Thomas C. Berg, *Freedom to Serve: Religious Organizational Freedom, LGBT Rights, and the Common Good*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COM-*

Yet that answer raises difficulties, for it might appear to make religious freedom a matter of policy rather than of right. As I have written previously, “grounding religious freedom on these contributions might suggest that it should protect only those religions that those in power agree with or view as beneficial”—whereas true religious freedom means protecting all faiths subject to equal standards of regulation.²⁶ Indeed, focusing on these social contributions might suggest that government should support the faiths with whom it agrees and restrict or at least disfavor others.

There are answers to this objection. Religious freedom could rest on a rule-utilitarian assessment about the common good: freely exercised religion tends to make social contributions on the whole, and so we protect it for all faiths, just as we protect speech that does not promote a search for truth, in part because we do not trust government to distinguish between such “good” and “bad” speech. Many of the founders believed, and there is good reason to affirm today, that religion contributes on net to others only if it is voluntary and does not rely on state support, which is likely to make it complacent or arrogant.²⁷

In this collection, Stanley Carlson-Thies presents several arguments that the common good requires “robust institutional religious freedom,” in response to charges, for example, that exempting religious institutions from nondiscrimination laws “elevates the good of religious people over LGBTQ people,” thus “violat[ing] the requirement that the government must promote the good of all.”²⁸ His argument rests on the diversity of deep moral views in society: to promote the common good, i.e. “the good of [each and] every member of the political community,” government must protect people’s freedom to be able to “live consistently with their convictions, even though others do not share those convictions.”²⁹ That means protecting their ability to provide and receive social services in settings, and under norms, that are consistent with their deep moral views. Carlson-Thies would relax nondiscrimination regulation, for example, to make room both for institutions that serve only LGBTQ persons, and for those that serve only persons with traditionalist religious values.³⁰ “Variety is more likely to promote the good of all than a single approach. Thus, institutional religious freedom,

MON GROUND 307 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018) [hereinafter Berg, *Freedom to Serve*]; Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Non-Profits*, 91 NOTRE DAME L. REV. 1341 (2016) [hereinafter Berg, *Partly Acculturated*].

26. Berg, *Freedom to Serve*, *supra* note 25, at 309.

27. Berg, *Partly Acculturated*, *supra* note 25, at 1363 (citing Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TULANE L. REV. 87, 120–21 (1992)).

28. Carlson-Thies, *supra* note 4, at 531, 533.

29. *Id.* at 534.

30. *Id.* at 544.

enabling religious options to be among those available, serves the common good.”³¹

It is important to emphasize that although this “common good” argument defends freedom for religiously grounded services to those in need—refugees, the poor, the homeless—it is not limited to those activities. Religious institutions also promote the common good by training and educating children, nurturing families, and engaging in a host of other activities.

Many founders believed that religion provided this sort of broad foundation for the common good; in this symposium, political scientist Mark David Hall documents and discusses their views.³² The founders generally believed that religion was important for societal happiness: as the Northwest Ordinance of 1787 put it, “religion, morality, and knowledge [were] necessary to good government and the happiness of mankind.”³³ With respect to the connection between religion and a free, republican society, Hall describes what historian James Hutson has called the “founding generation’s syllogism”: “virtue and morality are necessary for free, republican government; religion is necessary for virtue and morality; religion is, therefore, necessary for republican government.”³⁴ The founders’ public statements connecting religion, morality, and well-functioning government “could be multiplied almost indefinitely.”³⁵

Hall also asks why the above propositions did not call for prohibiting the religions that taught departures from accepted morality? Because “religious liberty,” the founders concluded, “causes Christianity to flourish *and* to be purer”—whereas compulsion of faith, in the words of one pamphleteer, “works not to conviction, but most naturally leads them to hypocrisy.”³⁶ Hall concludes by describing how, as part of their commitment to religious liberty, the founders supported making exceptions to accommodate religious conscience in particular contexts, most notably military service and official oath-taking.³⁷

Religious freedom also protects social peace, which is another aspect of the common good. This theme is picked up in the article by sociologists

31. *Id.* at 542.

32. Mark David Hall, *America’s Founders, Religious Liberty, and the Common Good*, 15 U. ST. THOMAS L.J. 642 (2019).

33. *Id.* at 646 (quoting *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio [Northwest Ordinance] (July 1787)*, in *THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING* 236, 238 (Daniel L. Dreisbach & Mark David Hall eds., 2009)).

34. *Id.* at 648 (quoting JAMES H. HUTSON, *RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC* 81 (1998)).

35. *Id.* at 650.

36. *Id.* at 652-53 (quoting pseudonymous author Worcestriensis, *Number IV (Sept. 4, 1776)*, in *THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING* 274 (Daniel L. Dreisbach & Mark David Hall eds., 2009)).

37. *Id.* at 656-61.

Roger Finke and Dane Mataic, who show how repression of religion is associated with violence and social conflict.³⁸ Working from two data sets measuring various conditions—restrictions on religious freedom, societal pressure against minority religions, instances of religious persecution—in approximately 170 nations, Finke and Mataic first find that the promise of religious freedom in national constitutions is frequently undercut in practice. Restrictions often stem from “seemingly benign” practices such as registration, and they have increased in frequency and severity in the last 25 years.³⁹ The “strongest predictors” for restrictions Finke and Mataic find are societal pressures, “government favoritism [for] a single religion,” and the lack of “an independent judiciary and free elections.”⁴⁰ They then trace the baleful consequences of religious restrictions: “Although government restrictions on religion are often justified in an effort to reduce tensions and conflict, research suggests that the opposite occurs; government restrictions are associated with higher levels of tension and conflict” and, in a vicious cycle, “social restrictions lead to higher levels of government restrictions, which in turn lead to persecution that is more violent. Following the heightened violent persecution, religious groups respond with heightened social restrictions.”⁴¹ Finke and Mataic’s paper gives a modern echo to James Madison’s argument in the “Memorial and Remonstrance against Religious Assessments”:

Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. [In contrast,] equal and compleat [sic] liberty, if it does not wholly eradicate [religious discord], sufficiently destroys its malignant influence on the health and prosperity of the State.⁴²

C. *Religious-Freedom Limits and Critiques, Based on the Common Good*

The foregoing arguments suggest that the relationship between the common good and religious freedom is harmonious, once each concept is properly defined and understood. Religious freedom is an essential, inherent element of the common good—and while the common good also limits religious exercise, such limits are inherent in any viable definition of religious freedom. On the other hand, those limits on freedom require specification: in that sense, the push for broad religious freedom will inevitably come in

38. Roger Finke & Dane R. Mataic, *Promises, Practices and Consequences of Religious Freedom: A Global Overview*, 15 U. ST. THOMAS L.J. 587 (2019).

39. *Id.* at 593–94.

40. *Id.* at 588; *see id.* at 595–600.

41. *Id.* at 601.

42. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶11 (1785), <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

tension with considerations of the common good. Several contributors to this symposium explore that dynamic of conflict between religious interests and common good.⁴³

Sociologist Jacqueline Rivers discusses “the paradox of the black church and religious freedom”: African-Americans have reasons to support religious freedom but have not joined in recent campaigns to protect it.⁴⁴ Rivers examines this issue by refocusing attention from “underlying principles” of religious freedom to what she calls “*enacted* religious freedom”: “how religious freedom is used, often taken for granted, often without specific claims of that right being made.”⁴⁵ Religious freedom has been of considerable use to black people: “enacted religious freedom plays a key role in the black community”; “religious arguments and deeply held religious motivations were at the heart of the abolition” and civil rights movements; the black church has been an “institutional hub” and service provider for the black community.⁴⁶ But clearly, “enacted religious freedom” practiced by whites oppressively burdened black Americans: slavery, segregation, and even racist violence “were sometimes explicitly couched in terms of religious freedom” or evangelical religion.⁴⁷ Due “to the powerful association of religious freedom with white evangelicals . . . [and hence with racism,] an essential partner in the effort to preserve religious freedom, the black church, is alienated from the effort.”⁴⁸

Angela Carmella, a religious-freedom scholar also versed in Catholic social teaching (CST), explores CST as a potential source of principles that, to protect the common good, would limit overly expansive claims for accommodation of religious interests.⁴⁹ She connects those limitations on religious “free exercise” not just to the necessity of “public order,” but to the First Amendment’s other religion provision: the prohibition on “law[s] respecting an establishment of religion.” The Establishment Clause, she argues, prevents not only “religious harms”—the government controlling a church, or a church coercing worship or financial support by others—but also “non-religious harms,” for example where government “privilege[s] religious interests] in ways disproportionate to any reasonable protection of religious exercise, thereby giving an unwarranted advantage.”⁵⁰ Carmella says that Catholic teaching has generally “prioritize[d] the Free Exercise

43. That is so even if these contributors might reach the same results as Picarello in many current disputes.

44. Jacqueline C. Rivers, *The Paradox of the Black Church and Religious Freedom*, 15 U. ST. THOMAS L.J. 676 (2019).

45. *Id.* at 677.

46. *Id.* at 680, 685–98.

47. *Id.* at 700.

48. *Id.* at 702.

49. Angela C. Carmella, *Catholic Thought on the Common Good: A Place for Establishment Clause Limits to Religious Exercise*, 15 U. ST. THOMAS L.J. 546 (2019).

50. *Id.* at 547.

Clause and subordinate[d] the Establishment Clause”—understandably, since the latter has often been used “as a weapon” to prevent even-handed government assistance to Catholic schools and “as a vehicle for secularizing society and privatizing religion.”⁵¹ But she argues that CST is consistent with, and can more forthrightly affirm, non-establishment themes: “[t]he Church’s teaching on law and politics is concerned with much more than securing its own freedom” and “recognizes clearly the secular nature of the state” as well as, among other things, “the duty of every group and individual to promote the common good.”⁵² By endorsing a measured version of Establishment Clause limits on religious exercise, she suggests, “the Church would offer an important counterweight to the very polarized discourse . . . in which maximalist free exercise claims are met with hostile attempts to restrict religion.”⁵³

Finally, church-state scholar Melissa Rogers shares lessons learned from four years as executive director of the White House Office of Faith-based and Neighborhood Partnerships in the Obama administration.⁵⁴ In that time she worked on some of the most polarizing issues involving government-religion partnerships, religious organizations’ autonomy, nondiscrimination, and sexual freedom. Here, she makes recommendations not for the substantive resolution of such conflicts, but for the “structures and processes” by which the executive branch addresses them. First, she says, the executive branch needs both “[p]olicy as well as legal components within the agencies and the Executive Office of the President must contain staff with knowledge and experience handling issues at the intersection of religion, law, and public policy” and “[b]oth political appointees and civil servants should be included among staff handling these issues.”⁵⁵ Second, there is a need for greater “[c]oordination on these issues across the federal executive branch.”⁵⁶ Finally, the political polarization over religious-freedom issues creates the prospect for stakeholders “. . . to have their expectations and understandings about fundamental human rights and liberties upset every four to eight years”; the executive branch should seek “to minimize both the number of shifts from administration to administration and their magnitude” by “[s]earching for common ground on religious freedom issues.”⁵⁷ As Rogers sums up, “[a] nation with a unique and proud, albeit flawed, history on religious liberty should do what it can to ensure that this

51. *Id.* at 549.

52. *Id.*

53. *Id.*

54. Melissa Rogers, *Religious Freedom and the Federal Executive Branch: Lessons Learned from Public Service*, 15 U. ST. THOMAS L.J. 703 (2019).

55. *Id.* at 707.

56. *Id.*

57. *Id.* at 712; 714.

freedom is not actually serving as, nor even simply seeming like, a partisan tool.”⁵⁸

II. FUTURE DIRECTIONS

Rogers’ warning is timely. In recent years, religious freedom has indeed been at risk of being seen as just a partisan tool. That risk is among the greatest posed by our current culture wars. Connecting religious freedom to the common good holds out some hope of bridging that partisan divide—partly because it emphasizes that religious freedom has limits, but also because it shows that religious freedom serves goals that a wide range of Americans can embrace. This collection of essays, rich as it is, only scratches the surface of the issues posed when we connect religious freedom and the common good. Here are just a few of the issues that need further exploration:

- As Byron Johnson suggests, we need much further study to document the effectiveness of faith-based organizations—more precisely, to document which organizations and practices are effective, which are not, and why.
- We need further study about the effect of religious-freedom conflicts on these organizations. How many will reduce their services, or exit altogether, if forced by law to contravene their stated tenets or identity? We have some anecdotal evidence: “Catholic Charities branches in Massachusetts, Illinois, and the District of Columbia stopped performing adoptions because of rules requiring them to place children with same-sex couples,” and “several nonprofit challengers to the [Obama administration’s] contraception mandate warned that they would cease providing services rather than pay for medicines they believed to be sinful.”⁵⁹ But it would be good to have a sense of the magnitude of the risk.
- Finally, we need research on methods for accommodating religious conscience while still protecting social peace and the interests of others. In the case of the mandate for employers to cover contraception in employees’ health insurance, the Obama administration eventually hit upon a solution to protect religious nonprofits: contraception would be covered separately by the insurer or (in the case of self-insuring employers) a third-party administrator, with no outlay by the objecting employer and no cost to the employee. The Supreme Court then extended this arrangement to closely held for-profit corporations in the *Hobby Lobby* decision.⁶⁰ Are there similar ways to accommodate religious freedom in other situations?

58. *Id.*

59. Berg, *Freedom to Serve*, *supra* note 25, at 320–21 (footnotes and citations omitted).

60. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781–83 (2014).

For example, some deeply religious individuals and groups are driven to provide food and water to immigrants who have entered the country illegally but are now vulnerable as they travel.

- Can we protect that activity while still prohibiting other activities—such as transporting or hiding undocumented entrants—that directly undercut enforcement of the immigration laws? Take another example: In 2016, California threatened to pass a bill stripping state scholarships from students at religious colleges that discriminated against same-sex relationships or transgender students. Could we protect those colleges and reduce the effect on LGBT students—perhaps, for example, by requiring that a college not only give notice of its policies to prospective students (which California ultimately did require), but that the college streamline transfer policies so that an LGBT student whose conflict becomes clear after she arrives can move to another school with minimal cost?⁶¹

In our deeply divided society, the future of religious freedom—and of social peace— may depend on our answering such questions successfully.

61. *United States v. Warren*, No. MJ-17-0341-TUC-BPV, 2018 WL 6809430 (D. Ariz. Dec. 27, 2018) (denying defendant's motion to dismiss under Religious Freedom Restoration Act).