Religious Liberty Requires Constant Vigilance

Mr. Scott J. Meyer delivered the following paper at the January 21, 2013, LCA Conference in Fort Wayne, Indiana. The paper has been updated since that time.

Introduction
We Lutherans in America sometimes fail to appreciate that among the countless blessings from God is the privilege to live in a country that provides constitutional protection of religious liberty. We tend to take this freedom for granted and fail to realize that there is no assurance of its endurance. State encroachment on the Church, initiated and promoted by atheists, agnostics, and anti-religion activist groups, has frequently resulted in stringent limitations on religious liberty by judicial fiat. As Thomas Sowell reminds us, "There have been many wise warnings that freedom is seldom lost all at once. It is usually eroded away, bit by bit, until it is all gone." Accordingly, this essay will address the proposition that religious liberty requires constant vigilance.

As background history on the gradual loss of religious liberty, this essay will briefly describe several attempted state encroachments upon the parochial school in the late nineteenth and early twentieth centuries in which Missouri Synod Lutherans were directly or indirectly involved, including two historic U.S. Supreme Court cases that ruled in favor of parental rights. Abrupt changes occurred after the end of World War II, and today the encroachments on religious liberty are accelerating at an undue speed. This essay will highlight a couple of recent, far-reaching instances of state encroachment on religious liberty that, if anything, should give us a wake-up call. These encroachments are the positions taken by the Federal Government in the Hosanna-Tabor case, and the contraceptive and abortifacient drug mandate in the Affordable Health Care Act. As so aptly put by Phyllis Schlafly, the Obama administration in flagrant disregard of the U.S. Constitution in these recent instances "had discovered two new rights: Americans could not only demand a job from their church but also demand that that church pay for their sex lives." Most Americans, and that includes Lutherans, apparently "do not yet grasp the depth of Obama's contempt for religious freedom." These recent encroachments on religious liberty under the Obama administration confirm that religious liberty in America needs constant vigilance by Lutherans and other devout Christians.

Importance of Religious Liberty
It is an a priori principle that religious liberty is important to Lutherans and, especially, Missouri Synod Lutherans, whose forefathers from Saxon, Bavaria, Prussia and other states came to America seeking freedom of religion. We begin with C.F.W. Walther (1811-87), who is recognized as "The Founding Theologian" of the Missouri Synod. He was one of several confessional Lutheran pastors who emigrated in 1838 from Saxony, the land of Luther. Various factors contributed to the emigration, including religion, politics, and economics. But according to Walter O. Forster, the eminent historian of the Saxon 1838 emigration, religious factors, especially rationalism and unionism (syncretism), had a more direct influence on the emigration than did economic conditions.

Other groups of confessional Lutherans from Germany were sent from Bavaria by J.K.W. Lohe (1808-72), in response to the plea of F.C.D. Wyneken (1810-76), a Hanoverian by birth. They were attracted also by Walther's concern for sound doctrine as voiced in Der Lutheraner. In the age of rationalism, as noted by Dr. Theodore Graebner, "Loehe was one of the few men who clung to the teachings of the Lutheran Church, who accepted the Bible as the Word of God and the Lutheran Confessions as a summary of saving doctrine."

Another group of confessional Lutherans from Germany were the so-called "Old Lutherans" who emigrated from Prussia as a result of the Prussian Union of 1817. Although freedom of worship was decreed in Prussia in 1740, Friedrich Wilhelm III in 1817 ordered the merger of the Lutheran Church and the Calvinist Reformed Church to form a single state church, the Evangelische Kirche.

Similar unions as in Prussia were formed in many smaller German states. When these states were given full power to enforce the Prussian Union in 1830, many Old Lutherans chose to emigrate rather than comply. According to historian, Professor Ralph Owen, they came to America "because the Constitution of the United States guaranteed religious freedom, and this they believed implied the right to maintain church schools .... Like the Pilgrims of 1620, the Old Lutherans came because they were impelled by a dominant religious need."

Constitutional Protection of Religious Liberty
So when these Lutherans came to America, they were able to enjoy the religious liberty protected under the First Amendment to the U.S. Constitution, which provides that:

Image
“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” .... (Amendment 1).

The First Amendment thus has two Religion Clauses: a "no establishment" provision and a "free exercise" provision. Not mentioned here or anywhere else in the Constitution is the frequently misapplied term "separation of church and state." In a well-reasoned dissenting opinion in 1985, Justice William Rehnquist of the U.S. Supreme Court, a devout Lutheran who became Chief Justice later that year, argued that the original meaning of the "establishment of religion" clause in the First Amendment only "forbade establishment of a national religion, and forbade preference among religious sects or denominations." 10

According to legal history scholar Stephen Presser, Rehnquist "who eloquently sifted the historical evidence ... was, of course, right." 11 The First Amendment provision for "free exercise" of religion clearly means freedom of and not freedom from the exercise of religion.

Religious Liberty Subjected to a "Wall of Separation"

A contrary modern view of the "establishment of religion" clause surfaced in a U.S. Supreme Court decision in 1947, Everson v. Board of Education. 12 In that decision, Justice Hugo L. Black, writing for a 5 to 4 majority, "spelled out a hitherto unheard of interpretation" of the establishment clause as creating an absolute "wall of separation" between church and state. That became a turning point in judicial thinking, based on a misuse of a metaphor expressed in a letter by Thomas Jefferson in 1802. Subsequent cases that grasped hold of the language: "wall of separation," resulted in an endless chain of state encroachments upon religious liberty by judicial rulings which, in essence, held that public space must be "religion free." 13 Several of these cases will first be briefly described to illustrate how judicial fiat is restricting religious liberty of Christians in the public school.

Typical examples of such rulings are U.S. Supreme Court decisions which held unconstitutional the required reading of ten Bible verses at the opening of each school day; 14 a moment of silence for meditation and prayer; 15 prayers at high school football games; 16 teaching of creation science; 17 posting of the Ten Commandments on public school premises; 18 and nonsectarian prayer at a middle school graduation ceremony. 19 In these cases, what had been accepted practice for nearly two centuries in America was abruptly outlawed by the U.S. Supreme Court. 20 By outlawing these practices in the public school, the Court in essence forbade the teaching of moral values and biblical precepts and principles for building good character [e.g., McGuffey’s Readers]. Is it not any wonder that our nation is being overtaken by a ‘social decomposi- tion’...due to...‘forced eradication of the inculcation of traditional moral values...?’”

A convoluted judicial reasoning in many U.S. Supreme Court cases that condone state encroachment of religious liberty is illustrated in a bizarre case which is commonly known as ACLU v. Allegheny County. 22 In that case, Justice Henry Blackman, who is more well-known for legalizing abortion, 23 wrote for the majority in a 5 to 4 decision that, on the one hand, a Catholic group’s display of a Nativity Scene (creche) at its own expense on the Grand Staircase of the Allegheny Courthouse violated the Establishment Clause of the Constitution; whereas, on the other hand, the display of an eighteen-foot-high Jewish Menorah erected at taxpayers’ expense at the City - County Building did not violate the Establishment Clause. As concluded by Justice Antonin Scalia in dissent in another case, the decisions of the Supreme Court in the Establishment Clause cases had made "a maze" in the law. 24

To illustrate how far our nation has strayed from the protection of the free exercise of religion since the end of World War II, I hold in my hand a copy of the U.S. Government’s printing of the prayers of Rev. Peter Marshall, Chaplain of the U.S. Senate in the 80th Congress, 1947-48. 25 In each and every one of his prayers, offered at the opening of the daily sessions of the Senate during that two year period, he prayed in the name of “Jesus Christ” or equivalent words. These prayers were consistent with the principle, at least until 1980, that “In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has been part of the fabric of our society.” 26

Now go fast forward to 2005, when in the House of Representatives here in this great state of Indiana, the Speaker permitted prayers that likewise were offered in the name of Jesus Christ. But a U.S. District Court Judge in the Southern District of Indiana, Judge David Hamilton, ruled that a prayer used in the Indiana legislature that mentioned "Jesus Christ" was unconstitutional. 27 However, in the same case he wrote that in the House legislature “a Muslim imam may offer a prayer addressed to ‘Allah’. Thus, in our secularized judiciary, the public acknowledgment of Jesus Christ is judicially ruled unconstitutional, but Islam’s name for God isn’t. Not surprisingly in 2009, as his first federal judicial appointment, President Obama appointed Judge David Hamilton to the Court of Appeals for the Seventh Circuit. Then in 2010, according to Rev. Franklin Graham, anti-religion activists persuaded the military to cancel his personal participation in a Pentagon prayer event “on grounds that it might offend Muslims.” Rev. Graham said: “It is shocking to experience, in our own country, such open opposition to Christian prayer for the nation.” 28 Even up to this very day of the presidential inauguration, intolerance of the Obama administration is evident by pressure exerted by “gays” against the conservative pastor [Louie Giglio] scheduled to deliver the inauguration benediction, which caused him to withdraw because it came to light that he delivered a sermon in the mid-1990s against the aggressive homosexual agenda. 29

State Encroachment on the Parochial School and Parental Rights

Long before the Everson case of 1947, various acts of state encroachment upon religious liberty of Lutherans were pursued in the area of the parochial school. Thus, in Illinois the
Edwards Attendance Bill, and in Wisconsin the Bennett Law, both revised in 1889, were opposed by Lutherans because they denied parents the right to send their children to the school of choice and they interfered with school participation in church festivals.

In his 1890 Synodical Address, President H.C. Schwan said: "It is our privilege to oppose by legal means every law that we see unconstitutional, unjust, or unnecessary. It is our privilege to oppose such laws either in the courts or in the general election." 30 Lutherans carried out extensive educational campaigns and protests to the state legislatures with the result that these laws were repealed, the Edwards Law in 1893 and the Bennett Law in 1891. 31 What Lutherans did then, we need to do today to combat state encroachment on religious liberty.

Three decades later the U.S. Supreme Court handed down two historic decisions that affirmed the many centuries' old right of parents to control the education of their children. Thus, in a 1923 case, Meyer v. Nebraska, the state of Nebraska had enacted a school-language law that forbade the use of all modern foreign language in elementary schools in the state, including parochial schools. A Lutheran parochial school teacher, Robert T. Meyer, was arrested, tried, and fined in 1920 for violating the law. The U.S. Supreme Court ruled the law unconstitutional and upheld the freedom of a Lutheran school to teach German to children. It said that the desire of the legislature to "foster a homogeneous people with American ideals" doesn't justify violation of fundamental rights. 32

Two years later the U.S. Supreme Court, in Pierce v. Society of Sisters, decided a case involving a statute in Oregon that required all normal children between the ages of eight and sixteen to attend public schools of the state. In essence it was a compulsory school law that would close all private and denominational elementary schools. Although Missouri Synod Lutherans were active in the campaign against the law and were interested in pursuing the case in court, they did not do so for lack of funds. The U.S. Supreme Court held the law unconstitutional. Justice McReynolds wrote:

Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. ... The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. The child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. 33

These two famous U.S. Supreme Court cases had enunciated constitutional rights which over the next eight decades became known as settled law of Meyer-Pierce. This was affirmed in 2000 by the U.S. Supreme Court in Troxel v. Granville, which recognized the constitutional right of parents to control the education of their own children. 34 Despite this settled law, the lower federal courts in recent years have made disturbing contrary rulings. Illustratively, by 2005, the Third, Seventh, and Ninth Circuits denied protection of those rights, but the U.S. Supreme Court has failed to grant review (certiorari).
firmed that the teacher "is called as an assistant to the past-
tor (Gehilfe des Pastors)." He emphasized that Walther also
told pastors that: "The minister, therefore, must never forget
that the teacher is one of those who minister to the church,
that he conducts his office as assistant to the pastor, and in
this respect, therefore, he is coordinate. (Translated from
Walther's Pastorate, p. 391.)" 42

Legal challenges to the teaching ministry in the Missouri
Synod were initiated by the Internal Revenue Service in
1949-50. In a case involving a Missouri Synod teacher at St.
Lorenz Lutheran School, Frankenmuth, Michigan, the IRS
took the view that a teacher was expected to pay income tax
on the rental value of his dwelling that was included in his
compensation as a teacher. But the Synod convinced the
IRS that the teacher qualified as a "minister of the Gospel"
and entitled to the tax benefits provided for the clergy. 43 It
was held that a teacher in the parochial schools of the
LCMS, as distinguished from a teacher in other schools, had
the status of a "minister of the Gospel."

These legal challenges initiated by the Internal Revenue
Service contributed to the adoption of a more explicit
definition of the term "teacher" in the Missouri
Synod to ensure application of the "ministerial exception" to
teachers. The term "teaching ministry" was ex-
plained in a 1981 report of the Commission on Theolo-
gy and Church Relations (CTCR). 44 That report
states that "Putting it simply, there is only one pastoral
office, but the office which we formally refer to as 'the office
of the public ministry' has multiple functions, some of which
are best handled by another, e.g., the parochial school teacher
who is performing that function of the pastoral office."
45 The report further states that: "By the term 'teaching
ministry' we are indicating the special nature of the
auxiliary office of teacher in our church." 46

The CTCR definitions have caused some confusion. For
example, the late Rev. Kurt Marquart (d. 2006), Professor
Concordia Theological Seminary, stated that the report
"introduced a precarious distinction between the 'Public Min-
istry' and the 'Office of the Public Ministry,' such that one
may hold office in the Public Ministry, but not be in the Office
of the Public Ministry!" 47 The generic use of the terms
"minister" and "ministry" in the CTCR report was criticized for
its confusion in an essay by Dr. Robert D. Preus who con-
cluded that "the proliferation of 'calls' and 'ministries' in the
Missouri Synod has caused great confusion and degraded
the one office of the ministry, to say nothing of our under-
standing of the AC XIV [Augsburg Confession] and doctrine
of the call." 48 On the matter of confusion, the late Dr.
George Wollenburg (d. 2008), in a presentation at a district
conference in 1996, stated that the generic use of the terms
"ministry" and "minister," which grew out of the concept of
Everyone a Minister "creates theological and doctrinal
confusion." 49

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Dr. George Wollenburg

Three classifications of positions serving the membership of
the Synod were ultimately approved by the 1993 Delegate
Convention of Synod: viz. I. Minister of Religion, Ordained;
II. Minister of Religion, Commissioned; and III. Certified
Church Worker, Lay. 50 Thus a church worker traditionally
designated by the plain term "Teacher" as it was in the days
when this essayist attended the Lutheran parochial school,
is now officially designated by the cumbersome term
"Minister of Religion, Commissioned." The legal effect of that
designation was challenged by the Federal Government in a
case decided by the U.S. Supreme Court in 2012, as will
now be described.

Teaching Ministry Challenged in the Hosanna-Tabor
Case

Thus, an attempt at state encroachment on religious liberty
in the parochial schools and the teaching ministry of the
Missouri Synod took a severe turn recently by the Federal Gov-
ernment's position expressed in a case before the U.S.
Supreme Court commonly known as the Hosanna -Tabor
case. 51 Briefly, the facts of the case are as follows: After
serving one year as a contract teacher, Cheryl Perich was
certified under the LCMS colloquy program and became a
"called teacher" (or "Commissioned Minister" in the current
parlance of the LCMS) and taught another four years in the
parochial school operated by Hosanna-Tabor Evangelical
Lutheran Church at Redford, Michigan. During a several
month period in which she took a leave of absence due to
illness (narcolepsy), her position was filled by a substitute
teacher. When the church did not permit her to return to
work, Perich threatened to sue under the Americans with
Disabilities Act [42 § 12117(a), "ADA"] rather than agree to a
peaceful release proposal offered by the church, whereupon
the church rescinded her call. 52 She then filed a complaint
with the Equal Employment Opportunity Commission
(EEOC) and, in a case that ultimately reached the U.S.
Supreme Court, alleged that Hosanna-Tabor had violated the
ADA.

The District Court initially granted summary judgment in fa-
vor of Hosanna-Tabor on the basis of the "ministerial excep-
tion," 53 but the order was vacated by the Circuit Court of
Appeals with a remand to the District Court to make a finding
on the merits of Perich's retaliation Claim under the ADA. 54
Hosanna-Tabor then petitioned the U.S. Supreme Court for
a writ of certiorari, which was granted March 26, 2011, and
oral arguments were heard October 5, 2011. The extreme position taken by the Federal Government in the *Hosanna-Tabor* case should be of concern to all Christians who cherish religious liberty and, especially, Missouri Synod Lutherans who support the Synod’s parochial school system. This case ruled on the issue of whether a parochial school teacher who also teaches a full secular curriculum can qualify as a “minister” and thus be entitled to the “ministerial exception” under the ADA. Despite the long history of the “ministerial exception” in civil rights cases in the lower courts, Obama’s Justice Department submitted a legal brief to the Court in which it argued for disavowal of the “ministerial exception” in its entirety or at least its narrowing so that it does not apply to parochial school teachers. Such advocated results would have constituted a deprivation of long-accepted religious liberty rights under the First Amendment.

In a severe rebuke to the Obama administration, the U.S. Supreme Court handed down a unanimous decision, January 11, 2012, that overturned the Court of Appeals decision and gave a strongly worded opinion for religious freedom. It has been said that this case “is arguably among the most important religious liberty cases in a half century.” 55 Chief Justice John Roberts, writing for a unanimous Court, said that the government’s claim was:

> hard to square with the text of the First Amendment itself, which gives special solutude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers. 56

The decision was applauded by Missouri Synod Lutherans and other devout Christians. LCMS President Rev. Dr. Matthew C. Harrison said: “We are delighted with the opinion issued by the U.S. Supreme Court in the *Hosanna-Tabor* case today.” 57

Nevertheless, it should be carefully observed that in the *Hosanna-Tabor* decision, Justice Roberts put forth several caveats and specifically stated that the decision applies only to “an employment discrimination suit.” He wrote:

> We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister .... We express no view on whether someone with Perich’s duties would be covered by the ministerial exception in the absence of the other considerations we have discussed .... The amount of time an employee spends on particular activities is relevant in assessing that employee’s status, but that factor cannot be considered in isolation without regard to the nature of the religious functions performed and the other considerations discussed above .... We express no view on whether the [ministerial] exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise. 58

**Encroachment on Religious Liberty by ObamaCare**

Despite the strongly worded rebuke from the U.S. Supreme Court, the Obama administration continued its relentless disregard of the First Amendment clauses protecting religious liberty. Thus, the dust had barely settled on the *Hosanna-Tabor* case, when Health and Human Services (HHS) announced that religious institutions would not be exempt from the mandate of the Affordable Care Act (“ACA”), or ObamaCare, 59 that employer health-care plans cover all the costs of contraception, including abortion-producing drugs, and sterilization coverage for their employees. The rule would force Catholic institutions “either to violate the moral teachings of the Catholic church or abandon the health-care, education and social service they provide the needy.” 60

As stated by Phyllis Schlafly, the HHS right “to free contraception and abortifacients trumps the right of conscience covered by the First Amendment guarantee of the free exercise of religion.” 61 The HHS mandate, though specially directed against Catholic schools, charities, and hospitals, is an affront to religious liberty that should be condemned by all religious denominations, including the LCMS. 62 LCMS President Harrison issued a forthright statement against the HHS mandate. Lutherans were asked to act on his plea: “I encourage the members of the LCMS to join with me in supporting efforts to preserve our essential right to exercise our religious beliefs.” 63 President Harrison’s plea was not idle talk, for he then set an example and testified vigorously against the HHS mandate before the House Oversight and Government Reform Committee in February 2012. He told Congress that the *Hosanna-Tabor* case “gives us no comfort that this administration will be concerned to guard our free exercise rights.” President Harrison was said to have expressed “genuine outrage” at the administration’s “draconian violation of our First Amendment rights.” 64 He testified that “the conscience is a sacred thing,” and emphasized that “this provision is draconian in that it involves the realm of our conscience.” 65 When the religious leaders at the hearing were asked the simple question: Would you go to jail rather than comply with the HHS mandate? Rev. Harrison responded emphatically: “Yes, I would clearly [go to jail].” 66 His testimony follows the teaching of the Apostles that “We ought to obey God, rather than men” (Acts 5:29).

The battle against the ObamaCare restriction on religious liberty entered the federal courts upon the filing of over 45 lawsuits as of this writing (January 21, 2013). Several of these cases, in various stages of litigation, will be described in this essay. For example, in what is characterized as “historic,” 67 twelve federal lawsuits were filed on the same day, May 21, 2012, by 43 plaintiffs, comprising the nation’s most prominent Catholic institutions. The plaintiffs included the University of Notre Dame, the Catholic University of America, the Archdioceses of New York, St. Louis and Washington, D.C., and the Dioceses of Dallas, Fort Worth, Pittsburgh and Springfield, Illinois. 68

As bluntly stated by Harvard Law School Professor Mary...
Ann Glen M. Bishops are suing the Federal Government because "The main goal of the contraceptive mandate is not to protect women's health. It is a move to conscript religious organizations into a political agenda." 69

These twelve lawsuits were separately filed in the respective federal district courts that had jurisdiction but were coordinat ed with many identical statements in the pleadings. For example, in the cases filed by the Archdiocese of Saint Louis, 70 the University of Notre Dame, 71 and The Catholic University of America 72 the first paragraphs of the complaints are identical except for the brief bracketed material added in one case, as follows:

This lawsuit is about one of America's most cherished freedoms, the freedom to practice one's religion without government interference. It is not about whether people have a right to abortion-inducing drugs, sterilization, and contraception. These services are [and will continue to be] freely available in the United States, and nothing prevents the Government itself from making them more widely available.

Other suits were supported by organizations fighting for religious freedom, especially the Becket Fund for Religious Liberty, and the Alliance Defending Freedom. The Becket Fund for Religious Liberty filed cases representing Belmont Abbey College, 73 Colorado Christian University, 74 Eternal Word Television Network (EWTN), 75 and Ave Maria University. 76 The Alliance Defending Freedom filed lawsuits against the ObamaCare mandate for Louisiana College 77 and Geneva College, 78 and then later on August 23, 2012, represented a jointly filed case in Indiana by Grace College and Seminary, Winona Lake, Indiana, and Biola University, Mirado, California. 79

In a landmark decision, December 5, 2012, in the above case filed by the Archdiocese of New York, the challenge to the contraceptive coverage of the HHS mandate survived the federal government's counter challenge to the standing of the plaintiffs and the ripeness of the case. 80 The opinion stated that the First Amendment does not require citizens to accept assurances from the government that changes in the HHS mandate will be made. There is no "Trust us, changes are coming" clause in the Constitution. But in its inexcusable drive against opponents of the HHS mandate, the Obama administration filed a motion, January 11, 2013, for reconsideration or certification permitting appeal.

In another significant case 81 under the Religious Clauses of the Constitution, Wheaton College joined the above-cited suit previously filed by the Catholic University of America. 82 This action, in which Evangelicals and Catholics "united in the defense of religious liberty for all faiths," has been described as "a historically unprecedented event." 83 Philip Ryken, president of Wheaton College, said that this issue is "one of the strongest points of affinity between Roman Catholics and Evangelical Protestants." He indicated that the "sanctity of life" is another. 84 This joint effort for the protection of religious liberty is an action in the left-hand kingdom and presumably does not involve unionism (syncretism).

The separately filed Wheaton College case and the Belmont Abbey College case were consolidated by the U.S. Circuit Court of Appeals for the DC Circuit. An order was issued December 18, 2012, that the cases be placed on hold, based on the government representation that it would not enforce the HHS mandate in its present form but would provide guidance on non-enforcement or exemption. The government was ordered to file status reports every 60 days on its compliance with the order. 85

As distinguished from the above cases, the constitutionality of the ObamaCare mandate was first considered by the U.S. Supreme Court on a petition filed on grounds other than religious liberty, specifically under the Commerce Clause (Article I, Section 8, Clause 3). 86 That case, NFIB v. Sebelius, was argued on behalf of Florida and 25 other states and the National Federation of Independent Business over a 3-day period, March 26-28, 2012. 87 In an early and somewhat surprising ruling, 88 the Court in a 5-4 decision upheld the insurance mandate of ObamaCare, not under the Commerce Clause, but on the basis of Congress's "Power to lay and collect Taxes" (Article I, Section 8, Clause 1). 89

In rejecting the Obama administration's argument to uphold the insurance mandate under the Commerce Clause, Chief Justice Roberts wrote that:

Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority . . . . The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. 90

The decision in the NFIB v. Sebelius case does not affect the merits of the pending cases brought under the First Amendment Religion Clauses. The Court did not rule on the constitutionality of the HHS edict to force non-profit organizations to pay for abortion-inducing drugs, contraception, and sterilization in their insurance plans, which comprised the Complaint in the cases brought under the Religion Clauses. The debate about ObamaCare thus is not over but remains in the religious liberty phase.
The earliest lawsuit to challenge the constitutionality of ObamaCare was filed on the day it became law, May 23, 2010. That case, filed by Liberty University, has been adjudicated in the Federal District Court in Virginia and the Court of Appeals for the Fourth Circuit, but on procedural grounds, not on the merits of the HHS mandate. ^91^ The latest skirmish in this case was a remand by the U.S. Supreme Court to the Fourth Circuit for consideration in the light of its decision in the NFIB v. Sebelius case. ^92^

Of interest for some hope in the expected ultimate consideration by the U.S. Supreme Court of the constitutionality of the HHS mandate under the First Amendment Religious Clauses is the following statement by Justice Ruth Bader Ginsburg, joined by three other Justices, in a separate concurring opinion in the NFIB v. Sebelius case:

A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, *interfered with the free exercise of religion*, or infringed on a liberty interest protected by the Due Process Clause. (emphasis added). ^93^

Although these comments are only *obiter dicta*, i.e., gratuitous assertions that lack the force of an adjudication, they suggest that Justice Bader might support a ruling in favor of the plaintiffs in the HHS mandate cases brought under the Religion Clauses. On the same day that the decision in the NFIB v. Sebelius case was released, President Matthew Harrison issued a statement in response to the Supreme Court ruling and said:

... we remain opposed to the controversial birth control mandate, which is one of the requirements included in the law. The court's decision today guarantees that we will continue to bring awareness to the threat to religious liberty represented by the birth control mandate ... because it runs counter to the sanctity of human life and creates a conflict of conscience for religious employers and insurers, who face steep penalties for non-compliance. ... We will continue to stand with those who have filed suit in the many religious cases pending against the birth control mandate. Through education and civic advocacy, we will continue to educate the public about the vital necessity of protecting our First Amendment right to act according to the tenets of our faith. ... ^94^

A fine example of the "education and civic advocacy" mentioned by President Harrison was the virtually contemporaneous public release of "An Open Letter from Religious Leaders in the United States to All Americans" which was titled: "Free Exercise of Religion: Putting Beliefs into Practice." ^95^ The letter was signed by President Harrison and 24 other religious leaders. Other Lutheran leaders who signed the open letter were Rev. Mark G. Schroeder, president of the Wisconsin Evangelical Lutheran Synod (WELS); Rev. John A. Molstad, president of the Evangelical Lutheran Synod (ELS); and Cheryl D. Naumann, president of Concordia Deaconess Conference, LCMS. As stated in the open letter:

No government should tell religious organizations either what to believe or how to put their beliefs into practice. We indeed hold that to be an inalienable constitutional right. If freedom of religion is a constitutional value to be protected, then institutions developed by religious groups to implement their core beliefs in education, in care for the sick or suffering, and in other tasks must also be protected .... The HHS mandate prevents this free exercise.

Another example of the "education and civic advocacy" is the campaign launched by the LCMS in October 2012, designated "Religious Liberty: Free to be Faithful." ^96^ Various aspects of the campaign were described in a 4-page series of brief articles that were "aimed at inspiring LCMS rostered and lay members to take action to protect freedom of religion." ^97^ The campaign aspects were identified as:

- Religious Freedom, by Rev. Dr. Matthew C. Harrison and James F. Sanft
- Repeating History? by Mark Pfundstein;
- Timeline of Religious Freedom, by Robert Smith;
- What the Affordable Care Act Means for You, Describes Care, Cost and Coverage;
- God Values Life, by Rev. Christopher Esgut;
- Talk to Your Neighbor, by Dr. Gene Edward Veith.

As further distinguished from the above cases, several other lawsuits against the HHS mandate have been filed by *secular for-profit employers who do not qualify as a religious employer* under the ACA. Typical examples are the lawsuits filed by Hercules Industries, a local Colorado Company, and by Hobby Lobby Stores, a national chain. Thus, in what may be a case of first impression, i.e., without precedent, a Federal District Court in Colorado granted a Preliminary Injunction against application of the HHS mandate in a case filed by the Catholic family owners of Hercules Industries, a heating-and-cooling company. ^98^ The complaint was brought under the Religious Freedom Restoration Act (RFRA), ^99^ in addition to the First and Fifth Amendments and the Administrative Procedure Act. According to the complaint, the plaintiffs "seek to run Hercules in a manner that reflects their sincerely held religious beliefs." They were "Faced with a choice between complying with the ACA or complying with their religious beliefs." The ObamaCare "abortion pill mandate threatens to put them out of business" by the payment of millions of dollars of fines unless they choose to abandon their faith. ^100^ Nevertheless, in stark contradiction to its claims of "unwavering" support for religious freedom, the Obama administration filed an appeal of the Hercules decision on September 25, 2012. ^101^

A similar type suit by a secular for-profit employer was filed against the HHS mandate on behalf of the owners of a much larger business, Hobby Lobby Stores. ^102^ That business is an arts and crafts retail chain with more than 500 stores. It is a non-Catholic owned business in which the owner, David Green, said "We simply cannot abandon our religious beliefs to comply with this mandate .... It is by God's grace and provision that Hobby Lobby has endured .... Therefore we seek to honor God by operating the company in a manner consistent with Biblical principles." ^103^ The District Court denied the request to stop enforcement of the HHS mandate, whereupon the Becket Fund for Religious Liberty immediately filed an appeal, November 20, 2012, to the U.S. Court of Appeals for the Tenth Circuit. ^104^ In a decision, December
20, 2012, the Court of Appeals refused to grant an injunction. Hobby Lobby Stores then filed an emergency application to the U.S. Supreme Court for an injunction pending appellate review, but it was denied December 26, 2012, by Justice Sotomayor. Defiance of the mandate could cost Hobby Lobby Stores penalties of $1.3 million per day.

In two other cases of **secular for-profit** employers, now on appeal to the Circuit Court of Appeals, one in the Eighth Circuit, the other in the Seventh Circuit, the Courts granted the motions for injunction pending appeal.

Due to the split in the Circuit Courts of Appeals on the constitutional issues in these religious liberty cases, it is anticipated that the U.S. Supreme Court will ultimately need to settle the matter for the lower courts.

**Other Current State Encroachments on Religious Liberty**

If the foregoing current state encroachments on religious liberty are not sufficiently convincing of the need for constant vigilance, then consider several other well-documented on-going state encroachments that are being advocated by President Obama and social activists in our country:

- The normalizing of homosexual behavior in the military; the order not to defend the constitutionality of the Defense of Marriage Act (DOMA), and the legalization of so-called “same-sex marriages” or “civil unions.”
- The time allotted for oral presentation of this essay does not permit other than a brief mention of these other encroachments, all of which are part of the revolt against the command of God given with the creation of man and woman on the sixth day of creation (Gen. 1:26-28; 5:1-2) and the authority of Scripture as expounded by Moses, the Prophets, the Apostles, and Christ himself. For confessional Lutherans and other devout Christians the response to this line of encroachment on religious liberty is or should be self-evident. It should be a resounding opposition, even though faced with hypocrisy and insult by the media and others who claim they are promoting tolerance for a minority view, whereas in fact they themselves are demonstrating intolerance for a view that is not consistent with their own.

What Christians are now facing is further fulfillment of Christ’s prophesy that “Everyone will hate you because of my name.”

Mark 13:13 (AAT)

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Family Association: “The survival of our civilization as we know it is at stake,”

- Creationist scientist Dr. Kevin Anderson reasoned that: “A society that broadens God’s boundaries of marriage eventually has no boundaries. Such a society will decay to its very core.”
- Veteran columnist Cal Thomas said we are becoming a “nation out of control.”
- Rev. Franklin Graham put it even stronger and posited that we are on “The Road to Destruction.”

This essayist believes that these warnings are not exaggeration or hyperbole; God’s judgment on Sodom and Gomorrah not only is factual history (Gen. 19:24), but also needs to be taken seriously by all as a warning (2 Pet. 2:16).

That marriage is at risk in our nation today is further evident by the statistic that in 2010 only 50% of all births occurred to married couples, which is down from 93% in 1964. Vocal groups such as exemplified by *The Shriver Report* now consider the traditional family a thing of the past. Finally, a recent study by the Pew Research Center found that Americans unaffiliated with any religion whatsoever, so-called "nones," has grown from 15% to 20% in the past five years.

Clearly, the recent encroachments fostered by the state, even though still in flux, are recipes for moral anarchy and social disintegration. They require constant vigilance and determination to uphold the teachings of Scripture. Lutherans and other Christians cannot remain silent and accept moral disintegration as in the time of the Judges, a time of apathy, decline and moral decay, when “Every man did that which was right in his own eyes” (Judges 21:25, KJV). In America, the handwriting was on the wall some ten years ago when the U.S. Supreme Court protected private homosexual acts and ruled that the anti-sodomy laws of 17 states were unconstitutional. In his dissent, Justice Antonin Scalia said that the Court had “taken sides in the culture war” and "largely signed on to the so-called homosexual agenda," and that the decision "effectively decrees the end of all morals legislation.”

**Conclusion**

The prospect of the potential appointment of at least two new U.S. Supreme Court Justices in the second Obama term, which officially began at noon yesterday, January 20, 2013, does not bode well for religious liberty in America. President Obama wants judges who believe in a "living constitution" that changes with the times. And in the November 2012 elections, three states approved provisions to allow same-sex marriages, and another state rejected a proposed constitutional definition of marriage that excludes same-sex marriage.

One wonders whether the U.S. Supreme Court will again take sides in this culture war and sign on to the same-sex agenda just as it did in ruling unconstitutional the anti-sodomy laws of 17 states ten years ago. We may soon have an answer because on December 7, 2012, the court agreed to hear two cases that involve limitations to same-sex marriage. The first case, which comes from New York, challenges the constitutionality of the federal Defense of Marriage Act (DOMA). The second case, which comes from Califor-
nia and the Ninth Circuit Court of Appeals sitting in San Francisco, challenges the constitutionality of Proposition 8, the voter-approved ban on same-sex marriage. The U.S. Supreme Court held hearings March 26-27, 2013, and is expected to rule on these cases later this year. Even though 32 states currently ban same-sex marriages, the prognosis for judicial acceptance of the sanctity of traditional marriage does not look good. And under the ObamaCare HHS mandate, taxpayer funding of abortions is set to increase substantially by payment to abortion providers that receive Medicaid funds under the guise of public health care pursuant to the Affordable Care Act. We Lutherans and other devout Christians may be disheartened and discouraged by the issues of the unborn and the legal definition of marriage, whereby our nation is in grave danger as it keeps turning its back on God. If same-sex marriage becomes the law, for Christians to publically speak out against it may be litigated as "hate speech."

But we should not be dismayed and withdrawn; instead we should work hard and pray for God's help and intervention for a reversal of the anti-Christian course exemplified by Obama, who for the fourth consecutive year in his Thanksgiving Day address in 2012, omitted thanking God but, instead, merely reminded us to thank each other; and who when he presumes to quote from the Declaration of Independence, consistently and conspicuously omits the significant definitive word "Creator." In that historic document, the unalienable rights of men are declared to be "endowed by their Creator" and not by government as misstated by Obama, who for the first time in our history, was U. S. Secretary of Education during the 1980s.

In conclusion, the proposition of this essay rests: Religious Liberty Requires Constant Vigilance! Thank you for your kind attention.

Scott J. Meyer, B.S., M.B.A., J.D., Retired Patent Attorney, Monsanto Company Board President, Concordia Historical Institute

1. Thomas Sowell, "Issues" or America?” http://townhall.com, August 21, 2012. Thomas Sowell is a Senior Fellow, Hoover Institute, Stanford University, and conservative scholar, author and syndicated journalist.
3. That term has been ascribed to Walther, who with F. C. D. Wyreken and J. K. W. Loewe, was one of the "Three Important Leaders" in the founding of the Missouri Synod. See, e.g., the aside by Dr. Lawrence R. Rast, Jr., in an article by Rev. William J. Schmelter, "A Synod is Born," The Lutheran Witness, Vol. 116, No. 4, April 1997, pp. 8-14, at p. 10.
6. Ralph Dornfeld Owen, "The Old Lutherans Come," Concordia Historical Institute Quarterly XX, No. 1. (April 1947). pp. 3-56, at pp. 45 and 53. Dr. Owen was a professor of education in the Graduate Division at Temple University, and a descendant of a signer of the Mayflower Compact. See also Forster at pp. 16-17.
7. Owen, at pp. 45 and 53.
8. The significance and importance of the constitutional protection of religious liberty was emphatically acknowledged by C.F.W. Walther in an address to youth groups, July 4, 1853. See excerpts tr. by James Ware, The Lutheran...


65 Quoted by Adrienne Dorr and Joel Gehrke, ibid.

66 Quoted by Phyllis Schlafly and George Neumayr, p. 176.


77 Louisiana College v. Sebelius, Case No.1:2012cv00463, W.D. La., February 16, 2012.


83 Ibid.


91 Liberty University, Inc. v. Geithner; 753 Supp. 2d 611 (W.D. Va 2010); Liberty University v. Geithner; 671 F.3d 391 (4th Cir. 2011).


96 http://www.lcms.org/freetobeliefful.htm In this video, Rev. Harrison said this is a vital moment for us ... We are not telling you how to vote. We are telling you, however, that Christians need to be informed about the religious freedom challenges that are upon us. It’s not going to get easier into the future no matter who is elected.

97 Supplement to Reporter, October 2012. See also Vishki J. Biggs, "LCMS

98 Wm. Newland et al. and Hercules Industries, Inc. v. Sebelius, Case No. 1:12


99 The FRSA, signed November 19, 1993, requires the courts to throw out state or federal laws that unduly burden religiously motivated conduct “unless [the law] is a narrowly tailored means of achieving a compelling state interest.”


107 See the letter to the President and Secretary of Defense, April 28, 2010, in protest of lifting of the ban on open homosexual behavior in the military, signed by 40 retired Chaplains, including LCMS Luthernans, Capt. John C. Wohlrabe, Jr., CHC, USN (Ret.) and Capt. Mark J. Schreiber, CHC, USN (Ret.), reported in Christian News, May 17, 2010.

108 The act was passed by large majorities in the House and Senate in 1996 and signed by President Bill Clinton. On February 23, 2011, President Obama ordered the Justice Department not to defend the constitutionality of DOMA. See Jeffrey T. Kuhner, "Obama’s Homosexual America," The Washington Times, February 24, 2011.


110 See, e.g., Harper v. Poway Unified School District, 445 F.2d 116 (9th Cir. 2006). After Poway High School endorsed the "Day of Silence" sponsored by the Gay Lesbian and Straight Education Network (GLSEN), a student responded by wearing a T-shirt inscribed on the front "I will not accept what God condemns," and on the back "Homosexuality is shameful." The Court ruled against the student and denied the protection of the First Amendment. Dissenting Circuit Judge Kozinski pointed out the hypocrisy of the majority that "waxes eloquent about the rights of schools to teach civic responsibility and tolerance as part of the basic educational mission, while suppressing other points of view." Footnote 7 of dissent. See also the hypocrisy of intolerance by the anti-Christian activists against the public statement made by the owner of the Chick-fil-A restaurants in which he expressed his view that marriage should be between a man and a woman. Jeffrey T. Kuhner, "The real gay agenda: Banish Christianity," The Washington Times, August 16, 2012. See also the intolerance toward Liberty University, scorned as being "hateful, obnoxious," Mollie Ziegler Hemingway, "When New England Progressives Won’t Tolerate Evangelicals," The Wall Street Journal, December 29, 2012.


112 Action Message from Tim Wildmon, president of the American Family Association, July 2012. Wildmon also has thoughtfully noted that "it is becoming increasingly apparent that the thin veneer of civilization that we all take for granted is beginning to disappear," 25 Signs The Collapse of America Is Speeding Up as Society Rotts From The Inside Out," [\url{www.afl.net}], July 12, 2012.


114 Interview with Cal Thomas, reported in Decision Magazine, Vol. 53, No. 10, October 2012, pp. 6-7. Cal Thomas is a veteran conservative and widely read syndicated columnist.

115 ibid. at pp. 3-4.


120 As provided by the Twentieth Amendment to the U.S. Constitution.


122 See supra, note 119.


124 Hollingsworth v. Perry, Case No. 12-144.


127 As "Pastor" Matthew Harrison reminds us, "Simply put, for Jesus there is no 'life unworthy of life.'" The Lutheran Witness, December 2012, page 1, "Joy Over Life." And on the 40th anniversary of Roe v. Wade, Pastor Harrison reminded us that "we—the soldiers and very liberters of Germany from the darkness of the Third Reich—have largely ignored and continue to ignore the deaths of some 80,000,000 innocent unborn babies in 'the land of the free,' where we are allegedly guaranteed 'life, liberty and the pursuit of happiness.'" ibid January 2013, page 1, "God's Gift of Life."

128 Walter A. Maier, the internationally famous speaker of "Bringing Christ to the Nations" The International Lutheran Hour wrote that "Roman historians have left sordid pictures of the degeneracy into which domestic relations have largely been practiced during the softness and luxury of the empire. The perversions openly practiced were so revolting that St. Paul in his letter to the congregation at Rome, can speak only broadly of these unnatural lusts." For Better, Not for Worse (St. Louis: Concordia Publishing House, 1935), Third Rev. Ed 1939, p. 8. As a classic chronicle on the discord between Christian and secular morality, "CPh Should Update and Reprint" this work as advocated by Herman J. Otten in Walker A. Maier Still Speaks: Missouri and the World Should Listen (New Haven, CT: Lutheran News, Inc. 2008), p. 11.

129 Although "hate speech," whatever that "vague" term may mean, is currently protected under the First Amendment free speech/press guarantee (see: The Heritage Guide to the Constitution, p. 314), liberal activists are likely to push it for criminalization as another exception to the First Amendment such as "threats" and "fighting words."


132 For a comprehensive and documented review of "What Christians Need to Know About Radical Islamists, Radical Secularists, and Why We Can't Leave the Battle Up to Our Divided Government" (sub-title), see the 544 page scholarly work by Bill Hieck, Two Wars We Must Not Lose (Fort Wayne: Concordia Theological Seminary Press, 2012). Bill Hieck is an insider to the political scenario who worked more than 40 years in various capacities in the Nation's Capital. He also has been a Lutheran pastor.

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